U. S.C.A. No. 16-30310
U.S.D.C. No. 1:16-cr-2002-LRS-1

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff- Appellee,

v.

NATHAN LYNN CLOUD,

Defendant-Appellant.

Appeal from the United States District Court
For the Eastern District of Washington

BRIEF FOR APPELLEE

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I. STATEMENT OF JURISDICTION

A. JURISDICTION OF THE DISTRICT COURT

Jurisdiction existed in the district court by virtue of 18 U.S.C. § 3231.

B. JURISDICTION OF THE COURT OF APPEALS

Jurisdiction exits in the Court of Appeals by virtue of 28 U.S.C. § 1291.

C. TIMELINESS OF APPEAL

This appeal is timely pursuant to Federal Rules of Appellate Procedure, Rule 4(b). Defendant was sentenced on December 15, 2016. ER 296.[1] The Judgment and Commitment Order was entered on December 19, 2016. ER 81-87. Notice of Appeal was filed December 22, 2016, that being within 14 days after entry of the final judgment. ER 88-89.

D. DEFENDANT'S STATUS

The Defendant is serving a fifty-five (55) month term of imprisonment in the custody of the U.S. Bureau of Prisons on the conviction relevant to this appeal. ER 81-87. Consequently, the Defendant's current anticipated release date from the custody of the Attorney General is November 9, 2019.

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[1] "ER" refers to Excerpts of Record. "CR" refers to the Court Record. "AOB" refers to Appellant's Opening Brief.

II. ISSUES PRESENTED

A. WHETHER THE DISTRICT COURT PROPERLY DENIED DEFENDANT'S MOTION TO SUPPRESS UPON THE BASIS OF A WASHINGTON STATE ARREST WARRANT EXECUTED ON TRIBAL LAND.

B. WHETHER LAW ENFORCEMENT OFFICIALS PROPERLY CONFIRMED THE EXISTENCE OF THE ARREST WARRANT.

C. WHETHER THE DISTRICT COURT PROPERLY DENIED ADJUSTMENT FOR ACCEPTANCE OF RESPONSIBILITY AFTER TRIAL.

III. STATEMENT OF THE CASE

A. NATURE OF THE CASE

Following a jury trial on September 14, 2016, Nathan Lynn Cloud (hereinafter "Defendant") was convicted of being a Felon in Possession of a Firearm in violation of 18 U.S.C. § 922(g)(1). ER 74. The Defendant was subsequently sentenced on December 15, 2016, to serve 55 months of imprisonment and 3 years of supervised release. ER 296. Judgment was entered on December 19, 2016. ER 81-87.

B. COURSE OF PROCEEDINGS AND STATEMENT OF FACTS

On the morning of October 18, 2015, law enforcement officers with the Yakima County Sheriff's Office (hereinafter YCSO) assigned to the lower valley

area of Yakima County, Washington, engaged in warrant service in White Swan, an area within their assigned patrol region. ER 77, 95-96, 99, 142. Prior to engaging in warrant service, YCSO Deputy Brian McIlrath confirmed an arrest warrant for the Defendant utilizing a shared county criminal database commonly referred to as "Spillman." ER 54, 97, 99, 100. A radio log of Deputy McIlrath's computer activity utilizing the Spillman system confirmed that he ran the Defendant's name through the system at approximately 7:16 a.m. ER 99, Exh. A. Deputy McIlrath ran the Defendant's name through Spillman because he was aware that the Defendant had an outstanding arrest warrant issued on behalf of the Department of Corrections for Washington State. ER 100. Deputy McIlrath had also received information from an undisclosed source that the Defendant was in the local area, and specifically may be located at 241 Second Street in White Swan, a residence of Elias Culps who was a known gang associate of the Defendant's. ER 54, 101, 124, 136. Deputy McIlrath also ran Elias Culps through Spillman, and determined that he too had an outstanding warrant for his arrest. ER 54, 101.

The deputies met prior to the warrant service for "muster" to discuss the arrest warrants they intended to serve and any issues associated with that service. ER 119. After the meeting, Deputy Gilbert Bazan utilized the Spillman system to

obtain and observe a booking photograph of the Defendant, as well as the Defendant's Department of Licensing (hereinafter DOL) photograph. ER 55, 166-167.

Later that morning, Deputy Bazan, Deputy McIlrath, Deputy Justin Mallonee, Reserve Deputy Les Peratrovich and Sergeant Bill Splawn proceeded to 241 Second Street in White Swan. ER 54-55. When the law enforcement officers arrived at the residence, Deputy McIlrath proceeded to a side window of the residence. ER 55. From this vantage point, Deputy McIlrath observed the Defendant inside the residence, asleep in a recliner. ER 55. Deputy McIlrath subsequently proceed to the corner of the residence to inform the deputies at the front door of what he had observed, then returned to the side window. ER 55.

Deputy Bazan approached the front door of the residence and knocked three times, with no response. ER 55, 147, 149, 168-169. During the second knock, Deputy Bazan heard the residence door dead bolt unlock. ER 55, 169. Upon the third knock, the front door to the residence opened. ER 55, 149, 169.

When the door opened, deputies Bazan and Mallonee observed a male in a recliner several feet from the door. ER 55, 150. Deputy Bazan utilized his forearm to open the residence door further, at which time he and Deputy Mallonee

identified the male in the recliner to be the Defendant. ER 55, 150, 169-170. Deputy Bazan and Deputy Mallonee entered the residence. ER 55. Deputy Bazan approached the Defendant, woke him, and advised him that there was a warrant for his arrest for escape from community custody. ER. 55, 170. Deputy Bazan placed the Defendant in handcuffs and escorted him out to his patrol vehicle. ER 55, 170. Deputy Bazan then conducted a search of the Defendant's person incident to arrest. ER 171. During the course of that search, Deputy Bazan felt what he believed in his training and experience to be the muzzle of a gun in the Defendant's right front pocket. ER 171. Deputy Bazan inquired if the Defendant had any weapons on his person. ER 171. The Defendant responded that he did not. ER 171. Deputy Bazan then removed the item, a loaded .22 caliber revolver from the Defendant's pocket, and handed it to Reserve Deputy Peratrovich. ER 171. Deputy Bazan confirmed the outstanding warrant for the Defendant's arrest warrant via dispatch operator. ER 55-56, 173. Deputy Bazan's radio log confirmed that the Defendant was run through Deputy Bazan's radio log at approximately 10 a.m. ER 173. After placing the Defendant in the rear of his patrol vehicle, and securing the firearm in an evidence bag in his trunk, Deputy Bazan transported the Defendant to the Yakima County jail. ER 171-172.

