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 GOVERNMENT'S OBJECTIONS TO MAGISTRATE JUDGE'S REPORT AND RECOMMENDATIONS

The United States of America, by and through Assistant United States Attorneys Randolph J. Seiler and Eric Kelderman, files the following objections to the Magistrate Judge's Report and Recommendations for Disposition of Motion to Suppress Statements and Evidence ("R&R"). Doc. 28. The United States objects to the portion of Magistrate Judge's R&R that recommends the Defendant's Motion to Suppress be granted in part.

FINDINGS OF FACT

As relevant to the Government's objections, the Magistrate Judge found the following facts:

On March 7, 2007, the Defendant was arrested by a Rosebud Sioux tribal officer and booked for the tribal offense of sexual contact with a minor. On March 8, 2007, while he was in tribal custody, the Defendant was interviewed by FBI Special Agent Brian Carroll and Rosebud Sioux Tribal Police Chief Charles Red Crow.

On March 9, 2007, the Defendant appeared in Rosebud Sioux tribal court with Oliver J. Semans, a non-lawyer who is not licensed to practice law in South Dakota, of the Rosebud Sioux

Public Defender's Office. At that hearing, the Defendant pled not guilty to the sexual contact charge, bond was set, and a pretrial conference was set for June 4, 2007. Mr. Semans later sought modification of the Defendant's bond. On March 22, 2007, Mr. Semans appeared in tribal court with the Defendant and moved for a bond modification, which the tribal court denied. The Defendant again pled not guilty to the tribal charge. On June 4, 2007, the Defendant again appeared in tribal court with Mr. Semans, pled not guilty, and a jury trial was set for October 23, 2007. Mr. Semans again requested the Defendant's bond be modified so that the Defendant could be released from custody. The tribal court granted the request.

On July 3, 2007, Special Agent Carroll again interviewed the Defendant following the Defendant's arrest on a state parole violation. Before the interview, Special Agent Carroll contacted the tribal police department and asked whether the Defendant had made any appearances in tribal court and whether the Defendant was represented by anyone. Special Agent Carroll also spoke to an Assistant United States Attorney regarding a second interview of the Defendant, about Mr. Semans not being a licensed attorney, and about a "Red Bird" concern. Special Agent Carroll began the interview by informing the Defendant of his rights, using an Advice of Rights form. The Defendant stated that he understood his rights, and was willing to waive them and answer questions without a lawyer, then agreed to talk to Special Agent Carroll. During the interview, the Defendant made inculpatory statements, admitting he had digitally penetrated D.B.'s anus on March 6, 2007. On July 25, 2007, the Defendant was indicted on charges of aggravated sexual abuse of D.B.

CONCLUSIONS OF LAW

Again, as relevant to the Government's objections, the Magistrate Judge reached the following conclusions of law:

The Magistrate Judge observed, "The issue here is whether [the Sixth Amendment right to counsel] attached when Defendant appeared in tribal court with 'lay counsel' (a tribal public defender) and was arraigned on the sexual abuse charge." See R&R at 9. The Magistrate Judge also noted, "Whether a tribal public defender, who is not a licensed attorney, but is authorized to practice law in tribal court and represent criminal defendants, can provide the requisite 'assistance of counsel' so as to activate the protections of the Sixth Amendment, is an issue of first impression." Id. at 10. The Magistrate Judge, citing United States v. Red Bird, 146 F. Supp. 2d 993 (D.S.D. 2001), aff'd, 287 F.3d 709 (8th Cir. 2002), concluded that the Defendant's "right to counsel, guaranteed by the Sixth Amendment, attached and was violated at the time he was interviewed by and made statements to Carroll" on July 3, 2007. Id. at 8. The Magistrate Judge added, "Inasmuch as the underlying facts, which provide the basis for both sets of charges, are substantively identical, Defendant's Sixth Amendment right to counsel would, in accordance with established law, have attached at the time of his tribal arraignments." Id. at 9-10. In so ruling, the Magistrate Judge also concluded that, in his view, "Semans was more than just a 'lay advocate'; he was Defendant's 'counsel/lawyer' or the 'functional equivalent' thereof," id. at 12, despite having earlier noted that "Semans is not a licensed attorney who is admitted to practice in state or federal courts in South Dakota." Id. at 10. The Magistrate Judge observed that Mr. Semans "was admitted to practice in tribal court, at the time of Defendant's tribal arraignments, and was being supervised by Eric Antoine, a licensed attorney[.]" Id. The Magistrate Judge noted the significance of (1) Mr. Semans's admission to practice before the Rosebud Sioux tribal court and membership in the Sicangu Oyate Bar Association, (2) the number of cases Mr. Semans has handled, (3) the various matters Mr. Semans has handled, (4) that Mr. Semans has "consulted with and provided representation to Defendant in the tribal sexual

