UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Criminal No. 19-320 (SRN/LIB)

UNITED STATES OF AMERICA, Plaintiff, v. WAYNE MICHAEL FISHER a/k/a "Burrito", Defendant.	)	**UNITED STATES' RESPONSE TO DEFENDANT'S PRETRIAL MOTIONS**

The United States of America, by and through attorneys, Erica H. MacDonald, United States Attorney, and Andrew R. Winter and Bradley M. Endicott, Assistant United States Attorneys, submit this response to Wayne Fisher's motions to: (1) suppress evidence from a tracking warrant (ECF No. 25); (2) suppress evidence from a July 27, 2016, automobile search; (3) suppress evidence from a July 30, 2016, automobile search pursuant to a warrant (ECF No. 25); (4) suppress cell phone evidence that was seized pursuant to a warrant on August 5, 2016 (ECF 25); (5) suppress evidence seized pursuant to a tribal search warrant on July 27, 2019 (ECF No. 25); and (6) dismiss Count Three of the indictment on Double Jeopardy grounds (ECF No. 22).

A motions hearing was held February 10, 2020. The government offered: (1) Fisher's federal arrest warrant (Gov't Ex. 2); (2) an "Application and Findings, Order, and Tracking Warrant" issued July 26, 2016 (Gov't Ex. 3); (3)

an affidavit and search warrant issued July 30, 2016 (Gov't Ex. 4); (4) an affidavit and search warrant issued August 3, 2016 (Gov't Ex. 5); and (5) an affidavit and search warrant issued June 27, 2019 (Gov't Ex. 6). Trooper Nicholas Otterson also testified. For the reasons stated below, Fisher's motions should be denied.

BACKGROUND

I. The Tracking Warrant

On July 26, 2016, this Court issued an arrest warrant for Fisher for a Supervised Release Violation Petition. (Gov't Ex. 2). That same day, Special Agent Robert Fraik of the Minnesota Bureau of Criminal Apprehension obtained a warrant to track Fisher's cellular phone movements. (Gov't Ex. 3). Fraik's "Affidavit of Probable Cause" asserted Fisher had an "outstanding felony level arrest warrant" and that his phone would "likely provide fruitful information about the whereabouts of [Fisher] and will aid law enforcement in locating and arresting [Fisher] for a felony level arrest warrant." (*Id.* at Application-3).

II. Trooper Otterson's Traffic Stop – July 27, 2016

Trooper Nicholas Otterson testified about the July 27, 2016, traffic stop. (Tr. 27–77). Otterson is a certified K-9 handler and has specialized training in drug investigation and drug interdiction. (Tr. 28–29). His duties include

proactive traffic enforcement, responding to 911 calls, conducting crash investigations, and utilizing Busa, a certified drug detection K-9. (*Id.*) Busa is certified to detect odors of cocaine, ecstasy, heroin, marijuana, methamphetamine, and psilocybin mushrooms. (Tr. 49).

Prior to and during his July 27 shift, Otterson communicated with Fraik and Jerry Wilhelmy of the Minnesota Department of Corrections. (Tr. 30). They asked Otterson to stop "a white Chrysler 300 with dark tint and big fancy rims" with a known license plate and said Fisher was associated with the vehicle. (Tr. 31). At the time, Fisher was wanted by the U.S. Marshals and was Minnesota's "highest ranking Native Mob member". (*Id.*) Otterson also learned that Fisher allegedly assaulted an individual on Red Lake Reservation with a firearm two days prior, and was involved with transporting methamphetamine to the reservation area. (*Id.*)

Later that day, Fraik told Otterson that he was tracking Fisher's movements via the phone tracking warrant. (Tr. 33–34; *see also* Gov't Ex. 3). Fisher was in Twin Cities and was expected to travel to U.S. Highway 10 and onto Minnesota Highway 64 towards the Red Lake Reservation. (Tr. 33). A vehicle must traverse through Motley, Minnesota to reach Red Lake via this route. (*See* Tr. 33–34).

Otterson began his shift at 3:00 p.m. and drove towards Motley, Minnesota as Fraik tracked Fisher's whereabouts towards Motley and

communicated updates to Otterson. (Tr. 34). At 3:53 p.m., Otterson observed the Chrysler driving east on Minnesota Highway 210. (*Id.*) The license plate matched Fraik's description.[1] (Tr. 35).

Based upon training and experience, Otterson believed the Chrysler's side windows had illegal tint. (Tr. 35–36). Under Minnesota Statute § 169.71, subdivision 4(3) it is a traffic violation to have window tinting that "obstruct[s] or substantially reduce[s] the driver's clear view through the window or has a light transmittance of less than 50 percent plus or minus three percent in the visible light range or a luminous reflectance of more than 20 percent plus or minus three percent." In order to measure window tint, the vehicle must be stopped. (Tr. 37.)

Otterson executed a U-turn and intercepted the Chrysler. After following the vehicle for a short time, Otterson activated his emergency lights and pulled the vehicle over. (Tr. 37; Gov't Ex. 1, at 0:01:12–0:01:21). Otterson approached the front passenger door and observed three occupants: a driver, a front seat passenger, and a woman laying down on the back seat without a seat belt. (Tr. 38–39; Gov't Ex. 1, at 0:01:40). Otterson asked the driver for his license and proof of insurance. (Tr. 39; Gov't Ex. 1, at 0:01:42). Otterson also informed the occupants of the suspected tint violation. (*Id.*) The driver

[1] Otterson testified the Chrysler was white and orange and not solid white as described by Fraik.

provided North Dakota identification, the title for the vehicle, and told Otterson that he lacked proof of insurance because he recently purchased the vehicle. (Tr. 39; Gov't Ex. 1, at 0:01:55).

Otterson identified the driver as Zebediah Gartner ("Gartner"). (Tr. 39). Otterson observed that the front passenger matched Fisher's description. (Tr. 39–40; Gov't Ex. 1, at 0:02:04–0:02:38). Otterson also noticed that the female in the back seat appeared disheveled, disoriented, and had bloodshot eyes with constricted pupils. (Tr. 40; Gov't Ex. 1, at 0:02:39). This led Otterson to believe she recently used drugs. (*Id.*).

