UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

HOWARD D. KILLEANEY,

Defendant.

CR 07-30063-KES

GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION TO SUPPRESS STATEMENTS & EVIDENCE

The United States of America, by and through Assistant United States Attorney Jeremy R. Jehangiri, files this response resisting Defendant Howard D. Killeaney's motion to suppress statements and evidence.

I. BACKGROUND

From February 15, 2007, to March 7, 2007, Defendant lived in Michaelyn Black Lance's residence on the Rosebud Sioux Tribe Indian Reservation. During that time, Ms. Black Lance and Defendant were romantically involved. Ms. Black Lance's children also lived in the home, one of whom is the victim in this case. On February 26, 2007, Defendant began babysitting Ms. Black Lance's children while she attended college classes.

According to police reports, on March 7, 2007, Ms. Black Lance notified tribal authorities that Defendant, her boyfriend at the time, sexually assaulted her four-year-old son. At the time of the call, Ms. Black Lance and her two children were hiding in a bedroom and remained there until law enforcement arrived. Officer Daniel Kettell responded to the call, knocking on the

Black Lance residence door upon arrival. Ms. Black Lance answered the door, whereby Officer Kettell observed Ms. Black Lance crying. She informed the officer that Defendant was in the living room. Officer Kettell followed Ms. Black Lance upstairs to the living room and then to the bedroom where the two children were waiting. While in the bedroom, the victim stated that Defendant put his finger in the victim's anus. The victim appeared to be scared and stated that his "butt hurt." Ms. Black Lance informed the officer that the victim was not bleeding but that the victim's anus was red.

While Officer Kettell was in the residence investigating Ms. Black Lance's call, he looked in the kitchen and bathroom trash cans. In the bathroom trash can, Officer Kettell found several pieces of folded-up toilet paper containing round feces stains. Following this discovery, Ms. Black Lance informed Officer Kettell that those pieces of toilet paper were not present when she left for school.

On March 8, 2007, Defendant was arrested and interviewed by Special Agent Brian S. Carroll of the Federal Bureau of Investigation. Prior to commencing the interview, Defendant was advised of his rights. After being so advised, Defendant agreed to participate in the interview and signed an "Advise of Rights" form, acknowledging that he understood his rights and declaring that he was willing to answer questions without the presence of a lawyer. At the conclusion of the March 8 interview, Defendant stated that he was not under the influence of alcohol or drugs at the time of the alleged incident, as it is a condition of his parole. He was interviewed again on July 3, 2007. This interview, too, began with Defendant being informed of his rights. On that same date, after being so advised, Defendant agreed to participate in the interview and signed an "Advise of Rights" form, acknowledging that he understood his rights and declaring that he was willing to answer questions without a lawyer present. Defendant also

provided a taped summary statement during this interview.

On July 25, 2007, a two-count indictment was filed, charging Defendant with aggravated sexual abuse of a child in each count. On August 27, 2007, Defendant filed a motion to suppress the search and seizure of the toilet paper in the bathroom, along with the results of any testing on that evidence, and his statements made during the interviews.

II. ARGUMENT

A. Search and Seizure of Toilet Paper Evidence

"'The Fourth Amendment's general prohibition against warrantless searches does not apply when officers obtain voluntary consent from the person whose property is searched or from a third party with common authority over the property.'" United States v. Hines, 387 F.3d 690, 694 (8th Cir. 2004) (quoting United States v. Esparza, 162 F.3d 978, 980 (8th Cir. 1998) (citing Illinois v. Rodriguez, 497 U.S. 177, 181 (1990))). "The voluntariness of consent is evaluated in light of the totality of the circumstances." United States v. Jimenez, 478 F.3d 929, 932 (8th Cir. 2007) (following Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973)).

