UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Case No. 23-cr-23 (KMM/LIB)

UNITED STATES OF AMERICA,

Plaintiff,

v.

(1) TRINA MAE JOHNSON,
(2) BOBBI JO JOHNSON,
a/k/a Bobbi Jo Kingbird,
(3) ELLIE MAE JOHNSON,
(5) BERTRAM CALVIN LUSSIER, JR.,

Defendants.

**THE GOVERNMENT'S OMNIBUS RESPONSE TO DEFENDANTS' PRETRIAL MOTIONS**

The United States of America, by and through its attorneys, Andrew M. Luger, United States Attorney for the District of Minnesota, Ruth S. Shnider, Assistant United States Attorney, hereby submits its response to the above-captioned defendants' pretrial motions.

## NON-DISPOSITIVE / DISCOVERY MOTIONS

The Government notes at the outset that it does not understand any defendant to be making a particularized claim of a discovery deficiency at this stage of the case. In other words, no defendant has identified to the Government specific discovery materials that they believe exist and have been improperly withheld from them under the relevant rules. To the contrary, the Government has responded in good faith to requests for additional information and, where possible, has obtained and disclosed such information where it exists. As such, the Government largely interprets the various discovery motions as general

reservations/preservations of rights. The Government responds below to the various categories of non-dispositive motions and will continue to confer in good faith with any defendant who believes they are entitled to specific, additional information in this case.

**1. Motion for Rule 16 Discovery (ECF Nos. 104, 114, 115, 131)**

Defendants Trina Johnson, Bert Lussier, and Ellie Johnson have filed motions requesting Rule 16 discovery. The United States has already complied with Rules 12(b)(3), 12(h), 16 and 26.2 (in part) and has even made extensive discovery not required by law. To the extent the United States comes into possession of additional discoverable materials as the case progresses, it will continue to abide by its disclosure obligations.

As to requests for disclosure of expert testimony under Rule 16(a)(1)(E), whether medical, forensic, or otherwise, the Government does not object to the schedule already set forth in the Court's Scheduling Order: mutual expert disclosures 28 days prior to trial, and rebuttal expert disclosures 14 days prior to trial. (ECF No. 51).

The Government does object to any discovery order which exceeds the requirements of Rule 16. Rule 16 is the only vehicle for discovery in a criminal case and it has been held consistently that there is no general constitutional right to discovery in a criminal case. *See United States v. Bursey*, 429 U.S. 545, 559 (1977). The Government also objects to any request seeking records not in its possession, custody, or control. (*See, e.g.*, ECF No. 104 at 2 (Trina Johnson's request for "up-to-date medical records for the alleged victim")).

**2. Motion to Disclose *Brady* Material (ECF Nos. 105, 119, 120, 126, 132)**

Defendants Trina Johnson, Bert Lussier, Bobbi Jo Johnson, and Ellie Johnson have moved for disclosure of evidence pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963) and

its progeny. The Government is aware of its obligations in this area—and the Government has complied, and will continue to comply, with those obligations. The Government objects to the defendants' requests to the extent they go beyond the requirements of *Brady*, *Giglio*, and their progeny, or to the extent the seek information not in the possession, custody, or control of the prosecution team. The Government also notes that to the extent the defendants' requests are tied to the identity of the Government's trial witnesses, the Government will disclose such information consistent with the schedule set by the District Court for disclosure of witness lists, and as soon as practicable thereafter, should additional information become known.

Trina Johnson and Ellie Johnson seek "ongoing" disclosures of medical information concerning the injuries suffered by the victim, including records reflecting the victim's healing over time. (ECF No. 105 at 2-4; ECF No. 132 at 5). The Government has already produced a significant number of medical records in this case (that both pre-date and post-date the charged crimes) and will continue to supplement those productions with any additional medical information it intends to offer at trial. If the Government comes into possession of evidence suggesting potential alternative causes of injuries that will be referred to at trial, the Government will produce it.

