

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

United States of America,

Case No. 21-CR-119 NEB/LIB

Plaintiff,

v.

Descart Austin Begay, Jr.,

Defendant.

**DEFENDANT'S MEMORANDUM**  
**IN SUPPORT OF MOTION TO**  
**SUPPRESS TRIBAL COURT**  
**GUILTY PLEA**

From July 2020 to February 2020, Descart Begay sat in a Red Lake Detention Center cell. For those eight months, Begay appeared at just two Tribal hearings that lasted six-and-a-half minutes during which he was asked nothing, and he said nothing. As the Court neared the end of the maximum time under which Begay could be held, the Tribe presented Begay with a written “proposed plea agreement” even though Begay cannot read and the agreement’s terms were not explained orally. At a subsequent sentencing hearing that lasted barely two minutes, Begay uttered one, unintelligible word to the Court’s suggestion that his time in jail was nearly finished. In all, Begay sat in jail for nine months, attended three hearings that lasted a combined eight minutes, and said one word. While the Tribe did not afford Begay due process in convicting Begay of a Tribal offense, the federal Government seeks to introduce the Tribal conviction in this case as reliable evidence of Begay’s guilt. To make matters worse, the Government colluded with Red Lake law enforcement to convict Begay for the sole purpose of using it against him in a subsequent federal prosecution. The Tribe’s and Government’s

conduct violated Begay's statutory and Constitutional due process rights, and the Court should suppress Begay's Tribal conviction.

## **I. BACKGROUND**

On July 3, 2020, Red Lake law enforcement officers responded to a call about an alleged assault on Tribal land, and later that day, they arrested Descart Begay. (Ex. D5.) That night, FBI Special Agent Justin Montgomery interviewed the alleged victim, he collected physical evidence, and medical staff examined the alleged victim. (Ex. D1.) Three days later, Montgomery and Red Lake Criminal Investigator Garrett Dietman interviewed Begay. (Exs. D4, D23.) The FBI conducted three additional interviews in September. (*See* Dkt. 66 (hereinafter "Hearing Tr., Vol. 1") at 81:23-82:6.) And while it is the FBI agent's usual practice to quickly seek a suspect's Tribal criminal history, Montgomery did not do so. (*See* Dkt. 67 (hereinafter "Hearing Tr., Vol. II") at 141:12-17.)

Meanwhile, Begay appeared at a July 9, 2020 arraignment in Tribal court that lasted four minutes. (Gov. Ex. 5; Ex. D6.) He said nothing during that proceeding. (*See id.*) On August 6, 2020, he appeared at a pre-trial proceeding that lasted two-and-a-half minutes. (Gov. Ex. 6; Ex. D8.) Again, he said nothing. (*See id.*) During both hearings, the Tribal court did not advise Begay of his rights, including:

- His right to be informed of the nature and cause of the accusation;
- His presumption of innocence;
- His right against compelled self-incrimination;
- His right to confront witnesses;
- His right to compulsory process;
- His right to a speedy and public trial; or

- His right to a private attorney.

(*See* Gov. Exs. 5-7; Exs. D6, D8, D11.)

On February 12, 2021, Begay attended a two-minute sentencing hearing during which he uttered one, unintelligible word in response to a comment from the Tribal judge. (Gov. Ex. 7; Ex. D11.) No one at his sentencing hearing explained his due process rights or inquired of Begay whether he was voluntarily pleading guilty to an offense. (*See id.*) In the days preceding this hearing, the Tribe presented Begay with a written proposed plea agreement in which Begay would receive the statutory maximum punishment—one-year in jail. (*See* Gov. Ex. 4.) By that point, Begay had sat in jail for more than eight months, and by law, his incarceration would end shortly even if he refused to sign the proposed plea agreement. (*See* Red Lake Tribal Code Ch. 500.02, subd. 4.<sup>1</sup>) There is no evidence the agreement was explained orally to Begay and that Begay understand the terms of the proposed agreement.<sup>2</sup>

Just five days after his sentencing hearing, FBI agents directed Red Lake law enforcement to ask the Tribal court for Begay's Red Lake criminal history. (Ex. D12; *see* Hearing Tr., Vol. I at 86:19-21.) Such a request—coming over eight months after the FBI opened an investigation—was unusual. (Hearing Tr., Vol. II at 141:12-17.) With the Tribal judgement and proposed plea agreement in hand, the Government presented its case to the Grand Jury, which returned a two-count indictment. (Dkt. 1.)

