

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Cr. No. 21-119 (NEB/LIB)

UNITED STATES OF AMERICA,

Plaintiff,

v.

DESCART AUSTIN BEGAY, JR.,

Defendant.

**GOVERNMENT’S RESPONSE TO
DEFENDANT’S MOTION TO
SUPPRESS TRIBAL COURT GUILTY
PLEA AND MEMORANDUM IN
SUPPORT THEREOF**

The United States of America, by and through its attorneys, Charles J. Kovats, Jr., Acting United States Attorney for the District of Minnesota, and Evan B. Gilead, Assistant United States Attorney, files this Response to Defendant Descart Austin Begay, Jr.’s (Begay) Memorandum in Support of his Motion to Suppress Tribal Court Guilty Plea—ECF No. 71. For the grounds set herein, the government requests this Court deny Begay’s request.

BACKGROUND FACTS

A. Procedural Background.

Begay is charged by Indictment with one count of Aggravated Sexual Abuse, in violation of Title 18, United States Code, Sections 2241(a), 1151, and 1153(a). ECF No. 1. *Inter alia*, Begay has filed a motion to suppress his custodial statements. ECF No. 26. The Court held a motions hearing on September 8 and 14, 2021. ECF Nos. 55 and 63. Relating to this motion, government exhibits 4-8, and defense exhibits 6, 8, and 11-12,

were moved into evidence.¹ Following the hearings and submission of evidence, Begay filed a memorandum in support of his motion to suppress his tribal court guilty plea taken on February 12, 2021 in Red Lake Nation Tribal court (Tribal Court). ECF No. 71.²

B. Factual Background.

Begay was arrested by the Red Lake Police Department for his involvement in a sexual assault that occurred on Friday, July 3, 2020. On July 9, 2020, Begay was arraigned in Tribal court case number 20K00796. *See* Gov't Ex. 5; Def. Ex. 6. At his arraignment, Begay was addressed by Tribal Judge Christopher Allery:

<u>Judge:</u>	Mr. Begay, do you need me to read through your rights at this time or do you understand your rights?
<u>Begay:</u>	[Unintelligible]

¹ Government exhibit 4 is a composite exhibit which includes (1) Begay's February 2, 2021 Tribal court Order; (2) Begay's Tribal court Plea Agreement; and (3) Begay's Criminal Complaint in case number 20K00796. Government exhibit 5 includes audio recordings of Begay's July 9, 2021 Tribal court arraignment in case number 20K00796—four recordings. Government exhibit 6 includes audio recordings of Begay's August 6, 2021 Tribal court pretrial hearing in case number 20K00796—four recordings. Government exhibit 7 includes audio recordings of Begay's February 12, 2021 Tribal court plea hearing in case number 20K00796—four recordings. Government Exhibit 8 is a composite exhibit which includes five Minnesota Bureau of Criminal Apprehension (BCA) forensic laboratory reports dated (1) October 12, 2020; (2) November 16, 2020; (3) January 27, 2021; (4) February 16, 2021; and (5) March 15, 2021.

Defense exhibit 6 is a transcript of government exhibit 5. Defense exhibit 8 is a transcript of government exhibit 6. Defense exhibit 11 is a transcript of government exhibit 7. Defense exhibit 12 is a Tribal court criminal history request.

² Defense's original motion to suppress—ECF No. 27—partly claimed that Begay's Tribal court guilty plea was made pursuant to *North Carolina v. Alford*, 400 U.S. 25, 37 (1969). To the extent Begay has sustained such argument, the government disagrees with such characterization.

Judge: Do you understand?
Begay: [Silent]
Judge: Okay, alright. Mr. Johnson, are you representing Mr. Begay?
Defense: Yes, your honor.

Arraignment continued to proceed. The Tribal prosecutor and Begay's counsel argued the merits of continued detention, the clerk set a pretrial conference date, and Judge Allery issued a no-contact order on behalf of the victim.

On August 6, 2020, the Tribal court held Begay's pretrial conference. Begay was present, along with his counsel. The proceedings were recorded. *See* Gov't Ex. 6; Def. Ex. 8. Begay's counsel maintained Begay's not guilty plea and requested trial by jury. *Id.* A trial date was scheduled, and the parties again argued the merits of continued detention.