To the extent these defendants request an order requiring the Government to direct the creation of additional medical records, or to otherwise seek out private medical information that it would not otherwise obtain, the request should be denied. For one thing, the request is wholly speculative and makes no particularized showing that such evidence would be *exculpatory*. And the Government has no obligation, under *Brady* or otherwise,

to discover information not in the possession of the prosecution team. *United States v. Heppner*, 519 F.3d 744, 750 (8th Cir. 2008) ("*Brady* does not require the government to discover information not in its possession or of which it was not aware."); *United States v. Jones*, 34 F.3d 596, 599 (8th Cir. 1994) ("*Brady* requires the prosecution to disclose to the defendant only evidence in the prosecution's possession.").

Further, the defendants' claim that such evidence is material to the question of whether the victim suffered "serious bodily injury" under 18 U.S.C. § 113(b)(2) is inapposite; Trina Johnson is not charged with that particular assault crime (and Ellie Johnson is not charged with assault at all). Trina Johnson is charged with assault on a minor with a dangerous weapon, which does not require a specific injury threshold. *See* 18 U.S.C. § 113(a)(3). Although other counts of the indictment require proof of "extreme abuse" and "substantial harm," the Government's obligation is only to collect and produce the evidence it intends to use to prove those issues at trial (and, of course, to produce any evidence favorable to the defense that comes into its possession). It is not under an obligation to conduct a fishing expedition through the victim's ongoing, private medical information held by third parties based on conjecture about how the victim may have healed. The same is true of the Government's burden to prove a particular degree of injury by a preponderance of the evidence under the Sentencing Guidelines.

In sum, Trina Johnson and Ellie Johnson have not cited any authority suggesting the Government has an ongoing duty to collect and supplement a victim's medical records to reflect the status of his healing, or to seek out particular medical information not otherwise

in its knowledge or possession. To the extent the motions seek such relief, they should be denied.

**3. Motions to Strike Surplusage (ECF Nos. 106, 122, 135)**

Defendants Trina Johnson, Bert Lussier, and Ellie Johnson have moved to strike "surplusage" from the indictment, all arguing in one fashion or another that portions of the "Introduction" section of the indictment (in particular, Paragraphs 1 and 4) should be stricken as unduly inflammatory and prejudicial. The defendants have not met their high burden to show they are entitled to any striking of this language, and these motions should be denied.

Upon a defendant's motion, Federal Rule of Criminal Procedure 7(d) allows a district court to strike surplusage from the indictment. However, such a motion should be granted "only where it is clear [that] the allegations contained therein are not relevant to the charge made or contain inflammatory and prejudicial matter." *United States v. DeRosier*, 501 F.3d 888, 897 (8th Cir. 2007). "Motions to strike surplusage are not lightly granted and require the defendant to meet a significant burden of proof." *United States v. Augustine Medical, Inc.*, 2004 WL 502183, at *4 (D. Minn. 2004). In a factually and legally complex case, background information can be particularly helpful for contextualizing the criminal conduct alleged, and thus generally should not be stricken. *Id.*; *United States v. Watt*, 991 F. Supp. 538, 554 (D.D.C. 1995). As long as the government's evidence parallels the factual allegations in the indictment, the allegations are neither inflammatory nor prejudicial, and therefore should not be stricken. *United States v. Figeuroa*, 900 F.2d 1211, 1218 (8th Cir. 1990).

The defendants' primary argument is that the indictment's allegations about the methods with which the abuse of Minor Victim 1 was carried out are "not an element of the offense[s]" alleged against them, and are unnecessarily prejudicial. This claim ignores both the nature of the offenses charged and the scope of the alleged abuse. The language in the indictment tracks the evidence that the Government expects to present at trial, which relates to a pattern and scheme amongst the defendants to severely abuse, neglect, and injure the minor victim over the course of many months. The introductory factual allegations are relevant and necessary to explain the nature, manner, and means of the abuse; to outline the relationships between the various defendants and the victim; and to establish conduct that particular defendants knew about, assisted, or permitted, even if they did not commit it solely on their own. Particularly given that four out of the five defendants were not the legal foster guardian of the victim, absent these details, a defendant might claim they were not properly put on notice of the factual allegations and legal theories underlying their alleged liability.