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<sup>1</sup> Available at

[https://www.maquah.net/Legal\\_Documents/Red\\_Lake\\_Indian\\_Courts/Title\\_05.htm](https://www.maquah.net/Legal_Documents/Red_Lake_Indian_Courts/Title_05.htm).

<sup>2</sup> Begay cannot read, as he explained when interviewed by FBI Special Agent Montgomery. (Gov. Ex. 1.)

## II. ARGUMENT

The Court should suppress the Tribal conviction for either of two reasons. First, Red Lake did not afford Begay due process rights provided by the Indian Civil Rights Act of 1968 (“ICRA”), 25 U.S.C. § 1301 *et seq.* Without such procedural safeguards, this Court has no way to determine whether Begay in fact pled guilty and whether that plea was knowing and voluntary, and thus, reliable. Second, the federal Government colluded with Red Lake law enforcement to secure Begay’s conviction in violation of Begay’s Constitutional due process rights.

### A. Begay’s Tribal court conviction was obtained in violation of his rights under ICRA

The Court should suppress Begay’s Tribal conviction because the Tribe obtained it in violation ICRA’s guarantee of due process. In particular, the circumstances and conditions under which Begay was imprisoned, and the procedures under which the Tribal court convicted Begay do not plausibly conform to any notion of due process.

The Government may not introduce a prior Tribal conviction if that conviction was not the product of a knowing and voluntary waiver of his or her rights. A Tribal conviction is admissible only if it is reliable, and its reliability depends on the Tribe’s compliance with ICRA’s procedural safeguards. *See United States v. Gillette*, 2018 U.S. Dist. LEXIS 47968, at \*12 (D.S.D. Mar. 23, 2018). Although not identical to the Bill of Rights, ICRA protects criminal defendants in Tribal courts. Crucially, Section 1302(a)(8) states no Tribe shall “deny to any person the equal protection of its laws or deprive any person of liberty or property without due process of law.” *See also United States v.*

*Bryant*, 136 S. Ct. 1954, 1966 (2016) (“ICRA itself requires tribes to ensure ‘due process of law,’ § 1302(a)(8), and it accords defendants specific procedural safeguards resembling those contained in the Bill of Rights and the Fourteenth Amendment.”).

“ICRA guarantees tribal-court defendants the right against compelled self-incrimination, the right to ‘be informed of the nature and cause of the accusation,’ the right to confront witnesses and to compulsory process, [and] the right to a jury of at least six persons in criminal cases punishable by imprisonment . . . .” *Gillette*, 2018 U.S. Dist. LEXIS 47968, at \*12; *see also* 25 U.S.C. § 1302(a)(4), (6). Courts often look to Constitutional due process in evaluating the analogous protections ICRA provides. *See generally, id.* at \*14 n.2 (citing *Kelsey v. Pope*, 809 F.3d 849, 864-66 (6th Cir. 2016) (applying federal due process cases to a claim that tribe violated ICRA’s due process clause where the Indian tribe’s criminal procedures did not differ significantly from those employed in Anglo-Saxon society), and *United States v. Schmidt*, 403 F.3d 1009, 1013 (8th Cir. 2005) (“Although the fourth amendment does not apply to the conduct of Indian tribal officials in Indian territory, the same standards are applicable to their actions under the Indian Civil Rights Act of 1968.”)).

