KARIN J. IMMERGUT, OSB #96314
United States Attorney
District of Oregon
SCOTT M. KERIN OSB # 96512
Assistant United States Attorney
1000 S.W. Third Ave., Suite 600
Portland, OR 97204-2902
Telephone: (503) 727-1000
Scott.Kerin@usdoj.gov
Attorneys for United States of America

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

UNITED STATES OF AMERICA,	**CR No. 07-477-RE**
v.	**GOVERNMENT'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO SUPPRESS STATEMENTS**
EDGAR FARREL BOISE,	
Defendants.	

The United States of America, by Karin J. Immergut, United States Attorney for the District of Oregon, through Scott M. Kerin Assistant United States Attorney for the District of Oregon, asks the court to deny defendant's motion to suppress the incriminating statements he made on September 17, 2007 and September 18, 2007.

On September 17, 2007, after being taken into custody for stabbing his brother, the defendant made a series of incriminating and voluntary statements. These statements were not made in response to any interrogation by law enforcement officers. On September 18, 2007, the defendant was formally interviewed. After being advised of his constitutional *Miranda* rights,

his rights under the Indian Civil Rights Act, and having the differences between the rights clarified, the defendant acknowledged understanding those rights and voluntarily talked with law enforcement agents and admitted stabbing his brother. Accordingly, his incriminating statements are admissible against him at trial.

A. Facts.

On September 17, 2007, at about 9:00 p.m., Warm Springs Police Officers were dispatched to 4507 Beaver Drive on a report of a stabbing. Officer Dennis White and Sgt. Whittenburg responded and found Diamond Tewee bleeding from his upper abdominal area and lower left side. Tewee was transported to the hospital. A witness at the scene told the responding officers that the defendant had stabbed his brother, Diamond Tewee, and then run off. Shortly thereafter Officer White saw the defendant walking back towards the residence. Officer White told the defendant was told to lie down and he was handcuffed. While the officer was walking the defendant to the patrol car the defendant asked the officer, "what's up Dennis?" Office White told the defendant he was being detained for investigative purposes and for detoxification. Boise blurted out, "I fucked up Dennis." A search of the residence located a bloody knife in the bedroom of Diamond Tewee. Tewee told the officers that his brother Edgar Boise (Boise) had stabbed him.

After the crime scene was cleared, Officer White transported the defendant to jail. En route to the jail the defendant stated that he killed his brother and wanted to die. These were volunteered statements that were not made in response to any police questioning. The defendant was subsequently booked into jail. During a search inside the jail the defendant kept stating,

over and over, "I killed my brother." Again, these were volunteered statements that were not made in response to any questioning.

On September 18, 2008, at approximately 5:12 p.m., Detective Gary Samuel and FBI Special Agent Rhonda Townsend-Schantz interviewed the defendant. Detective Samuel introduced himself to the defendant and told him that he wanted to speak with him about what happened the previous night. The interview took place in a well-lit interview room and the event was recorded. Government Exhibit 1(to be provided at hearing). Detective Samuel told the defendant that since he was in custody and since there was always the possibility of Tribal Court proceedings and/or Federal Court proceedings he was going to advise him of both his *Miranda* rights and, pursuant to the Indian Civil Rights Act, his tribal rights. As an enrolled member of the Warm Springs Tribe the defendant was entitled to be advised of his tribal rights. Detective Samuel further stated he would explain the difference in the forms. The defendant appeared relaxed and the tone of the interview was conversational.

The defendant was first advised of his constitutional *Miranda* rights. Government Exhibit 2. Detective Samuel went through a prepared form and advised the defendant of his rights and, following each right, asked the defendant if he understood his rights. The defendant repeatedly stated he understood them. The defendant further signed the rights advisal form acknowledging that he understood his rights and was willing to talk to the police.

The defendant was then advised of his Warm Springs Confederated Tribal Rights. Government Exhibit 3. Again, Detective Samuel went through and reviewed the defendant"s Tribal Rights one-by-one and the defendant acknowledged understanding each of his rights. The

defendant then signed the form acknowledging he understood his rights and that he was willing to talk to the officers.

Detective Samuel then explained the difference in the two sets of rights to the defendant. Detective Samuel told the defendant that under the Indian Civil Rights Act, which Warm Springs follows, in Tribal Court the defendant was entitled to an attorney but he would have to pay for the attorney at his own expense. Conversely, should the defendant be charged with a crime in Federal District Court, off the reservation, an attorney would be appointed for him at no expense. Detective Samuel asked the defendant if he understood the difference in the two sets of rights and the defendant stated that he did. There was no indication that the defendant was under the influence of any substance or that he somehow failed to understand what he was told.

