UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Case No. 23-cr-23 (KMM/LIB)

UNITED STATES OF AMERICA,

Plaintiff,

v.

(1) TRINA MAE JOHNSON,

Defendant.

THE GOVERNMENT'S POST-HEARING RESPONSE TO DEFENDANT'S PRETRIAL MOTIONS

The United States of America, by and through its attorneys, Andrew M. Luger, United States Attorney for the District of Minnesota, Ruth S. Shnider, Assistant United States Attorney, hereby submits its post-hearing response to Defendant Trina Johnson's pretrial motions to strike surplusage, dismiss the indictment, and suppress statements and evidence.

1. Relevant Facts

FBI Special Agent Ryan Nilson testified at the September 7, 2023 motions hearing about the investigation into Ms. Johnson's abuse of a minor in her foster care, identified in the indictment as Minor Victim 1, including two interviews he conducted with Ms. Johnson on May 3 and May 5, 2022. (*See* Transcript of Motions Hearing, ECF No. 164, hereinafter "Tr."). SA Nilson was the lead federal investigator in this matter, which came to his attention shortly after Minor Victim 1 presented at a youth shelter in Bemidji with injuries consistent with severe abuse. (Tr. 51-53, 81). By the time SA Nilson first spoke with Trina Johnson on May 3, he had reviewed medical information related to the victim's injuries,

and had reviewed the victim's first forensic interview, wherein the victim did not make any disclosures about abuse in Ms. Johnson's home. (Tr. 52-53, 105).[1] On the afternoon of May 3, SA Nilson obtained Ms. Johnson's telephone number and called her. He identified himself and requested that Ms. Johnson come to the FBI office for an interview. Ms. Johnson agreed. At no point during this phone conversation did SA Nilson suggest Ms. Johnson was under arrest or otherwise obligated to speak with him. At the time of the call, Ms. Johnson was already in the Bemidji area on an errand, and thus she came to the FBI within about half an hour. (*See generally* Tr. 53-54).

The May 3 interview took place in a child/adolescent forensic interview room at the FBI – what SA Nilson described as "soft interview room," more like a "living room" than a suspect interrogation room that might be seen on television. (Tr. 54). An investigator with Red Lake Tribal Police was also present. (Tr. 55). Both Minor Victim 1 and Ms. Johnson are Red Lake tribe members, and their home during the abuse was on the Red Lake Reservation. (Tr. 70). SA Nilson explained that on all the reservations where he has worked, it is commonplace for the FBI to coordinate with tribal investigators who may have concurrent jurisdiction. (Tr. 54-55). Both officers wore plain clothes and had their weapons holstered. (Tr. 56). The interview was audio recorded and later transcribed. (Gov. Ex. 1, 2).

[1] At times, Johnson's briefing (and some of the questioning at the hearing) muddles the correct timeline of events. The minor victim's first forensic interview was on May 3, 2022, and he did *not* disclose abuse by Ms. Johnson at that time. His disclosure did not occur until his second forensic interview, which was on May 6, 2022. (*See* Gov. Ex. 9 at bates 00507). SA Nilson thus did not have a victim disclosure during either conversation with Trina Johnson. (Tr. 71, 104-105).

At the start of the conversation, SA Nilson advised Ms. Johnson that he wanted to talk about Minor Victim 1, and explained: "Okay, um, you're not under arrest. Or anything like that k, we are looking into a couple things but, um, you're free to leave at any point if you gotta leave because you gotta something going on." (Gov. Ex. 2 at 3). Ms. Johnson replied: "Nah, I'll get it taken care of." (*Id.*). She mentioned her boyfriend was waiting in the car but that he was "old enough to be out there." (*Id.*). SA Nilson did not read Ms. Johnson her *Miranda* rights during this conversation because she was not in custody. (Tr. 57-58).

Throughout this conversation, which lasted about two hours, SA Nilson never threatened Ms. Johnson; he never made promises to her about what might happen in the case; he never raised his voice or brandished his weapon. (Tr. 58). He testified that Ms. Johnson did not seem impaired or confused, and she seemed fully to understand the consequences of speaking with him, as well as her right to terminate the conversation. She never stated that she wished to leave or to stop talking. (Tr. 58-60). At the time, Ms. Johnson was in her late 40s and, although she did not have much experience with the criminal justice system, she was a licensed foster care provider, which generally entails some exposure to the legal system. (Tr. 59). As the conversation unfolded, Ms. Johnson made a number of incriminating statements about her role in the abuse of Minor Victim 1. (Tr. 60).