contact case," (5) that Mr. Semans was present during the three court hearings held in that case, (6) that Mr. Semans made two bond modification requests and was successful in one of them, and (7) that Mr. Semans acted on the Defendant's behalf, pleading not guilty and preserving the Defendant's right to a jury trial during three court appearances. Id. at 12-13.

ARGUMENT

The United States respectfully submits that the Magistrate Judge erroneously concluded that the Defendant's statements to Special Agent Carroll on July 3, 2007, should be suppressed. Specifically, the Magistrate Judge erred in concluding that the Defendant's "right to counsel, guaranteed by the Sixth Amendment, attached and was violated at the time he was interviewed by and made statements to Carroll."

Notwithstanding numerous assertions made in caselaw and elsewhere, the Rosebud Sioux Tribal Constitution does not guarantee the right to be represented by an attorney, nor does it state that the tribe will pay for an attorney if a defendant is indigent. Rather, the Tribal Constitution provides that "[a]ny Indian accused of any offense shall have the right to assistance of counsel . . . ." Rosebud Sioux Tribal Const., amend. XI, art. X § 2; see also CR. 01-30047, Magistrate Judge's Report and Recommendations, doc. 32 at 6, 13.

In Red Bird, the Eighth Circuit held that a tribal defendant, who had been appointed a licensed attorney by the Rosebud Sioux tribal court, was entitled to Sixth Amendment protections. Red Bird, 287 F.3d at 714. Despite the actual language of the Rosebud Sioux Tribal Constitution, quoted above, the court noted that Constitution "guarantees members the right to an attorney in tribal court, and the tribe will pay for an attorney if a defendant is indigent." Id. at 711. The attorney appointed in that case was "a licensed attorney in the state of South Dakota who [was] admitted to

practice in the United States District Court for the District of South Dakota and the United States Court of Appeals for the Eighth Circuit." Id. Some time later, an FBI Special Agent and a Rosebud Sioux Tribal Investigator, knowing of the tribal charges against the defendant and that he was represented by an attorney "licensed to serve him in both tribal and federal court," interviewed the defendant without contacting the attorney or receiving the attorney's permission to conduct the interview. Id. at 711-12, 714. The Eighth Circuit noted that was "not a case where the federal agent was unaware of the tribal charge or unaware of the defendant's representation by counsel." Id. at 714. The court cited the cooperation between tribal and federal authorities and the fact that the defendant was represented by an attorney as supporting the conclusion that the protections of the Sixth Amendment applied to that defendant. Id. As a result, the court held that the defendant was entitled to Sixth Amendment protection. Id.

In the instant case, just the opposite is true, at least with respect to the agents's knowledge regarding the Defendant's representation status. The Defendant was "represented" only by Mr. Semans, whom the Magistrate Judge found "is not a licensed attorney who is admitted to practice in state or federal courts in South Dakota." See R&R at 10. The defendant in Red Bird, on the other hand, at the time he was interviewed, "had been indicted and had been appointed an attorney who was licensed to serve him in both tribal and federal court." Red Bird, 287 F.3d at 714.