On January 12, 2016, the Defendant was charged by Indictment with the crime of Felon in Possession of a Firearm, in violation of 18 U.S.C. § 922(g)(1). ER 1-2. On February 16, 2016, the Defendant filed a motion to suppress evidence. CR 25; ER 4-19. The Defendant argued suppression of the evidence was required because (1) the YCSO law enforcement officers failed to comply with the terms of a Memorandum of Understanding (hereinafter "MOU") entered into by Yakima County and the Yakama Nation thereby violating the Defendant's Fourth Amendment rights; and (2) the YCSO law enforcement officers failed to comply with "knock and announce" requirements, thereby the Defendant's rights. ER 4-9. On August 18, 2016, the Defendant filed a supplemental motion to suppress, arguing state law enforcement officers did not have the jurisdictional authority to arrest or seize him pursuant to Wash. Rev. Code 37.12.010 or *State v. Pink*, 144 Wash.2d 945 (2008). ER 49-51. The Defendant argued that due to the violation of the MOU by state law enforcement officers, said law enforcement officers lacked jurisdiction to enter tribal land to execute the Defendant's arrest warrant, rendering the seizure of the firearm illegal and requiring suppression. ER 49-51.

On August 23, 2016, a suppression hearing was held. ER 90-246. Deputy McIlrath testified at the hearing. Deputy McIlrath testified that arrest warrant service was part of his duties as a patrol officer. ER 96. Deputy McIlrath testified that on October 18, 2015, he was working with Deputy Mallonee, Deputy Bazan, Sergeant Splawn and Reserve Deputy Peratrovich. ER 97. Prior to warrant service that morning, Deputy McIlrath conducted a warrant check for the Defendant utilizing Spillman, as confirmed by his radio log. ER 97-99, Exh. A. Deputy McIlrath testified that he was familiar with the Defendant from prior contacts, and due to the Defendant having an outstanding warrant from the Department of Corrections, as visible in Spillman. ER 100. Deputy McIlrath further testified that he had received information indicating that the Defendant was in the area. ER 102. Deputy McIlrath testified that he also ran Elias Culps through Spillman. ER 99. Culps also had an outstanding warrant for his arrest with a listed address of 241 Second Street, in White Swan. ER 113.

That morning, when the deputies arrived at the residence at 241 Second Street in White Swan, Deputy McIlrath proceeded to a side window. ER 103. Deputy McIlrath testified that through the window, he observed a male asleep in a recliner. ER 103-104. Deputy McIlrath recognized the male to be the Defendant.

ER 104-105. Deputy McIlrath communicated his observation to the deputies at the front door, and watched while the deputies entered the residence and arrested the Defendant. ER 105.

Deputy McIlrath testified that he was aware of an MOU between Yakima County and Yakama Tribal Police. ER 105-106. Deputy McIlrath further testified as to his understanding of the MOU, specifically that "[t]hey want us to advise the Yakama Nation Police if we go onto trust land to arrest an enrolled Native American." ER 106-107. Deputy McIlrath testified that the difficulty with determining whether a piece of property is fee land or trust land is,

> it's broken up like a checkerboard, where you have one piece that's deeded land, and one piece that's trust land. There's areas that I know for sure because they're housing areas, such as place called Apis Goudy and Adamsview. Every other place there's—I have no idea.

ER 107. Deputy McIlrath testified that at the time of the warrant service on October 18, 2015, he did not know whether the property at 241 Second Street in White Swan was trust land. ER 107-108. Deputy McIlrath testified that he did not call tribal police prior to entering the residence to arrest the Defendant, Elias Culps, or Ira Heemsah. ER 108.

During cross examination, Deputy McIlrath testified that he knew both the Defendant and Elias Culps were enrolled members of the Yakama tribe. ER 131. Deputy McIlrath also testified that the outstanding warrant for the Defendant was not confirmed until after his arrest. ER 120. During the course of re-direct, Deputy McIlrath clarified that those individuals with warrants in Spillman are highlighted in red to alert other officers as to the existence of an outstanding warrant. ER 137.

Deputy Mallonee also testified at the hearing. He testified that he was familiar with the Defendant due to outstanding warrants, Spillman, and prior conversations with task force and tribal officers. ER 144. Deputy Mallonee testified, "We readily exchange information. And with Nathan's outstanding warrant, that was information we exchanged." ER 144. Deputy Mallonee testified that on October 18, 2015, Deputy McIlrath had received information that the Defendant and other individuals with warrants may be located at 241 Second Street in White Swan. ER 146.

Deputy Mallonee proceeded to the residence at 241 Second Street with the other deputies. ER 145-146. Deputy Mallonee subsequently observed the Defendant in the residence through a window, and received confirmation from

Deputy McIlrath regarding the Defendant's identity. ER 147. Deputy Mallonee testified that Deputy Bazan knocked on the door, announced "sheriff's office", and knocked again. ER 147. Deputy Mallonee testified that the door opened during the course of Deputy Bazan's knocking. ER 149. Deputy Mallonee observed the Defendant sleeping in a recliner in the residence. ER 150. Deputy Mallonee testified that he and Deputy Bazan entered the residence and handcuffed him. ER 151. Deputy Mallonee then handed the Defendant over to Deputy Bazan. ER 151.

Deputy Mallonee also testified as to his knowledge of the MOU. He testified that he was aware of the MOU, specifically,

> [i]f we were going to serve an arrest warrant specifically on land that we knew to be trust land, land held in trust by the U.S. government for the Yakama Nation, we should attempt to call Tribal PD and have them present.

ER 152. Deputy Mallonee testified that he did not know whether 241 Second Street in White Swan was trust land. ER 152.

Deputy Bazan also testified at the hearing. He testified that he had been a law enforcement officer for three years at the Granger Police Department, before being hired by YCSO approximately four months prior to October 18, 2015. ER 166. Deputy Bazan testified that he was working with other deputies that day,

including Deputy Mallonee, Deputy McIlrath, Reserve Deputy Peratrovich and Sergeant Splawn. ER 166. Deputy Bazan testified that he participated in warrant service on October 18, 2015, and that prior to warrant service, he utilized Spillman to look at a booking photograph and DOL photograph of the Defendant. ER 77-78. Deputy Bazan testified that as a result of information that he received from the other deputies that morning, he proceeded with the other deputies to 241 Second Street in White Swan. ER 167. Deputy Bazan testified that this location was the believed residence for Elias Culps, an individual with an outstanding arrest warrant. ER 166-167. Deputy Bazan testified that he arrived at the residence, walked to the front door, knocked three times, and announced that he was with the Yakima County Sheriff's Office. ER 168. As Deputy Bazan knocked on the third occasion, the door opened and he observed a male sleeping in a recliner. ER 169. Deputy Bazan recognized the male to be the Defendant. ER 169. Deputy Bazan testified that he confirmed the Defendant's identity with Deputy Mallonee and entered the residence. ER 170. Deputy Bazan woke the Defendant, and advised him that he was being arrested pursuant to an outstanding warrant for escape from community custody. ER 170. Deputy Bazan testified that he handcuffed the Defendant and escorted him outside to his patrol vehicle. ER 170. Deputy Bazan

performed a search of the Defendant's person incident to arrest. ER 170. During the course of the search, Deputy Bazan testified that he felt, what he believed to be in his training and experience, the muzzle of a gun. ER 171. Deputy Bazan inquired if the Defendant had any weapons on his person; the Defendant responded that he did not. ER 171. Deputy Bazan removed the item, a loaded .22 caliber revolver, from the Defendant's right pocket. ER 171. Deputy Bazan placed the Defendant in his patrol vehicle, secured the firearm in an evidence bag in his trunk, and transported the Defendant to the Yakima County Jail. ER 171-172. Deputy Bazan also testified that he confirmed the outstanding arrest warrant for the Defendant, as confirmed by radio log, at approximately 10 a.m. ER 172-173. Deputy Bazan further testified that he had been employed by YCSO for approximately four months, and he was not aware of a Memorandum of Understanding between YCSO and the Yakama Nation on October 18, 2015. ER 172.