Next, Otterson observed the interior of the vehicle. (Tr. 40; Gov't Ex. 1, at 0:02:39–0:02:54). He observed air fresheners around the vehicle, multiple cell phones, and loose molding near the console and radio. (Tr. 41; *See also* Tr. 51–52). In Otterson's experience, loose molding can indicated hidden contraband and multiple air fresheners are often used to mask contraband odors. (Tr. 40–41). According to Otterson, drug traffickers often use a second phone to facilitate illicit conduct and avoid detection. (*Id.*)

After asking Gartner to exit the vehicle, Otterson advised Fisher of his outstanding warrant and placed him under arrest. (Tr. 48; Gov't Ex. 1, at 0:05:00–0:05:49). Otterson asked the female passenger to exit the Chrysler and asked her about their travels that day. (Tr. 45–48; Gov't Ex. 1, at 0:06:42). She identified herself as Danielle Webster ("Webster"). (Tr. 45; Gov't Ex. 1, at

0:07:12). Webster told Otterson that the group went shopping in St. Cloud and were returning to Red Lake Reservation. (*Id.*).

Otterson returned to his vehicle and questioned Gartner. Gartner stated the group was returning from a daylong shopping trip to Albertville Outlet Mall. (Tr. 43; Gov't Ex. 1, at 0:09:50 – 0:10:00; *see also* Gov't Ex. 1 0:15:23). In Otterson's estimation, Gartner's story contradicted Webster because the Albertville Shopping Center is located 25 miles from St. Cloud. (Tr. 43, 45-46; Gov't Ex. 1, at 0:07:12). Moreover, physical surveillance and phone tracking showed they were coming from the Twin Cities. (Tr. 43).

Otterson also performed routine record checks on Gartner and Webster (Tr. 44; Gov't Ex. 1, at 0:11:15). Otterson learned Gartner's license was suspended and that there was a warrant for his arrest. (Tr. 44–45; Gov't Ex. 1, at 0:12:08–0:13:05). As a result, Otterson detained him. (Tr. 44–45; Gov't Ex. 1, at 0:13:05). Otterson also determined Webster initially provided a false name when she identified herself as Danielle Webster. (Tr. 42). Webster's real name was Morningstar Webster and had active warrants for her arrest.[2] (Tr. 47; Gov't Ex. 1, at 0:24:21).

Once Otterson arrested Webster, he deployed Busa to sniff the Chrysler. (Tr. 47–49; Gov't Ex. 1, at 0:28:20).[3] Otterson performed two passes. (Tr. 49;

[2] Coincidently, Morningstar Webster and Danielle Webster both had outstanding arrest warrants. (Tr. 42, 47).

[3] Otterson planned to impound the Chrysler since: (1) the vehicle was blocking

Gov't Ex. 1, at 0:28:21–0:29:03). Each time, Busa alerted to the odor of narcotics. (*Id.*) On the first pass, Busa broke away from the search pattern, increased her respirations and alerted to exterior passenger door and open window seam. (Tr. 49; Gov't Ex. 1, at 0:28:25–0:28:31). On the second pass, Busa alerted at the exterior passenger door and open window seam and jumped into the window. (Tr. 49; Gov't Ex. 1, at 0:28:50). Busa indicated for the odor of narcotics by scratching the console and glove box. (Tr. 49–50; Gov't Ex. 1, at 0:28:55). Once Busa alerted, Otterson searched the vehicle. (Tr. 50).

Otterson first searched the front passenger area. (Tr. 50; Gov't Ex. 1, at 0:30:54). Otterson located a bag of Gabapentin pills wedged inside the console. (Tr. 50; Gov't Ex. 1, at 0:31:05). Gabapentin is a narcotics additive. (Tr. 50). Next, Otterson searched the glovebox. (Tr. 50; Gov't Ex. 1, at 0:31:40). Otterson located a marijuana pipe and loose marijuana sprinkled on a piece of paper. (Tr. 50; Gov't Ex. 1, at 0:33:15). Otterson searched the back seat. (Tr. 51; Gov't Ex. 1, at 0:34:33). The search revealed Webster's identification and a digital scale with clear, crystalline residue. (Tr. 42, 51; Gov't Ex. 1, at 0:34:45). The residue tested positive for methamphetamine. (Tr. 51). Finally, Otterson searched the trunk. (Tr. 51; Gov't Ex. 1, at 0:43:56). Otterson found

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part of the roadway; (2) Gartner lacked a valid license; (3) the other occupants were placed under arrest; and (4) there was no owner present. (Tr. 48). Otterson informed Gartner that regardless of the dog sniff, an inventory search was necessary since the vehicle had to be towed. (Gov't Ex. 1, at 0:18:34). *See United States v. Allen*, 713 F.3d 382, 387 (8th Cir. 2013).

three subwoofers (speakers), a digital scale, and luggage. (Tr. 50; Gov't Ex. 1, at 0:43:56–0:53:38).

After the search, Otterson tested the vehicle's window tint. (Tr. 52; Gov't Ex. 1, at 1:13:31–1:13:53). The tint measured 35% which was below the 50% light transmission requirement. (Tr. 51-52; Gov't Ex. 1, at 1:13:53). Afterwards, the Chrysler was impounded and Fisher and Webster were taken into custody. [4] (*Id.*)

III. A Second Search Reveals Hidden Methamphetamine.

After the Chrysler was towed, Otterson and Fraik suspected it still contained contraband. (Tr. 53). Otterson believed marijuana was placed inside the glove box to distract Busa from other narcotics. (Tr. 54). On July 28, 2016, the Chrysler was towed to Otterson's office and secured in a garage. (Tr. 53). Otterson left its doors and windows open for two days. (Tr. 54).

On July 30, 2016, Otterson obtained a search warrant for the Chrysler. (Tr. 55; *see also* Gov't Ex. 4). Otterson noted: (1) the circumstances surrounding the July 27, 2016 stop; (2) a CRI reported to Fraik that Fisher was a high level narcotics distributor scheduled to transport "a large quantity of methamphetamine to northern Minnesota;" and (3) Fisher's criminal history

[4] Gartner was released after the traffic stop. Although Gartner had an outstanding arrest warrant in Cass County, the county chose not to execute it. (Tr. 52; Gov't Ex. 1, at 1:05:34). Instead, Gartner was cited for driving after suspension and issued a warning for excessive tint. (Tr. 44–45, 52–53).

and Native Mob ties. (Gov't Ex. 4, at Application 1-3–1-4). A Minnesota court found probable cause and issued the warrant. (*Id.* at Application 1-7).