As to all of the defendants, for example, the Government will have to show that they acted as "caretakers" and all "intentionally" or "recklessly cause[d]" or "permit[ted] Minor Victim 1 to be placed in a situation that was likely to and did in fact result in substantial harm to Minor Victim 1's physical, mental, and emotional health." (ECF No. 1 at Count 3 (citing Minn. Stat. § 609.378 subdiv. 1(b)(1)). Needless to say, there are a variety of ways that these statutory standards could be met, and the language in the introductory paragraphs of the indictment makes clear the nature of the "situation" and "harm" that each defendant is alleged to have, at a minimum, "recklessly permitted" the victim to be placed

in. This is not a case about a child being left alone in a crib for an evening; it is a case about a course of conduct over nearly a year and a half wherein the victim was starved to the point of losing 100 pounds and was left with disfiguring injuries and scars on nearly every surface of his body.[1] The indictment properly situates this case along the spectrum of conduct that might be captured by the charged abuse and neglect statutes. And the broad liability language of the Minnesota child endangerment statute renders irrelevant Bert Lussier's claim that he did not necessarily participate in every aspect of the scheme. (*See* ECF No. 122 at 2). While the Government intends to prove that Mr. Lussier did in fact directly participate in key aspects of the abuse, it is certainly enough that he assumed responsibility for a portion of the care of the victim and knowingly "permitted" the victim to remain in such a gravely harmful "situation," under the same roof, for such a lengthy period of time.

Finally, contrary to the defendants' assertions, the language is not overly inflammatory. The introduction section is short compared to many "speaking indictments" and uses plain, concise language to summarize the abuse. *Cf. United States v. Rehak*, No. 008-CR-0072 PJS/SRN, 2008 WL 2828886, at *8 (D. Minn. July 21, 2008) (motion to strike surplusage denied where indictment language "plainly, albeit comprehensively, describes the facts comprising the alleged scheme").

[1] As to Trina Johnson, the Government also alleges that her conduct rose to the level of child *torture*, which is defined under state law to mean the intentional infliction of "extreme mental anguish and extreme psychological and physical abuse in an especially depraved manner." (ECF No. 1 at Count 1 (citing Minn. Stat. § 609.3775)). Clearly, the severity of this charge makes relevant the serious details of the abuse alleged here.

For the foregoing reasons, the defendants have not met their "significant burden of proof" to show that any language in the indictment should be stricken, and these motions should be denied.

**4. Motion for Disclosure of 404(b) Evidence (ECF Nos. 107, 116, 127, 130)**

Defendants Trina Johnson, Bert Lussier, Bobbi Jo Johnson, and Ellie Johnson move for early or immediate disclosure of Rule 404(b) evidence. The United States is aware of its obligations under Rule 404(b) and intends on complying with those obligations. With respect to timing, the Federal Rules of Evidence do not require immediate disclosure or notice of intention to use such evidence at trial, and notification two weeks prior to trial is common and customary in this District. *See* Fed. R. Evid. 404(b) advisory committee's notes, 1991 Amendments ("Other than requiring pretrial notice, no specific time limits are stated in recognition that what constitutes a reasonable request will depend largely on the circumstances on each case."). The Government thus respectfully requests that the Court order any Rule 404(b) notices/disclosures to be made no later than two weeks prior to trial and on a continuing basis thereafter. The Government also notes that the rules governing Rule 404(b) notice do not apply to acts that are *res gestae* or "inextricably intertwined" with the charged offense itself. *United States v. Adediran*, 26 F.3d 61, 63 (8th Cir. 1994).

In the interest of transparency, the Government notes that it is not currently in possession of evidence that it intends to offer at trial under Rule 404(b).