The Defendant presented testimony from four witnesses. The first, David Shaw, the Superintendent for the Bureau of Indian Affairs on the Yakama Indian Reservation, testified that pursuant to his investigation, 241 Second Street in White Swan is trust land, held in trust by the United States. ER 200-201, Exh. 101. Gary

King, an investigator for the Defendant, testified regarding a certification of the Defendant's Indian blood. ER 202-205, Exh.100.

Elias Culps testified that he was arrested approximately six months prior at 241 Second Street. ER 206. He testified that he was asleep prior to the deputies entering the residence, and did not hear any knocking prior to their entry into the residence. ER 206-210.

The Defendant was the final witness at the suppression hearing. ER 212. He testified that on October 18, 2015, he dozed off in a recliner and did not hear any knocking or pronouncements by law enforcement officers. ER 212. The Defendant further testified that at the time of his arrest, law enforcement did not present him with a warrant. ER 213. The Defendant testified that upon arrest, he inquired where tribal police were and whether he could be taken to sign a waiver or to see a tribal judge. ER 213. During cross examination, the Defendant testified that he only made inquiries requesting a tribal escort or transport to a tribal facility to Deputy Bazan. ER. 218.

After testimony and arguments from counsel concluded, the district court denied the Defendant's Motion to Suppress. ER 239-246. The district court first determined there was a knock and announce by law enforcement officers, and

subsequently concluded under *Hudson v. Michigan*,[2] suppression was not an appropriate remedy. ER 240-241. The district court then turned to the Defendant's argument relating to the MOU. The district court read a portion of the MOU into the record,

> Retention of legal rights, jurisdiction. Nothing in this memorandum shall be construed to cede any jurisdiction of either party to modify the legal requirements for arrest or search and seizure, to modify the legal rights of either party or of any person not a party to this memorandum, to accomplish any act violative of state or federal law, or to subject the parties to any liability to which they would not otherwise be subject to by law.

ER. 242.

Pursuant to this subsection, the district court determined that the MOU was, "at best…a general policy that has to be followed but [does] not create legal rights that go beyond the intent of the exact language which was created." ER 242. The district court also highlighted another section of the MOU in paragraph four, stating,

> This memorandum does not create any right, benefit, or other legally enforceable responsibility, substantive or procedural, enforceable at law or equity by either party against the other party. Nothing in this

[2] 547 U.S. 586 (2006)

> memorandum is intended to create a cause of action by either party against the other. As such, the terms of this memorandum are terminable at any time without cause upon written notice.

ER 242.

The district court went on to distinguish the *State v. Pink*[3] case relied upon by the Defendant from the Defendant's case. "[A]pplying the facts of this case would be, in my mind, inappropriate, since there was state jurisdiction." ER 242. The district court further found that the plain terms of the MOU would not give the Yakama Nation the authority to preclude Defendant's arrest, nor in "any way suggest that the execution of the state warrant can somehow be blunted or retracted by virtue of the cooperation provision with is otherwise set forth." ER 244. The district court ultimately cited *Nevada v. Hicks*, and concluded,

> But in this matter, tribal sovereignty does not prevent the state from serving criminal process on a tribal member on the reservation for an off reservation crime…reading the memorandum directly there's no indication that the failure to follow the advisory procedure precludes the sheriff from making an arrest. Moreover, ultimately, as long as the state warrant is valid, it would appear that the deputy sheriff on the scene would have the right to make the arrest.

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[3] 144 Wash.2d 945 (2008)

ER 245-246.

The district court subsequently memorialized its oral ruling in an Order denying the Defendant's Motion to Suppress. ER 53. The district court made factual findings, and further elaborated on its legal conclusions:

> This case is distinguishable from *Pink* because the Yakima County deputies had jurisdiction to execute the arrest warrant of Mr. Cloud for violating the terms of his community custody. Furthermore, the…(MOU) between the Yakama Nation and Yakima County, while an important tool, does not mandate the manner in which law enforcement must enforce laws on the reservation, nor does it provide the Defendant a source of rights. The MOU's language explicitly confirms this…It does not deprive this court of jurisdiction; and recognizes the jurisdiction of Yakima County deputies to execute arrest warrants for enrolled members on the reservation.

ER 57-58.

The matter proceeded to trial on September 12, 2016. CR 84; ER 302-364. After a three day jury trial, the Defendant was convicted of the sole count in the indictment, Felon in Possession of a Firearm, in violation of 18 U.S.C. 922(g)(1). ER 74. During the course of the trial, the Defendant contested the knowing possession of the firearm and the conduct of law enforcement officers during the course of the investigation. ER 439-441, 542-551.

On December 15, 2016, the district court sentenced the Defendant to a term of imprisonment of fifty-five (55) months, to be followed by a three (3) year term of supervised release. ER 296.

IV. SUMMARY OF ARGUMENT

First, the district court properly denied the Defendant's motion to suppress because state law enforcement officers had jurisdiction to effectuate a valid state arrest warrant on the Defendant, on tribal lands, pursuant to *Nevada v. Hicks*. 533 U.S. 353 (2001). Further, state law enforcement officers properly arrested the Defendant pursuant to the valid state warrant and conducted a search of the Defendant incident to arrest, in compliance with Washington State law. The MOU entered into by Yakima County and the Yakima Nation did not preclude state law enforcement officers from effectuating this proper legal process relating to a state criminal warrant issued pursuant to a state criminal matter. Thus the arrest and the subsequent search of the Defendant were valid.

Second, the state law enforcement officers properly confirmed the existence of a valid arrest warrant for the Defendant's arrest, as evidenced by the computer database ("Spillman") records admitted at the suppression hearing.

Finally, the district court properly determined the Defendant was not entitled to a two-point reduction to his sentence under the guidelines for acceptance of responsibility. The Defendant contested an element of the offense, the knowing possession of the firearm, from the time of his arrest through trial. Further, the Defendant failed to demonstrate the requisite contrition to warrant a downward adjustment for acceptance of responsibility.

