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UNITED STATES OF AMERICA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. JOSHUA JAMES COOLEY, Defendant.	CR 16-42-BLG-SPW RESPONSE TO MOTION TO SUPPRESS
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INTRODUCTION

Cooley has filed a motion to suppress evidence, including guns, methamphetamine, drug paraphernalia, cash, and cellular telephones seized from him and his pickup truck following a public welfare check on an isolated shoulder

of Highway 212 in rural southeastern Montana, within the boundaries of the Crow Indian Reservation and Big Horn County. Cooley sets forth three bases for suppression. First, he claims that James Saylor, who at the time was a Crow Highway Safety Law Enforcement Officer, and is currently an officer with the Bureau of Indian Affairs (BIA), did not have authority to detain him because he is a non-Indian. Second, he argues that Officer Saylor had no reason to detain him after he told Officer Saylor that he had pulled off of the highway because he was tired. Finally, he argues that, under the doctrine of spoliation, Officer Saylor and/or the United States intentionally destroyed the beginning portion of the dash cam video footage of Officer Saylor's contact with Cooley. Cooley is not entitled to suppression on any of these bases.

First, Officer Saylor, who conducted the public welfare check and developed suspicion of criminal activity, had authority as a tribal officer to detain Cooley while waiting for officers with criminal jurisdiction over Cooley to arrive at the scene. Officer Saylor contacted BIA and Big Horn County, and officers from both jurisdictions had authority to arrest Cooley responded to the scene.

Second, Officer Saylor had reasons that continued to develop throughout his contact with Cooley to detain Cooley and further investigate. Those reasons, which are set forth in detail in Officer Saylor's report written the day after his

contact with Cooley, coupled with the officer safety concerns that developed during the contact, justified Officer Saylor's detention of Cooley until the BIA and Big Horn County officers arrived.

During that detention, and specifically while Officer Saylor was retrieving two rifles and a loaded pistol from the front seat area of the pickup truck, Officer Saylor saw methamphetamine and drug paraphernalia. Additionally, Cooley had a large amount of cash, empty bindle baggies, and numerous cellular telephones, all indicative of drug trafficking. A records check completed during the detention revealed that Cooley had a suspended license. Finally, Cooley had a young child with him. Given those facts, Cooley was subject to both federal and state arrest, and was arrested that night by Big Horn County for traffic offenses and child endangerment. Consequently, all of the evidence in the pickup truck and on Cooley's person was in plain view, seized during a search incident to arrest, seized because Cooley consented to a search of the pickup truck, or subject to seizure under the doctrine of inevitable discovery.

Finally, because Cooley has failed to show that Officer Saylor or the United States acted in bad faith in failing to preserve dash cam video footage of the first portion of Officer Saylor's contact with Cooley, he is not entitled to dismissal of the indictment. Because he has failed to show prejudice, he is not entitled to a

remedial instruction. Indeed, given Officer Saylor's conduct here, the United States maintains that no sanction is appropriate.

The United States respectfully requests that the Court deny Cooley's motion to suppress.

FACTUAL BACKGROUND¹

On February 26, 2016, at approximately 1:00 a.m., Crow Highway Safety Law Enforcement Officer James Saylor was patrolling within the exterior boundaries of the Crow Indian Reservation and saw a white 2007 Dodge Ram pickup truck parked along the westbound shoulder of an isolated section of Highway 212 near mile marker 16. Officer Saylor pulled in behind the truck to check on the welfare of the occupants given that it was the middle of the night, it is

¹ Cooley has submitted with his brief a copy of the dash cam video footage marked as Exhibit 1. The facts set forth in this section are from that video, Officer Saylor's report and the dispatch log, which will be filed with this response and marked as Exhibits 501 and 502, respectively, and anticipated testimony of Officer Saylor and BIA Special Agent Kevin Proctor.