The defendant was then interviewed and voluntarily confessed to stabbing his brother. The defendant stated he, his brother Diamond Tewee, and some other people were at a party and drinking. The defendant told the agents he was intoxicated. At some point during the night he told the agents that he got into an argument or fight with his brother and that he ended up getting a knife and stabbing his brother in the chest. The defendant is approximately 36 years old and has had prior encounters with both the Warm Springs Tribal Courts and the state criminal courts.

Defendant now asserts that his statements given during contact with law enforcement were coerced, involuntary, and in violation of *Miranda*. Defendant further contends that he was confused about his right to counsel - whether one would be appointed or he would have to pay for one. Defendant's arguments should be rejected. The defendant was properly advised of his rights per *Miranda*, as well as his tribal rights. Defendant knowingly, intelligently, and voluntarily waived his rights per *Miranda*, as well as his tribal rights. Contrary to defendant's

assertions, law enforcement agents properly explained his rights and the differences between them. There is absolutely no evidence that the defendant did not understand his rights. His motion should be denied.

B. General Law of *Miranda.*

When a defendant is in custody and subject to police questioning there is a two-step process employed to determine whether any statements made by the defendant are admissible. First, did the police comply with the dictates of *Miranda*? Second, were any resulting statements voluntarily made? Here, the police complied with *Miranda* and the defendant's statements were voluntarily made and are thus admissible against him at trial.

The Fifth Amendment privilege against self-incrimination provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." The primary purpose of the Fifth Amendment is to prevent police from coercing involuntary statements from suspects. In *Miranda*, the Supreme Court established a procedural mechanism, the specific advisal of rights, to safeguard a defendant's Fifth Amendment privilege against the inherently coercive nature of custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). Thus, before law enforcement agents may interrogate a suspect in custody, *Miranda* holds they must inform the suspect he has the right to remain silent, that his statements may be used against him in court, that he has the right to the presence of an attorney, and that if he cannot afford one, one will be appointed for him prior to questioning. *Id.* at 479. The Supreme Court has held that the standard for determining the adequacy of *Miranda* warnings is whether they reasonably convey a suspect's rights. *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989).

Interrogation constitutes "words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response." *Rhode Island v. Innis*, 446 U.S. 291, 302 (1980); *United States v. Salgado*, 292 F.3d 1169, 1172 (9th Cir. 2002) ("The test to determine whether questioning is 'interrogation' within the meaning of *Miranda* is whether 'under all of the circumstances involved in a given case, the questions are reasonably likely to elicit an incriminating response from the suspect.'"). Telling a defendant about the evidence against him, the natures of charges he is facing or about other information that may help him make decisions about how to proceed with his case is not interrogation. *United States v. Thierman*, 678 F.2d 1331, 1334 n. 3 (9th Cir.1982) (interrogation does not include informing the suspect of the evidence against him, informing a suspect of new charges, showing a suspect a picture of himself committing a robbery and asking if he wanted to reconsider his assertion of his rights).

A person, after being advised of his or her rights may voluntarily, knowingly, and intelligently waive those rights and talk with agents. *Miranda*, 384 U.S. at 475. In assessing both the validity of the *Miranda* waiver and whether the resulting statements are voluntary, the courts examine the totality of the circumstances. *Moran v. Burbine*, 475 U.S. 412, 421 (1986).

An inculpatory statement is deemed voluntary "when it is the product of a rational intellect and a free will." *Beaty v. Schriro*, 509 F.3d 994, 999 (9th Cir. 2007). "The test is whether, considering the totality of the circumstances, the government obtained the statement by physical or psychological coercion or by improper inducement so that the suspect's will was overborne." *Id.; Pollard v. Galaza*, 290 F.3d 1030, 1033 (9th Cir. 2002) (citing *Collazo v. Estelle*, 940 F.2d 411, 416 (9th Cir. 1991)) (in assessing whether the defendant's statements were