Near the end of the May 3 interview, SA Nilson told Ms. Johnson that he'd like to go to her home and take photos. (Tr. 60). He explained that he was going to present her with "a consent form[,] basically it's you consenting for us to go look through your house,

an photograph it an[d] stuff." (Gov. Ex. 2 at 95). He then asked: "Okay, are you willing for that to happen?" Ms. Johnson asked if the search would take place that same day, and SA Nilson responded, "Yeah. Yep, it's gunna happen today." Ms. Johnson then said: "Yeah, I guess ya know tryin to be as honest as I can be. . . . I wanna be honest because I don't want . . . I'm just scared." (*Id.*). She mentioned that she was hoping to pick up a new washing machine while in town, and SA Nilson told her: "K, well, we're gunna have to probably skip the washer thing." (*Id.* at 96).

After some additional conversation, another agent came into the room and there was a discussion about whether Ms. Johnson's boyfriend (co-defendant Bertram Lussier) would come into the FBI office to be interviewed as well. Ms. Johnson placed a phone call to Mr. Lussier, which can be heard on the May 3 audio. (Tr. 61). Notably, she tells Mr. Lussier: "[J]ust please be honest because I don't wanna be in any more trouble than I am . . . we're not under arrest or anything just come talk to him please." (Gov. Ex. 2 at 111). SA Nilson then asked Ms. Johnson if she would be comfortable riding with him in his vehicle, to which she responded: "Sure." (*Id.*; *see* Tr. 61-62). On the ride, Ms. Johnson sat in the front seat with SA Nilson, not in the caged portion of the vehicle for in-custody suspects, and she was not handcuffed. A female agent rode in the back seat. (Tr. 63). During the ride, Ms. Johnson made some additional statements about how she was sorry, and about how she only let the minor victim outside at nighttime. (Tr. 64). SA Nilson testified that at the time they were driving to Ms. Johnson's residence, he had not yet made a decision about whether Ms. Johnson might be arrested federally, noting that is not a decision he makes on his own, but only after consultation with the U.S. Attorney's Office or the Special

Agent in Charge (SAC). (Tr. 62, 86, 90-91). He also had not had any discussions with tribal authorities at that point about their own arrest plans. (Tr. 62).

Once at Ms. Johnson's residence, SA Nilson audio-recorded an additional conversation with Ms. Johnson about her consent. (Gov. Ex. 3). During that conversation, SA Nilson told Ms. Johnson: "I have to advise you, you have the right to refuse consent – you don't have to do this." (Gov. Ex. 3 at 02:45-02:51). Ms. Johnson responded: "Well, why not, I mean, if it's gonna help me in the long run being honest, you know, I get what I did is wrong, but I'm not trying to hide nothing because, you know, I don't wanna be in jail forever. I wanna live my life, I wanna make sure my kids are okay." (*Id.* at 02:51-03:10). SA Nilson reminded her: "So this is, once again, completely voluntary." (*Id.* at 03:15-03:20). SA Nilson then presented Ms. Johnson with a Consent to Search Form that stated: "I have been advised of my right to refuse consent. . . . I give this permission voluntarily." (Gov. Ex. 4). Ms. Johnson signed the form. SA Nilson testified that she seemed to understand the impact of the decision, and was not coerced or threatened to make it. (*See* Tr. 65-66).

SA Nilson did a walkthrough of the home without Ms. Johnson, taking some photos, and then had Ms. Johnson accompany him through the home. She pointed out locations and items relevant to the abuse, and additional photos were taken. No physical evidence was seized. At no point did Ms. Johnson withdraw her consent to the search. (Tr. 66-68).

After the search was concluded, Ms. Johnson was placed under arrest by the Red Lake Tribal Police on tribal child abuse charges. (Tr. 68). SA Nilson did not direct the tribal officers to arrest her, nor did he have to persuade or convince them to do so. (Tr. 69-

70). He testified that given the severity of the abuse and the evidence collected to that point, it did not seem to be a close call for the tribal officers on whether tribal charges would be pursued immediately. (Tr. 70). SA Nilson did not accompany tribal officers when they took Ms. Johnson to the Red Lake jail. (Tr. 94).