The facts that Cooley sets forth in support of his motion are obtained from the dash cam footage and Officer Saylor's report. Cooley claims that he disputes some or all of those facts, *see* Brief in Support of Motion to Suppress (Doc. 34), p. 2 n.2., but fails to identify which specific facts that he disputes. Certainly Cooley will have an opportunity to testify at the suppression hearing and present those disputed facts. But, if Cooley sets forth those facts in the reply brief, which will then deprive the United States of the ability to address those facts and any additional arguments based upon those facts, the United States may seek leave to file a sur-reply brief to address any new facts or arguments raised prior to the hearing.

common for motorists who are pulled over on the side of the highway to need assistance, and there is limited cell coverage in the area. Officer Saylor did not turn on his front emergency lights, only the rear ones, as he was conducting a welfare check only and did not want the occupant(s) of the truck to think that he was “pulling them over.”²

Officer Saylor could not see into the truck, which was running, as he approached because of window tinting, but he did see movement in both the rear and front seats of the truck. Officer Saylor also noted as he approached that there were a lot of items, including a transmission and tools, in the bed of the truck. He

² Officer Saylor will testify that the dash camera would have automatically begun to record both audio and video if he had turned on his front emergency lights. Because he did not, he would have had to manually start the audio and video recording, which he did not do until he saw what he believed to be an empty bindle bag used to package drugs in Cooley’s sweatshirt pocket. That is when the audio portion of the recording begins on Exhibit 1 because Officer Saylor manually began the recording.

Officer Saylor will explain that as long as his dash camera is powered on, it is continuously recording video but not audio. It will only record audio if he manually starts the recording, or when he turns on his emergency front lights. But, as in this case, Officer Saylor can later go back and recover video footage (not audio) prior to when he manually started the recording. That is the reason why there is video footage prior to the start of the audio on Exhibit 1. Because Officer Saylor knew that Cooley had been arrested by the state and was likely facing federal charges, when he made a DVD of the recording of his contact with Cooley after the fact, Officer Saylor will testify that he attempted to go back to the start of his contact with Cooley and thought that he had. Unfortunately, he did not go back far enough and only saved the portion reflected in Exhibit 1.

knocked on the truck and asked if everything was okay. He shined his flashlight into the truck and saw a man in the driver's seat, later identified as Cooley, respond to the question by pointing his thumb down. Officer Saylor understood this gesture to mean that something was wrong and asked Cooley if he could roll down the window so that they could talk. Cooley rolled the driver's window partially down, which allowed Officer Saylor to see that there was a small child trying to climb from the back seat into the lap of the driver, but not much else, because of the window tinting.

Cooley told Officer Saylor that he had become tired while driving and pulled over to rest. Officer Saylor assumed that Cooley had been driving for a while, especially because the truck had Wyoming plates, so he was surprised when Cooley told him he was coming from Lame Deer, only 26 miles from their location. He asked Cooley why he had been in Lame Deer and Cooley responded that he came up from Wyoming to buy a vehicle. Because the truck was filled with personal items and had a Wyoming plate, Cooley's answer did not make sense to Officer Saylor, so he asked why he was purchasing a truck in the middle of the night. Cooley responded that his other vehicle had broken down, so he was driving the Dodge, which he stated belonged to either Thomas Spang or Thomas

Shoulderblade. “Thomas” was allowing Cooley to use the truck to get back to Wyoming.

Officer Saylor had worked in Lame Deer and knew both Spang and Shoulderblade. Specifically, Officer Saylor knew that Thomas Spang was involved in drug activities on the Northern Cheyenne Indian Reservation.

As Officer Saylor questioned Cooley about the particulars of his story, Cooley became confused and nervous. The volume of Cooley’s voice lowered, his hands began to shake, and it took him longer and longer to answer simple questions. At that point, Officer Saylor asked if he would roll the window down further because he could not hear Cooley. Additionally, Cooley was sitting in the driver’s seat of a running truck containing a small child and Officer Saylor also noticed that he was slurring words and his eyes were watery and blood-shot. Nothing that Cooley said made sense to Officer Saylor. As Officer Saylor continued to question Cooley, he became more nervous and agitated. Officer Saylor suspected that Cooley was impaired.