After obtaining the warrant, Otterson removed the luggage and three subwoofers from the Chrysler. (Tr. 56). Otterson then brought Busa to perform a dog sniff. (*Id.*) Instead of following the usual search pattern around the vehicle, Busa ran to the removed subwoofer. (*Id.*) Busa inserted her head inside its opening and scratched the speaker – an alert for narcotics odor. (*Id.*) Otterson removed the subwoofer's faceplate. (*Id.*) This revealed two garbage bags containing packages. (*Id.*) The packages contained 479 grams of methamphetamine. (*Id.*; *see also* Gov't Ex. 5, at Application 1-3).

IV. Fraik Obtains a Search Warrant for Fisher's Cellular Phones.

After Otterson's discovery, Fraik obtained a search warrant for the contents of Fisher's cellular phones. (Gov't Ex. 5, at Application 1-3). To establish probable cause, Fraik noted: (1) the circumstances surrounding Otterson's stop; (2) Otterson's discovery of methamphetamine; (3) Fisher's alleged involvement in the armed assault on Red Lake Reservation; and (4) knowledge of Fisher's involvement in narcotics sales. (*Id.*) A judge found probable cause and issued the warrant. (*Id.* at Warrant 1-1).

V. Red Lake Tribal Police obtain a search warrant.

On July 27, 2019, Ronald Leyba ("Leyba") of Red Lake Department of Public Safety sought a warrant in Red Lake Tribal Court to search both the residence of Richard Clark in Redby, Minnesota, and an SUV with a Leech Lake license plate. (Gov't Ex. 6, at Warrant 1-1). Leyba also sought to search Clark and Dezirae Desjarlait. (*Id.*) Leyba noted a confidential reliable informant (CRI) observed the purchase of 3.75 grams of methamphetamine from the residence. (*Id.*) A CRI also observed Fisher and Desjarlait at the residence. (*Id.*) Desjarlait was in possession of methamphetamine. (*Id.*) A CRI reported Fisher and Desjarlait returned from Cass Lake within the past 24 hours with methamphetamine to sell. (*Id.*) Finally, Leyba affirmed Fisher was a Native Mob member and had criminal history for "controlled substances crimes and violence." (*Id.*) The judge found probable cause and issued the warrant. (*Id.* at Warrant 1-5–1-6). The warrant enabled officers to search the residence and SUV for controlled substances and indicia thereof. (*See Id.* at Warrant 1-5).

Officers seized a quantity of methamphetamine pursuant to the search warrant.[5] As a result, Fisher was arrested and charged with possession with intent to distribute controlled substances in Red Lake Tribal Court. (Tr. 17–19). Fisher pled guilty to this drug possession. (Tr. 19–20).

[5] Officers found the methamphetamine inside the SUV.

LAW AND ARGUMENT

I. The phone tracking warrant was supported by probable cause and complied with *Carpenter v. United States,* 138 S. Ct. 2206 (2018).

First, Fisher contends the tracking warrant does not comply with *Carpenter v. United States*, 138 S. Ct. 2206 (2018). Here, Fisher argues Fraik should have known the Stored Communications Act ("SCA") was unconstitutional since an Eleventh Circuit panel (that was reversed *en banc*) concluded that a warrant was required. Second, Fisher asserts that the good faith exception is inapplicable. Because the phone tracking warrant adheres to the principles in *Carpenter,* the court should deny Fisher's motion to suppress.

In *Carpenter*, the court held "an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through [cell site location information]," and "[t]he location information obtained from [defendant's] wireless carriers was the product of a search." *Carpenter*, 138 S. Ct. at 2217. The court concluded "the Government must generally obtain a warrant supported by probable cause before acquiring such records." *Id*. at 2221.

Notwithstanding *Carpenter*, Minnesota requires law enforcement to obtain a warrant supported by probable cause to obtain cell location data. This requirement is outlined in Minn. Stat. § 626A.42, subd. 2(e), which generally

holds "a government entity may not obtain the location information of an electronic device without a tracking warrant." Indeed, "a warrant granting access to location information must be issued only if the government entity shows that there is probable cause the person who possesses an electronic device is committing, has committed, or is about to commit a crime." *Id*. Warrant applications must include:

> a full and complete statement of the facts and circumstances relied on by the applicant to justify the applicant's belief that a warrant should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, and (ii) the identity of the person, if known, committing the offense whose location information is to be obtained.

Minn. Stat. § 626A.42, subd. 2(a)(2). Thus, warrants obtained under Minn. Stat. § 626A.42 adhere to *Carpenter per-se*. *See State v. Harvey*, 932 N.W.2d 792, 805 (Minn. 2019) ("Because the search was authorized by the district court and supported by probable cause, as *Carpenter* requires, we hold that the police did not violate the Fourth Amendment when they acquired the CSLI evidence.").

Likewise, the phone tracking warrant here does not run afoul of *Carpenter*. Fraik provided the court with an "Affidavit of Probable Cause." (Gov't Ex. 3, at Application-2). Fraik identified Fisher as the subject of the warrant and noted his outstanding federal arrest warrant. (*Id.*; *see also* Gov't Ex. 2). Fraik affirmed that the specific phone number identified in the

application was the same number used by U.S. Probation to contact Fisher. (Gov't Ex. 3, at Application-2). Thereafter, the judge issued a "Findings, Order, and Tracking Warrant" for Fisher's cellular phone pursuant to Minn. Stat. § 626A.42. (*Id.* at Order-1–Order-2). The judge concluded "based upon the information submitted by [Fraik] . . . probable cause exists that a crime has been, is or is about to be committed by a person in possession of an electronic device." (*Id.* at Order-2).

Fisher offers no explanation how the affidavit and tracking warrant are incompatible with *Carpenter*. Instead, Fisher presumes that because the tracking warrant was obtained before *Carpenter,* the warrant violates the Fourth Amendment *per-se*. However, Fraik obtained "a warrant supported by probable cause before acquiring [Fisher's cell location data]." *See Carpenter*, 138 S. Ct. at 2221. Thus, the warrant complied with *Carpenter*.