On May 5, 2023, SA Nilson, accompanied by a tribal investigator, went to the Red Lake Jail to interview Ms. Johnson again. (Tr. 71-72). SA Nilson explained that he returned for a second interview because he had additional questions arising out of the medical exams of the victim, the interview with Bertram Lussier, and consultation with behavioral specialists at FBI.[2] (Tr. 71). The interview was audio recorded and later transcribed. (Gov. Ex. 5, 6). Because Ms. Johnson was unquestionably in custody, SA Nilson read her a *Miranda* advisory:

> Alright, Obviously because you're in jail now and in custody umm Alea read you your rights the other day. I'm gonna read them to you again. This is completely something that we do with everyone that is in jail- so it's not just you . . . There's some people that get weirded out by it. Just one of these things where I need to to know you understand your rights. It's important for Alea and I to know that you do understand. It's important for you to. Umm if you've got any questions, please ask. We'll get through it if once you sign this and we—and we start talking and you don't want to talk about a certain something just tell me and we won't talk about it. Fair? Ok. . . .

(Gov. Ex. 6 at 4-5). SA Nilson then read a full and complete *Miranda* advisory, which was also set forth on a written FBI Advice of Rights form. (Gov. Ex. 7). He asked Ms. Johnson whether she understood and was willing to talk, to which she responded: "Well, midas

[2] Johnson's briefing again muddles the timeline. (Johnson Br. at 2, ECF No. 180). SA Nilson spoke with the Behavioral Analysis Unit on May 5 – two days after the first interview with Ms. Johnson and shortly before the second. (Tr. 84-87). And any publications exchanged at that meeting may not have been provided to the U.S. Attorney's Office until a later time. (Tr. 104).

well" [might as well]. (Gov. Ex. 6 at 5). SA Nilson then asked Ms. Johnson to read aloud a portion of the Advice of Rights form that confirmed her understanding of her rights and willingness to answer questions without a lawyer present. (*Id.* at 5-6). He also reminded her that by signing the form, she was not binding herself into a "contract" that "forced" her to talk to them; she was simply memorializing her understanding of her rights. (Gov. Ex. 6 at 6; *see* Tr. 72-73). Ms. Johnson signed the Advice of Rights form and proceeded to talk to the officers for around 90 minutes, during which time she made additional incriminating statements about the abuse of Minor Victim 1. As with the May 3 interview, SA Nilson did not threaten, coerce, or yell at Ms. Johnson. She at no point said she wanted to stop talking or wanted to consult with a lawyer. (Tr. 73-74). SA Nilson testified that by the time of the May 5 interview, he believed it likely that the case would ultimately go federal, although he, of course, does not make charging decisions. (Tr. 85-86, 99-102).

Immediately prior to the May 5 interview, SA Nilson took custody of Ms. Johnson's cell phone, which had accompanied her to the Red Lake jail and was in her jail property. (Tr. 75). During the course of the conversation, Ms. Johnson acknowledged that relevant items may be on the phone, such as images reflecting the abuse and online searches. (Tr. 75). SA Nilson and Ms. Johnson then had a discussion about whether Ms. Johnson would consent to a search of the phone – in particular, SA Nilson asked if they could go through relevant items on the phone together and discuss them. Ms. Johnson expressed some reluctance, and SA Nilson reminded her repeatedly that the choice was hers. (Gov. Ex. 6 at 48-50; *see* Gov Ex. 5 at 53:50-58:35; Tr. 76). When Ms. Johnson asked, "What if I say no?", he told her: "Then we're not gonna go through it." (Gov. Ex. 6 at 49). He told her

that if she did not consent to go through the phone with him, he would apply for a warrant to search it. (Gov. Ex. 6 at 50; Tr. 76). Ms. Johnson ultimately agreed to go through the phone with SA Nilson, and they viewed some media files together – including videos where Minor Victim 1 can be heard "confessing" (seemingly under duress) to self-harming and harming other children in the home, and one where Minor Victim 1 can be seen with tape over his face. (Gov. Ex. 6 at 53-60).