On February 8, 2021, Begay signed and executed a plea agreement to resolve his Tribal court case. Gov't Ex. 4 at 2. Specifically, Begay pleaded guilty to (1) Aggravated Sexual Abuse, in violation of 508.07(a); and (2) Breaking and Entering, in violation of 509.08. *Id.* The Tribal prosecutor also signed the plea agreement. *Id.*

On February 12, 2021, the Tribal court accepted Begay's plea. Gov't Ex. 4 at 1; Gov't Ex. 7; Def. Ex. 8. The Tribal court judge signed Begay's plea agreement—indicating the Tribal court's acceptance—and sentenced Begay to 365 days in jail, along with other conditions on the court's Order. *See* Gov't Ex. 4 at 1-2. The hearing was audio recorded. Gov't Ex. 5. However, portions of the hearing—including the pronouncement of

sentence—were not recorded.³ Begay and his counsel were present at the hearing. Gov’t Ex 4 at 1.

While Begay’s Tribal court case proceeded, the BCA continued to provide updated forensic reports to the government. *See generally* Gov’t Ex. 8. First, on October 12, 2020, the BCA provided the victim’s toxicology report. Gov’t Ex. 8 at 1. On November 16, 2020, the BCA provided a report of a forensic analysis of known DNA standards from Begay and the victim against several items collected as evidence. Gov’t Ex. 8 at 2-4. On January 27, 2020, the BCA provided an additional report which pertained to their analysis of known DNA standards from Begay and the victim against several items collected as evidence. Gov’t Ex. 8 at 5-6.

On February 16, 2021, four days after Begay’s Tribal court guilty plea, the BCA provided a second toxicology report. Gov’t Ex. 8 at 7-9. Lastly, on March 15, 2021, more than a month after Begay’s Tribal court guilty plea, the BCA provided a final report relating to its Y-STR (short tandem repeat)⁴ analysis of Begay’s DNA sample against evidence collected in the investigation. Gov’t Ex. 8 at 10-12.

³ The audio recording begins with a back and forth regarding days left on Begay’s sentence. Unlike the other recordings entered into evidence, Begay’s case was not formally announced. At the motions hearing, FBI Special Agent Ryan Nilson stated that he believed that he had received everything requested. However, SA Nilson—nor anymore—could not obtain what was never captured by audio recording.

⁴ The male-specific part of the human Y chromosome is widely used in forensic DNA analysis, particularly in cases where standard autosomal DNA profiling is not informative. A Y-chromosomal gene fragment is applied for inferring the biological sex of a crime scene

Here, Begay seeks suppression of his Tribal court guilty plea. First, Begay argues that his Tribal conviction was obtained in violation of the Indian Civil Rights Act of 1968 (ICRA). ECF No. 71 at 4-9. Second, though relevant evidence continued to be amassed after Begay's Tribal court guilty plea, Begay asserts that impermissible collusion occurred between the federal government and Red Lake Nation to secure his Tribal guilty plea. The law and facts do not support Begay's contention. His arguments and aspersions fail. Thus, his motion should be denied.

ARGUMENT

A. Begay's Rights Were Protected Under ICRA.

Begay claims that his due process rights under the U.S. Constitution were violated when the Tribal court did not orally advise him of his rights pursuant to Red Lake Tribal Code. Begay has the burden of proving, by a preponderance of the evidence, that his prior convictions are invalid. *See United States v. Miller*, No. 12-CR-1867 WJ, 2014 WL

trace donor. Haplotypes composed of Y-chromosomal short tandem repeat polymorphisms (Y-STRs) are used to characterize paternal lineages of unknown male trace donors, especially suitable when males and females have contributed to the same trace, such as in sexual assault cases. Y-STR haplotyping applied in crime scene investigation can (i) exclude male suspects from involvement in crime, (ii) identify the paternal lineage of male perpetrators, (iii) highlight multiple male contributors to a trace, and (iv) provide investigative leads for finding unknown male perpetrators. Y-STR haplotype analysis is also employed in paternity disputes of male offspring and other types of paternal kinship testing, including historical cases, as well as in special cases of missing person and disaster victim identification involving men. *See Forensic Use of Y-Chromosome DNA: A General Overview*, Kayser, Manfred; Hum. Genet. 2017; 136(5): 621-635, Mar. 17, 2017.