voluntarily made the courts look to whether "the confession [is] the product of an essentially free and unconstrained choice by its maker?"). Factors to be considered by the court in assessing whether the statements are voluntary include the defendant's intelligence, education, age, familiarity with the criminal justice system, physical and mental condition, the nature and location of the questioning, and the manner of questioning. *Pollard*, 290 F.3d at 1034*; Derrick v. Peterson*, 924 F.2d 813, 819, 821 (9th Cir. 1990) (age, intelligence and past experience with justice system); *United States v. Fisher*, 137 F.3d 1158, 1165 (9th Cir. 1998) (nature and location). Where a defendant has been advised of his or her constitutional rights, and there is no conduct by the police that overbears the person's free-will, the resulting statements are presumed to be voluntarily made and admissible against the person. *Id.; see also Colorado v. Connelly*, 479 U.S. 157, 167 (1986) (absent coercive activity a post-advisal statement is considered voluntary for Fifth Amendment purposes); *Derrick v. Peterson*, 924 F.2d 813, 816 (9th Cir. 1990) ("a confession is only involuntary under the fourteenth amendment if the police use coercive activity to undermine the suspect's ability to exercise his free will" and the "[p]ersonal characteristics of the defendant are constitutionally irrelevant absent proof of coercion."). A signed *Miranda* waiver form is a powerful indicator of a defendant's voluntary waiver of his rights. *North Carolina v. Butler*, 441 U.S. 369, 373 (1979).

A defendant can voluntarily waive his constitutional rights and make voluntary statements even when his mental faculties are impaired by alcohol or other reasons. *United States v. Kelley*, 953 F.2d 562, 565 (9th Cir. 1992) (despite a defendant's intoxication, a statement is voluntary if it is "the product of a rational intellect and a free will."); *Medeiros v. Shimoda*, 889 F.2d 819, 823 (9th Cir. 1989) (defendant's statements were voluntary where, "although he

was intoxicated, he was not incapacitated."); *see also, United States v. Rodriguez-Rodriguez,* 393 F.3d 849, 855 (9th Cir.), *cert. denied,* 544 U.S. 1041 (2005) (noting Ninth Circuit case law supports finding that individuals going through heroin withdrawal can voluntarily and intelligently waive *Miranda* rights)(internal citations omitted); *United States v. George,* 987 F.2d 1428, 1430-31 (9th Cir. 1993)(voluntary waiver of rights and resulting statements admissible where defendant was in critical condition in hospital suffering from drug overdose); *United States v. Lewis,* 833 F.2d 1380, 1384-85 (9th Cir. 1987) (statements voluntary where defendant had recently returned from surgery, was in pain, and had recently received a general anesthetic); *United States v. Martin,* 781 F.2d 671, 673-74 (9th Cir. 1985)(statements voluntary even though defendant was under the influence of a pain killer and still in great pain).

If the court concludes that the defendant's statements should be suppressed due to a *Miranda* violation, the statements, if voluntarily made, are still admissible during the cross-examination of the defendant. *Harris v. New York,* 401 U.S. 225 (1971).

C. The Defendant's Statements are Admissible against him at Trial.

1. The defendant's statements on the evening of September 17, 2007, were not made in response to police interrogation and were voluntarily made.

On the night of September 17, 2007, the defendant was taken into custody for stabbing his brother. After being told he was being detained for investigative purposes and for detoxification he said: "I fucked up Dennis." Later the defendant was transported to the Warm Springs Tribal jail.

En route the defendant told the officer that he thought he had killed his brother and he wanted to die. When the defendant arrived at the jail he was subject to a search to make sure he did not have any weapons of contraband on him prior to being placed into a jail cell. While the defendant was taking off his clothes he kept saying "I killed my brother."

None of these incriminating statements were preceded by or made in response to any interrogation by law enforcement officers. The defendant's statements at the crime scene, while being transported, and at the jail all appear to reflect a real feeling of remorse for stabbing his brother and thinking, at the time, that he had killed his brother. While his brother survived the stabbing, the defendant was apparently unaware of that at the time. But, whatever the defendant's motivation for making the statements, the fact remains that the statements were voluntarily made and were not made in response to any interrogation by officers.

Accordingly, the issue then becomes whether the defendant's statements were voluntarily made. While the defendant had been drinking, there is no indication that his statements were anything other than the product of his own free will. The defendant was walking and able to comply with the officers commands while being taken into custody. While alcohol might have loosened his tongue, he was not incapacitated and his statements were in no way the product of police coercion or improper conduct.

Rather, the defendant voluntarily shared his feelings of remorse with the police and they are now admissible against him at trial.

2. The defendant's statements on September 18, 2007, during his formal interview with the police, were voluntarily made after being advised of his Constitutional and Tribal Rights.

a) The defendant was appropriately advised of his rights.