V. ARGUMENT

A. THE DISTRICT COURT PROPERLY DENIED DEFENDANT'S MOTION TO SUPPRESS UPON THE BASIS THAT STATE OFFICERS PROPERLY EXECUTED A VALID ARREST WARRANT FOR THE DEFENDANT, A TRIBAL MEMBER, ON TRUST LAND

1. Standard of Review

A district court's denial of a motion to suppress and the lawfulness of a search and seizure conducted by law enforcement is reviewed de novo. *See United States v. Mayer*, 560 F.3d 948, 956 (9th Cir. 2009); *United States v. Deemer*, 354 F.3d 1130, 1132 (9th Cir.2004). Findings of fact underlying the district court's determination are reviewed for clear error. *See Id.*

2. State law enforcement officers properly served a valid state arrest warrant on the Defendant, a member of the Yakama Nation, on trust land on the Yakama Nation Reservation

State law enforcement officers may enter a reservation, including tribal land, to investigate or serve legal process involving violations of state law. *Nevada v. Hicks*, 533 U.S. 353, 364 (2001). This authority is not limited merely to non-Indians located on the reservation. Rather "[w]hen…state interests outside the reservation are implicated, States may regulate the activities even of tribe members on tribal land, as exemplified by our decision in *Confederated Tribes*." *Id.* at 362 (citing *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980)).

In the present case, the Defendant, a tribal member of the Yakima Indian reservation, was subject to the supervision of the State of Washington Department of Corrections due to a prior felony conviction for unlawful possession of a controlled substance. ER 30-32, 54. Thus, the Defendant was subject to the supervision of the State of Washington pertaining to a criminal matter.

On September 24, 2015, a warrant was issued by the Washington State Department of Corrections, specifically by Department of Corrections Officer Juan Frausto, for the Defendant's arrest, due to the Defendant's violation of a condition

of community custody, pursuant to his prior conviction for unlawful possession of a controlled substance. ER 30-32; *see also* Wash. Rev. Code § 69.50.4013(1),(2). The validity of this warrant is uncontested. ER 57.

In *Hicks*, the Supreme Court emphasized that its prior decisions regarding assumption of federal court jurisdiction over various violent crimes committed by Indians on the reservation "recognized the right of state *laws* to 'operat[e] …upon [non-Indians] found' within a reservation, but did not similarly limit to non-Indians or the property of non-Indians the scope of the *process* of state courts." *Id*. (quoting *United States v. Kaguma*, 118 U.S. 375 (1886)). In a criminal case, process is equated with a warrant. *Id*.

In addition to the outstanding warrant for the Defendant, on October 2015, deputies with the Yakima County Sheriff's Office were also aware of an outstanding arrest warrant for Elias Culps, an associate of the Defendant's. ER 54. The address listed on the warrant for Elias Culps was 241 Second Street in White Swan, Washington. ER 112-113. The Defendant was also known to frequent this location. ER 54. The deputies proceeded to 241 Second Street, in White Swan, Washington, to attempt to serve the outstanding arrest warrants for Culps and the Defendant. ER 54. Such warrant service falls within the bounds of legal process

permitted to be effectuated by state agents on the reservation because "the reservation of state authority to serve process is necessary to 'prevent [such areas] from becoming an asylum for fugitives from justice." *Id*. at 364 (quoting *Fort Leavenworth R. Co. v. Lowe*, 114 U.S. 525, 533 (1885)).

Thus, as a threshold issue, on October 18, 2015, when Yakima County Sheriff's deputies arrived at 241 Second Street in White Swan, Washington, observed the Defendant within the residence, and entered the residence to serve the outstanding arrest warrant for the Defendant, their actions fell squarely within the legal bounds of lawful service of state process, and legal arrest as defined by the Supreme Court in *Hicks*. The district court agreed in its oral ruling denying the Defendant's motion to suppress citing *Hicks* and stated, "But in this matter, tribal sovereignty does not prevent the state from serving criminal process on a tribal member on the reservation for an off reservation crime." ER 245.

Defendant effectively ignores *Hicks*, despite the fact that his argument turns on the jurisdictional authority of the state to enter the reservation and effectuate legal process, including warrants. Instead, Defendant argues that the search of his person conducted incident to arrest was unlawful pursuant to Washington state law due to a violation of a Memorandum of Understanding (hereinafter MOU) between

Yakima County and the Yakama Nation, thereby requiring suppression of all evidence located by state officers during the course of the search. AOB at 14. The Defendant relies largely on *State v. Clark*, 178 Wash.2d 19 (2013), to support these contentions, however, Defendant's reliance on *Clark* is misplaced. The Defendant's arrest was lawful pursuant to Washington State law.

Pub.L. No. 83-280, 67 Stat. 588 (1953) (hereinafter PL-280) gave Washington, among other states, the consent of the United States to assume jurisdiction over Indian Country. *State v. Cooper*, 130 Wash.2d 770, 773 (1996). Washington only asserted jurisdiction over any tribe that would give its consent. *Id*. Wash. Rev. Code § 37.12.010 gives the State jurisdiction "over crimes within the borders of a reservation or on trust or allotment lands outside of the reservations borders," but not "over crimes committed on trust or allotment land within the reservations borders." *See State v. Clark*, 178 Wash.2d 19 (2013).

The issue of state criminal process and state law enforcement authority over tribal members in Washington State has been considered by the Washington State Supreme Court after the advent of the *Hicks* ruling. In 2008, in *State v. Cayenne*, the court considered whether a sentencing condition imposed on a tribal member

convicted in state court for an off reservation crime could, by implication, restrict a tribal member's activities on the reservation. 165 Wash.2d 10, 12 (2008)(en banc).

Specifically, *Cayenne* involved an enrolled member of the Chehalis Indian Tribe who was convicted of the felony offense of first-degree unlawful use of nets to take fish, in violation of Wash. Rev. Code § 77.15.580. *Id*. at 13. As a condition of the defendant's eight month sentence, the trial court prohibited the defendant from owning gillnets, on or off the reservation, for the term of his sentence. *Id.* The defendant subsequently appealed, arguing the trial court's imposition of such a condition regarding fishing on the reservation exceeded the court's authority. *Id*. The appellate court agreed, and vacated the crime related prohibition as it applied to the defendant's conduct on the reservation. *Id*. However, the Washington State Supreme Court reversed the appellate court, noting the defendant committed the underlying crime outside the reservation and as such, "the state court not only had jurisdiction but, important to the issue in this case, the court also had *personal jurisdiction* over the defendant." *Id.* at 14 (emphasis added).

The Washington State Supreme Court highlighted *Hicks* in examining whether the trial court had exceeded the scope of its jurisdictional limits, and

ultimately concluded that the defendant, an individual convicted of a felony offense for an off-reservation crime, was subject to the full authority of the state court, including crime-related prohibitions. *Id.* at 17. The court opined, "[l]imiting the trial court's sentencing authority, as Cayenne suggests, would create the unwanted result of permitting tribal lands to be havens for criminals avoiding justice after violating state laws." *Id.*

In *State v. Clark*, the Washington Supreme Court further examined the applicability of *Hicks* to a case in which a search warrant was issued by a state court judge for a tribal member's residence located on trust land on the Colville Indian Reservation pursuant to a crime committed on fee land and within the reservation. 178 Wash.2d at 27. Clark, an enrolled member of the Colville Tribes, argued the trial court erred in denying a motion to suppress evidence that police gathered at his residence pursuant to a state court issued search warrant. *Id.* at 23. Clark's argument was premised on the contention that the tribal court had jurisdiction over his property; therefore the state could not authorize or execute a search warrant without the authority of the tribal court. *Id.* at 24. The court acknowledged that Wash. Rev. Code § 37.12.010 provided the state with jurisdiction over the crime Clark had committed, but did not expressly provide the

state the authority to obtain and execute a search warrant on tribal land pursuant to the state's criminal jurisdiction. *Id.* at 26. However, the court noted the absence of such explicit authority did not mean the state lacked the authority to issue a warrant or execute a warrant on trust property. *Id*. Rather, absent explicit statutory authority, "[t]he State may exert its authority on reservation lands . . . subject to certain limitations." *Id.* at 26 (citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141 (1980)).