12796762 at *4 (D.S.D. Apr. 11, 2014) (“[T]he Defendant has the burden to show by a preponderance of the evidence that his prior convictions are constitutionally invalid [and h]e must do so using **affirmative** evidence[.]”) (Emphasis added); *see also United States v. Miller*, 20 F.3d 926, 932 (8th Cir. 1994); *United States v. Eldridge*, 984 F.2d 943, 947 (8th Cir. 1993); *United States v. Day*, 949 F.2d 973, 982 (8th Cir. 1991).

Generally, the Sixth Amendment does not apply to tribal court proceedings. *See United States v. Bryant*, 136 S.Ct. 1954, 1962 (2016) (citations omitted). “As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority.” *Santa Carla Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). Because the ICRA controls rather than the U.S. Constitution in tribal court criminal proceedings, *Bryant* summarily halted the question on whether a defendant can claim a Sixth Amendment right attached to their tribal court proceedings.

“The [ICRA], which governs tribal court proceedings, accords a range of procedural safeguards to tribal court defendants ‘similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment.’” *Bryant*, 136 S.Ct. at 1956 (quoting *Martinez*, 436 U.S. at 49). “Therefore, the use of those convictions in a federal prosecution does not violate a defendant’s right to due process.” *Id.* at 1966. Among other rights, the ICRA entitles criminal defendants appearing in a tribal court proceeding to appointed

counsel *when their sentence of imprisonment is more than one year. United States v. Long*, 870 F.3d. 741, 747 (8th Cir. 2017).

First, the Tribal court attempted to orally provide Begay with his rights at his arraignment:

<u>Judge:</u>	Mr. Begay, do you need me to read through your rights at this time or do you understand your rights?
<u>Begay:</u>	[Unintelligible]
<u>Judge:</u>	Do you understand?
<u>Begay:</u>	[Silent]

The record evidence suggests the Tribal court's satisfaction with Begay's non-verbal response. Further, through three Tribal court appearances—July 9 and August 6, 2020, and February 12, 2021, Begay was represented by counsel. *See generally* Gov't Exs. 5-7. Such counsel was also satisfied with Begay's non-verbal response to the Tribal court's query. Nor was Begay's counsel perturbed by the Tribal court's failure to orally advise Begay of his rights. Absent an allegation that Begay's Tribal counsel was deficient, incompetent, or inadequate, the government submits that counsel's presence provided Begay with sufficient safeguards against any ICRA and, therefore, due process violation.

To support his arguments, Begay almost exclusively relies on reasoning espoused in *United States v. Bundy*, 966 F.Supp.2d 1175 (D.N.M. 2013). In *Bundy*, that court ultimately ruled that the defendant's plea was obtained in violation of due process due to a *lack of counsel*:

As previously noted, Defendant has provided the Court with a copy of the transcript of her guilty plea proceeding [...]. **Since there is no indication in**

the transcript that Defendant was represented by counsel, the Court will not assume that Defendant was informed of her rights by counsel.

Id. at 1179 (Emphasis added). In other words, courts can assume represented defendants are adequately informed of their rights by their counsel. Such assumption should be made here. Begay’s reliance of *Bundy*—and other inapposite cases involving *uncounseled* guilty pleas—is wholly misplaced.

Additionally, on February 8, 2021, Begay signed and executed a plea agreement. Four days later—during which time Begay had the opportunity to reflect on the terms and consequences with his counsel on such an agreement—the Tribal court signed the plea agreement and sentenced Begay to 365 days’ jail. For reasons unknown, the Tribal court’s audio for Begay’s plea hearing failed capture the entire hearing. However, documents before this Court show that Begay “freely and of his own accord, accept[ed] the plea agreement[.]” Gov’t Ex. 4 at 2. *Miller* deals with a similar issue involving an incomplete record. *See Miller*, 2014 WL 12796762 at *4-5. The District of New Mexico court distinguished *Miller* from *Bundy* regarding ambiguities or silence in the record:

Instead of providing affirmative evidence comparable to Bundy’s plea proceeding transcript which conclusively verified that Bundy’s rights were violated, our Defendant merely points out that the judgment and the order of closure documents do not explicitly show that the judge followed Rule 12(c) of the NRCPP. Such ambiguity or silence in the record is not affirmative evidence and cannot be used to overcome the presumption of regularity.