Even if Fraik obtained a court order instead of a warrant, good faith precludes suppression. It is settled that exclusion of the evidence is unwarranted when police acted with objectively reasonable good faith belief that their actions were lawful. *United States v. Leon*, 468 U.S. 897, 918–19. "[R]eliance on a federal statute gives rise to a presumption of good faith unless the statute is 'clearly unconstitutional.'" *United States v. Chambers*, 751 F. App'x 44, 46 (2d Cir. 2018) (quoting *Illinois v. Krull*, 480 U.S. 340, 349, 107 S. Ct. 1160, 94 L. Ed. 2d 364 (1987)). To rebut this presumption, a statute must

defective "so as to render a police officer's reliance upon the statute objectively unreasonable." *Krull*, 480 U.S. at 359. As a result, "[u]nless a statute is clearly unconstitutional, an officer cannot be expected to question the judgment of the legislature that passed the law." *Id.* at 349–50.

Prior to *Carpenter*, "the SCA was not 'clearly unconstitutional.'" *Chambers*, 751 F. App'x at 46 (quoting *Krull*, 480 U.S. at 349) (affirming a district court decision not to suppress evidence obtained from an order issued before *Carpenter*). Therefore, because Fraik's July 2016 warrant complied with a federal statute which was not "clearly unconstitutional" at the time, the good faith exception applies. *See id.*

Such holding is consistent with other circuit precedent. After *Carpenter*, the Supreme Court remanded the case back to the Sixth Circuit. *United States v. Carpenter*, 926 F.3d 313 (6th Cir. 2019). There, the court ruled the good faith exception applied to Carpenter himself as the officers requested court orders–and the magistrates issued the orders–under belief that the statute was lawful. *Id.* at 318. Further, at least five other circuits hold that the good faith exception applies to SCA orders obtained before *Carpenter*. *E.g. Chambers*, 751 F. App'x at 46; *United States v. Elmore*, 917 F.3d 1068, 1073 (9th Cir. 2019); *United States v. Goldstein*, 914 F.3d 200, 205–06 (3d Cir. 2019); *United States v. Joyner*, 899 F.3d 1199, 1204 (11th Cir. 2019); *United States v. Curtis*, 901 F.3d 846, 847 (7th Cir. 2018); *United States v. Chavez*, 894 F.3d

593, 608 (4th Cir. 2018). Likewise, this district has found that the good faith exception applies. *United States v. Reed*, No. 18-15 (JNE/DTS), 2018 U.S. Dist. LEXIS 183967, 2018 WL 7504843, at *5 (D. Minn. Sep. 14, 2018), *aff'd*, 2018 U.S. Dist. LEXIS 181342, 2018 WL 5269991 (D. Minn. Oct. 22, 2018).

Fisher's argument to the contrary is misplaced. Fisher argues Fraik had notice of SCA's unconstitutionality under *United States v. Davis*, 754 F.3d 1205, 1217 (11th Cir. 2014). Yet, that panel was reversed by the Eleventh Circuit sitting en banc which held that the SCA did not violate the Fourth Amendment. *United States v. Davis*, 785 F.3d 498, 518 (11th Cir. 2015) (*en banc*). Other circuits have similarly found the SCA to be constitutional. *In re Application of U.S. for Historical Cell Site Data*, 724 F.3d 600, 615 (5th Cir. 2013); *In re Application of U.S. for an Order Directing a Provider of Elec. Commc'n Serv. to Disclose Records to Gov't*, 620 F.3d 304, 313 (3d Cir. 2010). What's more, other courts in this district have previously examined Fisher's argument and determined that an agent's reliance on the SCA does not preclude application of the good faith doctrine. *United States v. Reed*, No. 18-cr-15 (JNE/DTS), 2018 U.S. Dist. LEXIS 181342, 2018 WL 5269991, at *2 (D. Minn. Oct. 22, 2018). This Court should adopt their well-reasoned analysis.

II. Otterson's July 27, 2016 traffic stop was lawful.

Next, Fisher argues Otterson's traffic stop[6] and search were unlawful. First, Fisher contends the tracking warrant was illegal. Second, Fisher concludes Otterson lacked reasonable suspicion of a window tint violation. Both arguments are without merit. As stated above, the tracking warrant was valid and subject to the good faith exception. Otterson also was justified to stop the vehicle because he had: (1) reasonable suspicion of a window tint violation; and (2) knowledge of Fisher's outstanding warrant and presence in vehicle.

a. The tracking warrant complied with the Fourth Amendment, Therefore, Otterson's seizure and subsequent search was lawful.

First, Fisher contends Otterson's seizure was direct result of the tracking warrant. Since Fisher asserts that warrant should be excluded, he argues any evidence obtained from the search thereof is inadmissible as fruit of the poisonous tree.[7] *See Wong Sun v. United States*, 371 U.S. 471 (1963).

Fisher's argument is premised that the tracking warrant must be excluded. Indeed, Fisher bears the burden to establish "a nexus between a

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[6] "When a police officer makes a traffic stop, the driver of the car is seized within the meaning of the Fourth Amendment. The same is true of a passenger." *Brendlin v. California*, 551 U.S. 249, 251 (2007). Thus, Otterson's stop is a seizure.

[7] Aside from the lawfulness of Otterson's traffic stop, Fisher does not assert Otterson otherwise lacked probable cause to search the Chrysler once Busa alerted to the presence of narcotics.

constitutional violation and the discovery of evidence sought to be excluded, [before] the government must show the challenged evidence did not arise by exploitation of that illegality . . .” *United States v. Tuton*, 893 F.3d 562 (8th Cir. 2018) (citing *United States v. Hastings*, 685 F.3d 724, 728 (8th Cir. 2012) (quoting *Wong Sun*, 371 U.S. at 488). Thus, government illegality must be the “but-for cause” for the evidence obtained thereof. *United States v. Olivera-Mendez*, 484 F.3d 505, 511 (8th Cir. 2007).

Here, there is no constitutional violation. The government established that the warrant complied with *Carpenter* and that the good faith exception would otherwise apply. Assuming the warrant was the "but-for cause” for the seizure, the evidence obtained as a result cannot be “fruit of the poisonous tree.” *Id.; see also Wong Sun*, 371 U.S. at 488.

b. Otterson had reasonable suspicion to stop the vehicle.