The court identified those limitations as federal preemption and tribal sovereignty. *Id*. at 26-27. The court summarily dismissed federal preemption as an issue, and considered *Hicks* in light of tribal sovereignty. The court acknowledged *Hicks* as binding precedent, despite Clark's contention that *Hicks'* holding relating to the state's ability execute criminal process was mere dictum. The court further acknowledged its reliance upon *Hicks* in its ruling in the *Cayenne* case, discussed *supra*.

The court went on to distinguish Clark's case from *Hicks* and *Cayenne*, because Clark's crime occurred on the Colville reservation. The court noted this as significant because "unlike crimes committed off-reservation, the State does not have exclusive jurisdiction over crimes by Indians occurring on their reservations"

and "[t]ribal sovereignty provides a tribe with concurrent jurisdiction to punish its members for violations of tribal occurring on the tribe's reservation." *Id*. at 30. The court noted that the shared criminal jurisdiction between the Colville Tribe and the state required a different approach than that in *Hicks* and *Cayenne*. *Id.*

Here, tribal sovereignty was not implicated under the *Clark* ruling because the tribal court did not possess concurrent criminal jurisdiction over the Defendant. Rather, the State court, by virtue of its personal jurisdiction over the Defendant pursuant to his status as a convicted felon on community supervision, possessed sole criminal jurisdiction over the Defendant on the outstanding arrest warrant, akin to the defendants in *Hicks* and *Cayenne*. ER 58, 245. Thus, the district court's finding that "Yakima County deputies had jurisdiction to execute the arrest warrant of Mr. Cloud for violating the terms of his state community custody," ER 58, falls directly in line with the laws of Washington state pursuant to legal process on tribal members on the reservation. The Defendant's arrest was lawful and permitted under the rationale as articulated in *Hicks* and *Cayenne*.

The Defendant argues to the contrary, applying the *Mathews* test to the present case, despite the fact that the *Clark* court acknowledged that the *Hicks* holding superseded *Mathews* in cases factually akin to *Hicks*, specifically where

state law enforcement officers search tribal property for an off-reservation crime. *Id.* at 31. In fact, the *Clark* court specifically identified the *Mathews* case as a starting point for searches of reservation lands only where *Hicks* is distinguishable. *Id*.

Here, the tribe did not share concurrent jurisdiction with the state. Rather, Defendant's outstanding arrest warrant was purely within the jurisdictional realm of the state. ER 242. Thus, *Hicks*, *Clark*, and *Cayenne*, all support the notion that *Hicks* is binding precedent in this instance, and the legal process effectuated by the state officers in serving the Defendant's outstanding arrest warrant falls squarely within the lawful realm of legal process. The arrest by state officers pursuant to a valid state arrest was lawful, as was the subsequent search incident to arrest of the Defendant's person. ER 246.

3. Law enforcement had authority under state law to arrest the Defendant and to search the Defendant incident to arrest

Evidence obtained in violation of state law cangenerally be admitted into a federal prosecution so long as it was obtained in compliance with federal protections. *United States v. Cormier*, 220 F.3d 1103, 1111 (2000). In evaluating a search incident to arrest, courts look to the underlying arrest, which is governed by, state law, to determine if the arrest was legal. *See id*. (citing *United States v. Mota*,

982 F.2d 1384, 1387 (9th Cir. 1993)). Therefore, if an arrest is permissible under state law, it is also valid under federal law, so long as it complies with other federal protections.

In Washington, "[a]n arrest is valid if there is lawful authority for it and it is based on probable cause." *State v. Carnahan*, 130 Wash.App. 159, 165 (2005). Here, a warrant existed for the Defendant's arrest. ER 30-32. The validity of the arrest warrant is uncontested. ER 57. Under the authority of the warrant and Wash. Rev. Code § 10.34.010, any officer could arrest the Defendant. ER 30. The warrant specifically granted state law enforcement officers the authority to arrest the Defendant under Wash. Rev. Code § 9.94A.716 because the Defendant violated the terms of his community custody. ER 30-32. Probable cause for the arrest existed because Officer Bazan, who was familiar with the Defendant, positively identified the Defendant upon entering the residence, and arrested the Defendant, whom he believed was named in the arrest warrant. ER 166-170. Therefore, under state law the Defendant's arrest was lawful. The lack of compliance with tribal extradition procedures does not invalidate the arrest under state law.

Law enforcement may search a person incident to arrest without a warrant. *See United States v. Smith*, 389 F.3d 944, 950 (9th Cir. 2004). Searches conducted

incident to arrest are valid "because of the need to remove any weapons that threaten the arresting officers or bystanders and the need to prevent the concealment or destruction of evidence." *Id*. Here, Officer Bazan conducted a search of the Defendant's person incident to arrest. ER 170-171; 405. During the search, he located a loaded firearm. ER 170-171; 405-408. Any lack of compliance with extradition procedures does not invalidate the search incident to arrest which led to the discovery of the firearm.

4. Assuming *arguendo* that this Court deems the Memorandum of Understanding to be binding legal authority, the evidence presented at the suppression hearing failed to trigger its arrest and extradition provisions

Assuming *arguendo*, the MOU is binding legal authority, thus requiring the County to arrest and extradite tribal members per its terms, the evidence at the suppression hearing failed to trigger the extradition provision in the MOU. The MOU advises a "[w]here a Yakima County deputy sheriff *knowingly* enters Trust lands for the purpose of serving a state court warrant on an enrolled member of the Yakama Nation . . . the deputy sheriff will . . . first contact Yakama Nation police dispatch." ER 16 (emphasis added). Officer McIlrath and Officer Mallonee testified during the suppression hearing that at the time the warrant was executed they did not know they were on trust land. ER 107, 152. Neither Officer McIlrath

nor Officer Mallonee knowingly entered trust land, thereby triggering the provisions of the MOU. Officer Bazan was not aware of the existence of the MOU and; therefore, would be unaware any requiring that he must determine if he were on trust land and whether he could execute a warrant. ER 172. Indeed, in the White Swan area the land is broken up much like a "checkerboard" as referenced by Deputy McIlrath with some land titled as tribal trust land, areas titled as allotment land, areas titled as allotment land by the tribe, land titled as tribal fee land, and still other land titled as fee land generally. ER 107; *see also cf: Confederated Tribes & Bands of the Yakama Nation v. Holder*, No. CV-11-3028-RMP, 2012 WL 893913, at *3 (E.D. Wash. Mar. 15, 2012)(acknowledging the Yakima reservation contains a "checkerboard of incorporated municipal land, fee land, and trust land.")