SA Nilson then asked if Ms. Johnson would also sign a consent form permitting further search of the phone by the FBI. (Gov. Ex. 6 at 70). Again, Ms. Johnson initially expressed some reluctance about agents potentially seeing personal items on the phone. (*Id.* at 70-71; *see* Gov. Ex. 5 at 1:23:00-1:25:00). SA Nilson asked: "Do you want to sign this or no?" And Ms. Johnson replied: "Midas well" [might as well]. (Gov. Ex. 6 at 70-71). SA Nilson read the form aloud to her, which stated: "I have been advised of my right to refuse consent. . . I give this permission voluntarily. . . . I authorized these agents to take any items which they determine may be related to their investigation." (Gov. Ex. 8; *see* Gov. Ex. 5 at 1:33:00 – 1:34:20; Gov. Ex. 6 at 76-77). SA Nilson then reminded her: "It's up to you – you don't have to do this, it's voluntary and it's up to you." (Gov. Ex. 6 at 77). Ms. Johnson responded: "Well you're gonna get it anyway," and SA Nilson told her: "I'm gonna apply for a warrant yeah." (*Id.*). Ms. Johnson then said she didn't "want the warrant thing," and she "midas well just do it" to "save[] a whole lot of paperwork." (*Id.*). She signed the consent form. (Tr. 77).

Notwithstanding Ms. Johnson's oral and written consent, SA Nilson later applied for a federal warrant to search the phone. (Gov. Ex. 9). Following the May 5 interview,

he did not look in the device any further until he had the signed warrant in hand. (Tr. 78). And in the warrant affidavit, he affirmed: "in an abundance of caution, this warrant application does not rely on any information I viewed on the Device pursuant to TRINA's consent, and no download/extraction of the Device has yet been performed." (Gov. Ex. 9 at bates 507). Magistrate Judge Huseby signed the warrant. (*Id.* at bates 511). A review of data in the phone uncovered several relevant chat threads from Ms. Johnson's Facebook account. Thus, SA Nilson also obtained a federal warrant to search the Facebook account. (Gov. Ex. 10).

Ms. Johnson had her first appearance in Red Lake Tribal Court on May 6, 2022 and was ordered detained for several months. (Def. Ex. 11 at 34). During that time, her tribal advocate made several motions for her release, based largely on Ms. Johnson's health conditions. Most of those motions were denied – but the request for release was ultimately granted on October 19, 2022. (Def. Ex. 11 at 1). Tribal court records indicate that around that time, Ms. Johnson entered the radiation phase of cancer treatment, which placed her at a higher risk being in the jail – thus, the tribal court released her. (*See* Def. Ex. 11 at 28; Tr. 41-42).

SA Nilson noted that neither he nor anyone in the federal government (to his knowledge) had any role in the filing of tribal charges, the tribal court's decision to detain Ms. Johnson, or the scheduling and other procedures that governed her tribal case. (Tr. 70-71, 79). Following her release from Red Lake Jail, Ms. Johnson remained out of custody and was not federally indicted until January 26, 2023. She was released on conditions in the federal case. (*See* ECF Nos. 1, 18, 23). SA Nilson testified that in the intervening

months between the tribal arrest and the federal indictment, he undertook a number of additional investigative activities, including serving subpoenas, reviewing documents, and interviewing witnesses. (Tr. 79-80). The federal indictment added four more defendants to the case. (ECF No. 1).

Clayton Van Wert, Ms. Johnson's tribal lay advocate, also testified at the motions hearing regarding the tribal proceedings. Mr. Van Wert expressed his frustration that the tribal court did not let Ms. Johnson out of custody sooner, and about the tribal court's scheduling and disclosure rules. (Tr. 28-38). However, he also acknowledged that Ms. Johnson was in fact released prior to starting a higher risk phase of cancer treatment (radiation). (Tr. 41-42). He also acknowledged that he never brought a motion for habeas corpus in relation to Ms. Johnson's detention (Tr. 42); he never made a motion in tribal court to set an expedited trial date (Tr. 43); and he noted that tribal procedures governing the timing of discovery disclosures have been in place for many years (Tr. 43-45). He also acknowledged that he had no evidence suggesting that federal authorities had any role in the decisions that were made by the tribal prosecutor or the tribal judge. (Tr. 44-45).

2. Motion to Dismiss the Indictment (ECF No. 103)

Johnson's post-hearing briefing on this motion largely restates the arguments from her pre-hearing brief. Her central claim is that, under recent Supreme Court precedents, "the Tribes are no longer sovereign"—and thus, alleged deficiencies in the tribe's handling of her tribal matter should supply a basis to dismiss this federal action. (ECF No. 180 at 11). This sweeping claim, purportedly made in the interest of the tribe members who come before this Court, finds no support in the law and should be rejected. The Government

incorporates by reference its prior briefing on the subject (ECF No. 145 at 14-17) and offers the following supplemental observations.