It is settled that, “if an officer has reasonable suspicion or probable cause to stop for a traffic violation, any ulterior motivation on the officer's part is irrelevant.” *United States v. McLemore*, 887 F.3d 861, 864 (8th Cir. 2018) (internal citation and quotation marks omitted). Under *Terry*, “an investigatory stop is permissible under the Fourth Amendment if supported by reasonable suspicion that the person stopped is involved in criminal activity.” *United States v. Arnold*, 835 F.3d 833, 838 (8th Cir. 2016) (citing *Terry v. Ohio*, 392 U.S. 1, 30 (1968)). “Reasonable suspicion must be supported by specific

and articulable facts." *United States v. Hughes*, 517 F.3d 1013, 1016 (8th Cir. 2008). The "court must look at the totality of the circumstances, allowing officers to draw on their experience and training." *Id.*

Minnesota law prohibits side window tint that allows "light transmittance of less than 50 percent plus or minus three percent in the visible light range," subject to certain exceptions. Minn. Stat. § 169.71, subd. 4. This district has recognized that officers may initiate a traffic stop for a suspected tint violation. *United States v. Maurstad*, No. 18-CR-300(1) (SRN/KMM), 2019 WL 4863451, at *3 (D. Minn. Aug. 21, 2019), *report and recommendation adopted*, No 18-CR-300(1) (SRN/KMM), 2019 WL 4862029 (D. Minn. Oct 2, 2019); *see also United States v. Moody*, 240 F. App'x 858, 858 (11th Cir. 2007) (finding no error in denying defendant's motion to suppress after defendant "was stopped based on suspicion of violating [Georgia statutes] regulating window tinting"); *see also United States v. Shank*, 543 F.3d 309, 313 (6th Cir. 2008) ("Due to the officers' familiarity with window tinting and their estimate that the vehicle was tinted substantially darker than permitted by law, we agree with the district court's determination that the officers had a proper basis to initiate the traffic stop."); *United States v. Davis*, 460 F. App'x 226, 230 (4th Cir. 2011) ("There is no question that [officers] were justified in stopping [the defendant]. They perceived that the level of his window tint likely violated

[state] law, which provided them with adequate justification to conduct a traffic stop.").

In this case, Otterson testified that "based on [his] training and experience", he "could see that [the Chrysler] had illegal tint on its side windows." (Tr. 35). Otterson initiated the stop based on the apparent violation. (Tr. 35, 39; Gov't Ex. 1, at 0:01:42). Otterson tested the Chrysler's side windows with a tint meter. (Tr. 52; Gov't Ex. 1, at 1:13:31–1:13:53). The tint measured 35% light transmittance. (Tr. 52; Gov't Ex. 1, at 1:13:53). Minnesota law requires tint to allow at least 50% light transmittance. Minn. Stat § 169.71, subd. 4(3). The only way for Otterson to confirm whether the tint was illegal was to investigate further. (Tr. 37).

Fisher argues Otterson lacked reasonable suspicion because: (1) the windows were clearly visible and an observer had no trouble seeing through them; and (2) he did not ticket Gartner for the violation. Both arguments are meritless. First, Minnesota criminalized tint based on percentage of light transmittance, not whether an observer can see through the window. Minn. Stat § 169.71, subd. 4(3). Second, Fisher's conclusion that Otterson lacked reasonable suspicion because he did not cite Gartner is flawed. The correct analysis is: (1) whether Otterson had reasonable suspicion to believe the Chrysler's tint was illegal; and (2) what his subsequent investigation found.

Otterson initiated the stop based upon his experience and observation of the suspected illegal tint. (Tr. 35–36). Indeed, he informed the occupants that this suspicion was the basis for the stop. (Tr. 39; Gov't Ex. 1, at 0:01:42). He then developed probable cause to search once Busa alerted. It is irrelevant Gartner was not cited because Otterson's stop was justified based on his observations of the window tint which merited a stop and further investigation.

Furthermore, Otterson was permitted to stop the vehicle to confirm whether one of the occupants was Fisher - who was wanted on a federal arrest warrant. Reliance on an arrest warrant "justifies a stop to check identification, to pose questions to the person, or to detain the person briefly." *United States v. Hensley*, 469 U.S. 221, 232 (1985). Under these circumstances, it was entirely appropriate for Otterson to briefly stop the vehicle so that he could make reasonable inquiries aimed at confirming Fisher's presence inside the vehicle.

III. Otterson's July 30, 2016 search conformed to the Fourth Amendment.

Next, Fisher contends Otterson's July 30, 2016, search pursuant to a warrant was unconstitutional. Fisher claims Otterson made deliberate and reckless omissions in his warrant affidavit and requests a *Frank's* hearing. This argument lacks merit. First, Otterson required no search warrant because he had probable cause under the automobile exception. Second, even

if the automobile exception did not apply, Otterson's affidavit offered substantial basis for the court's probable cause determination. Third, Fisher failed to offer the preliminary showing required under *Franks v. Delaware*, 438 U.S. 154 (1978).

a. The automobile exception justified Otterson's search.

Second, the automobile exception justified Otterson's search. The automobile exception allows police to "search a vehicle without a warrant if they have probable cause to believe the vehicle contains evidence of criminal activity." *United States v. Davis*, 569 F.3d 813, 817 (8th Cir. 2009) (quoting *United States v. Cortez-Palomino*, 438 F.3d 910, 913 (8th Cir. 2006) (internal quotation marks omitted)). "Probable cause exists where there is a 'fair probability that contraband or evidence of a crime will be found in a particular place." *United States v. Brown*, 634 F.3d 435, 438 (8th Cir. 2011) (quoting *United States v. Donnelly*, 475 F.3d 946, 954 (8th Cir. 2007)). Once probable cause is established, "police may search every part of the car and its contents that may conceal the object of the search." *Payne,* 119 F.3d at 642 (1997) (citing *California v. Acevedo*, 500 U.S. 565, 579–80 (1991).

Once probable cause is found, the automobile exception allows police to search even after the vehicle is towed. *United States v. Rodriguez*, 414 F.3d 837, 844 (8th Cir. 2005) ("[P]robable cause existed to search the entire vehicle, and a search pursuant to the automobile exception to the Fourth Amendment

may take place at a separate place and time."); *see also United States v. Polar*, 2004 U.S. Dist. LEXIS 25828, 2004 WL 2980215, at *6 (D. Minn., December 15, 2004) ("If the police have probable cause to conduct a warrantless search of the vehicle at the time of the stop, the officers may tow the vehicle to a police station and search it at a reasonable later time.").