The Magistrate Judge also distinguishes United States v. Dupris, 422 F. Supp. 2d 1061 (D.S.D. 2006), where the district court adopted his report and recommendation recommending denial of a motion to suppress based on a Sixth Amendment violation. The Magistrate Judge notes several distinctions between Dupris and the instant case. The Magistrate Judge's parenthetical following citation to Dupris states that, in that case, the tribal constitution did not guarantee the right to counsel

in criminal cases, neither the public defender nor her assistant were active members in good standing of the tribal bar, the assistant public defender only appeared with the defendant at his arraignment, and the interviewing FBI agent did not know the defendant had appeared in tribal court with the assistant public defender and been arraigned. See R&R at 11. In Dupris, the Magistrate Judge recommended and opined "that Red Bird is distinguishable and that Defendant's Sixth Amendment right to counsel was not triggered until he made his initial appearance in federal court . . . ." Id. at 1068. The Magistrate Judge next observed, "Stated another way, Defendant's right to counsel did not attach because he never appeared in tribal court with 'counsel' or a 'lawyer' prior to the . . . interrogation." Id. The Magistrate Judge later added that, at the time of the interview, "Defendant had not even been charged with a federal offense. Although Defendant had been arraigned in tribal court and appeared with lay counsel there, this proceeding did not serve to trigger his right to counsel under the Sixth Amendment." Id. at 1069. In conclusion, the Magistrate Judge opined, "Inasmuch as Defendant's Sixth Amendment right to counsel did not attach until his initial appearance in federal court, that right was not violated when [the FBI] questioned him without the presence of counsel." Id. at 1070.

Just as in Dupris, in the instant case the Defendant "never appeared in tribal court with 'counsel' or a 'lawyer'" before Special Agent Carroll interviewed him. Id. at 1068. The Defendant's Sixth Amendment right, therefore, was not triggered and did not attach until his initial appearance in federal court. Courts, including the Magistrate Judge in this case, have distinguished the practice of the Rosebud Sioux Tribe, which is unique in that it provides counsel to Indian defendants, from other reservations that grant no such right. See, e.g., Red Bird, 287 F.3d at 716; United States v. Whitefeather, No. Crim 053881DWFRLE, 2006 WL 763204, at *2 (D. Minn. Mar. 24, 2006). That

distinction notwithstanding, however, whatever rights are accorded the Defendant under the Rosebud Sioux Tribal Constitution, and regardless of whether he *should have been* appointed an attorney (as opposed to his "counsel," Mr. Semans) when he appeared in tribal court, the fact remains that he was not. Like the assistant public defender in Dupris, Mr. Semans is not a licensed professional attorney. See Dupris, 422 F. Supp. 2d at 1069; see also Whitefeather, No. Crim 05881DWFRLE, 2006 WL 763204, at *2 (noting that because the defendant, unlike the defendant in Red Bird, "was appointed a 'lay advocate,' as opposed to a licensed lawyer," his "arraignment in Tribal Court did not trigger the protections of [his] Sixth Amendment rights, and, therefore, [his] interrogation was not in violation of any such rights"). While "federal courts are obligated to extend respect and act with principles of comity toward tribal courts," United States v. Swift Hawk, 125 F. Supp. 2d 384, 388 (D.S.D. 2000), the remedy for the Rosebud Sioux tribal court's failure to provide a licensed attorney to the Defendant, if one is so required, lies with and in that court. The United States, in this prosecution, should not be penalized for the Special Agent complying with the law as it existed at the time of the interview.[1]

Caselaw is replete with references stating that Sixth Amendment rights do not apply or attach

[1]The Magistrate Judge also cites United States v. Swift Hawk, 125 F. Supp. 2d 384, 386-88 (D.S.D. 2000). The published Swift Hawk opinion, however, does not specifically denote the status (i.e., licensed or unlicensed) of the defendant's counsel. The opinion notes only that the tribal investigator involved "knew that counsel would have been appointed for him in tribal court" and "that his lawyer would still have been acting as counsel for [him]." Id. at 386. The court went on to discuss its own experience in civil cases. The court took judicial notice that, in those cases, "investigators and especially attorneys do not question a person they know to be represented by counsel without the attorney's consent and knowledge." Id. The court then continued its discussion regarding the defendant's representation, noting that the defendant was not told about his "right to have his *attorney* present when he was being questioned," was not "asked whether he wanted his *attorney* present," and "[n]o permission was sought or received from his *attorney* to interview him." Id. at 387 (emphasis added). Based on the court's analysis in Swift Hawk, it appears that case, like Red Bird, is inapposite to the issue in the instant case.