When Cooley rolled the window down further, Officer Saylor saw the butts of two semi-automatic assault rifles against the front passenger seat with the barrels pointing down to the floor board. Cooley told Officer Saylor that the rifles belonged to “Thomas.” Officer Saylor asked if there were other weapons in

the truck but Cooley would not provide a direct response. Cooley kept repeating that he had pulled over because he was tired.

At this point in the conversation Cooley had told Officer Saylor that he pulled over because he was tired yet he had driven only 26 miles. Cooley said he went to Lame Deer to purchase a vehicle, yet it was the middle of the night. Cooley said the truck and its belongings, including rifles, belonged to “Thomas” because he had broken down, yet the truck was loaded with personal items, including a car seat, and had Wyoming plates.

Officer Saylor asked Cooley for some identification. Cooley reached into his right front pants pocket, but instead of a license he pulled out wads of money and put them in a compartment in his dashboard. Each time he removed a wad of money, Cooley looked at Officer Saylor and moved his hand from his pocket to the dash area. Because Officer Saylor could not see what Cooley was doing with his right hand, he removed his service pistol from the holster and held it to his side. Officer Saylor then saw Cooley reach with his right hand between his body and the center seat. Cooley’s breathing become more shallow and rapid and he broke off eye contact with Officer Saylor, staring forward. Officer Saylor believed that Cooley was thinking about attacking him. He told Cooley to stop and show him his hands.

Officer Saylor had his firearm drawn at this point, and he instructed Cooley to reach slowly into his pocket and remove his identification and nothing else. Officer Saylor shined his flashlight directly at Cooley's right hand and saw him remove from his pocket a Wyoming driver's license.

Because of the limited cell coverage in the area, Officer Saylor could not call for backup on his portable radio and he did not want to return to his unit. Given the presence of the rifles and Cooley's behavior, Officer Saylor moved to the passenger side of the truck and opened the passenger door to provide a barrier between himself and Cooley. When he did so, Officer Saylor saw the handle of a pistol in the area of Cooley's right pants pocket where Cooley had been reaching with his right hand. Officer Saylor removed the pistol, which was loaded. He asked Cooley why he did not tell him about the pistol when asked. Cooley responded that it belonged to "Thomas."

Given the presence of multiple weapons and the large amount of cash, coupled with Cooley's demeanor and condition, his failure to disclose the presence of the pistol, and the fact that his story was not credible to Officer Saylor, Officer Saylor told Cooley to step out of the truck.

Cooley got out of the truck carrying the small child. Officer Saylor checked Cooley for weapons and told him to move toward the patrol unit. Cooley

asked if he could remove the money from his pocket and Officer Saylor advised him that he could remove anything that he wanted to and put it on the hood of the patrol unit. Cooley removed a large quantity of cash and placed it on the hood of the patrol unit. While he emptied his pockets, Officer Saylor could see into the pocket of Cooley's hoodie and saw a small plastic baggie, which he knew from his training and experience to resemble baggies used to package drugs. Officer Saylor questioned Cooley about the baggie and he responded that it was just a plastic bag.

Officer Saylor instructed Cooley to get into the back seat of the patrol unit and told him that he was being detained. Officer Saylor was able to contact dispatch with his patrol unit radio and requested both BIA and county back up.

Officer Saylor then went back to the truck to secure the weapons. While removing the rifles and the pistol, Officer Saylor also reached into the driver's side to turn off the truck and saw, in plain view, a bag of what appeared to be methamphetamine and a glass methamphetamine pipe tucked between the driver seat and the center folding seat. Additionally, Officer Saylor saw multiple cellular phones on the dash board of the truck.

By this time, BIA Lieutenant Sharon Brown arrived at the scene and instructed Officer Saylor to seize whatever was in plain view in the truck.

Lieutenant Brown, in coordination with the BIA drug unit, made arrangements for the truck to be towed. While waiting for the tow truck, Big Horn County Deputy Gibbons arrived at the scene. Officer Saylor drove Cooley and his son to the Crow police department where Cooley met with BIA Special Agent Kevin Proctor and provided written consent to search the truck.