To begin, absolutely nothing at the motions hearing substantiated the defense's claim that there was collusion between the federal and tribal authorities that might undermine the dual sovereign doctrine. Both SA Nilson and Mr. Van Wert testified that that they were not aware of any direction given to the tribe by the federal government regarding the tribe's handling of Ms. Johnson's proceedings, the decisions about her detention, or the rules governing her tribal case. (Tr. 70-71, 79, 44-45). Johnson cites no authority to support her claim that the federal government's "aware[ness]" of the crime and the likelihood of federal interest amounted to improper collusion. (Johnson Br. at 12, ECF No. 180). Rather, the record reflects nothing more than "[r]outine cooperation between local and federal authorities" that "does not establish collusion" and is "important to crime prevention." *United States v. Begay*, No. 21-CR-119 (NEB/LIB), 2022 WL 683090, at *5 (D. Minn. Mar. 8, 2022).

Second, Johnson still has not offered any interpretation of Supreme Court case law that supports her position. This Court should reject it again, as it did in *United States v. Lussier*, No. 21-CR-145 (PAM/LIB), 2022 WL 17476661, at *14 (D. Minn. Oct. 11, 2022), *R&R adopted*, 2022 WL 17466284 (D. Minn. Dec. 6, 2022). The recent case of *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022) affected no change to tribal sovereignty in cases involving "crimes committed by Indians in Indian country," nor to the federal government's right to proceed against Indians under the Major Crimes Act. *Castro-Huerta*, 142 S.Ct. at 2495 n.2, 2496. Further, whatever might be said about *Castro-*

Huerta's effect on the balance of tribal-state sovereignty in *Oklahoma*, the case has nothing to say about the *Red Lake* reservation, which was exempted from Public Law 280 and "specifically excluded by Congress from being subject to the concurrent state criminal jurisdiction of the State of Minnesota." *Lussier*, 2022 WL 17476661, at *14 n.21.

Johnson's attempt to articulate an equal protection claim fares no better. *Haaland v. Brackeen*, 143 S.Ct. 1609 (2023) said nothing on the issue, and the facts and legal issues in that case are wholly inapposite. Federal courts have held for decades that the matrix of criminal laws that apply in Indian Country do not violate equal protection. *See, e.g., United States v. Antelope*, 430 U.S. 641, 648 (1977); *United States v. Stately*, No. 19-CR-342 (ECT/LIB), 2021 WL 1187152, at *3-4 (D. Minn. Mar. 30, 2021); *Lussier*, 2022 WL 17476661 at *14 (collecting cases). Further, Johnson's supposed equal protection claim is not analytically coherent. Johnson claims "*the Government* created two classes of defendants": those subject to jurisdiction in tribal court and those who are only subject to state and/or federal jurisdiction. (Johnson Br. at 13, ECF No. 180). But Johnson's complaints are not in fact with federal law but only with the procedures used in Red Lake tribal court. Those procedures are promulgated and exercised by a distinct sovereign entity and apply to her by virtue of her tribal membership and her election to reside on the reservation. As the record at the hearing clearly established, "the Government" had nothing to do with it. Legal distinctions applicable to different jurisdictions do not themselves violate equal protection. *Cf. Antelope*, 430 U.S. at 649 ("the National Government does not violate equal protection when its own body of law is evenhanded, regardless of the laws of States with respect to the same subject matter"). Indeed, an Indian prosecuted in Red

Lake tribal court is not similarly situated to a defendant prosecuted in federal court: Red Lake can *only* exercise jurisdiction over misdemeanor offenses, and its procedures are tailored to that limited authority. (Tr. 44); *see* 25 U.S.C. § 1302(a).

Never mind that Johnson offers only the unlicensed opinion of Mr. Van Wert that her rights (whatever their origin) were violated in tribal court at all. (Johnson Br. at 8, ECF No. 180). Defendants in federal court (including those with health concerns) are routinely detained pending trial, and most federal cases are not set for trial within five months of charging, as Johnson claims should have happened in Red Lake. In fact, as the Government has repeatedly noted, the procedural history belies her claim that the tribal court turned a blind eye to the issues surrounding her medical conditions and detention: the tribal court did ultimately place her on pretrial release when it found her medical treatment warranted it. In any event, Johnson's remedy, if she felt aggrieved during her tribal detention, was to bring a petition for a writ of habeas corpus under 25 U.S.C. § 1303. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59-67 (1978); *Stanko v. Oglala Sioux Tribe*, 916 F.3d 694, 697 (8th Cir. 2019); *Akins v. Penobscot Nation*, 130 F.3d 482, 486 (1st Cir. 1997). To this, she offers no meaningful response. (Johnson Br. at 13, ECF No. 180).