At the time of his hearing on February 12, 2021, Red Lake had imprisoned Begay for eight months, during which he had two hearings, the most recent of which was in August 2020, over six months prior. (*See* Ex. D20.) Combined, those two hearings lasted less than six and half minutes, and Begay did not speak a single word in either. (*See* Gov. Exs. 5, 6; Exs. D6, D8.) As of February 2021, Begay had no trial date set. (*See* Ex. D20; *see generally* Hearing Tr., Vol. I; Hearing Tr., Vol. II.)

In Begay’s third hearing, the court imposed a sentence without asking if Begay was pleading guilty to an offence, or asking Begay if he was in fact guilty. In this hearing—which lasted just two minutes and four seconds—Begay uttered only one word, which was unintelligible, and made in response to a remark by the Tribal judge that Begay would be released soon. (Gov. Ex. 7; Ex. D11.) Notably, Begay’s lone comment came *after* the Tribal judge had already imposed a sentence, which was the maximum sentence permissible under the Red Lake Tribal Code. (*See* Gov. Ex. 7; Ex. D11; Dkt. 59 at 5.)

In *United States v. Bundy*, the court held that a defendant’s prior Tribal conviction was inadmissible as substantive evidence in a federal prosecution because it was obtained “in violation of the due process provision of ICRA.” 966 F. Supp. 2d 1175, 1180 (D.N.M. 2013) (stating, “[i]f a defendant’s guilty plea is not voluntary and knowing, it has been obtained in violation of due process and is therefore void”). To assess the Tribal court’s adherence to ICRA, the court first recognized the applicable Tribal law required the judge, before accepting a guilty plea, to explain the defendant’s rights, including, the right against compelled self-incrimination, the right to confront witnesses, the right to a speedy and public trial, and the right to a private attorney. *Id.* The Tribal court gave no such explanation in *Bundy*. *Id.* “Instead of the detailed enumeration of her trial rights contemplated by the Navajo Rules of Criminal Procedure, the page-and-a-half transcript shows a cursory, rudimentary colloquy,” *id.*, nor did the trial court comply with ICRA, *id.* at 1180. Accordingly, “the Court conclude[d] that Defendant’s guilty plea was obtained in violation of the due process provision of ICRA, and . . . is inadmissible as substantive evidence.” *Id.*; *cf. Gillette*, 2018 U.S. Dist. LEXIS 47968, at \*11-14 (identifying indicia

of ICRA-compliant due process as advisement of: (1) the nature of the charges to which defendant is pleading guilty, (2) the maximum penalties for the crimes to which defendant is pleading guilty, and (3) inquiry and confirmation of whether defendant understands the complaints against him).

As in *Bundy*, Begay's Tribal court proceedings did not comply with the provisions of the Red Lake Tribal Code. Chapter 404.01, subd. 4,<sup>3</sup> for example, requires:

Before the defendant is required to plead to any criminal charge, the Judge *shall*;

- a) read the complaint to the defendant and determine that the defendant understands the complaint and the section of the Tribal Code which the defendant is charged with violating, including the maximum authorized penalty; and
- b) advise the defendant that he has the right:
  - 1) to remain silent and that anything he does say may be used against him/her in this or in any subsequent proceedings
  - 2) that he has a right to counsel, at his own expense, in all subsequent proceedings; and if he/she cannot afford the services of counsel then one will be appointed for him/her.
  - 3) that he has a right to talk with his counsel and a continuance will be granted if necessary to enable the defendant to obtain or speak to his counsel;
  - 4) that he has a right to a jury trial or trial by the Court.

(emphasis added).