That night while processing the evidence, Officer Saylor conducted a field test on the drug paraphernalia seized from Cooley's truck, which tested positive for the presence of methamphetamine. Additionally, Officer Saylor seized \$2,655.00 in cash from Cooley. After towing the vehicle to the Crow police department and conducting a consent search, investigators located an additional approximately 96 grams of methamphetamine in the vehicle. In total, investigators seized over three hundred grams of suspected methamphetamine from Cooley's vehicle. Also during the search, investigators seized four cellular phones and an iPod.

A check on Cooley's license came back as suspended. Deputy Gibbons arrested Cooley for driving with a suspended license and criminal endangerment of a child.

ARGUMENT

Officer Saylor had the authority to detain Cooley and investigate violations of state and federal law.

As an initial matter, Cooley claims that Officer Saylor, a Crow tribal officer at the time of his contact with Cooley, exceeded his authority as a tribal officer to detain him and conduct the limited investigation that he did pending the arrival of federal and state law enforcement. Cooley is wrong.

The United States Supreme Court has long recognized that Indian tribes have authority to enact ordinances regulating the conduct of their members and to employ law enforcement officers to enforce such ordinances and to maintain the peace. *Montana v. United States*, 450 U.S. 544 563 (1981); *see also Ortiz-Barraza v. United States*, 512 F.2d 1176, 1179 (9th Cir. 1975). Additionally, the Court has also acknowledged that tribal police officers have the power to restrain non-Indians who commit offenses within the exterior boundaries of the reservation and to eject them by turning such offenders over to the proper authority with jurisdiction to prosecute. *Duro v. Reina*, 495 U.S. 676, 696-97 (1990).

Incident to those powers of the tribe, tribal police also have authority to investigate violations of state and federal law. *Ortiz-Barraza v. United States*, 512 F.2d 1176, 1180 (9th Cir. 1975). As stated by the Ninth Circuit, “[t]he power of the Papago to exclude non-Indian state and federal law violators from the

reservation would be meaningless were the tribal police not empowered to investigate such violations. Obviously, tribal police must have such power.” *Id.*; see also *Bressi v. Ford*, 575 F.3d 891, 895 (9th Cir. 2009). The Eighth Circuit, relying on *Ortiz-Barraza*, held that tribal police officers on the Pine Ridge Indian Reservation in South Dakota had the authority to detain a non-Indian “whose conduct disturbs the public order on their reservation.” *United States v. Terry*, 400 F.3d 575, 579-80 (8th Cir. 2005).

Turning to the State courts, the Washington Supreme Court came to the same conclusion in *State v. Schmuck*, 121 Wash.2d 373 (1993). In *Schmuck*, the Washington Supreme Court addressed the authority of tribal officers to stop a non-Indian who was driving a vehicle on a public road within the Suquamish Reservation, and held that a tribal officer had authority to investigate a violation of state law prior to delivery of the offender to state law enforcement. *Id.* at 392.

Similarly, in *State v. Ryder*, 98 N.M. 453 (1982), the New Mexico Supreme Court upheld as a valid tribal power a tribal officer’s detention and search of a non-Indian suspected of illegal drug possession pending arrival of a state police officer. *Id.* at 456. And the Wyoming Supreme Court, in *Coyler v. State Dept. of Transp.*, 203 P.3d 1104, (Wy. 2009), determined that the detention of Coyler, a non-Indian,

by a BIA officer prior to his formal arrest by a state officer was lawful. *Id.* at 1111.

Finally, in *State v. Zackuse*, 253 Mont. 305 (1992), the Montana Supreme Court upheld the conviction of a non-Indian in a state court prosecution that was based on evidence gathered by a tribal police officer. *Id.* at 309. The case involved a non-Indian defendant whose illegal drug sales activity on the Flathead Reservation was investigated by tribal officers. *Id.* *Zackuse* argued that the investigation of his illegal drug activities by tribal police exceeded the tribe's jurisdiction and authority; violated unspecified federal and state constitutional rights; and subjected him, a non-Indian, to tribal law. *Id.* The Montana Supreme Court disagreed and, while not analyzing that issue in any depth, noted that "[t]he fact that this criminal investigation was conducted by a tribal law enforcement officer has no relevance in determining the jurisdiction of this case." *Id.*