Id. That court further elucidated:

At a minimum, then, a defendant pointing to a silent or missing record of a prior plea proceeding must begin by also submitting an affidavit or its

equivalent asserting that the defendant's plea was in fact not voluntary or was lacking the necessary understanding, and specifying in detail the factual support for such assertion. Self-serving conclusory statements would be unavailing ... [but] [a]ffidavits or testimony by judges, government and defense attorneys, probation officers, and others involved in and knowledgeable about the challenged proceedings, and directly supporting the defendant's position, would be probative.

Id.

Here, Begay has not presented—as is his burden—any evidence to this Court that his plea was other than knowing or voluntary. Instead, Begay points to incomplete records, and inapposite cases, despite the protections afforded to him through Tribal counsel throughout all stages of his Tribal court case.

Like in *Gillette*, Begay had been appointed counsel to represent him. The appointment complied with Red Lake Nation Tribal Code. *See United States v. Gillette*, 3:17-CR-30122-RAL, 2018 WL 3151642 at *4-5 (D.S.D. Jan. 29, 2018). This case is not one where a tribal defendant entered a guilty plea without the benefit of counsel. Begay has failed to provide this Court with competent evidence that would invalidate his Tribal court conviction.

Accordingly, Begay was afforded counsel, who presumably advised Begay of his rights under the ICRA. Further, Begay was asked whether he understood his rights, and evidence suggests the Tribal court's satisfaction with Begay's response. Prior to his plea hearing, Begay signed a plea agreement, and was sentenced before the Tribal court four

days later. All of this was with the benefit of counsel. All told, there is no evidence of a due process violation, and Begay has not come close to meeting his burden.

B. There Was No Collusion.

Despite the discovery being disclosed to him, and despite receiving the government's response—ECF No. 49—to his motion to compel, Begay weaves a fictitious narrative and exclaims that “the only meaningful evidence the Government obtained after September 2020 was the February 12, 2021 proposed plea agreement and Tribal court sentencing proceeding.” ECF No. 71 at 10. This is patently false. The government received substantial evidence after Begay's Tribal court guilty plea relevant to Begay's federal prosecution. *See* Gov't Ex. 8 at 7-12. First, on February 16, 2021, the government received a second toxicology report from the BCA. Gov't Ex. 8 at 7-9. The next day, February 17, 2021, Begay's tribal court history was requested. Def. Ex. 12. Second, on March 15, 2021, the government received a BCA DNA forensic analysis report regarding a Y-STR analysis. Gov't Ex. 8 at 10-12. In this report, the BCA concluded that the “Major Y-chromosomal profile” matched Begay. *Id.* Despite the conclusion of Begay's Tribal court case, the *federal* government's investigation continued. I's were dotted. T's were crossed. Evidence that Begay's Y-chromosome was the *major* profile found on the victim's swabbed buttocks, rectum, vagina, and perineal areas, and a conclusive toxicology report, are the *sine qua non* of “meaningful evidence” in sexual assault litigation. Any assertion to the contrary is confounding.

Regarding the balance of Begay's allegations of impermissible government collusion, the government rests of its response to Begay's motion to compel. ECF No. 49.

CONCLUSION

In sum, the Tribal court protected Begay's rights under the ICRA when it provided Begay with counsel. Through such representation of counsel, Begay's plea, evidenced by his free and voluntary signature on his plea agreement, was knowing and voluntary. Begay has failed to carry his burden to prove the invalidity of his agreement, and no impermissible collusion occurred. Accordingly, the government submits that Begay's admission of guilt in Tribal court should be admissible as substantive evidence against him in his federal prosecution.

For these reasons, the government requests this Court to DENY Begay's Motion to Suppress Tribal Court Guilty Plea.

Dated: November 14, 2021

Respectfully Submitted,

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/s/ Evan B. Gilead

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