in tribal court. See, e.g., Red Bird 287 F.3d at 713 (citing Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 98 S. Ct. 1670 (1978) ("The Bill of Rights and the Fourteenth Amendment . . . do not apply directly to tribes."); United States v. Percy, 250 F.3d 720, 725 (9th Cir. 2001) (citing Talton v. Mayes, 163 U.S. 376, 381-82 (1896); Tom v. Sutton, 533 F.2d 1101, 1102-03 (9th Cir. 1976)); Settler v. Lameer, 507 F.2d 231 (9th Cir. 1974). "Although an individual citizen's right to appointed counsel is protected under the Sixth and Fourteenth Amendments in criminal actions brought by the United States and the individual states thereof, Indians on the reservation do not have such protection under the federal constitution when the criminal action is brought under tribal law in the tribal court." Tom, 533 F.2d at 1103. This is so not because Congress, when it adopted the ICRA, made a "decision that Native Americans would not necessarily be entitled to the same protections extended to every other American, namely the right to counsel in criminal cases in tribal courts, appointed at public expense, if necessary[,]" Red Bird, 146 F. Supp. 2d at 997, but because, "[a]s separate sovereigns, pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." Red Bird, 287 F.3d at 713 (quoting Santa Clara Pueblo, 436 U.S. at 56, 98 S. Ct. 1670).

One exception to that proposition, understandably, occurs when a tribal court appoints an attorney licensed to represent the defendant in both tribal and federal court, as was the case in Red Bird, distinguishing it from the instant case. However, this exception should not now swallow the "well established" rule that the "protections of the United States Constitution are generally inapplicable to Indian tribes, Indian courts and Indians on the reservation." Percy, 250 F.3d at 725. One district court has opined, "The right to be represented by counsel is protected by the Sixth and Fourteenth Amendments. These amendments, however, protect these rights only as against action

by the United States in the case of the Fifth and Sixth Amendments, and as against action by the states in the case of the Fourteenth Amendment. Indian tribes are not states within the meaning of the Fourteenth Amendment." Glover v. United States, 219 F. Supp. 19, 21 (D. Mont. 1963).

Applying the Sixth Amendment in the way contemplated by the Magistrate Judge opens the doors to extension of such a ruling that are not far removed from the Magistrate Judge's recommendation, but certainly not anticipated under nor consistent with Sixth Amendment jurisprudence. Consistent with the Magistrate Judge's recommendation, any person who appears in a tribal court and advises a defendant in some way becomes a de facto attorney, not because that person actually is an attorney, but because s/he is advising a tribal defendant. Because any person advising a tribal defendant would become a de facto attorney, every defendant would be entitled to the rights afforded under the Sixth Amendment, even when those rights historically do not attach during tribal court proceedings (except, of course, in situations like that in Red Bird).

Furthermore, although the Magistrate Judge's recommendation makes a distinction between the rights afforded under the Rosebud Sioux Tribal Constitution and those afforded by other tribes, this is a distinction without a difference as applied to this case. Mr. Semans is not an attorney. Although Mr. Semans may be recognized by the Rosebud tribal court as a counselor or lawyer, whatever title he holds within that court is not, and should not be, binding on a federal court in the Sixth Amendment context. If the Rosebud tribal court chose to give the title "attorney" or "lawyer" to a psychotherapist, for example, the federal court would not be bound by the title the tribal court gave that psychotherapist, in determining whether the Sixth Amendment attached when the psychotherapist went to court with a defendant.

Finally, the Magistrate Judge's recommendation serves to discourage cooperation between

federal and tribal authorities during investigations. Special Agent Carroll took steps to ensure he was acting according to the law in this case. And, indeed, he was complying with the law as it existed at the time of the interview. Special Agent Carroll, advised on the law, and knowing of Mr. Semans's non-attorney status, interviewed the Defendant. The Magistrate Judge's recommendation will encourage agents not to ask questions of tribal authorities or agents, to be as ignorant as possible about the tribal investigation and case, and to be less cooperative with tribal agents. Under the Magistrate Judge's recommendation, federal agents who do not take the time to find out about tribal court proceedings would be able to conduct interviews with more confidence in the lawfulness of those interviews than would a careful agent like Special Agent Carroll, who both knew numerous details about the tribal investigation and also cautiously requested a legal opinion about whether he could interview the Defendant. Certainly a ruling that encourages less communication between federal agents and tribal authorities, or between federal agents and attorneys, could not be desirable.