**5. Motion for Early Disclosure of Jencks Act Material (ECF Nos. 108, 118, 133)**

Defendants Trina Johnson, Bert Lussier, and Ellie Johnson seek early disclosure of Jencks Act materials. The Government notes that it has already disclosed a voluminous

amount of potential Jencks material. However, the Government objects to any motion *requiring* Jencks Act disclosures any earlier than is required by statute. It has been repeatedly and consistently held in this Circuit and District that the United States may not be required to make pretrial disclosure of Jencks material. *Finn v. United States*, 919 F. Supp. 1305, 1315 (D. Minn. 1995); *see also United States v. Ben M. Hogan Co.*, 769 F.2d 1293, 1300 (8th Cir. 1985); *United States v. White*, 750 F.2d 726 (8th Cir. 1984). Accordingly, the United States objects to any court-ordered disclosure of such statements prior to the witnesses' testimony. The Government will endeavor to voluntarily produce any outstanding Jencks statements at least 3 days prior to trial.

**6. Motion to Retain Rough Notes (ECF Nos. 109, 117, 138)**

Defendants Trina Johnson, Bert Lussier, and Ellie Johnson have moved for an order requiring that agents retain and preserve all rough notes taken as part of their investigation. The Government's discovery obligations derive from the United States Constitution, the Federal Rules of Criminal Procedure, applicable case law, and statute, including but not limited to Rule 16, *Brady*, *Giglio*, and the Jencks Act. The Government will comply with those obligations. The Government also does not object to an order requiring law enforcement officials to retain and preserve any substantive "rough notes" that relate to this investigation, and observes that the discovery produced to date contains various references to the preservation of such notes by the FBI investigators in this case.

The Government does object to any order concerning the *disclosure* of rough notes, and no defendant has shown any entitlement to such. It is well established that rough notes are not considered witness statements within the meaning of the Jencks Act. *United States*

*v. Redding*, 16 F.3d 298, 301 (8th Cir. 1994) (concluding that rough notes are not a statement of witness as there was no evidence that the witness signed, adopted, or approved of notes); *United States v. Shyres*, 898 F.2d 647, 657 (8th Cir. 1990) (finding defendant not entitled to discover government agents' general notes from witness interviews).

Nor are agent rough notes generally discoverable as a "statement" of the agent. *See, e.g., United States v. Scotti*, 47 F.3d 1237, 1249 (2d Cir. 1995) ("Absent any indication that an FBI agent signs, adopts, vouches for, or intends to be accountable for the contents of the notes, the rough notes taken in a witness interview cannot be considered the agent's statement."); *United States v. Ramos*, 27 F.3d 65, 69-70 (3d Cir. 1994) (rough notes not considered "statements" of the agents); *United States v. Simtob*, 901 F.2d 799, 809 (9th Cir. 1990) ("A government agent's rough notes will not be Jencks Act statements when they are not complete, are truncated in nature, or have become an unsiftable mix of witness testimony, investigator's selections, interpretations, and interpolations."); *United States v. Bernard*, 623 F.2d 551, 558 (9th Cir. 1979) (Jencks Act not intended to cover "rough surveillance notes").

Finally, the defendants' assertions about potential *Brady* or impeachment material in "rough notes" are wholly conjectural and insufficient to warrant disclosure. *See United States v. Pisello*, 877 F.2d 762, 768 (9th Cir. 1989) (defendant's assertion that agents' notes "might" contain impeachment evidence insufficient to order production of notes); *United States v. Hudson*, 813 F. Supp. 1482, 1490 (D. Kan. 1993) (agent's rough interview notes need not be produced under *Brady* where defendant failed to show that notes were material).

The Government also notes it has no obligation to ensure preservation (or disclosure) of notes held by persons not on the prosecution team, such as persons working for local child protection agencies. (*See* ECF No. 109 at 2).

**7. Motion for Disclosure of Grand Jury Transcripts (ECF No. 112)**

Defendant Bert Lussier has moved for disclosure of grand jury transcripts of any witness who will testify at the motions hearing or trial. The Government has no objection to this motion, to the extent it is consistent with the Government's Jencks obligations. The Government will disclose the grand jury testimony of FBI Special Agent Ryan Nilson in advance of the motions hearing, and will include the grand jury transcripts of any additional trial witnesses for whom they exist with its Jencks disclosures prior to trial.

**8. Motion for Notice of Intent to Use Residual Hearsay Exception (ECF Nos. 113, 134)**

Defendants Bert Lussier and Ellie Johnson have moved for an order requiring the Government to disclose its intent to offer evidence under the "residual hearsay exception" (Fed. R. Ev. 807) at least 30 days prior to trial.