As this Court has done before, it should deny this motion.

3. Motion to Suppress Statements (ECF No. 110)

Johnson has moved to suppress two audio-recorded statements that she provided to law enforcement: a voluntary, non-custodial interview conducted on May 3, 2022, and a

Mirandized, in-custody interview conducted on May 5, 2022. All her arguments are meritless.

a. May 3, 2022 Statement

Johnson's primary challenge to the May 3 interview is that she was "in custody" and should have been Mirandized. The Eighth Circuit has identified six non-exclusive factors for analyzing whether a defendant is "in custody" for *Miranda* purposes:

> (1) whether the suspect was informed that he or she was free to leave and that answering was voluntary; (2) whether the suspect possessed freedom of movement; (3) whether the suspect initiated contact or voluntarily acquiesced; (4) whether strong-arm tactics or strategies were employed; (5) whether the atmosphere was police-dominated; or, (6) whether the suspect was placed under arrest at the end of questioning.

United States v. Elzahabi, 557 F.3d 879, 883–84 (8th Cir. 2009) (citing *United States v. Griffin*, 922 F.2d 1343, 1349 (8th Cir.1990)).

Considered from every angle, the Court can easily conclude that Johnson was not in custody. She was not confronted by officers in person but received a telephone call from SA Nilson and agreed to come to the FBI office. She was never restrained, threatened, or coerced in any fashion. The conversation took place in a "soft" interview room, rather than an interrogation room, and the two officers were in plain clothes with their weapons holstered. Johnson was not impaired, she possessed average intelligence, and she appeared to fully understand the consequences of speaking with agents. Most, importantly, she was informed at the outset that she was free to leave, and her freedom to depart was never curtailed. (Tr. 57). It "weighs heavily in favor of noncustody when officers clearly inform a suspect that she is free to leave or decline questioning." *United States v. Sanchez*, 676

F.3d 627, 631 (8th Cir. 2012). Johnson was arrested at the end of the events of May 3 – though, notably, she was arrested by tribal authorities, not the FBI, and SA Nilson did not give any directives to tribal police in their decision. And, contrary to Johnson's suggestion, she was never "promise[d]" anything about whether an arrest might be warranted at some point. (Johnson Br. at 15-16, ECF No. 180). Indeed, SA Nilson testified repeatedly at the motions hearing that he cannot make federal arrest decisions on his own authority, nor does he make charging decisions. (Tr. 62, 86, 102).

Johnson's argument essentially boils down to a claim that because she was eventually arrested on May 3, and because SA Nilson was subjectively aware of that possibly, that alone establishes that she was in custody the entire time. She cites no authority for the claim that the sixth *Griffin* factor is the "most important," let alone that it is dispositive. (Johnson Br. at 16, ECF No. 180). To the contrary: as Judge Menendez of this Court observed, a "panel of the Eighth Circuit Court of Appeals has recently questioned whether an arrest at the end of questioning, one of the six *Griffin* factors, is indicative of custody because 'custodial status depends on whether a reasonable person would feel free to leave during the interview.'" *United States v. Hallmon*, No. 22-CR-365 (KMM/DTS), 2023 WL 6285183, at *11 n.13 (D. Minn. Sept. 27, 2023) (Menendez, J.) (quoting *United States v. Treanton*, 57 F.4th 638, 641 (8th Cir. 2023)). Nothing about the fact of the later arrest had any objective impact on whether Ms. Johnson should have felt free to leave throughout that day. Indeed, near the end of the May 3 interview at the FBI, she reiterated to her boyfriend on the phone that she did not understand herself to be under arrest. (Tr. 61-62).

It is also worth noting that at the time SA Nilson called Ms. Johnson to request the May 3 interview, he did not yet have a disclosure implicating her from the victim. The evidence in the case developed dramatically over the course of May 3, as Ms. Johnson made substantial admissions about her role in the abuse, and then showed evidence of the abuse to agents at her home. Given such a sequence, it is unsurprising that the day started with a noncustodial interview but ended with an arrest. *See United States v. Sanchez-Velasco*, 956 F.3d 576, 581 (8th Cir. 2020) ("While an interview that ends in arrest may indicate a custodial setting, that is not dispositive, especially when the interview arises from reasonable suspicion and the suspect's answers provide probable cause for the arrest.").