Cooley argues here that Officer Saylor exceeded his authority by doing more than simply turning him over to state or federal authorities but, in making this argument, Cooley tries to draw a distinction that the courts who have considered the issue have been simply unwilling to accept. Cooley cannot argue against the authority of tribal police to detain and eject a non-Indian offender. But it does not

follow that the non-Indian offender has a right to be immediately turned over to federal or state authorities. To the contrary, tribal police officers have authority to investigate unlawful criminal activity on the reservation, and it is reasonable that they would also have authority to conduct a proper and thorough investigation, to gather the evidence and then, in due course, to turn the offender and the evidence over to the proper jurisdiction with authority to prosecute the non-Indian involved in the criminal activity. That is precisely what happened here.

Officer Saylor began by conducting a welfare check on a truck that was running parked on the side of the highway at 1:00 a.m. Cooley was sitting in the driver's seat with a small child in the truck. His answers to simple questions made no sense. He showed signs of impairment. He told Officer Saylor that the truck may have been borrowed from a man that Officer Saylor knew to be involved in drug trafficking. His actions as well as the presence of multiple firearms, including a loaded pistol that he failed to disclose, caused Officer Saylor to fear for his safety. In sum, the welfare check quickly developed into reasonable suspicion of impairment and criminal activity, and legitimate officer safety concerns.

Officer Saylor did request federal and state backup as soon as it was practical given the safety concerns and the limited cell and radio coverage, but he was out alone on a remote highway and was not in a position to allow Cooley to

move about freely. Nor could he simply leave Cooley in the driver's seat of a running truck surrounded by weapons without determining whether Cooley was impaired. His choice was to safeguard his own safety and that of Cooley and the child until backup arrived. Officer Saylor had the authority to detain Cooley and investigate. He then turned Cooley over to federal and state authorities. Under the controlling authority of *Ortiz-Barraza*, nothing Officer Saylor did, on February 26, 2016, exceeded his authority.

Officer Saylor's detention and investigation of Cooley was justified because of suspicion of criminal activity and officer safety.

The question presented by this case is a bit different than the normal traffic stop, because Officer Saylor did not stop Cooley's vehicle. Officer Saylor came upon Cooley's vehicle, pulled off on the side of the highway, and conducted a public welfare check to ensure that the occupant(s) were not in need of assistance. Cooley does not dispute that Officer Saylor had the right to check on his welfare. What he argues is that Officer Saylor had no right to continue questioning him or detaining him after Cooley told him that he had pulled off because he was tired. That argument ignores the reality that suspicion of criminal activity and impairment, and officer safety concerns developed almost immediately, making it impossible for Officer Saylor to simply drive away.

As in the situation of a traffic stop where the stop may be lawful but becomes unlawful because it is prolonged beyond the time necessary to accomplish its purpose, Cooley argues that Officer Saylor inappropriately prolonged the stop beyond its initial purpose of conducting a public welfare check. What Cooley ignores is that suspicion of criminal activity that justifies prolonging the encounter can develop as the circumstances of the contact develop. *See United States v. Williams*, 837 F.3d 1016, 1022 (9th Cir. 2016). In *William*, the officers, acting on a tip that a male was sleeping in a car and known to sell drugs, investigated the tip and found themselves in a potentially dangerous situation, because they encountered a possible drug dealer sitting in a car with temporary plates in a dark and deserted parking lot in a high crime area in the early morning hours. *Id.* at 1022-23. The Ninth Circuit determined that they acted reasonably in blocking in the car with their car, turning on their lights, and one officer drawing a gun. *Id.* This led to further suspicious activity that justified the detention of Williams. *Id.*

Similarly, in this case, Officer Saylor, in conducting a public welfare check, soon began to suspect criminal activity. Cooley's demeanor – his confusion and agitation, and his explanation of why he was pulled over on Highway 212 in the middle of the night did not make sense. That, coupled with Officer Saylor's belief that he was impaired, and the presence of multiple weapons justified

detaining Cooley to ensure the safety of Officer Saylor and to further investigate until officers with authority to arrest arrived.