Aside from Fisher's threshold claim that Otterson's July 27, 2016 was unconstitutional, he does not argue Otterson lacked probable cause to search the Chrysler once Busa initially alerted to the presence of narcotics. Instead, Fisher presumes Otterson required a separate, independent probable cause basis for the July 30, 2016, search. (Def. Memo. in Support of Pretrial Mot., at 7) ("[T]he affidavit in support for the second search provides no reason to believe anything would be found in the vehicle that was not already found during the first very thorough search.").

That supposition is flawed. Otterson had probable cause for the July 27, 2016 search when Busa alerted to narcotics. The fact Otterson searched the Chrysler on July 27, 2016, without locating concealed methamphetamine before conducting the July 30 search does not render the latter search invalid. *See, e.g., Michigan v. Thomas*, 458 U.S. 259, 260–62 (1982) (second search of vehicle without warrant lawful due to existence of probable cause to perform first search); *Texas v. White*, 423 U.S. 67, 68 (1975) ("[P]olice officers with probable cause to search an automobile at the scene where it was stopped

[may] constitutionally do so later . . . without first obtaining a warrant."); *United States v. Carbajal*, 449 Fed. Appx. 551 (8th Cir. 2012) (affirming denial of motion to suppress narcotics found in second search of vehicle even though officer searched defendant's car during initial stop and found no drugs). Moreover, it is permissible to search days following initial seizure. *United States v. Johns*, 469 U.S. 478, 487 (1985) ("[T]he warrantless search three days after the packages were placed in the DEA warehouse was reasonable and consistent with our precedent involving searches of impounded vehicles.").

Here, Busa alerted to narcotics on July 27, 2016. (Tr. 49–50; Gov't Ex. 1, at 0:28:55). This gave Otterson probable cause to search. That search revealed marijuana and two digital scales. (Tr. 50–5; Gov't Ex. 1, at 0:30:54–0:53:38). One scale even contained methamphetamine residue. (*Id.*) Since Otterson had probable cause to conduct the first search, he did not require an independent probable cause basis for the second search. *See Thomas*, 458 U.S. at 260–62; *Carbajal*, 449 Fed. App'x at 551. Likewise, the second search took place within three days of the first search. *See Johns,* 469 U.S. at 487. Therefore, the Court need not examine the warrant obtained on July 30, 2016.

b. The warrant for the vehicle was supported with probable cause.

Third, Fisher contends the July 30, 2016 warrant is invalid. He argues that Otterson's affidavit is insufficient to establish probable cause. However, Otterson's affidavit substantiates the judge's probable cause determination. "An affidavit for a search warrant need only show facts sufficient to support a finding of probable cause." *United States v. Parker*, 836 F.2d 1080, 1083 (8th Cir. 1987). "Therefore, '[w]hen the [issuing judge] relied solely upon the supporting affidavit to issue the warrant, only that information which is found within the four corners of the affidavit may be considered in determining the existence of probable cause.'" *United States v. Wiley*, No. 09-cr-239 (JRT/FLN), 2009 U.S. Dist. LEXIS 116899, 2009 WL 5033956, at *2 (D. Minn. Dec. 15, 2009) (quoting *United States v. Solomon*, 432 F.3d 824, 827 (8th Cir. 2005)). In "a motion to suppress, probable cause is determined based on 'the information before the issuing judicial officer.'" *United States v. Smith*, 581 F.3d 692, 694 (8th Cir. 2009). However, "[a] magistrate's 'determination of probable cause should be paid great deference by reviewing courts." *Gates*, 462 U.S. at 236. "[T]he duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing]' that probable cause existed." *Gates*, 462 U.S. at 238–39 (quoting *Jones v. United States*, 362 U.S. 257, 271 (1960)). A reviewing court must apply "common sense and not a hypertechnical

approach." *United States v. Grant*, 490 F.3d 627, 632 (8th Cir. 2007) (internal quotation marks and citations omitted).

Here, the warrant was supported with probable cause. Fisher's argument to the contrary is premised on a false assertion that Otterson only noted: (1) Fisher was a felon; (2) Fisher was suspected to be a high level distributor of narcotics; and (3) uncorroborated information from an informant. In reality, Otterson added: (1) Fisher's criminal history by conviction; (2) that the Chrysler was stopped on a known drug trafficking route to the Red Lake Reservation; (3) Gartner was unable to provide the name from whom he purchased the vehicle; (4) the passengers gave conflicting stories about their whereabouts; (5) he observed loose panels and tampering around the "dash, trunk, and console;"[8] (6) a certified canine alerted to the odor of narcotics; (7) 1.5 grams of marijuana, and a used pipe were found in the glove box; (8) gabapentin pills were found near the center console; and (9) a digital scale containing methamphetamine residue was recovered. (Gov't Ex. 4, at Application 1-2–1-3).

From these facts, the judge had ample information to find probable cause. The judge could find fair probability that the Chrysler contained

[8] Otterson's observation of tampering bolsters the court's probable cause determination. *See United States v. Hernandez-Mendoza*, 600 F.3d 971, 976 (8th Cir. 2010) ("It is well established, and well known, that drug traffickers have developed sophisticated means to secrete contraband in vehicles.")

methamphetamine, indicia from the sale of methamphetamine, firearms, currency, and evidence of vehicle ownership. (*Id.* at Warrant 1-1). Hence, "substantial basis for . . . conclud[ing] that probable cause existed." *See Gates*, 462 U.S. at 238–39.

Even if Otterson's affidavit was defective, the good faith exception applies. That is, "evidence seized pursuant to a search warrant issued by a magistrate that is later determined to be invalid, will not be suppressed if the executing officer's reliance upon the warrant was objectively reasonable." *United States v. Houston*, 665 F.3d 991, 994 (8th Cir. 2012) (internal citations and quotation marks omitted). However, evidence obtained from an unconstitutional search should be suppressed when:

> (1) when the affidavit or testimony supporting the warrant contained a false statement made knowingly and intentionally or with reckless disregard for its truth, thus misleading the issuing judge;
>
> (2) when the issuing judge "wholly abandoned his judicial role" in issuing the warrant;
>
> (3) when the affidavit in support of the warrant is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable"; and
>
> (4) when the warrant is "so facially deficient" that no police officer could reasonably presume the warrant to be valid.
>
> *Houston*, 665 F.3d at 995.

