

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA**

UNITED STATES OF AMERICA,	)	CASE NO. 8:17CR379
	)	
Plaintiff,	)	
	)	<b>BRIEF IN SUPPORT OF MOTION</b>
vs.	)	<b>TO SUPPRESS STATEMENT</b>
	)	
CHRISTOPHER FREEMONT,	)	
	)	
Defendant.	)	

On November 14, 2017, FBI Special Agent Jeff Howard deliberately elicited information from Christopher Freemont about an allegation for which Mr. Freemont had been charged and appointed counsel. This statement should be suppressed as a violation of the Sixth Amendment.

This brief supports a previously filed motion to suppress.

**FACTS**

On May 5, 2017, L. R. accused Christopher H. Freemont of an assault. These accusations were made to an officer of Omaha Nation Law Enforcement Services who drafted an incident report. Based upon L. R.'s May 5, 2017 accusation and the officer's report, on May 12, 2017, the Omaha Tribe of Nebraska charged Mr. Freemont with domestic abuse and aggravated assault. The case number in tribal court was CR-17-05-056.

On May 22, 2017, the Omaha Tribal Court held an arraignment in CR-17-05-056. At this arraignment, Mr. Freemont received a copy of the complaint and pled not guilty to both counts. The tribal court appointed a public defender, Nate Merrick, to

defend Mr. Freemont.

Mr. Merrick appeared in tribal court on Mr. Freemont's behalf on August 9, 2017 in CR-17-05-056. The tribal court held a hearing in CR-17-05-056 attended by Mr. Freemont and Mr. Merrick on September 15, 2017.

On October 1, 2017, the FBI received a referral from Omaha Nation Law Enforcement Services requesting an investigation into Mr. Freemont's alleged assault of L.R.

On October 25, 2017, Christopher Freemont again appeared in tribal court with his public defender in CR-17-05-056. His bond was continued and the matter was set for a jury trial on December 27, 2017.

A full investigation into the alleged May 5, 2017 assault was initiated by the FBI on November 14, 2017. That day, with Freemont's December jury trial pending before the tribal court, SA Jeff Howard visited Mr. Freemont at his home on South Taft Street in Walthill, Nebraska. SA Howard interrogated Mr. Freemont at his home about the May 5, 2017 incident. During this interrogation, Mr. Freemont made incriminating statements about the May 5, 2017 incident. At the time the interrogation took place, Mr. Freemont was represented by an appointed public defender regarding the subject of the interrogation and the public defender was absent.

On December 12, 2017, a grand jury in the District of Nebraska returned a one-count indictment alleging a domestic assault by a habitual offender, in violation of 18 U.S.C. § 117. This charge pertained to the May 5, 2017 incident with L.R. Three days later, on December 15, 2017, the Omaha Tribe of Nebraska dismissed its case against

Mr. Freemont in favor of the federal prosecution.

### ANALYSIS

**The statement provided by Mr. Freemont must be excluded as a violation of his right to counsel under the Sixth Amendment.**

The Sixth Amendment right to counsel is triggered “at or after the time that judicial proceedings have been initiated . . . ‘whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.’” *Brewer v. Williams*, 430 U.S. 387, 398 (1977)(quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972)). The Sixth Amendment guarantees defendants the right to counsel at “all ‘critical’ stages of the criminal proceedings.” *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009) (quoting *United States v. Wade*, 388 U.S. 218, 227-28 (1967)). Interrogation is a critical stage. *Id.* (citing *Massiah v. United States*, 377 U.S. 201, 204-05 (1964)). An accused is denied “the basic protections” of the Sixth Amendment “when there [is] used against him at his trial evidence of his own incriminating words, which federal agents ... deliberately elicited from him after he had been indicted and in the absence of his counsel.” *Massiah*, 377 U.S. at 206.

In *Fellers v. United States*, 540 U.S. 519 (2004), officers went to the home of John J. Fellers to arrest him after a grand-jury had returned an indictment against Fellers. The officers knocked on Fellers’ door, identified themselves, and asked to come in. *Id.* at 521. Fellers invited the officers in. Inside, the officers told Fellers that they were there to discuss his involvement in drug distribution. Fellers then made incriminating statements at his home before he was transferred to the county jail, where his *Miranda*

rights were read and waived. Fellers then repeated his inculpatory statements and made further admissions. *Id.* at 521-22. The district court suppressed the statements Feller made at his home, but admitted his jailhouse statements, concluding that he had waived his *Miranda* rights. *Id.* The Eighth Circuit affirmed. *Id.* at 522-23.

The Supreme Court reversed, re-affirming that the officers' "deliberate elicitation" of information at Feller's home triggered the Sixth Amendment. Regarding the interrogation at Fellers' home, the Court held, "Because the ensuing discussion took place after petitioner had been indicted, outside the presence of counsel, and in the absence of any waiver of petitioner's Sixth Amendment rights, the Court of Appeals erred in holding that the officers' actions did not violate the Sixth Amendment standards established by *Massiah* and its progeny." *Id.* at 524-25. Because the statements made at his home had been obtained improperly, the Supreme Court remanded the case for review of the legitimacy of the jailhouse statements under a "fruits" analysis.