In sum, Officer Saylor encountered Cooley in the middle of the night on a remote Montana highway sitting in the driver's seat of a running truck with a small child. He was slurring his words and had blood shot and watery eyes. His explanation for why he was there and what he was doing made no sense. As the encounter developed, Officer Saylor saw multiple weapons in the truck. Cooley claimed that he had borrowed the truck from a man that Officer Saylor knew to be a drug trafficker, and he had wads of cash, multiple cell phones, and drug paraphernalia and drugs. Cooley also lied about having a loaded pistol within reach.

Officer Saylor's initial purpose of conducting a public welfare check developed into justifying a detention and further investigation of Cooley because of the circumstances of the encounter and Cooley's demeanor and behavior. Officer Saylor acted appropriately in detaining Cooley until BIA and Big Horn County officers with authority to arrest arrived at the scene.

In the alternative, the evidence obtained in this case is admissible as evidence seized in a search incident to a lawful arrest. A search incident to arrest is an exception to the warrant requirement of the Fourth Amendment, and it allows

officers to search for weapons and evidence of the offense of arrest as long as the search is both temporal and proximate to the arrest. *United States v. Cook*, 808 F.3d 1195, 1199 (9th Cir. 2015). That means that the search must be “roughly contemporaneous with the arrest,” whether the search occurs before or after the arrest. *United States v. Smith*, 389 F.3d 944, 951 (9th Cir. 2004) (“it is not particularly important that the search preceded the arrest rather than vice versa”). That has been the law of this circuit since at least 1990, and the law of the land since 1980. *See United States v. Potter*, 895 F.3d 1231, 1234 (9th Cir. 1990) (citing *Rawlings v. Kentucky*, 448 U.S. 98, 111 (1980) (“Where the formal arrest followed quickly on the heels of the challenged search of petitioner’s person, we do not believe it particularly important that the search preceded the arrest rather than vice versa.”))

Here, Cooley was arrested by Big Horn County for traffic offenses and criminal endangerment. Officers had authority to search for weapons and evidence of the offense of criminal endangerment – possession of methamphetamine and drug paraphernalia in proximity of a small child. And it matters not that the arrest was effected after discovery of this evidence. Search incident to arrest provides a distinct basis for admission of the evidence seized in this case.

Finally, and in the alternative, the inevitable discovery doctrine, an exception to suppression, applies in this case. “The inevitable discovery doctrine is an exception to the exclusionary rule.” *United States v. Ruckes*, 586 F.3d 713, 718 (9th Cir. 2009). The doctrine permits the admission of unlawfully obtained evidence against a defendant if that evidence “would have been discovered absent a constitutional violation.” *Id.* (citing *Nix v. Williams*, 467 U.S. 431, 443 (1984)). “If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means . . . , then the deterrence rationale [for the exclusionary rule] has so little basis that the evidence should be received.” *Nix*, 467 U.S. at 444.

Here, Cooley was going to be arrested. It is indisputable that the truck would have been impounded and all of the evidence seized would have been discovered and seized during the routine inventory search process. Therefore, even if this Court finds that Officer Cooley seized any one piece of evidence illegally at the scene, the United States can establish by at least a preponderance of evidence that it would have been discovered “absent a constitutional violation.” Consequently, the inevitable discovery doctrine applies and operates as an exception to the exclusionary rule in this case.

Cooley is not entitled to dismissal of the indictment, a remedial instruction at trial, or any sanction for the failure of the United States to preserve the entire recording of the dash cam footage, because Cooley has failed to show bad faith and prejudice.

Cooley argues, under the doctrine of spoliation, that all evidence seized from his truck should be suppressed, or some other sanction should be imposed because the recording of the dash camera footage does not begin at the beginning of Officer Saylor's contact with Cooley. As explained above, Officer Saylor did not activate his front emergency lights and did not manually begin the recording until he discovered an empty plastic baggie that he recognized as what is commonly used to package marijuana. After the fact, Officer Saylor thought he made a recording from the beginning of his contact with Cooley, and did record footage prior to when he manually activated the recording at the scene, but Officer Saylor did not back up the recording far enough.