The Tribal court failed to advise Begay of these rights at his arraignment. (*See* Gov. Ex. 5, Ex. D6.) Instead of reading the complaint and informing Begay of his rights under Tribal law, as he was required to do, the Tribal judge merely asked Begay open-endedly if he understood his rights. Although Begay provided no response to the

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<sup>3</sup> Available at [https://www.maquah.net/Legal\\_Documents/Red\\_Lake\\_Indian\\_Courts/Title\\_04.htm#\\_To\\_c66022814](https://www.maquah.net/Legal_Documents/Red_Lake_Indian_Courts/Title_04.htm#_To_c66022814).

question, the Tribal judge continued, “You understand? Okay. Alright.” (*Id.*) Regardless of whatever nonverbal cue the Tribal judge may have interpreted from Begay or his counsel—of which there is no record—the applicable provisions of the Tribal Code do not grant a judge the discretion to skip steps as crucial as ensuring a criminal defendant is fully appraised of his legal rights. *See Bundy*, 966 F. Supp. 2d at 1179 (finding it was insufficient for the Tribal judge to ask “Do you understand your rights as explained to you” rather than the enumeration of those rights required by the Navajo Rules of Criminal Procedure).

More concerning is the Tribal court’s failure to comply with the Tribal Code governing a change-of-plea proceeding. Red Lake Tribal Code Chapter 404.01, subd. 8<sup>4</sup> requires:

If the defendant enters a plea of guilty, the judge shall accept the plea only if he is satisfied that the plea is made voluntarily and the defendant understands the consequences of the plea. The judge may then impose sentence or defer sentencing for a reasonable time in order to obtain and consider any information that he deems necessary for the imposition of a just sentence. The defendant shall be given an opportunity to be heard by the Court prior to sentencing.

Like in state and federal court, before a Red Lake Tribal Court accepts a guilty plea, the Tribal judge must ensure the plea is voluntary and that the defendant “understands the consequences of the plea.” The Tribal court failed to do so for Begay. During Begay’s two-minute- sentencing hearing, (*see* Ex. D20), the Tribal judge never

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<sup>4</sup> Available at [https://www.maquah.net/Legal\\_Documents/Red\\_Lake\\_Indian\\_Courts/Title\\_04.htm#\\_To\\_c66022814](https://www.maquah.net/Legal_Documents/Red_Lake_Indian_Courts/Title_04.htm#_To_c66022814).

affirmed or inquired whether Begay was pleading guilty and whether the change of plea was voluntary, and at no point did the judge affirm or inquire whether Begay understood the consequences of a guilty plea. (*See* Gov. Ex. 7; Ex. D11.) Those failures violated the Red Lake Tribal Code, and they violated ICRA. Like in *Bundy*, the Court should conclude these violations of Tribal law establish that Begay’s plea was not knowing and voluntary, and as such, the Court should suppress the Tribal conviction.<sup>5</sup>

**B. The Government improperly colluded with the Red Lake Tribe to obtain Begay’s conviction of a Tribal offense**

Besides the Tribe’s failure to provide to Begay ICRA-required due process, the Government separately colluded with Red Lake law enforcement again in violation of Begay’s due process rights. Impermissible coordination or collusion between the law enforcement authorities of separate sovereigns violates the federal constitutional rights of criminal defendants. In *United States v. Alvarez-Sanchez*, 511 U.S. 350, 359 (1994), the Supreme Court observed “collusion” between state or local authorities and federal officials can implicate the federal rights of criminal defendants even in a non-federal arrest. And in *Barktus v. Illinois*, 359 U.S. 121, 123 (1959), the Court noted, albeit related to a separate Constitutional right, that the dual sovereignty doctrine does not permit one

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<sup>5</sup> By all accounts, the records of the three hearings represent the entirety of the process the Tribe gave to Begay. (Hearing Tr., Vol. II at 143:20-25, 144:25-145:2.) Special Agent Nilson admitted that in his review of the records, there was no evidence that Begay had been orally advised of his rights at any Tribal court hearing. (*Id.* at 143:5-9.) Nor did Special Agent Nilson recall any evidence that Begay had been orally advised of his right against compelled self-incrimination, his right to a private attorney, his right to confront witnesses, or his right to be informed about the nature and cause of the accusation. (*See id.* at 143:5-21.)

sovereign to use the prosecution of another “merely as a tool” for its own, subsequent prosecution.