At this juncture of the case, the only evidence that the Government believes might implicate Rule 807 are the video-taped forensic interviews of Minor Victim 1, and potentially those of other children living in the household, all of which have already been produced (unredacted) to defense counsel. The Government has not yet decided which portions of these interviews it may offer at trial—and it seems likely that additional hearsay exceptions may be implicated by these items—but in the interest of transparency, the Government hereby provides notice that it may offer these items under, among other

provisions, Rule 807 and the factors outlined in *United States v. Thunder Horse*, 370 F.3d 745 (8th Cir. 2004). The Government believes the admissibility of these interviews is best litigated and resolved by the trial judge in connection with motions in limine.

Although the Government is not currently aware of any additional evidence it would offer under Rule 807, notice 30 days prior to trial of any such evidence is impractical, as the Government at that point will likely still be refining its case for trial. The Government thus respectfully requests that any additional Rule 807 notices be ordered at the same time that disclosure of exhibit lists are required by the District Judge.

**9. Motion to Reserve the Issue of Severance for Trial (ECF Nos. 121, 136)**

Defendants Bert Lussier and Ellie Johnson have filed a motion reserving their right to bring a severance motion before the trial judge. The Government agrees that the issue of severance is premature at this juncture and thus does not object to this motion. The Government notes, however, that it has every intention of opposing any motion for severance and intends to comply with any requirements of *Bruton v. United States*, 391 U.S. 123 (1968) and its progeny in order to achieve a joint and fair trial in this matter.

**10. Motion to Participate in Voir Dire (ECF No. 137)**

Ellie Johnson has moved for counsel to participate in voir dire at trial. This motion should be addressed to the trial judge and denied without prejudice at this time.

## SUPPRESSION AND DISMISSAL MOTIONS

### 11. Trina Johnson's Motion to Dismiss

Defendant Trina Johnson has moved to dismiss the indictment based on alleged violations of her rights under the U.S. Constitution and the Indian Civil Rights Act of 1968 ("ICRA") in the tribal prosecution that preceded this federal matter. Given Ms. Johnson's stated intention to present evidence at the motions hearing and to file further briefing on this issue, the Government will offer some general points now, and will respond further as warranted by Ms. Johnson's post-hearing submission. Simply put, Ms. Johnson's arguments are meritless and can be summarily denied.

Trina Johnson's central claim, as best the Government can discern, is that the Red Lake Band of Chippewa Indians, and its tribal courts, should not be deemed a distinct sovereign – and that alleged errors in tribal criminal proceedings should therefore give rise to some right to dismiss a subsequent federal charge based on the same criminal conduct. Attempting to avoid the longstanding "dual sovereign doctrine," Ms. Johnson points (without evidence) to alleged "manipulation" of the tribe by federal authorities who, according to Ms. Johnson, somehow cause the tribe to bring tribal charges against an Indian defendant in order to obtain the defendant's detention in tribal jail while the federal investigation continues, thus depriving the defendant for some period of time of the rights that would attach to an immediate federal charge. Because, Ms. Johnson argues, this sequence of events is possible only for Indian defendants on the reservation, she was denied the equal protection of the law and her right to a speedy trial under ICRA.

Worth noting at the outset, arguments that question the durability of tribal sovereignty in the criminal context have been lodged for decades as double jeopardy arguments – that is, where a tribal *conviction* preceded the federal charges. Courts have consistently rejected them. *See, e.g., Denezpi v. United States*, 142 S. Ct. 1838 (2022); *United States v. Wheeler*, 435 U.S. 313 (1978). Trina Johnson, of course, cannot make such a claim because she has not been convicted in Red Lake Tribal Court. But her arguments are similarly meritless.