In this case, the circumstances demonstrate that Officer Kettell obtained voluntary consent to enter Ms. Black Lance's home, investigate the allegations of child sexual abuse, and collect any evidence. Upon hearing that Defendant sexually assaulted her child, Ms. Black Lance called the police and permitted the responding officer to enter the home. Then, Ms. Black Lance led Officer Kettell to the living room where Defendant was located and to the bedroom where the victim was waiting. While in the bedroom, the officer was allowed to ask the victim questions, with Ms. Black Lance answering a separate inquiry about whether the victim was bleeding. Such conduct on the part of Ms. Black Lance is indicative of a person assisting with law enforcement's efforts in investigating a crime. Ms. Black Lance was the source of most, if not all, of the

information supplied to Officer Kettell. With these facts, coupled with Ms. Black Lance's ownership of and authority over the residence, Officer Kettell's search for and seizure of evidence was permissible under the Fourth Amendment. See United States v. Hilliard, 490 F.3d 635, 639 (8th Cir. 2007). Moreover, Officer Kettell's entry into the residence and actions while inside the residence were reasonable since he was escorted by Ms. Black Lance throughout the house. As such, even if Ms. Black Lance lacked the authority to give consent, a prudent officer, such as Officer Kettell, would reasonably believe the consent to enter the home and conduct an investigation was valid. Id. (citing Rodriguez, 497 U.S. at 188-89).

B. Defendant's July 3, 2007, Interview Statements

"'A statement is not voluntary if the totality of the circumstances shows the defendant's will was overborne,' and voluntary statements must not be the result of deception, intimidation, or coercion of the person giving the statement." Jimenez, 478 F.3d at 932-33 (quoting United States v. Annis, 446 F.3d 852, 855 (8th Cir. 2006)). However, "[a] defendant's statements after being advised of his Miranda rights may be used against him if he knowingly and voluntarily waived his rights." United States v. Bell, 477 F.3d 607, 612 (8th Cir. 2007) (citation omitted).

As an initial matter, Defendant's motion to suppress his statements only pertains to the July 3, 2007, interview. At the outset of his July 3 interview, Defendant was informed of his rights. He was also provided an "Advise of Rights" form, on which Defendant signed and dated. He acknowledged his understanding of such rights and declared his willingness to proceed with the interview without a lawyer to the interviewing agent. Furthermore, the "Advise of Rights" form contained language to fully apprise Defendant of the possible consequences of going forward with the interview. Accordingly, Defendant knowingly and voluntarily waived his rights. See id.

Defendant, though, further contends that his Sixth Amendment right to counsel was violated since at the time of the second interview he was represented by lay counsel, Mr. O.J. Seamans. Because Defendant was charged with the same crimes in tribal court as those charged federally, he asserts that his right to counsel attached, thereby invalidating any purported waiver of the right to counsel without the presence of Defendant's attorney. However, as conceded by Defendant, Mr. Seamans is not a licensed attorney. Therefore, Defendant's right to counsel was not triggered until he made his initial appearance in federal court. See United States v. Red Bird, 287 F.3d 709 (8th Cir. 2002). Cf. United States v. Plumman, 409 F.3d 919, 926 (8th Cir. 2005). In other words, because Defendant never appeared in tribal court with a licensed lawyer before the July 3 interview, his right to counsel under the Sixth Amendment did not attach. As such, Defendant's motion to suppress the statements made during the July 3, 2007, interview should be denied.

III. CONCLUSION

Pursuant to the foregoing analysis, Defendant Bordeaux's motion to suppress the evidence and statements, and request for a hearing should be denied.

Dated this 4th day of September, 2007.

MARTY J. JACKLEY
United States Attorney

/s/ *Jeremy R. Jehangiri*

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CERTIFICATE OF SERVICE

The undersigned attorney for the United States of America hereby certifies that a true and correct copy of the Government's Response to Defendant's Motion to Suppress Statements & Evidence was served on Edward G. Albright, Federal Public Defender's Office, 124 South Euclid, Suite 202, Pierre, South Dakota 57501, by electronic transmission, first-class mail, postage prepaid, hand delivery, or fax this 4th day of September, 2007.

/s/ *Jeremy R. Jehangiri*

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Jeremy R. Jehangiri
Assistant United States Attorney