UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HOWARD D. KILLEANEY,

Defendant.

CR 07-30063-KES

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO SUPPRESS STATEMENTS AND EVIDENCE

This memorandum of law is offered in support of Defendant Howard D. Killeaney's Motion to Suppress Statements and Evidence pursuant to Local Rule 7.2 of the United States District Court for the District of South Dakota.

STATEMENT OF FACTS

1. On July 25, 2007, an Indictment was filed in the United States District Court, District of South Dakota, Central Division, charging Defendant with two counts of Aggravated Sexual Abuse of a Child, in violation of 18 U.S.C. §§ 1153, 2241(c), and 2246. The offense is alleged to have occurred between February 15, 2007, and March 7, 2007, in Todd County, South Dakota.

2. According to investigative reports, Defendant was living at Michaelyn Black Lance's residence between February 15, 2007, and March 7, 2007, on the Rosebud Indian Reservation. During that time, Defendant babysat Black Lance's children, which included the alleged victim in this case. On the evening of March 7, 2007, the alleged victim made a sexual abuse allegation against Defendant

which resulted in Black Lance making a report to the Rosebud tribal police.

3. Officer Dan Kettell responded to Black Lance's residence, house #187 in Soldier Creek. Defendant was at the residence when the officer arrived. According to Officer Kettell, the Defendant appeared to be scared and kept saying he did not do anything. After speaking to and inspecting the condition of the alleged victim, Officer Kettell again approached Defendant and asked him what was going on. Defendant said they were sitting there all day and said "I did not do anything perverted to them." Officer Kettell placed Defendant in handcuffs and escorted him to the police car. According to Kettell, Defendant kept saying "I didn't do anything." After placing Defendant in the police car, Officer Kettell went back into the home and spoke with Black Lance. The officer's report does not indicate any request for, or consent given, to search the residence. Officer Kettell searched the bathroom trash can and seized several folded up pieces of toilet paper that had round feces stains on them. Defendant was arrested by the tribal authorities and charged with sexual abuse of a minor and sexual contact with a minor.

4. On March 8, 2007, while in the Rosebud jail on the aforementioned tribal charges, Defendant was interrogated by FBI Agent Brian Carroll and RST Chief of Police Charles Red Crow. Defendant was advised of and waived his *Miranda* rights. In this interview, Defendant denied any sexual abuse/contact with the alleged victim.

5. On March 9, 2007, the Defendant was arraigned in the Rosebud Sioux Tribal Court on the tribal charges and was appointed counsel from the Rosebud Public Defender's Office. Defendant was, and is presently, being represented by O.J. Seamans, an employee of the public defender's office, but who is not a licensed

lawyer. However, the supervisor of the Rosebud Public Defender's Office, Eric Antoine, is a licensed lawyer. Defendant's tribal charges, which charge the same offense he is charged with in the federal indictment, is a pending case scheduled for trial on October 23, 2007.

6. On July 3, 2007, Defendant was again interrogated by FBI Agent Brian Carroll. Defendant was incarcerated in the Hughes County Jail on a state parole violation. According to Agent Carroll's report, Defendant was advised of his rights under *Miranda*, and made a statement that he accidentally inserted his finger into the child's anus. Agent Carroll conducted this interrogation alone. A tape recorded summary was made of the interrogation.

ARGUMENT AND AUTHORITIES

I. Search and Seizure of Toilet Paper in Bathroom.

Defendant moves to suppress the search and seizure of the toilet paper in the bathroom by RST Police Officer Dan Kettell on March 7, 2007, and the results of any testing on such evidence. Officer Kettell's report does not indicate that he conducted the search and seizure pursuant to any lawful search warrant or the consent of any person residing in the house. The search goes beyond any type of search warranted as a "search incident to arrest." Defendant asserts that the search of the residence he was residing in violated his rights under the Fourth Amendment to the United States Constitution and must be suppressed under the Exclusionary Rule. *Mapp v. Ohio*, 367 U.S. 643 (1961), *Wong Sun v. United States*, 371 U.S. 471 (1963). Defendant asserts that as an invited guest who had been residing in the home for three weeks, he has standing to contest the constitutionality of the search and seizure. *See Minnesota v. Olson*, 495 U.S. 91 (1990).

II. Suppression of Defendant's Statements.

Defendant moves to suppress the statements he made on July 3, 2007, to FBI Agent Brian Carroll on three grounds: (A) there was not a voluntary, knowing and intelligent waiver of his *Miranda* rights; (B) his statements were not voluntary under the Fifth Amendment to the United States Constitution; and (C) the agent violated Defendant's Sixth Amendment right to counsel.

A. Invalid Waiver of Miranda.

The Defendant's alleged waiver of rights under the Fifth Amendment was not done voluntarily, knowingly and intelligently. Once warned, a suspect "may waive effectuation of [*Miranda*] rights, provided the waiver is made voluntarily, knowingly and intelligently." *Miranda*, 384 U.S. at 444. "The inquiry [into the validity of a waiver] has two distinct dimensions. . . . First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances surrounding the interrogation' reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." *Moran v. Burbine*, 475 U.S. 412, 421 (1986). "In determining whether a valid waiver has been made, a trial court must look at the totality of the circumstances in each case, including the background, experience, and conduct of the accused." *United States v. Barahona*, 990 F.2d 412, 418 (8th Cir. 1993). In this case, the Defendant's background and mental deficiencies all weigh against a voluntary, knowing and intelligent waiver of his *Miranda* rights.