In a multi-district litigation case arising out of at least seven states, a federal judge, designated by the United States Supreme Court to hear the case, provided a thorough discussion of the roots of the lawyer under the American legal system, which the court opined was "critical to the understanding of the word 'counsel' as used by the framers in the Sixth Amendment." Turner v. Am. Bar Ass'n, 407 F. Supp. 451, 474 (D. Ala. 1975), aff'd sub nom. Pilla v. Am. Bar Ass'n, 542 F.2d 56 (8th Cir. 1976); aff'd sub nom. Taylor v. Montgomery, 539 F.2d 715 (7th Cir.1976). The court noted it could not "find even a suggestion in the history of the Common Law after its primeval inception or in the history of the American lawyer that the word 'counsel', as used in the Sixth Amendment, was meant to include a layman off the street without qualification as to either training or character." Id.. The Court of Appeals of New York, that state's highest court, later opined,

"Counsel, as the word is used in the Sixth Amendment can mean nothing less than a licensed attorney at law. A lay person, regardless of his educational qualifications or experience, is not a constitutionally acceptable substitute for a member of the Bar." New York v. Felder, 391 N.E.2d 1274, 1276 (N.Y. 1979). The court in Felder cited caselaw from numerous federal circuits, including the Eighth Circuit's affirmance of Turner, for this proposition: "numerous Federal courts dealing with the not unrelated issue of the right of a criminal defendant to choose to be represented by a lay person have consistently held that the right to counsel means the right to an attorney." Id. (citing United States v. Wilhelm, 570 F.2d 461 (3d Cir. 1978); United States v. Wright, 568 F.2d 142 (9th Cir. 1978); Turner, 407 F. Supp. 451, aff'd sub nom. Pilla, 542 F.2d 56, aff'd sub nom. Taylor, 539 F.2d 715).

Outside the Rosebud reservation, Mr. Semans would not be elevated to the status of "attorney" for Sixth Amendment purposes. Thus, the Magistrate Judge's opinion serves to create an isolated island, the Rosebud reservation, where defendants would enjoy greater Sixth Amendment rights than anywhere else in the country. Mr. Semans's "representation" of the Defendant, had it occurred outside the Rosebud tribal court, would not have triggered the Sixth Amendment. Furthermore, it appears likely that Mr. Semans would not have been permitted to "represent" the Defendant at all had this occurred outside the Rosebud reservation. That the Rosebud Sioux tribal court permits a non-attorney to appear on behalf of defendants is insufficient to elevate him to the status of attorney for non-tribal matters.

In sum, caselaw indicates that the Sixth Amendment right to counsel calls for an attorney licensed to practice law, not for the "functional equivalent" thereof. The Magistrate Judge did not cite authority providing that the appointment of the "functional equivalent" of an attorney triggers

Sixth Amendment protections. Because the Sixth Amendment, as relevant to this case, is interpreted in federal courts, not tribal courts, a tribal designation of a person as an "attorney," "counsel," or "lawyer" has no bearing on that person's status before the federal court. And, as demonstrated above, except in situations akin to that in Red Bird, the Sixth Amendment does not apply to Indian tribes, courts, and prosecutions. Accordingly, because Mr. Semans is not a licensed attorney as contemplated under federal law, Sixth Amendment rights were not triggered. The Magistrate Judge's R&R, to the extent it recommends suppression, should be overruled.

CONCLUSION

Based on the foregoing, the United States objects to the Magistrate Judge's Report and Recommendations, and requests the Court overrule the portion of the Report and Recommendations recommending suppression of the Defendant's statement to Special Agent Carroll on July 3, 2007.

Dated this 9th day of November, 2007.

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CERTIFICATE OF SERVICE

The undersigned attorney for the United States of America hereby certifies that on the 9th day of November, 2007, a copy of the Government's Objections to the Magistrate Court's Report and Recommendations was provided by electronic filing or mailed by first-class mail to Ed Albright, Public Defender's Office, 124 S. Euclid, Suite 202, Pierre, South Dakota, 57501.

/s/ Eric Kelderman
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