The defendant was appropriately advised of his *Miranda* rights and his Tribal Rights prior to any questioning. Per *Miranda*, he was explicitly told that he had the right to remain silent, that his statements may be used against him in court, that he has the right to the presence of an attorney, and that if he cannot afford one, one will be appointed for him prior to questioning. Per his Tribal Rights he was told he had the right to an attorney but was required to pay for the attorney at his own expense. The interviewing detective explained the rights and the differences between the two sets of rights. The defendant acknowledged understanding these rights, their differences, and then knowingly and voluntarily waived his rights and talked with the police. The officers did not engage in any conduct that could be construed as overbearing the defendant's free will. Accordingly, the agents complied with the requirements of *Miranda* and the defendant's resulting statements are admissible at trial.

Defendant, however, asserts that the subsequent advisal of his Tribal Rights created confusion about his ability to have an attorney appointed. Notably forgotten in defendant's assertions is the fact that he is an enrolled member of the Confederated Tribes of the Warm Springs Indian Reservation. As such, he is entitled to hear both sets of rights because any tribal member may face arrest, prosecution, and sentencing consequences in both tribal and federal courts and Warm Springs Police personnel are directed to advise tribal members of tribal rights. Here, however, there was no confusion in the rights the defendant retained because Detective Samuel carefully reviewed the defendant's rights with him and explained the differences.

In making his argument that being advised of both Tribal rights and *Miranda* rights caused confusion, rendering his waiver of those rights invalid, the defendant relies primarily upon the Ninth Circuit's holding in *United States v. San Juan-Cruz*, 314 F.3d 384 (9th Cir. 2002). In *San Juan-Cruz*, the defendant was arrested for an immigration violation. *Id.* at 386. A Border Patrol Officer initially advised the defendant his administrative rights for purposes of an immigration hearing. These rights informed the defendant that he had the right to counsel at his own expense.[1] *Id.* The agent then explained to the defendant that he could also be charged criminally and thereafter read standard *Miranda* warnings to the defendant. *Id.* at 386-87. The court found that, based on the totality of the circumstances, the reading of these two warnings was confusing.

> From San Juan's perspective, it was entirely unclear what the nature of his rights was under the Fifth Amendment. Specifically, San Juan could not reasonably ascertain from the warnings provided to him by the Government whether he could or could not retain the services of an attorney for free.

Id. at 388. In ruling that the defendant's *Miranda* advisal was therefore inadequate the court stated "the *Miranda* warning must be read and conveyed to all persons clearly and in a manner that is unambiguous." *Id.* at 389. The court went on to explain that these seemingly inconsistent advisal of rights could have been easily rectified had the agent merely clarified his statements to the defendant. *Id.* at 389. Here, Detective Samuel did just that.

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[1] These rights advise a detainee that he or she has "the right to be represented at no expense to the Government. The examining officer will provide the alien with a list of the available free legal services. . . ." 8 C.F.R. § 287.3(c).

While defendant argues that Detective Samuel's explanation only created additional confusion, his assertions are contrary to caselaw. The Supreme Court has stated that there are no magical words an officer need use in informing a defendant of his *Miranda* rights. *Duckworth,* 492 at 202 (1989). In *Duckworth,* police officers read an advice of rights form to the defendant that stated, in part, that the defendant had the right to consult with counsel prior to questioning and to have counsel present during questioning. The form also stated, "We have no way of giving you a lawyer, but one will be appointed for you, if you wish, *if and when you go to court.*" *Id.* at 198 (emphasis added). In finding the warning sufficient, the Court stated:

> Reviewing courts therefore need not examine *Miranda* warnings as if construing a will or defining the terms of an easement. The inquiry is simply whether the warnings reasonably "conve[y] to [a suspect] his rights as required by *Miranda*."

Id. at 203 (alteration in original)(citation omitted). The Court found that the warning "touched all of the bases required by *Miranda*." *Duckworth*, 492 U.S. at 203. The Court was not troubled by the officers' statements that the defendant would not receive an attorney until he appeared in court. The Court found that it was likely that most defendants asked *when* they would get an attorney and the warning simply provided that information. *Id.* The Court found that, in its totality, the warning reasonably conveyed the defendant's rights and the defendant's statements were, therefore, admissible.

Here, Detective Samuel addressed and rectified the problem that the Court in *San Juan-Cruz* was so concerned with: namely making sure a defendant sufficiently understood the rights he possessed. Not only did Detective Samuel deliberately and carefully review with the defendant his rights, one-by-one, he also clarified the interplay of the rights and the highlighted

the differences for the defendant. There is no question that there is a fundamental difference in the *Miranda* rights and the Tribal Rights regarding whether the government will provide the defendant with counsel or whether he is responsible for retaining counsel. This difference does not invalidate the adequacy of *Miranda* warnings. The issue is simply whether or not circumstances created so much confusion that "it was entirely unclear what the nature of [the defendant's] rights was under the Fifth Amendment." *San Juan-Cruz,* 314 F.3d at 388.