Here, these factors do not exist. First, there is no evidence that the issuing judge was misled. Fisher himself identifies no statement in the affidavit that is false. *See United States v. Reinholz*, 245 F.3d 765, 774 (8th Cir. 2001).

Second, there is no evidence to suggest that the issuing judge "wholly abandoned his judicial role" at the time he issued the warrant. *See Houston*, 665 F.3d at 995.

With respect to the third category, even if the Court finds the warrant lacked probable cause or sufficient nexus, suppression is inappropriate because Otterson relied in good faith on the issuing judge's probable cause determination." *Leon*, 468 U.S. at 922.

> It is the magistrate's responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment. In the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination . . . . Penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations.
>
> *Leon*, 468 U.S. at 921.

Further, Otterson's belief that probable cause existed must be "entirely unreasonable" to preclude good faith. The Eighth Circuit notes, "'[e]ntirely unreasonable' is not a phrase often used by the Supreme Court, and we find nothing in *Leon* or in the Court's subsequent opinions that would justify our

dilution of the Court's particularly strong choice of words." *United States v. Carpenter*, 341 F.3d 666, 670 (8th Cir. 2003).

All things considered, Otterson acted in good faith. Busa previously alerted to the Chrysler and Otterson recovered narcotics. Even though Otterson had probable cause to perform the second search under the automobile exception, he still sought judicial review. Under these circumstances, Otterson had an objectively reasonable basis to rely on the court's probable cause determination.

Fourth, the warrant is not so facially deficient that no law enforcement officer could reasonably presume it to be valid. *United States v. Puckett*, 466 F.3d 626, 630 (8th Cir. 2006). The warrant identified the place to be searched, described the items to be seized in detail, and was signed by a judge. (Gov't Ex. 4, at Application 1-6). Accordingly, the good faith exception applies.

c. Fisher is not entitled to a Frank's Hearing.

Next, Fisher's is not entitled to a *Frank's* hearing. A defendant is entitled to an evidentiary hearing regarding omissions in a warrant affidavit if they show: "(1) that facts were omitted with the intent to make, or in reckless disregard of whether they make, the affidavit misleading; and (2) that the affidavit, if supplemented by the omitted information, could not support a finding of probable cause." *Reinholz*, 245 F.3d at 774. A defendant must show the omission is "clearly critical" to finding probable cause. *United States v.*

Jacobs, 986 F.2d 1231, 1235 (8th Cir. 1993). "[N]egligence or innocent mistake is not enough to establish a *Frank's* violation." *United States v. Butler*, 594 F.3d 955, 961 (8th Cir. 2010) (internal citations and quotation marks omitted).

To obtain the hearing, Fisher must provide "substantial preliminary showing" accompanied by an offer of proof that specifically points out which portion of the affidavit is false and must be accompanied by supporting affidavits or similarly reliable statements. *United States v. Williams*, 477 F.3d 554, 557 (8th Cir. 2007). The "substantial preliminary showing" requirement "is not lightly met." *Williams*, 477 F.3d at 557.

Fisher argues Otterson failed to disclose that he previously searched the Chrysler without finding methamphetamine. Second, Fisher claims Otterson failed to disclose he was acting upon a hunch. Neither argument is availing. First, Otterson necessarily disclosed that he searched the Chrysler because he disclosed the fruits of the search thereof. For example, Otterson states: "your affiant **found** approximately 1.5 grams of NIK positive marijuana and a used pipe in the glove next to the center console . . . . A bag of Gabapentin pills was **found** in the center console area." (Tr. 50; Gov't Ex. 1, at 0:31:05 – 0:33:15) (emphasis added). Second, Otterson's interpretation about whether probable cause existed is irrelevant. He "cannot be expected to question the [judge's] probable-cause determination or [] judgment that the form of the warrant is technically sufficient." *Leon*, 468 U.S. at 921. Otterson disclosed his basis for

the warrant which included details of the July 27, 2016 stop. Even if Otterson had only a hunch methamphetamine was hidden in the vehicle, the relevant question is whether the court had "'substantial basis for . . . conclud[ing]' that probable cause existed" from Otterson's affidavit. *Gates*, 462 U.S. at 238–39. The record proves the court did.

Second, Fisher lacks substantial preliminary showing. His motion contains no "affidavits or sworn or otherwise reliable statements of witnesses" apart from the warrant to establish Otterson's affidavit contained clearly critical omissions. *See Franks*, 438 U.S. at 171, 198. Since Fisher failed to offer "substantial preliminary showing," granting Fisher a *Frank's* hearing constitutes procedural error. *See Williams*, 477 F.3d at 557. Therefore, his motion should be denied.

IV. Fraik's August 5, 2016 warrant conformed to the Fourth Amendment.

Fisher moves to suppress evidence from the search of Fisher's phones. He asserts Fraik's warrant affidavit is premised on fruits of unlawful searches and seizures on both July 27, 2016 and July 30, 2016. However, since both searches conformed to the Fourth Amendment, the motion should be denied.

V. The Red Lake Tribal Warrant conformed to the Fourth Amendment.

Next, Fisher contends that the evidence obtained pursuant to the July 27, 2019 warrant is inadmissible. First, Fisher argues the warrant lacks

authenticity under Fed R. Evid. R. 901. Second, Fisher asserts the warrant is facially invalid. Each argument is meritless. First, the Federal Rules of Evidence does not apply to Fisher's suppression motion. Second, the warrant is facially valid.

a. There is no basis under the Federal Rules of Evidence for suppression.

Next, the Federal Rules of Evidence provide no basis to exclude evidence obtained from the tribal warrant. Courts are not bound by the Federal Rules Evidence in preliminary determinations about evidence admissibility. Fed. R. Evid. 104(a), 1101(d)(1); *United States v. Raddatz*, 447 U.S. 667, 679 (1980) ("[T]he interests at stake in a suppression hearing are of a lesser magnitude than those in the criminal trial itself. At a suppression hearing, the court may rely on hearsay and other evidence, even though that evidence would not be admissible at trial."); *United States v. Matlock*, 415 U.S. 164, 172–73 (1974) ("[I]t should be recalled that the rules of evidence normally applicable in criminal trials do not operate with full force at hearings before the judge to determine the admissibility of evidence.").