Second, as Trina Johnson acknowledges, this Court has already rejected a similar attempt to wholly erode tribal sovereignty based on cherry-picked dicta from *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022). *See United States v. Lussier*, No. 21-CR-145 (PAM/LIB), 2022 WL 17476661, at *14 (D. Minn. Oct. 11, 2022), *R&R adopted*, 2022 WL 17466284 (D. Minn. Dec. 6, 2022) (collecting cases). As this Court recognized, *Castro-Huerta* held only that "Congress has not limited the ability of the State of Oklahoma to prosecute ***non-Indians*** for crimes committed within Indian country in Oklahoma." *Id.* (emphasis added). Indeed, the *Castro-Huerta* opinion expressly sets aside, and does not question, tribal sovereignty in cases involving "crimes committed by Indians in Indian country," as well as the federal government's right to proceed against Indians under the Major Crimes Act (as here). *Castro-Huerta*, 142 S.Ct. at 2495 n.2, 2496. This Court has also observed the numerous reasons why *Castro-Huerta* "could not have any application" to a crime committed by an Indian on the ***Red Lake*** reservation, specifically. *See Lussier*, 2022 WL 17476661, at *14 n.21.

The more recent case of *Haaland v. Brackeen*, No. 21-376, 2023 WL 4002951 (June 15, 2023) does nothing to alter the legal landscape analyzed by this Court in *Lussier*. Even if the statutory scheme governing child custody proceedings could be analogized to the issues in this criminal case (itself a stretch), the Court in *Brackeen* did not address any equal protection arguments on the merits. *Brackeen*, 2023 WL 4002951, at *17-20.

Third, if the relevant sequence of events is unclear from Trina Johnson's motion, it is because those facts squarely contradict her claim of improper collusion between tribal and federal authorities. Ms. Johnson was arrested on tribal charges on May 3, 2022. She was released from tribal jail on October 19, 2022 – in other words, she asked the tribal court for release, and release was ultimately granted.[2] The United States continued its investigation and did not indict this case until January 25, 2023. (ECF No. 1). And even then, the Government made no attempt to hold Ms. Johnson in custody – she was released on conditions at her initial appearance. (ECF Nos. 18, 23). Thus, the claim that the Government improperly caused Ms. Johnson's detention in tribal jail for some nefarious purpose finds no support in the record or common sense. This Court, in *Lussier*, properly rejected allegations of this nature, noting that "Defendant's speculative and conclusory allegation merely points to typical and routine cooperation between two different law enforcement agencies who may have concurrent jurisdiction over alleged criminal conduct (i.e., Red Lake law enforcement and the federal government)—there is in fact no factual

[2] By the Government's count, Trina Johnson was in tribal custody approximately 169 days, but this is not materially different from her own estimate of 159 days. (*See* ECF No. 103 at 3).

evidence in the present record of collusion." *Lussier*, 2022 WL 17476661, at *12. The same is true here.

Relatedly, Trina Johnson's claim that the Government improperly "dallied" in bringing this case (ECF No. 103 at 20), thus prolonging her detention in Red Lake Jail, is entirely undermined by the proceedings to date. Ms. Johnson and her co-defendants have moved the Court multiple times for lengthy continuances of the schedule and exclusions of time under the Speedy Trial Act, citing the voluminous discovery and complex legal and factual issues in this case. (*See, e.g.*, ECF Nos. 69, 73, 81, 87, 94, 99). Ms. Johnson can hardly fault the Government for carefully investigating these issues and collecting these voluminous materials – particularly given the seriousness of the charges filed against Trina Johnson, and the fact that four additional defendants were added to the case.

Finally, whatever can be said of how Ms. Johnson's procedural rights were handled in tribal court under ICRA, her remedy is not in this Court at this time. "With the exception of petitions for habeas corpus relief, Congress did not intend in the ICRA to create implied causes of action to redress substantive rights in federal court." *Akins v. Penobscot Nation*, 130 F.3d 482, 486 (1st Cir. 1997) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59-66 (1978)). Ms. Johnson's remedy, if she believed her ICRA rights were being violated during her tribal proceedings, was to bring a petition for a writ of habeas corpus under 25 U.S.C. § 1303. *See Stanko v. Oglala Sioux Tribe*, 916 F.3d 694, 697 (8th Cir. 2019) (no implied rights of action in federal court under ICRA other than habeas claim under § 1303); *Santa Clara Pueblo*, 436 U.S. at 66-67 ("Congress' provision for habeas corpus relief, and nothing more, reflected a considered accommodation of the competing goals of preventing

injustices perpetrated by tribal governments, on the one hand, and, on the other, avoiding undue or precipitous interference in the affairs of the Indian people."). There is no basis in law or fact for her claim to a remedy of dismissal in this prosecution. And, as noted above, the procedural history belies her claim that the tribal court turned a blind eye to the issues surrounding her medical conditions and detention: the tribal court did ultimately place her on pretrial release when it found her medical treatment warranted it.