Cooley argues that Officer Saylor's version of events prior to the beginning of the dash cam footage is disputed, and implies that what occurred is potentially exculpatory, *see* Brief in Support of Motion to Suppress (Doc. 34), p. 18. In support of his motion to suppress evidence on this basis, he claims, or at least implies that either Officer Saylor or the United States intentionally failed to preserve a recording of the entire contact.

The Ninth Circuit addressed both the destruction of evidence and the failure to preserve evidence in two recent cases: *United States v. Sivilla*, 714 F.3d 1168, 1172 (9th Cir. 2013) (destruction of evidence), and *United States V. Fries*, 781 F.3d 1137, 1153 (9th Cir. 2015) (failure to preserve evidence). In *Sivilla*, the defendant sought dismissal of the indictment or, alternatively, a remedial jury instruction, because the United States destroyed evidence in contravention of a court order. *Sivilla*, 714 F.3d at 1170-71. In *Fries*, the defendant requested a remedial jury instruction at trial because the United States failed to record a phone call that gave rise to a false statement charge. *Fries*, 781 F.3d at 1153.

The Ninth Circuit made clear in *Sivilla* that the appropriate sanction for destroying evidence depends on whether the defendant can show that the United States or its agents acted in bad faith. *Id.* at 1172. Bad faith in this context “turns on whether” the exculpatory nature of the missing evidence was apparent to the United States or its agents. *Id.* If not, dismissal of the indictment is not appropriate. *Id.*

Here, Cooley states that facts as reported by Officer Saylor in his report written the day after his contact with Cooley are in dispute, but he fails to identify which particular facts are in dispute. Consequently, it is impossible for the United States to respond to his implication that those disputed facts are

exculpatory. It is his burden to show bad faith – that the missing portion of the recording contains evidence that was exculpatory and that its exculpatory nature was apparent to Officer Saylor.

The alternative sanction addressed in *Sivilla* was the defendant's request for a remedial jury instruction. *Id.* at 1172-73. To obtain a remedial instruction, rather than a showing of bad faith, the court balances the nature of the government's conduct against any prejudice to the defendant. *Id.* The government must explain its conduct; the defendant must demonstrate prejudice. *Id.*

Here, Officer Saylor had good reason not to activate his front emergency lights. He believed he was conducting a welfare check. He manually began the recording as soon as he suspected that the encounter was developing into something more. He then thought he had made a recording of the entire encounter but inadvertently failed to back up the stored video footage far enough to capture the entire encounter. In considering whether a remedial instruction, or any sanction for that matter, is appropriate, it is important to note that this is a case of failure to preserve evidence, at worst, rather than destroying evidence as what occurred in *Sivilla*. That distinction is not without a difference.

In *Fries*, the Ninth Circuit considered whether the district court erred in refusing to give a missing evidence instruction when a government agent failed to record a telephone call that gave rise to a false statement charge. *Fries*, 781 F.3d at 1153. In affirming the district court, the Ninth Circuit noted the “stark contrast” between a failure to preserve evidence and destroying evidence in violation of a court order. *Id.* But, even using the standard announced in *Sivilla*, the court found that the district court did not err in refusing a remedial instruction because *Fries* had failed to show how the missing evidence would have been used by the defendant, and *Fries* was allowed to argue that there was insufficient evidence because no recording was made of the phone call. *Id.*

This case is much more like *Fries* than *Sivilla*. At worst, Officer Saylor failed to preserve the entire dash cam footage. But, Cooley has failed to make any showing of how he would use the missing portion of the recording. The conduct of Officer Saylor in this case is explainable; Cooley has failed to provide any explanation of how he has been prejudiced.

In sum, because there is no showing of bad faith and no ability to show bad faith in this case, dismissal of the indictment is not warranted. The United States also maintains that a remedial instruction is not appropriate given the conduct of Officer Saylor and the lack of prejudice.

DATED this 23rd day of November, 2016.

MICHAEL W. COTTER
United States Attorney

s/ Lori Harper Suek
LORI HARPER SUEK
Assistant U. S. Attorney