Ashley A. Harada
Harada Law Firm, PLLC
2772 3rd Avenue North, Suite 400
P.O. Box 445
Billings, MT 59103
(406) 294-2424
(406) 272-0037 (Fax)

ashley@haradalawfirm.com

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

UNITED STATES OF AMERICA, Plaintiff, vs. JOSHUA JAMES COOLEY Defendant.	))))))))))	Case No. CR 16-42-BLG-SPW REPLY

COMES NOW Defendant, JOSHUA JAMES COOLEY, by and through his counsel of record, ASHLEY A. HARADA, and hereby files the following Reply.

I. **Officer Saylor, who was a Tribal Officer, Did Not Have Authority to Conduct an Investigation of a Non-Tribal Member.**

The Government would have this Court believe that tribal police[1] have authority to conduct full-blown investigations into potential violations of state or

[1] Although the Government indicates that Officer Saylor is now a BIA officer, there is no question that he was only a Crow Tribal Officer at the time of this incident. Cooley has previously conceded that BIA officers are statutorily

federal law prior to the delivery of potential offenders to state law enforcement. See Govt.'s Response, Doc. 41 at 13, citing to *State v. Schmuck*, 121 Wash. 2d 373, 392 (1993), *cert. denied*, 510 U.S. 931 (1943).

First, *Schmuck* does not hold "that a tribal officer ha[s] authority to **investigate** a violation of state law prior to delivery of the offender to state law enforcement." Doc. 41, (emphasis added.) Instead, the actual holding in *Schmuck* is that a tribal officer has authority to **detain** a non-Indian "until he or she can be turned over to state authorities for charging and prosecution." *Schmuck*, 121 Wash 2d at 393, (emphasis added.) Authority to detain is not the authority to investigate.

Second, while it was true that in 1975, the Ninth Circuit determined tribal police have authority to investigate on-reservation violations of state and federal law (see *Ortiz-Barraza v. United States*, 512 F.2d 1176, 1180 (9th Cir. 1975)), the *limitation* of that power has since been clarified in numerous decisions, including the Ninth Circuit opinion of *Bressi v. Ford,* 575 F.3d 891, 895 (9th Cir. 2000).[2] As noted in Cooley's first brief, the *Bressi* opinion makes it clear that a suspicionless stop of a non-Indian by tribal authorities is limited to the amount of time, and the nature of inquiry, that can establish whether or not the driver is an Indian. *Bressi*, 575 F.3d at 896-97. If an obvious violation, such as alcohol impairment is found,

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given the authority to investigate crimes on the reservation, including potential crimes that may occur on state right of ways. In the absence of some agreement with the State; however, that same power is not given to tribal officers.

[2] In his first brief, Cooley referred to the *Bressi v. Ford* decision as *Ford*, but the case is more commonly referred to as *Bressi*. In this brief, Cooley will cite to the case as *Bressi* and apologizes for any confusion.

detention by tribal authority for delivery to state officers is authorized. Importantly, inquiry going beyond Indian or non-Indian status, **or including searches for evidence of crime**, is not authorized on purely tribal authority in the case of non-Indians. *Id*.

Bressi is the most recent Ninth Circuit case discussing tribal authority of non-Indians travelling on state highways that pass through reservations. Incredibly, although cited for a proposition greater than for which it supports, (see Doc. 41 at 13) the substance of the *Bressi* case is not even discussed in the Government's response.

The Government has claimed that the *Ortiz-Barraza* decision is controlling authority for the proposition that Officer Saylor "had the authority to detain Cooley and investigate." Doc. 41 at 16, referring to *Ortiz-Barraza v. United States*, 512 F.2d 1176, 1179 (9th Cir. 1975). Cooley disagrees. There have been numerous cases since the *Ortiz-Barraza* decision where the courts have discussed and clarified the limited power tribes have over non-Indians. See e.g., See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978) (in the absence of state authorization, tribal officers have no inherent power to arrest and book non-Indian violators); *Montana v. United States*, 450 U.S. 544, 564-67 (1981)(Crow Tribe lacked authority to regulate hunting and fishing by non-Indians on land within the Tribe's reservation owned in fee simple by non-Indians); see also *Strate v. A-1*

Contractors, 520 U.S. 438, 445(1997) (absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances.)

The discussion of the evolution of the case law addressing tribal authority over the conduct of nonmembers in *Strate* is instructive. In *Strate*, the Court said, "the inherent sovereign powers of an Indian tribe—those powers a tribe enjoys apart from express provision by treaty or statute— do not extend to the activities of nonmembers of the tribe."' *Strate*, 520 U.S. at 445 (internal citation omitted.) In *Strate*, the Supreme Court treated a state right-of-way as the equivalent of non-Indian owned fee land. Because the Tribe retained no landowner's right to occupy and exclude and because there was tribal consent to the right-of-way, the right-of-way functioned as non-Indian owned land. See *Strate*, 520 U.S. at 454-56; see also, *Nord v. Kelly*, 520 F.3d 848, 854 (8th Cir.2008) (in determining whether a state right-of-way is equivalent to non-Indian fee land for purposes of tribal court jurisdiction over activities of nonmembers, a court need not consider coercive conduct evidence between state and tribe in relation to the right-of-way where the record showed the tribe contained no "gate keeping right" over the right-of-way, the right-of-way remained part of the state highway system, and no statute or treaty granted or retained tribal authority over nonmembers.)