Like the officers in *Fellers*, on November 14, 2017, SA Howard approached and deliberately elicited information from Christopher Freemont, who was then charged with an offense. SA Howard was specifically there to inquire about the allegation that Mr. Freemont was then charged with. SA Howard did this outside of the presence of Mr. Freemont's appointed counsel and in the absence of any waiver of Freemont's Sixth Amendment rights.

The Eighth Circuit considered a similar case in *United States v. Red Bird*, 287 F.3d 709 (8th Cir. 2002). In *Red Bird*, the defendant faced a tribal-court rape charge

and was appointed the Rosebud Sioux Public Defender. *Id.* at 711. After the initiation of the tribal prosecution and the appointment of counsel, the FBI learned of the rape allegation. An FBI agent and a BIA agent visited Mr. Red Bird at his house, outside the presence of his public defender, Mirandized him, and questioned him. *Id.* at 711-12. The district court suppressed the statement, having found that the Red Bird's Sixth Amendment right to counsel attached at the time of his arraignment. *Id.* at 712. Specifically, the district court concluded that federal and tribal charges were identical and that the federal and tribal authorities had worked in tandem. *Id.* The district court found that the FBI agent had known about the appointment of counsel at the time of the interview. *Id.*

The *Red Bird* Court affirmed. It noted that the Bill of Rights and the Fourteenth Amendment do not apply directly to tribes and that the right to counsel in tribal cases is statutory and extends only to non-indigent defendants. 287 F.3d at 713 (*citing Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) and the Indian Civil Rights Act, 25 U.S.C. § 1302(6) (2001)). The Court noted that the constitution of the Rosebud Sioux guarantees the right to a licensed attorney from the tribe's public defender's office. *Id.* The Court goes on to note, however, that "[a]lthough the Sixth Amendment does not constrain the conduct of tribal officials, it does apply to the conduct of federal officials. 'The line of authority . . . exempting Indian tribes from Constitutional provisions addressed specifically to State or Federal Governments . . . does not relieve State and Federal Governments of their obligations to individual

Indians under these provisions.” *Id.* at 713 (quoting *Santa Clara Pueblo*, 436 U.S. at 56, n.7 (omissions in original)).

The fact that the Rosebud Sioux guarantee licensed attorneys and the Omaha Nation does not is not a distinguishing factor. *Cf. United States v. Killeaney*, No. CR-07-30063-01-KES, 2007 WL 4459348, at \*6 (D. S.D. December 17, 2007) (unpub. opinion) (holding that it was the appointment of a licensed attorney that rendered the Rosebud Sioux tribal prosecution “adversarial judicial criminal proceedings.”) In *Killeaney*, the district court, singling out the licensure requirement, ignored the other factors cited by *Red Bird* for deciding whether certain proceedings were adversarial, including the use of a criminal complaint, the entrance of a plea, and the exposure to confinement. See 287 F.3d at 716.

Like the agents in *Red Bird*, the FBI and tribal authorities worked in tandem. Chief Tyndall of the Omaha Nation Law Enforcement Services contacted the FBI on October 1, 2017, directly in the midst of Mr. Freemont’s tribal prosecution. Though the Sixth Amendment might not bind, Chief Tyndall, it does bind federal officials like Special Agent Howard.

Moreover, Sixth Amendment rights had attached to Christopher Freemont. The tribal offenses that Mr. Freemont faced before the Omaha Nation – the domestic abuse of L.R. on May 5, 2017, in violation of Omaha Tribal Code § 11-2-1(a) and the aggravated assault of L.R. on May 5, 2017, in violation of Omaha Tribal Code § 5-4-5 – had “identical essential elements when compared with the later federal charges filed.” *Red Bird*, 287 F.3d at 715 (quoting *United States v. Red Bird*, 146 F.Supp.2d

993, 999 (D.S.D. 2001)). And the proceedings before the Omaha Tribal Court – which originated with the filing of a criminal complaint, which precipitated the appointment of a public defender, which required the entry of pleas, and which exposed Mr. Freemont to two years of imprisonment (one year for each count) – were adversarial. *See Red Bird*, 287 F.3d at 716 (citing the appointment of a licensed attorney, the use of a formal criminal complaint, the entry of pleas with an attorney present, and the exposure to confinement as factors in determining whether the proceedings were “adversarial” as defined by *United States v. Gouveia*, 467 U.S. 180, 188 (1984)).

### CONCLUSION

The Sixth Amendment bound FBI SA Jeff Howard in his interactions with Mr. Freemont on November 14, 2017. SA Howard, working in tandem with the Omaha Nation tribal authorities, deliberately elicited a statement from Mr. Freemont outside the presence of his counsel amid adversarial judicial criminal proceedings. Christopher Freemont’s November 14, 2017 statement should be suppressed as a violation of his Sixth Amendment right to counsel.

WHEREFORE, the Defendant, Christopher H. Freemont, moves to suppress the statement he provided on November 14, 2017.

CHRISTOPHER H. FREEMONT, Defendant,

By: s/ Richard H. McWilliams

**RICHARD H. MCWILLIAMS**  
**Assistant Federal Public Defender**  
222 South 15th Street, Ste. 300N  
Omaha, NE 68102  
(402) 221-7896

**CERTIFICATE OF SERVICE**

I hereby certify that on February 21, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the following: Erin Eldridge, Special Assistant United States Attorney, Omaha, NE.

s/ Richard H. McWilliams \_\_\_\_\_