For similar reasons, even accepting her characterization of the record and her creative application of the "collective knowledge" doctrine, Johnson's arguments about SA Nilson's subjective thought process or intentions throughout May 3 are irrelevant. Even if SA Nilson harbored a secret belief that Ms. Johnson would be arrested that day and/or would at some point be charged federally, Johnson makes no credible showing that a reasonable person *in her position at the time of her statements on May 3* would have felt her "freedom to depart was restricted in any way." *Elzahabi*, 557 F.3d at 88; *see also United States v. LeBrun*, 363 F.3d 715, 721 (8th Cir. 2004) ("the coercive aspects of a police interview are largely irrelevant to the custody determination except where a reasonable person would perceive the coercion as restricting his or her freedom to depart"). "[T]he rule is that 'a policeman's unarticulated plan has no bearing on the question of whether a suspect is in custody at a particular time; the one relevant inquiry is how a

reasonable man in the suspect's position would have understood his situation.'" *Griffin*, 922 F.2d at 1356 (quoting *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984)). In other words, "the custody issue turns on an objective determination of whether a reasonable person would have considered himself under arrest, not on the officer's subjective belief not communicated to the suspect." *Sanchez-Velasco*, 956 F.3d at 580-81.

Finally, even if SA Nilson's polite and respectful behavior toward Johnson on May 3 could be called "phony" (Johnson Br. at 16, ECF No. 180), "[t]he use of deception is irrelevant unless it relates to a reasonable person's perception of his freedom to depart." *Hallmon*, 2023 WL 6285183, at *12 n.15 (Menendez, J.) (quoting *United States v. Laurita*, 821 F.3d 1020, 1026 (8th Cir. 2016)). Indeed, Johnson's suggestions throughout her brief that she was misled about the possibility of federal charges make little sense: SA Nilson works for the FBI, which Johnson knew throughout all their interactions. He only investigates potential federal crimes that may wind up in federal prosecution. (Tr. 104). No one was hiding the ball.

Johnson ends this section of her brief with a cursory claim that her May 3 interview was involuntary. (Johnson Br. at 17, ECF No. 180). This Court can dispose of this argument just as quickly. "A statement is involuntary when it was extracted by threats, violence, or express or implied promises sufficient to overbear the defendant's will and critically impair his capacity for self-determination." *LeBrun*, 363 F.3d at 724 (quotation omitted). For all the same reasons that the May 3 interview was noncustodial, nothing about the interview was coercive to a degree that impaired Johnson's ability to make free and voluntary decisions.

b. May 5, 2022 Statement

As to the May 5 interview, Johnson does not dispute that she was Mirandized and signed a valid *Miranda* waiver. (Johnson Br. at 18, ECF No. 180). She appears to rest entirely on her argument that the statement was the product of undue delay in her presentment to a judge under Rule 5 or 18 U.S.C. § 3501. She acknowledges that this argument is foreclosed by existing precedent, since she was not in custody on federal charges at the time. *See Lussier*, 2022 WL 17476661, at *12. Federal presentment rules thus did not apply, even if SA Nilson "believe[d]" that she "also may have violated federal law." *United States v. Alvarez-Sanchez*, 511 U.S. 350, 358 (1994).

Johnson's assertions that SA Nilson was "taking advantage of a delay in Red Lake" and "use[d] . . . Red Lake Tribal Court as a holding cell" find no support in the record—and this reprisal of the "collusion" argument remains meritless for the reasons stated earlier. Indeed, SA Nilson testified at the motions hearing that he wasn't even aware of when the tribal charges were formally presented. (Tr. 95). More importantly, Ms. Johnson was *exhaustively* advised of her rights under the *federal* constitution and elected to waive them. She can hardly claim now that federal actors were exploiting the tribal system. SA Nilson did not simply perform a perfunctory *Miranda* advisory to check a box; his discussion with Johnson about her rights was the epitome of best practices. (Gov. Ex. 6 at 4-6). He told her how "important" it was that she "understand [her] rights." He told her that that if, once they started talking, she didn't want to talk about a certain topic, "just tell me and we won't talk about it." (*Id.* at 5). He had her read a waiver affirmation aloud. He reminder her that signing the waiver did not "bind [her] into a contract" or "force[]" her

into a conversation. (*Id.*). Nothing could have been less exploitative. Regardless of the stage of Johnson's tribal case, she had all the ability and opportunity to decline the May 5 interview if she so chose. And, as with the May 3 interview, the May 5 conversation was devoid of any coercion.