Ortiz-Barraza has not been explicitly overruled, but its holding has at least been implicitly narrowed by the Supreme Court precedent cited above. In any event, under Ninth Circuit precedent, it is clear that in instances of "suspicionless traffic stops" tribal authority is limited to questioning to determine non-Indian status and detention only for obvious violations of state law. *Bressi*, 575 F.3d at 896-97. Searches for evidence of crime is not authorized on purely tribal authority in the case of non-Indians. *Id*.

II. After Officer Saylor Determined Cooley Was Not in Need of Assistance, any Continued Detention Beyond That Point Was Illegal.

Ironically, the limitations against a tribal officer from performing a criminal investigation of a non-Indian mirrors the limitation on an officer who is performing community caretaking functions. Community caretaking functions must be "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Cady v. Dombrowski*, 413 U.S. 433, 441(1973).

Citing to *United States v. Willliams*, 837 F.3d 1016, 1022 (9th Cir. 2016) the Government claims Cooley ignores that suspicion of criminal activity that justifies prolonging the encounter can develop as the circumstances of the contact develop. Doc. 41 at 17. No, it is the Government that ignores, unlike in *Williams*, the original contact in this case was based upon a "welfare check," not suspicion of

criminal activity. In *Williams,* the officer was investigating a tip about a male who was sleeping in a car *and was known to sell drugs.* Therefore, the original detention of Williams was not only based upon a need to check his welfare, but it was also based upon suspected criminal conduct. *Williams* does not support the continued detention in this case was justified.

Throughout its response, the Government attempts to justify the extension of its public welfare check by pointing to evidence located after the welfare check was completed. This is improper. A search unlawful at its inception may not be validated by what it turns up. *Wong Sun v. United States*, 371 U.S. 471, 484 (1963). Even if Officer Saylor was suspicious when first meeting with Cooley, a vague suspicion cannot be transformed into probable cause by ambiguous conduct the officer himself has provoked. *Id*.

Here, Cooley told Officer Saylor he was tired. Officer Saylor did not take Cooley at his word, and according to his own report, "continued to probe." USAO 014. It was while he continued to probe that Saylor learned the information the Government now tries to use to justify his continued detention. The information Saylor learned by continuing to question Cooely was not "totally divorced" from the investigation of a crime and cannot be used to support his continued detention.

Saylor also claimed Cooely "did not appear to be Native" and was driving a truck with Wyoming plates. His reference to these facts in his report suggests he

believes this information validly contributes to his suspicion. See USAO 013. Cooley's ancestry does not provide a reasonable suspicion of criminal wrongdoing. See *Chavez v. United States*, 683 F.3d 1102, 1111 (9th Cir. 2012)(even in areas near the border, apparent Mexican ancestry does not justify a reasonable belief the driver is an alien or a reasonable belief the car may conceal other aliens who are illegally in the country.)

At the time Saylor detained Cooley, and not based upon what he may have learned later,[3] Saylor did not have a reasonable suspicion that Cooley was engaged in criminal conduct and his continued detention was illegal.

III. Video evidence.

In Cooley's first brief, he argued that spoliation of the video evidence in this case requires dismissal. Cooley would note the explanations now given by the Government as to the reasons why the audio portion of the tape was not working and the reasons why the video portion does not start until after the investigation of Cooley was already taking place were not provided in previous communications asking about missing portions of the tape. While, in view of the explanation now given outright dismissal of the charges may be inappropriate, Cooley would nevertheless ask this Court to consider the fact this same officer experienced

[3] The Government also claims Officer Saylor detained Cooley for a suspended license. According to the Government's own discovery, information that Saylor's license was suspended was not known by officers until 0218 when the original encounter and subsequent detention of Cooley started at 0102. USAO 27-28.

similar difficulties in preserving critical portions of video evidence in another case, when considering the reliability of the officer's testimony as to disputed facts.

CONCLUSION

In view of the reasons as contained herein, those that were contained in the Defendant's original brief and for those which may be presented at an evidentiary hearing in this matter, Cooley respectfully asks this Court to grant his motion to suppress.

The *Ortiz-Barrera* case is not controlling. Tribal officers may not conduct an investigation but are limited to detaining non- Indian offenders for delivery to proper authorities when an alleged offense takes place on a state right-of-way passing through a reservation. Officer Saylor's actions in conducting an investigation beyond a welfare check were ultra vires and unreasonable. The reasonableness of the officer's action must be measured by the information known by him at the time of detention and not from information later acquired. Dismissal of charges may not be the appropriate remedy for the missing portions of the video in this case, but the fact this officer has previously had similar difficulty in operating his video equipment can be considered by this Court when evaluating the reliability of the information testified to by this officer.

DATED this 7th day of December, 2016.

/s/ Ashley Harada

Ashley Harada
Attorney for Defendant

CERTIFICATE OF SERVICE - L.R. 5.2(b)

I hereby certify that on December 7, 2016, a copy of the foregoing document was served on the following persons by the following means:

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1. Clerk, U.S. District Court

2. Lori Harper-Suek
U.S. ATTORNEY'S OFFICE
2601 2nd Avenue North, Ste 3200
Billings, MT 59101
Counsel for the United States

3. Joshua Cooley

/s/ Ashley Harada

Ashley Harada