B. Involuntary Statement.

Defendant also asserts that the statements he made were not voluntary. Statements that are not the product of a rational intellect and free will must be suppressed. *Mincey v. Arizona*, 437 U.S. 385 (1978). The Fifth Amendment and *Miranda v. Arizona*, 384 U.S. 436 (1966), require a statement to be voluntary. In determining the voluntariness of the statement, the Court must consider the totality of the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). The Court must look at the "conduct of the officers and the characteristics of the accused. The issue is whether the authorities overbore the defendant's will and critically impaired his capacity for self-determination." *United States v. LeBrun*, 363 F.3d 715, 724 (8th Cir. 2004). "[O]ne of the key concerns in judging whether confessions were involuntary . . . [is] the intelligence, mental state, or any other factors possessed by the defendant that might make him particularly suggestible, and susceptible to having his will overborne." *Id*., 363 F. 3d at 726. The government has the burden of proving the statement was voluntary. *Colorado v. Connelly*, 479 U.S. 157 (1986). Defendant asserts that there are several factors which overbore Defendant's will and critically impaired his capacity for self-determination. Defendant's mental deficiencies, the manner in which the agent questioned him and the agent's coercive conduct resulted in an involuntary statement.

C. Sixth Amendment Right to Counsel Violation.

At the time of the July 3, 2007, interrogation, Defendant had already been charged in Rosebud Sioux Tribal Court with the offenses of Sexual Abuse of a Minor and Sexual Contact with a Minor. Defendant was represented by O.J. Seamans, an employee of the public defender's office, who is not a licensed lawyer. However, the supervisor of the Rosebud Public Defender's Office, Eric Antoine, is a licensed lawyer. Defendant's tribal charges, which charge the same

offense he is charged with in the federal indictment, is a pending case scheduled for trial on October 23, 2007.

Defendant asserts that his Sixth Amendment right to counsel was violated when Agent Carroll interrogated Defendant on July 3, 2007, without his tribal attorney being notified or present for such interrogation. The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." The Sixth Amendment right to counsel attaches at the time judicial proceedings have been initiated against an accused whether by way of formal charge, preliminary hearing, indictment, information, arraignment, *United States v. Red Bird*, 287 F.3d 709 (8th Cir. 2002), or warrant of arrest. *Brewer v. Williams*, 430 U.S. 387 (1977). Once the right of counsel attaches, and the accused obtains an appointed attorney, any purported waiver of the right to counsel without the presence of the accused's attorney is invalid. *United States v. Red Bird*, 146 F. Supp. 2d 993, 996-97, affirmed *Red Bird*, 287 F.3d 709 (8th Cir. 2002), citing *Michigan v. Jackson*, 475 U.S. 625, 636 (1986). Likewise, once the accused has obtained counsel after his right to counsel attaches, the "police may not interfere with the efforts of a defendant's attorney to act as a '"medium" between [the suspect] and the State' during the interrogation.'" *Moran v. Burbine*, 475 U.S. 412, 428 (1986). *See Red Bird*, 146 F. Supp. 2d at 1002 ("It is once again highly improper conduct on the part of [police agents] to again attempt an "end run" around an appointed and acting attorney, paying no attention to a previous decision by this Court. Agents of the Federal Bureau of Investigation and federal prosecutors should comply with both the letter and the spirit of the law.").

In the present case, the Defendant's Sixth Amendment right to counsel attached when he was arrested and formally charged with the sexual abuse/contact offenses in Rosebud Sioux

Tribal Court. Defendant was represented by an employee of that office at Defendant's tribal court hearings, including the March 20, 2007, bond hearing; the June 4, 2007, pre-trial conference; and the anticipated trial scheduled for October 23, 2007. After appointment of tribal counsel, any waiver by the Defendant of his right to counsel at the police-initiated interrogation is invalid under *Red Bird* and *Jackson*. *See also*, *Massiah v. United States*, 377 U.S. 201, 206 (1964) (Holding that defendant "was denied the basic protections of the right to the assistance of counsel when there was used against him at trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel."). In the case at bar, Defendant's alleged statements during the interrogation initiated by Agent Carroll, following the Defendant's tribal arrest and initial arraignment proceedings, violated the Sixth Amendment and must be suppressed, notwithstanding any purported waiver of his *Miranda* rights or agreement to speak to the agent.

The facts underlying the tribal charge are identical to the facts underlying the present federal charge. Both jurisdictions accuse the Defendant of committing a sexual act upon the alleged child victim. That the charges are brought by different sovereigns, tribal and federal, is of no consequence. *Red Bird*. *See also*, *United States v. Swift Hawk*, 125 F. Supp.2d 384, 386-87 (D.S.D. 2000) (Where tribal charges and federal charges arose under identical facts, the Court ruled "it is simply not fair play to go around the attorney, even when the represented party agrees to talk without the presence of his attorney." Id. at 386-87. Pursuant to the principles set forth and affirmed by the Eighth Circuit in *Red Bird*, this Court should suppress the statements that Defendant allegedly made to Agent Carroll on July 3, 2007.

WHEREFORE, Defendant urges this Court to suppress the statements made by the Defendant and suppress the evidence seized.

Dated this 27th day of August, 2007.

Respectfully submitted,

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By:

/s/ Edward G. Albright

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