Here, the Government used Red Lake law enforcement as a tool in prosecuting Begay twice. Red Lake Tribal police arrested Begay on July 3, 2020, and that night, the FBI interviewed the alleged victim. (Ex. D1; D2.) Three days later, Red Lake Criminal Investigator Dietman and then-FBI Special Agent Justin Montgomery interrogated Begay during which Begay admitted to consensual sexual relations with the alleged victim. (Exs. D4, D23.) The FBI interviewed three additional witnesses in early September 2020. (*See* Hearing Tr., Vol. 1 at 81:23-82:6.) No other witness interviews were conducted, (*see id.* at 81:17-20), and thus, the Government presumably possessed sufficient evidence to charge Begay by September 2020, but did not.

Despite still purportedly conducting an active investigation, the only meaningful evidence the Government obtained after September 2020 was the February 12, 2021 proposed plea agreement and Tribal court sentencing proceeding. Notably, there is no record that Tribal police obtained any new evidence between September 2020 and February 2021 either. Indeed, Criminal Investigator Dietman stated, to his knowledge, there were no witnesses interviewed as part of the Red Lake investigation other than Begay and the alleged victim. (*Id.* at 81:17-20; *see also id.* at 82:11-13 (Q: “If those interviews had occurred after July 6th, wouldn’t you have known about them?” A: “I should have.”).)

All this time, Begay remained incarcerated in Tribal jail, with no trial date set and no record of any communication regarding possible plea agreements. Then, in February

2021, without any apparent explanation, Red Lake prosecutors offered Begay a “proposed plea agreement” in which Begay enters a guilty plea and in exchange receives the jurisdictional maximum sentence. Again, there is no evidence Begay was aware of the terms of this agreement. Despite the absence of investigative activity by either law enforcement entity, on February 17, 2021—five days after Begay’s sentencing—Criminal Investigator Dietman, at the behest of the FBI, sent a letter to the Red Lake Nation Tribal Court requesting Begay’s criminal history, because “[t]he Red Lake Department of Public Safety/Criminal Investigation and the FBI is conducting an investigation involving [Descart Begay].” (Ex. D12; Dkt. 66 at 86:19-21.)

The timeline of events and factual record show the government played an improper role in procuring Begay’s conviction in Tribal court. The Government’s investigation into Begay had been functionally dormant for nearly half a year. However, following Begay’s sentencing, the FBI instructed Criminal Investigator Dietman to draft a letter saying the Tribal police “and the FBI” were conducting an investigation. The unusual timing of this request is significant; Special Agent Nilson even admitted the timing of the criminal history request for Begay was atypical. In response to a question about when someone from the FBI would normally have asked Criminal Investigator Dietman to request criminal history records, Special Agent Nilson answered, “it’s usually right away when the case is open; so within a couple weeks of the FBI opening the case, we would have had Red Lake request his Tribal criminal history.” (Hearing Tr., Vol. II at 141:12-17.) Special Agent Nilson’s statement and the FBI’s failure to follow normal procedures in requesting Begay’s Tribal criminal history indicate the FBI was aware

there was insufficient evidence to establish a case against Begay. Only with a Tribal court conviction would the Government possess the additional evidence its legitimate investigation had failed to uncover. Such coordination contradicts due process.<sup>6</sup>

Because of the evidence of improper coordination between federal and Tribal law enforcement authorities in procuring Begay's Tribal conviction, the Court should suppress all evidence related to Begay's conviction.

### **III. CONCLUSION**

The Court should suppress all evidence related to Begay's Tribal conviction because his Tribal court proceedings failed to give him the minimum due process required by ICRA, and the Government colluded with Red Lake law enforcement to convict Begay in violation of his statutory and U.S. Constitutional rights.

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<sup>6</sup> Begay's motion to compel communications between members of the FBI and Red Lake Tribal law enforcement is currently pending before the Court. (*See* Dkts. 38, 59.) In its response to the motion to compel, the Government admits the requested communications exist. (*See* Dkt. 49 at 7.)

Dated: October 18, 2021

Respectfully submitted,

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