

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

CR 11-50031

Plaintiff,

vs.

DEFENDANT'S OBJECTIONS
TO MAGISTRATE'S REPORT
AND RECOMMENDATION

LEONARD CHASE ALONE, JR.,

Defendant.

COMES NOW Defendant Leonard Chase Alone, Jr., by and through his undersigned attorney, Assistant Federal Public Defender Gary G. Colbath, Jr., pursuant to 28 U.S.C. § 636(b)(1), and respectfully makes the following objections to the Report and Recommendation on motion to suppress issued by the Magistrate Court on May 9, 2011. Defendant requests that this Court make its own *de novo* determination of the issues presented within the findings and recommendation. *Hudson v. Gammon*, 46 F.3d 785 (8th Cir. 1995). Defendant incorporates herein the arguments and authorities set forth in his motion to suppress and supporting memoranda for this Court's consideration in making its *de novo* review of this matter.

Factual Objections

Defendant agrees with the factual findings made by the Magistrate Court. Additional facts relevant to discussion of his legal objections will be noted below, if necessary.

Legal Objections

Defendant objects to the following legal conclusions made by the Magistrate Court:

1. Defendant objects to the conclusion that his statements to the FBI were voluntary. Based upon a totality of the circumstances, his statements should be found to have been involuntary. Chase Alone is a poorly educated individual who has never been charged with a federal crime nor interviewed by the FBI. He was arrested and charged with several Tribal offenses, including a charge of sexual abuse. He obtained a Tribal attorney licensed to represent him in Tribal court upon whom he relied for legal advice and protection of his legal rights during his defense of the charges against him. He was held in Tribal jail for the charges levied against him. FBI agents showed up and asked to interview him about the very same incident and allegations for which he was charged by the Tribe. They provided him confusing information telling him he was not under arrest and would not be charged following any interview. They did little to explain any differences between the Tribal and Federal processes. Chase Alone's Tribal attorney had told him the "feds" may interview him and that Tribal officials were only holding him until he talked to the federal authorities. Chase Alone's understanding was that once that contact occurred, he could be released. This mistaken belief was confirmed by the agents when they told him "you will not be arrested after this interview" and no federal charges or hold is pending against you now. Given the custodial environment of the interrogation, Chase Alone's limited intellect, and the misinformation provided to him about the "need" for the interview, his statements should be found to be involuntary.

2. Defendant objects to the conclusion that any waiver of his *Miranda* rights was made in a knowing, voluntary, and intelligent fashion. For the same reasons that his statement

should be found to have been involuntary as noted above, Chase Alone's waiver of his *Miranda* rights should be invalidated. Moreover, given Chase Alone's limited intellect and the confusing information provided by his Tribal counsel, as compared to that provided by the FBI agents, his waiver should be invalidated as it was not knowingly and intelligently made. Under the circumstances here, Chase Alone can certainly not be found to have had a "full awareness of both the right being abandoned and the consequences of abandoning the right." *Thai v. Mapes*, 412 F.3d 970, 977 (8th Cir. 2005) (emphasis added).

3. Defendant objects to the conclusion that his Sixth Amendment Right to counsel was not violated pursuant to *United States v. Red Bird*, 287 F.3d 709 (8th Cir. 2002). The Magistrate Court relies on the factors relevant to this analysis that 1) there is no evidence supporting a similarity of the elements of the charges faced in Tribal court and those pending herein; 2) whether Defendant had a right to counsel under Tribal law; and 3) whether his attorney, Ken Bordeaux, qualified as "counsel" under the Sixth Amendment. These factors are present to a sufficient extent to support Chase Alone's claim.

First, Chase Alone was charged with "sexual abuse" as he and the agents described it. The charge arose out of his alleged contact with "E" on February 20, 2011. Agent Rice testified that she was aware of the charge and that she was investigating that exact allegation and circumstance. The present superseding indictment charges Chase Alone with one count of Abusive Sexual Contact occurring with "E" on February 20, 2011. There can be no doubt that the charged incidents and conduct are the same. Even if there is a slight difference in the

elements of the allegations, the government and/or law enforcement should not be able to circumvent a defendant's Sixth Amendment right by charging the same factual matter in two slightly different ways to avoid implicating a right to counsel.

Next, because he was charged with a criminal offense, Chase Alone was entitled to counsel in Tribal court under Chapter 14, Rule 4 of the Oglala Sioux Tribal Code. This is not a matter subject to the taking of evidence but rather a legal determination for the Court. In that regard, Rule 14-4 provides in part that "[t]he Trial Judge shall appoint a defense attorney if the defendant is unable to secure a Defense Attorney." It is undisputed in the record that Chase Alone was provided this right and had Tribal Attorney Ken Bordeaux representing him at the time he was contacted by the FBI.

Finally, this Court should find that Mr. Bordeaux qualifies as "counsel" for Sixth Amendment purposes. First, Bordeaux was properly licensed and authorized to appear in Tribal Court and represent Chase Alone under Tribal law and court rules. It is also undisputed that Chase Alone relied on Bordeaux's services and considered him as "his lawyer" in relation to the allegations against him regarding what happened with "E" on February 20, 2011. Last, the government presented no evidence to contradict Chase Alone's assertion that Bordeaux was his lawyer. At the time of the FBI interview, Agent Rice knew Chase Alone had pending charges and knew he had Tribal counsel.

Given the circumstances here, the factors relevant for the Court's consideration, as set forth in *Red Bird, supra*, and its progeny, support a conclusion that Chase Alone was denied his

right to counsel. Moreover, with the enactment of the Tribal Law and Order Act of 2010, 111 P.L. 211; 124 Stat. 2258, the federal government recognized with even greater force the need to promote and foster Tribal autonomy in operating independent justice systems. The clear intent of the Act was to help improve Tribal justice systems giving recognition to the rights, authorities, and powers they have. An Indian person should be able to rely on the services of counsel, lawfully acquired during the pendency of Tribal criminal proceedings and be secure in believing his or her rights are protected during the investigation and prosecution of the matters arising from the charges. Such an individual should not have to know or understand the difference between Tribal, state, and federal courts and the varying laws applicable to the admission and service of counsel in order to have one's rights protected. Counsel properly recognized under the law of the Tribe should be sufficient to trigger a defendant's Sixth Amendment right and protection during all subsequent investigation related to the same incident.

Dated this 19th day of May, 2011.

Respectfully submitted,

NEIL FULTON
Federal Public Defender
By:

/s/ Gary G. Colbath, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of May, 2011, a true and correct copy of the Defendant's Objections to Magistrate's Report and Recommendations was served upon the following person, by placing the same in the service indicated, addressed as follows:

Sarah B. Collins	<input type="checkbox"/>	U.S. Mail
Assistant U.S. Attorney	<input type="checkbox"/>	Hand Delivery
United States Courthouse	<input type="checkbox"/>	Facsimile
515 Ninth Street	<input type="checkbox"/>	Federal Express
Rapid City, SD 57701	<input checked="" type="checkbox"/>	Electronic Case Filing

/s/ Gary G. Colbath, Jr.

Gary G. Colbath, Jr., Assistant Federal Public Defender