Despite Deputy McIlrath having prior contact with Culps and having previously been to the residence where the Defendant was found, such prior contact does not require Deputy McIlrath to know the residence was on trust land. In fact, Deputy McIlrath's multiple prior contacts on the property would support his belief that the property was fee land, given that he was aware he needed to contact Yakama Nation Police if the State were to go "onto trust land to arrest an

enrolled Native American." ER 107. Even if Deputy McIlrath "was aware of the real possibility that it could be on trust land", AOB 25, the fact that the Defendant was on trust land does not lower or eliminate the requirement in the MOU that an Officer who "*knowingly* enters . . . must contact Yakama Police Dispatch." ER 16 (emphasis added). Here, the record does not support the contention that the officers knowingly entered trust land thereby triggering the provisions of the MOU regarding the arrest and extradition of tribal members.

5. Failure to extradite the Defendant in accordance with the Memorandum of Understanding does not amount to a Constitutional violation and should not result in suppression of evidence found search incident to a lawful arrest

The Defendant's argument that the firearm should be suppressed rests on the supposition of the MOU as binding law, creating explicit rights allowing a tribal member to claim a Fourth Amendment violation when the terms of MOU are not followed. However, the MOU "is only an overview of joint coordination of law enforcement activities, not binding authority." ER 58. Further the district court found the language in the MOU would not grant or create any right. The language of the MOU as quoted by the district court, specifically states:

> This memorandum expressly does not create any right, benefit, or other legally enforceable responsibility, substantive or procedural, enforceable at law or equity by either party against the other party.

> Nothing in this memorandum is intended to create a cause of action by either party against the other. As such, the terms of this memorandum are terminable at any time without cause, upon written notice.

ER 17. This language makes it clear that the MOU does not supplement the Defendant's Fourth Amendment rights nor does it provide any additional remedy to the Defendant if his rights were violated. The MOU does not add to the government's obligations in executing criminal process. The MOU does not take away any of the Defendant's Fourth Amendment rights nor does it take away the government's obligations; rather, the MOU establishes an understanding between the Yakama Tribe and Yakima County regarding how to "work together to ensure the safety and security of their residents and visitors to the Yakama Indian Reservation." ER 14.

The MOU is an agreement between the Yakama Tribe and Yakima County. ER 18. The Defendant was not a party to this agreement, and through it, is not afforded Constitutional rights. The duties and obligations outlined in the MOU apply to the Tribe and Yakima County, not the Defendant. Thus, while the Tribe may have an enforceable interest against Yakima County based on the MOU, the Defendant does not. While participation with the Yakama Nation police officers is highly encouraged, it does not prevent the State from exercising its criminal

process on Tribal lands. The terms of the MOU did not prevent the Defendant's arrest nor the subsequent search incident to arrest from occurring and did not require law enforcement to follow its terms. The Defendant cannot enforce the provisions of the MOU against law enforcement simply because law enforcement served its criminal process in a way contrary to the MOU.

The Defendant's claim that his arrest violated the MOU and therefore his Constitutional rights is a mere assertion. His arrest did not violate State or Federal due process, even if the arrest was in violation of tribal extradition proceedings. The Supreme Court has held "the power to try a person for a crime is not impaired by the fact that he has been brought within the court's jurisdiction by a 'forcible abduction.'" *Frisbie v. Collins*, 342 U.S. 519, 522 (1952). "[D]ue process of law is satisfied when one present in court is convicted of crime after having been fairly apprized [sic] of the charges against him and after a fair trial in accordance with Constitutional procedural safeguards." *Id*. "There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted escape justice because he was brought to trial against his will." *Id*.

Defendant is asking this Court to relieve him of his criminal conviction, arguing suppressing of the firearm would be appropriate, because the State brought

him within the State's jurisdiction without tribal extradition proceedings. Suppression is not the appropriate remedy to unlawful extradition. Suppression of evidence occurs when law enforcement violates a defendant's Fourth Amendment rights. Failing to extradite, per the MOU, is not a violation of the Fourth Amendment. Moreover, the nexus between the violation and the requested remedy has not be established. The Fourth Amendment does not provide the Defendant with the remedy of suppression because extradition procedures were not followed.

Exclusion of evidence only serves the purpose of deterring police misconduct. *See Davis v. United States*, 564 U.S. 229, 246 (2011). Suppression of reliable evidence is a high cost and allows an otherwise factually guilty defendant to go free. *See Id*. at 237; *see also United States v. Herring*, 535 U.S. 135, 141 (2009). Even when law enforcement violates the Fourth Amendment, suppression is not the "automatic" remedy rather it is the "last resort" that should be used reluctantly. *Herring*, 535 U.S. at 698; *Hudson v. Michigan*¸ 547 U.S. 586 (2006). "Exclusion is 'not a personal constitutional right,' nor is it designed to 'redress the injury' occasioned by an unconstitutional search." *Davis*, 564 U.S. at 236. The only reason the district court should have suppressed the evidence was to deter

unlawful conduct. The MOU is not binding and therefore, the state law enforcement officers could not act unconstitutionally in regards to its terms.

Likewise, Washington State always had jurisdiction over the violation alleged in the arrest warrant. Regardless of the Defendant sustaining another charge during the execution of the arrest warrant, that crime does not invalidate Washington State's jurisdiction and does not preclude the United States from using evidence lawfully found against the Defendant in a criminal trial.

Even though the Defendant was not extradited, how the Defendant ended up in Washington State's jurisdiction is irrelevant, so long as Due Process was not violated. The manner in which Defendant finds himself in front of a court does not "affect the court's power to proceed." *United States ex rel. Lujan v. Gengler*, 510 F.2d 62, 63 (2nd Cir. 1975)(*citing Ker v. Illinois*, 119 U.S. 439 (1886), and *Frisbie*, 342 U.S. 519); *See also*, *High Pine v. State of Mont.*, 439 F.2d 1093, 1094 (9th Cir.1971) (holding the illegal arrests and extraditions do not limit a courts power to try an individual for a crime). Washington State did not violate the Defendant's Fourth Amendment rights nor the Defendant's Due Process rights; he suffered "no deprivation greater than that which he would have endured through lawful extradition." *Lujan*, 510 F.2d at 66; *see also United States v. Fielding*, 645 F.2d

719 (9th Cir. 1980) (dismissal of the indictment inappropriate where the United States did not deprive the defendant of constitutional rights); *But see*, *United States v. Toscanino*, 500 F.2d 267 (2nd Cir. 1974) (dismissal of indictment appropriate where the United States engaged in torture, acts of terror, and custodial interrogation resulting a deprivation of the defendant's rights in violation of the Constitution).