Unlike the circumstances in *San Juan-Cruz*, the warnings rendered to defendant reasonably conveyed the defendant's rights in a manner that was neither confusing nor affirmatively misleading. Both the written warnings and Detective Samuel's oral comments distinguished between two categories of rights – tribal and federal. The tribal warning form informed the defendant that he had the right to have an attorney present at his own expense for offenses prosecuted tribally. Detective Samuel told defendant that, as a tribal member, he could have counsel present but would have to hire counsel on his own, and that if he was charged with a federal offense an attorney would be appointed by the court. In stark contrast to *San Juan-Cruz*, it was clear in the case when each set of rights applied: the tribal rights applied to offenses tried in tribal court and the *Miranda* rights applied to offenses tried in federal court. The defendant was consistently informed that different rights attached to tribal and federal charges, and that he could be facing charges in both sovereigns' courts.

Courts have found that in cases where the administration of *Miranda* rights may have been confusing, that alone is not always fatal to the admissibility of a defendant's statement. In *United States v. John Doe*, 819 F.2d 206 (9th Cir. 1985), the Court affirmed a conviction of a

juvenile who had been given his tribal advice of rights along with his *Miranda* rights in the morning. The defendant told officers he did not understand his rights. Later in the afternoon, officers again read the defendant his *Miranda* rights and the defendant answered questions. The court found no support in the record for defendant's argument that because he had been advised of both his tribal and *Miranda* rights, he "could only have been confused" about his right to appointed counsel. *Id.* at 209. The court found that there was nothing in the record to show that the defendant was too upset or otherwise unable to understand his rights, especially in light of the written waiver of those rights. *Id.*

Here, the defendant read both sets of rights. Detective Samuel carefully reviewed both sets of rights with defendant and the defendant had no questions about his rights. Detective Samuel specifically asked the defendant if he understood the difference in his rights and the defendant said he did. Under the totality of the circumstances in this case, Detective Samuel reasonably conveyed to defendant his rights by reading and discussing them with defendant. The defendant was able to "reasonably ascertain" from those warnings that he was entitled to a lawyer and when he would either have to obtain that lawyer on his own or have one appointed for him. While he might now assert there was some confusion, at the time Detective Samuel clearly explained the defendant's rights to him and the defendant stated that he understood his rights and wished to waive them. The agents complied with the directives outlined by *Miranda*.

b) The defendant knowingly and voluntarily waived his rights.

After being advised of his rights the defendant knowingly and voluntarily waived his *Miranda* rights and voluntarily talked with Detective Samuel. The *Miranda* advise of rights

form the defendant signed stated: “I have read this statement of my rights and I understand what my rights are. At this time, I am willing to answer questions without a lawyer present.” Government Exhibit 2. The defendant also affirmatively stated he understood his rights. At the time of the interview the defendant was sober and there are no indications that his mental or physical faculties were impaired in any way. Under the totality of the circumstances the defendant’s waiver of his rights was knowingly and voluntarily made.

c) The defendant’s statements were voluntarily made.

After waiving his rights, the defendant voluntarily talked and confessed to stabbing his brother. The key factor for the Court is whether the defendant’s statements were the “product of a rational intellect and a free will.” Here they were. As noted, at the time the defendant was formally interviewed by Detective Samuel he was sober and there are no indications that his mental or physical faculties were impaired in any way. The interview was conducted in a well-lit interview room and the defendant was sitting at a table next to the detective. The defendant was not handcuffed and appears to comfortably rest his arms on the table while talking to the detective. The tone of the interview is conversational and there are no indications of any coercion. The defendant also had prior encounters with both the Warm Springs Tribal Courts and the state criminal courts. Throughout the interview the defendant tracks the detective’s questions and gives appropriate answers to the questions that were asked. Based upon the totality of the circumstances the defendant’s statements were knowingly and voluntarily made and admissible against him at trial.

Conclusion

For the reasons outlined above, the government asks the court to deny defendant's motion to suppress statements.

DATED this 17th day of September 2008.

Respectfully submitted,
KARIN J. IMMERGUT
United States Attorney

s/ *Scott M. Kerin*
SCOTT M. KERIN, OSB # 96512
Assistant United States Attorney