As this Court has done before, it should deny this motion.

**12. Trina Johnson's Motion to Suppress Statements (ECF No. 110)**

Trina Johnson has moved to suppress two audio-recorded statements that she provided to law enforcement: a voluntary, non-custodial interview conducted on May 3, 2022, and a Mirandized, in-custody interview conducted on May 5, 2022. At the forthcoming motions hearing, the Government intends to present testimony from an FBI agent who was present at both interviews. The Government will also submit as exhibits audio recordings of both interviews, FBI transcripts that were created, and Ms. Johnson's signed *Miranda* waiver from the second interview.

As will be further explained in post-hearing briefing, Trina Johnson can show no basis in law or fact to suppress any of her statements. As her own motion acknowledges, she was clearly informed at the outset of her May 3 interview that she was "not under arrest" and was "free to leave at any point." (ECF No. 110 at 1). She never asked to terminate the interview; she was never restrained, threatened, or coerced; the conversation unfolded in a calm and polite tone; and Ms. Johnson appeared wholly aware of both the purpose of the interview and the significance of making incriminating statements. Her

statements were thus both noncustodial and voluntary, and no *Miranda* warnings were required. *See, e.g., United States v. Sanchez*, 676 F.3d 627, 631 (8th Cir. 2012) (noting that it "weighs heavily in favor of noncustody when officers clearly inform a suspect that she is free to leave or decline questioning"). The fact that later that day, Ms. Johnson was arrested by tribal authorities (*not* the FBI) has little bearing in this case on whether Ms. Johnson might reasonably have perceived her freedom restrained or her will overborne at the time of her statement. *See United States v. LeBrun*, 363 F.3d 715, 721 (8th Cir. 2004) ("some degree of coercion is part and parcel of the interrogation process and that the coercive aspects of a police interview are largely irrelevant to the custody determination except where a reasonable person would perceive the coercion as restricting his or her freedom to depart"). Her May 3 statement is admissible.

As to the May 5 interview, Trina Johnson does not appear to dispute that she was Mirandized and signed a valid *Miranda* waiver. (ECF No. 110 at 4). She points, somewhat unclearly, to her right under ICRA to have the assistance of counsel "at [her] own expense." (ECF No. 110 at 5 (citing 25 U.S.C. § 1302(a)(6)). But since Ms. Johnson was properly informed of her *Miranda* rights (including a more expansive right to counsel), and validly waived those rights, her counsel rights in tribal court are irrelevant. Ms. Johnson also argues her statement was the product of undue delay in her presentment to a federal judge – even though she was in custody only on tribal charges and was not federally indicted until months later. In identical circumstances, this Court has already rejected the argument that the federal presentment rules apply to tribal arrests and should do so again here. *Lussier*, 2022 WL 17476661, at *12. The May 5 statement is admissible.

**13. Trina Johnson's Motion to Suppress Searches and Seizures (ECF No. 111)**

Trina Johnson moves to suppress evidence obtained from a consent search of her residence, as well as data obtained via federal warrants to search her cell phone and Facebook account. The Government expects that testimony at the motions hearing will supply further context on the consent issue, and the Government will submit audio recordings reflecting Ms. Johnson's consent, as well as her signed consent form. As to the challenges to search warrants, Ms. Johnson has, at most, brought forth four-corners challenges, and the Government will submit copies of the warrants at the motions hearing. As explained below and in further post-hearing briefing, this motion should be denied in all respects.