However, evidence relied upon in a suppression motion must be sufficiently reliable and probative. *See United States v. Boyce*, 797 F.2d 691, 693 (8th Cir. 1986) ("the trial court may accept hearsay evidence at a suppression hearing if the court is satisfied that the statements were made

and that there is nothing to raise serious doubt about their truthfulness"); *United States v. Schaefer*, 87 F.3d 562, 570 (1st Cir. 1996) ("a judge presiding at a suppression hearing may receive and consider any relevant evidence, including affidavits and unsworn documents that bear indicia of reliability").

In this matter, the application and warrant is sufficiently reliable and probative. It contains the Leyba's sworn application and court findings. Fisher himself testified that he was arrested at a house the same day as the warrant was signed. (Tr. 17; *see also* Gov't Ex. 6, at Warrant 1-5–1-6). Fisher argues the warrant lacks authenticity because Leyba's application was subscribed to the judge at the same time as the judge signed the warrant. However, Fisher's claim goes to the sufficiency of the warrant, not its authenticity. Moreover, the application and warrant is probative. Evidence offered against Fisher was obtained from its execution. As the warrant is sufficiently reliable and probative, Fisher's motion should be denied.

b. The warrant is valid. Even if the warrant is defective, the good faith exception applies.

The warrant is valid. To determine validity, the Court should first apply the "four corners" review of the application described herein "to ensure that the magistrate had a substantial basis for . . . conclud[ing] that probable cause existed." *Gates*, 462 U.S. at 238–39 (quoting *Jones*, 362 U.S. at 271).

Here, the warrant is supported with probable cause. First, Leyba noted a CRI reported heroin and methamphetamine was sold from the particular residence in February 2019. (Gov't Ex. 6, at Warrant 1-3). Second, a CRI observed purchase of 3.75 grams of methamphetamine from the particular residence three days prior. (*Id.*) Third, a CRI observed both Fisher and Desjarlait (who was in possession of methamphetamine) at the residence. (*Id.*) Fourth, a CRI reported Fisher and Desjarlait returned from Cass Lake within the last 24 hours with methamphetamine to sell. (*Id.*) Fifth, a CRI reported the Leech Lake vehicle was parked at the residence identified in the warrant and that Fisher sold narcotics from the residence. (*Id.*) Leyba himself observed five vehicles travel to the residence for short durations of less than five minutes. (*Id.*) Finally, Leyba identified Fisher's Native Mob membership and criminal history for "controlled substances crimes and violence." (*Id.*)

From these facts, the judge could find fair probability the residence and SUV contained narcotics, paraphernalia, and indicia thereof. (*Id.* at Warrant 1-5). Leyba's affidavit provided "substantial basis for . . . conclud[ing] that probable cause existed." *See Gates*, 462 U.S. at 238–39. The Court should deny Fisher's motion to suppress.

Even if the warrant was defective, the good faith exception applies. No indicia for lack of good faith exist. *See Houston*, 665 F.3d at 995. First, there

is no evidence the judge was misled by a false statement. Fisher also identifies no false statement or critical omission. *See Reinholz*, 245 F.3d at 774.

Second, the judge did not abandon his judicial role. *See Houston*, 665 F.3d at 995. Fisher claims the judge was a "rubberstamp" because he authorized the warrant at the same time he swore the affiant. However, it is reasonable for a judge to read an application and proposed warrant before placing the affiant under oath. Second, Fisher claims that the judge neither authorized nor identified the officer responsible for executing the warrant. However, the warrant identified Leyba and added: "NOW, THEREFORE, YOU THE PEACE OFFICER(S) AFORESAID, **AND ALL OTHER PERSONNEL UNDER YOUR DIRECTION AND CONTOL** ARE HEREBY COMMANDED A ANYTIME SEARCH TO SEARCH THE DESCRIBED PREMISES . . ." (Gov't Ex. 6, at Warrant 1-5–1-6). The judge signed the warrant. (*Id.*) Finally, Fisher alleges the judge failed to read the affidavit because the warrant authorized a search for heroin while Leyba sought to search for methamphetamine. The contention is unavailing. The warrant authorized search for "**[a]ny and all controlled substances, including but not limited to heroin**". (*Id.* at Warrant 1-5).

Third, even if application statements were insufficient to establish probable cause, the affidavit, considered in its entirety, is not speculative or so lacking in indicia of probable cause as to render official belief in its existence

unreasonable. It identified dates, times, and locations where narcotics was sold and transported. (*Id. at* Warrant 1-3). Leyba "cannot be expected to question the [judge's] probable-cause determination." *Leon*, 468 U.S. at 921

Fourth, the warrant is not facially deficient so that no officer could reasonably presume its validity. The warrant described places to be searched and items to be seized in detail. (*Id.* at Application 1-5–1-6). A judge signed the warrant. (*Id.*) Accordingly, the good faith exception applies.

VI. The Double Jeopardy Clause is not offended as successive prosecutions are not barred among dual sovereigns.

Finally, Fisher lacks basis to dismiss count three of the indictment. Indeed, "[t]he Double Jeopardy Clause reflects the common-law conception of crime as an offense against the sovereignty of the government; when a defendant in a single act violates the peace and dignity of two sovereigns by breaking the laws of each, he has committed two distinct offenses." *United States v. Lara*, 541 U.S. 193, 197 (2004). Hence, tribal prosecution does "not amount to an exercise of federal power, and the [t]ribe act[s] in its capacity of a separate sovereign." *Id.* at 210. "Consequently, the Double Jeopardy Clause does not prohibit the Federal Government from [subsequently] proceeding with [a] prosecution for a discrete federal offense. *Id.* (citing *Heath v. Alabama*, 474 U.S. 82, 88 (1985)). *Gamble v. United States*, 139 S. Ct. 1960, 1964 (2019) re-affirmed "a crime under one sovereign's laws is not the same offence as a crime

under the laws of another sovereign." Thus, tribal prosecution does not preclude federal prosecution.

Here, Fisher was convicted of possession with intent to distribute controlled substances in tribal court. (Tr. 17–19). Since tribal prosecution does "not amount to an exercise of federal power," the government is not barred from also prosecuting Fisher. *Lara*, 541 U.S. at 210. Fisher himself acknowledges *Lara* precludes his motion. Thus, his motion should be denied.

CONCLUSION

For the foregoing reasons, the Court should deny Fisher's motions.

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