6. Even if the arrest, the search, and the failure to extradite the Defendant were deemed unconstitutional, the evidence could still be admitted under the inevitable discovery rule

Evidence obtained in violation of state or federal law is excluded under the "fruit of the poisonous tree" doctrine, or the exclusionary rule, with a few exceptions. *See United States v. Crews*, 445 U.S. 463, 469 (1980) (identifying three common exceptions: independent source, inevitable discovery, and attenuation). Each of these exceptions ratifies the previous unlawful conduct of law enforcement by dissipating the taint of its conduct, therefore allowing for admission of evidence obtained unlawfully. *See id*. at 471. If the United States can show by preponderance of evidence the unlawfully seized materials would have been discovered by lawful means, it will be admitted. *United States v. Andrade*, 784 F.2d 1431, 1433 (9th Cir. 1986).

Defendant argues that the arrest, the search, and the State's failure to extradite him resulted in a Fourth Amendment violation. However, even if the State's conduct resulted in a Fourth Amendment violation, the firearm found on the Defendant's person inevitably would have been discovered by law enforcement. Defendant had an active warrant for his arrest. ER 30-31, 57. Defendant was taken to the Yakima County Jail where he was booked into the facility. ER 171-172. Every person booked into the jail can lawfully be subjected to a search without a warrant. *See Illinois v. LaFayette*, 462 U.S. 640, 643-46 (1983). A search upon booking is an administrative step required to protect an arrestee from the jail unlawfully claiming property, himself, and the other inmates from harm or causing harm. *See id*. Even if the Defendant were unlawfully brought to into the State's jurisdiction, the firearm would nevertheless have been found.

If state law enforcement officers had delivered the Defendant to the tribal court, the Defendant would have been brought to the Yakama Nation tribal jail, where he would have been searched. Therefore, the firearm would inevitably have been discovered and was properly admitted, even if a constitutional violation occurred.

B STATE LAW ENFORCEMENT OFFICERS PROPERLY CONFIRMED THE DEFENDANT'S ARREST WARRANT PRIOR TO THE DEFENDANT'S ARREST

1. Standard of Review

"In federal criminal cases, Rule 51(b) explains how to preserve claims of error: 'by informing the court – when the court ruling or order is made or sought – of the action the party wished the court to take, or the party's objection to the courts action and the grounds for that objection." *Puckett v. United States*, 556 U.S. 129, 135 (2009). Issues not raised in the court below are reviewed for plain error. *United States v. Baramdyka*, 95 F.3d 84, 844 (9th Cir. 1996). Error that is plain requires "(1) error, (2) that is plain, and (3) affects substantial rights." *United States v. Hammons*, 558 F.3d 1100, 1103 (9th Cir. 2009). If plain error does exists the court "may then exercise its discretion to grant relief if the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id*.

Despite personal privacy interests under the Fourth Amendment, the exclusionary is not a personal privacy right, but rather it is a judicially created remedy. *Davis*, 564 U.S. at 236; *see also United States v. Leon*, 468 U.S. 897 (1984), *Stone v. Powell*, 428 U.S. 465 (1976), *United States v. Calandra*, 414 U.S.

338 (1974). If a Fourth Amendment violation occurs resulting in unlawful seizure of evidence, the individual who is harmed must raise the issue to exclude the evidence. *Rakas v. Illinois*, 439 U.S. 128, 138 (1978); *see e.g.*, *Brown v. United States*, 411 U.S. 223, 229-230 (1973), *Alderman v. United States*, 394 U.S. 165, 171-172 (1969), *Simmons v. United States*, 390 U.S. 377, 389 (1968). Exclusion of evidence is not aimed at deciding the truth in the matter, but rather is in place to protect privacy interests of the Fourth Amendment. *Stone*, 428 U.S. at 485-89, *Calandra*, 414 U.S. at 348.

2. State law enforcement officers properly confirmed the warrant for Defendant's arrest prior to the arrest on the morning of October 18, 2015

On the morning of October 18, 2015, Deputy McIlrath ran the names of the Defendant and Elias Culps through the Spillman database, which allowed him to confirm the warrants for both individuals. ER 97-100. Deputy McIlrath's radio log, entered into the record as Exhibit A, demonstrates that he engaged in confirming both warrants at approximately 7:15 a.m. to 7:16 a.m. the morning of the warrant service. ER 99. Further, at the suppression hearing, Deputy McIlrath detailed the information available to law enforcement officials in the Spillman database, including the fact that any individual with an outstanding warrant,

including the Defendant as of the morning of October 18, 2015, is highlighted by color in the database. ER 99, 137. Thus, Deputy McIlrath's response during cross-examination that he did not confirm the warrant is inconsistent with his own earlier testimony and the Spillman database records from the morning of October 18, 2015. The United States posits that Deputy McIlrath's response was referring to the fact that he did not call a dispatch operator to confirm the warrant, but rather utilized the Spillman database to confirm the warrant. The record before the district court confirmed that the Defendant's arrest warrant was confirmed both prior to the warrant service by Deputy McIlrath utilizing the Spillman database, and subsequent to the warrant service by Deputy Bazan via dispatch operator. ER 98-100, 172-173.

3. Wash. Rev. Code § 10.31.030 authorizes law enforcement to execute warrants without actual possession of the warrant at the time of the arrest

Generally, an officer can only arrest under the authority of a warrant and must show a defendant the warrant prior to arrest. Wash. Rev. Code § 10.31.030. However, if the officer does not have the warrant at the time of the arrest, "he or she shall declare that the warrant does presently exist and will be shown to the defendant as soon as possible on arrival at the place of intended confinement." *Id*. All that is required at the time of the arrest, if the officer does not physically have a copy of the warrant, is substantial compliance with Wash. Rev. Code § 10.31.030. *State v. Singleton*, 9 Wash.App. 327, 350 (1973). If an officer relies in good faith on information supplied by another officer that the warrant for the defendant's arrest was issued and in fact, the warrant is still validly in existence, the officer may arrest the defendant without the warrant in hand. *See State v. Trenidad*, 23 Wash.App. 418 (1979) (holding good-faith reliance on a warrant that does not exist does not validate an arrest).

Here, Officer Bazan had a good faith belief the warrant was in existence. Officer Bazan told Defendant he was under arrest due to a "felony warrant" for

escaping community custody. ER 27. Officer Bazan also informed Defendant of the unlawful possession of a firearm charge upon finding the gun. ER 27.

4. Wash. Rev. Code § 10.31.100 authorizes law enforcement to arrest without a warrant if probable cause exists that the a person committed a felony and Deputy Bazan had probable cause to arrest the Defendant based on collective knowledge of law enforcement and knowledge of the issued arrest warrant

Even if the warrant was not present, Deputy Bazan was authorized under Washington law to arrest the Defendant without a warrant. "A police officer having probable cause to believe that a person has committed or is committing a felony shall have the authority to arrest the person without a warrant." Wash. Rev. Code § 10.31.100. Probable cause requires "the facts and circumstances within the arresting officer's knowledge and of which the officer has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in a belief that an offense has been committed." *State v. Terrovona*, 105 Wash.2d 632, 643 (1986).