Trina Johnson's consent to search her home was given repeatedly, freely, and voluntarily. Near the end of her noncustodial interview on May 3, the FBI agent raised the issue of doing a consensual search of her home to document any evidence of the abuse of Minor Victim 1. As reflected in the audio, when the agent asked, "are you willing for that to happen?," Ms. Johnson responded: "Yeah, I guess, ya know, [I'm] tryin to be as honest as I can be." The agent then drove Ms. Johnson to her residence and discussed the consent issue again before any entry was made. As part of this discussion, the agent orally advised Ms. Johnson, "You have the right to refuse consent – you don't have to do this," to which Ms. Johnson responded freely: "Well why not, if it's gonna help me in the long run being honest. I get what I did was wrong, but I'm not trying to hide nothing." Ms. Johnson then signed a Consent to Search form that likewise documents that she was "advised of [her] right to refuse consent" and gave her "permission voluntarily." In sum, this motion fails

for many of the same reasons as Ms. Johnson's challenge to her May 3 statements. *See, e.g., United States v. Harris*, 55 F.4th 575, 581 (8th Cir. 2022); *United States v. Steinmetz*, 900 F.3d 595, 599 (8th Cir. 2018).[3]

Trina Johnson also challenges consent she gave during her May 5 custodial interview to the search of her cell phone. This consent was likewise voluntary but the Court need not resolve the issue. The Government later obtained a federal warrant to search the device, and did not rely on any data the agent reviewed with Ms. Johnson during the May 5 interview to set forth probable cause. Indeed, during the May 5 interview, the agent told Ms. Johnson repeatedly that if she declined consent, as she was free to do, he would obtain a warrant – which he then did anyway, notwithstanding her oral and written consent. The warrant is an independent source of all the data contained on the device and, at most, Ms. Johnson may bring a four-corners challenge to it. *United States v. Swope*, 542 F.3d 609, 614 (8th Cir. 2008). As can be further explained in post-hearing briefing, the warrant affidavit sets forth ample probable cause or, at a minimum, good faith applies.

Finally, Trina Johnson challenges the search of her Facebook account. It appears this challenge is based solely on the claim that this warrant was "tainted" by deficiencies in the search of her cell phone. Because her challenges to the cell phone search are meritless, it is unlikely the Court will have to reach this issue. Nonetheless, the

[3] The evidence obtained from Ms. Johnson's home was only photographs reflecting evidence of abuse (e.g., holes in the wall that Ms. Johnson explained were the product of smashing Minor Victim 1's head; potential weapons that may have been used). No physical items were seized. Ms. Johnson's cell phone was not seized from the home; rather it was on her person at the time of her arrest, was booked into her property at the Red Lake Jail, and was seized by the FBI two days later. Thus, the residence search has no bearing on the cell phone search.

Government will submit a copy of the warrant at the motions hearing and respond to any post-hearing briefing.

**14. Bert Lussier's Motion to Suppress Statements (ECF No. 123)**

Bert Lussier has moved to suppress all the recorded interviews he gave to law enforcement, which include noncustodial statements on May 3 and 4, 2022, and a Mirandized post-arrest statement on January 26, 2023. At the forthcoming motions hearing, the Government intends to present testimony from at least one FBI agent who was present at each of these interviews. The Government will also submit as exhibits audio recordings of the interviews, FBI transcripts that were created, and Mr. Lussier's signed *Miranda* waiver from the third interview.

As will be further briefed post-hearing, this motion fails for similar reasons as Trina Johnson's. The recordings and testimony will show that Bert Lussier was not in custody during the May 3-4, 2022 statements—nor was he arrested at the conclusion of either interview or until many months later. *See United States v. Galceran*, 301 F.3d 927, 931 (8th Cir. 2002) ("Lack of arrest is a very important factor weighing against custody."). There was no coercive dimension to any of the interviews, and Mr. Lussier's statements were entirely voluntary. After his arrest in January 2023, as conceded in the motion, Mr. Lussier was fully Mirandized, said he understood his rights, signed a *Miranda* waiver form, and voluntary chose to speak with agents. His motion should be denied in all respects.

Dated: July 20, 2023

Respectfully Submitted,

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