On October 15, 2015, Deputy Bazan, along with Sergeant Bill Splawn, Deputy Mallonee, Deputy McIlrath, and Reserve Duty Peratrovich met and decided to perform warrant service. ER 97. Deputies began warrant service at 241 White Swan. ER 166. Prior to executing the warrants information was received from other deputies that the Defendant, Nathan Cloud, and another individual,

Elias Culps, would be present at the residence. ER 166-167. Additional information was known personally by Deputy McIlrath. ER 99-102. Deputy McIlrath confirmed there was an outstanding warrant for the Defendant prior to its execution. ER 99. Deputy McIlrath was familiar with the Defendant prior to the service of the warrant because he had prior contacts with the Defendant. ER 99. A Department of Licensing check was performed on Mr. Cloud, allowing the deputies to confirm Mr. Cloud's appearance prior to performing warrant service. ER 105, 166-167. All of these circumstances amount to probable cause that the individual arrested was the Defendant listed in the arrest warrant**.**

C. THE DISTRICT COURT CORRECTLY DETERMINED THE DEFENDANT WAS PRECLUDED FROM RECEIVEING A TWO-POINT REDUCTION FOR ACCEPTANCE AND RESPONSIBILITY

1. Standard of Review

"Whether or not a defendant has accepted responsibility for his crime is a factual determination to which the clearly erroneous standard of review applies." *United States v. Gonzalez*, 897 F.2d 1018, 1019 (9th Cir. 1990). A district court's finding that a defendant did not accept responsibility is reviewed for clear error. *See United States v. Rosas*, 615 F.3d 1058, 1066 (9th Cir. 2010). Where the district court found a defendant did not accept responsibility, its determination

should not be disturbed "unless it is without foundation." *United States v. Aichele*, 941 F.2d 761, 767 (9th Cir. 1991).

2. The Defendant required the United States to prove its burden at trial

The Guidelines allow for a reduction where a defendant accepts responsibility. *See* U.S.S.G. § 3E1.1. A reduction due to acceptance of responsibility "is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and then only admits guilty and expresses remorse." *Id*.

As the district court noted at sentencing, the Defendant entered a plea of not guilty and the matter subsequently proceeded to trial. ER 257. The district court found the Defendant failed to accept responsibility when it required the United States to proceed to trial, explaining, "[i]t seems to me this case was contested all the way through, understandably. With that in mind, I don't believe there is a basis to allow a two-level reduction for acceptance of responsibility." ER 257. The Defendant's decision to take his case to trial is inconsistent with acceptance of responsibility. *See* U.S.S.G. § 3E1.1, cmt. n.2. Because the district court is in "a unique position to evaluate a defendant's acceptance of responsibility . . . the

determination of the sentencing judge is entitled to great deference on review." U.S.S.G. § 3E1.1, cmt. n.5.

3. Defendant's statements and conduct were inconsistent with acceptance and responsibility for his actions

While a trial conviction is not always inconsistent with acceptance of guilt, it is only in rare circumstances where a defendant's pretrial statements and conduct demonstrate the acceptance of responsibility that a defendant may receive downward adjustment. U.S.S.G. § 3E1.1, cmt. n.5. It is the defendant's burden to show he accepted responsibility. *See United States v. Innie*, 7 F.3d 840, 848 (9th Cir. 1993) (finding a district court cannot punish a defendant for not participating in a pre-sentence interview or pleading not guilty, but a defendant must prove acceptance of responsibility). Proof of acceptance must be shown by the defendant demonstrating at the very least "contrition or remorse." *See United States v. Gallant*, 136 F.3d 1246, 1248 (9th Cir. 1998). The Guidelines provide standards by which a defendant may show he is entitled to a downward adjustment. *See United States v. Nielsen*, 371 F.3d 574, 583 (9th Cir. 2004). Section 3E1.1 cmt. n.1 lists the following:

> (a)Truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable;

(b)Voluntary termination or withdrawal from criminal conduct;
(c)Voluntary payment of restitution prior to adjudication of guilty;
(d)Voluntary surrender to authorities promptly after commission of the offense;
(e)Voluntary assistance to the authorities in the recovery of the fruits and instrumentalities of the offense;
(f)Voluntary resignation from the office or position held during the commission of the offense;
(g)Post-offense rehabilitative efforts (e.g., counseling or drug treatment); and
(h)The timeliness of the defendant's conduct in manifesting the acceptance of responsibility.

U.S.S.G. § 3E1.1, cmt. n.1 (a)-(h).

The Defendant's actions do not demonstrate any of the characteristics listed above, nor did he not demonstrate contrition or remorse through his pre-trial statements or conduct. During the hearing for the motion to suppress, the Defendant did not make any statements indicating remorse or contrition. *See* ER 212-219. Furthermore, despite the district court finding the Defendant, "argued that the law precluded the legality of the arrest" throughout the case proceeding, that in and of itself does not constitute pre-trial conduct or statements that demonstrate acceptance of responsibility. ER 293-294.

To the contrary, from the time of his arrest through the trial, the Defendant argued an essential element of the offense, that he knowingly possessed the firearm at issue. At the time of his arrest, the Defendant stated to Deputy Bazan "he did

not know that the gun was in his pocket." ER 173. At trial, the United States did not elicit the Defendant's statements relating to the firearm. However, the Defendant elicited this testimony from Deputy Bazan in cross-examination, and continued to emphasize the Defendant's arguments regarding his lack of knowledge in possessing the firearm multiple times in closing argument. ER 541-543, 551. "On this record, the district court did not clearly err in finding that [the Defendant's] actions were inconsistent with acceptance of responsibility…." *United States v. Osinger*, 753 F.3d 939 (9th Cir. 2014) (quoting *United States v. Ramos-Medina*, 706 F.3d 932, 942 (9th Cir. 2013).

Finally, the Defendant's statement at sentencing that he only "took it to trial this far because I think they done wrong when they didn't take me to tribal jail" does not demonstrate remorse or contrition. ER 289. This post-trial statement is not evidence of acceptance and responsibility. *See United States v. Restrepo*¸ 930 F.2d 705, 710-11 (9th Cir. 1991) (holding defendant's post-trial admissions of guilt to probation and to the Court could be ignored by the district court and did not constitute acceptance of responsibility).

VI. CONCLUSION

For the foregoing reasons, the United States respectfully requests this Court affirm the conviction and the sentence of the district court.

Date: January 5, 2018

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s/ Laurel J. Holland
Laurel J. Holland
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STATEMENT OF RELATED CASES

Counsel for the plaintiff-appellee certifies that no cases are pending in this Court at are deemed related to the issues presented in the instant appeal.

s/ Laurel J. Holland
Laurel J. Holland
Assistant U.S. Attorney

CERTIFICATE OF SERVICE

It is hereby certified that on January 5, 2018, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participates who are registered EM/ECF users will be served by the appellate CM/ECF system.

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Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28-1.1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 16-30310

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Signature of Attorney or Unrepresented Litigant [s/Laurel J. Holland] Date [Jan 5, 2018]

("s/" plus typed name is acceptable for electronically-filed documents)

(Rev.12/1/16)