Johnson's emphasis on statements SA Nilson made near the end of the May 5 interview about the penalties she might face in federal court is curious given that elsewhere she claims SA Nilson committed an "unfair omission" by not informing Johnson about where her case might be headed. (Johnson Br. at 3-4, 18-19, ECF No. 180). In any event, Johnson does not make any showing how an agent's truthful remarks during an interview about the possibility of federal prosecution have any bearing on the admissibility of the defendant's statements. The May 5 statement is admissible.

4. Motion to Suppress Searches and Seizures (ECF No. 111)

Johnson moves to suppress evidence obtained from a consent search of her residence, as well as data obtained via federal warrants to search her cell phone and Facebook account. This motion should be denied in all respects.

a. Residence Search

Johnson claims in fairly cursory fashion that her consent to the search of her residence was involuntary. "Whether consent was voluntarily given turns on a variety of factors, including a defendant's age, intelligence, and education; whether he cooperates with police; his knowledge of his right to refuse consent; and his familiarity with arrests and the legal system." *United States v. Bearden*, 780 F.3d 887, 895 (8th Cir. 2015). "Also relevant is the environment in which consent was given and whether the police threatened,

intimidated, punished, or falsely promised something to the defendant; whether the defendant was in custody or under arrest when consent was given and, if so, how long he had been detained; and whether consent occurred in a public or secluded area." *Id.*

As confirmed at the motions hearing and in the audio exhibits, Ms. Johnson's consent to search her home was given repeatedly, freely, and voluntarily. Near the end of her noncustodial interview on May 3, the FBI agent raised the issue of doing a consensual search of her home and asked: "are you willing for that to happen?" Ms. Johnson responded: "Yeah, I guess, ya know, [I'm] tryin to be as honest as I can be." (Gov. Ex. 2 at 95). Ms. Johnson then had a phone conversation with her boyfriend, Bertram Lussier, in which she confirmed that she was "not under arrest" at that time, although she clearly understood that she was in some degree of "trouble." (Gov. Ex. 2 at 111). SA Nilson asked Johnson if she would be comfortable riding with him in his vehicle, and she said, "Sure." (*Id.*). She sat unhandcuffed in the front passenger seat, rather than in the caged back seat used for in-custody subjects. (Tr. 63). Once outside the residence, SA Nilson read aloud a standard consent form that informed her of her "right to refuse consent" (Gov. Ex. 4) and told her, "You don't have to do this." (Tr. 65). Johnson agreed to the search of her home and seemed to entirely understand the import of the decision. (Tr. 65-66; *see generally* Gov. Ex. 3).

The record amply demonstrates that the encounter remained non-coercive, Johnson's freedom remained unrestrained, and her decisions were made with her eyes open. Indeed, the only factor potentially weighing against voluntary consent would be Johnson's lack of a criminal history. But Johnson was a licensed foster care provider in

her late 40s and thus certainly possessed adequate familiarity with the legal system and adequate intelligence to assess her options. (Tr. 59). Her consent was voluntary. *See, e.g., United States v. Harris*, 55 F.4th 575, 581 (8th Cir. 2022); *United States v. Steinmetz*, 900 F.3d 595, 599 (8th Cir. 2018).

And, again, Johnson's emphasis on the fact that she was arrested later, after the search, is irrelevant – even suspects already in custody can voluntarily consent to a search. *See Bearden*, 780 F.3d at 895 ((affirming finding of voluntary consent where defendant "was handcuffed at the time and had been for at least fifteen minutes, he had not yet been read the *Miranda* warnings, and his consent was given in a secluded wooded area"); *United States v. Beasley*, 688 F.3d 523, 531 (8th Cir. 2012) (rejecting defendant's argument that "consent to search was coerced because he was in police custody, [and] was not given the *Miranda* warnings").

b. Search Warrants for Cell Phone and Facebook Account

Johnson agrees that any issue with the consent to search her phone is "moot" and that the question is controlled by a four-corners review of the search warrant. (Gov. Ex. 9). Her only argument that the warrant affidavit lacks probable cause is that it was "based on statements obtained by lack of timely presentment," and that without such statements, there was no nexus shown between the phone and the crime. (Johnson Br. at 21, ECF No. 180). This is not actually true—the warrant notes separately that Johnson had previously provided to local police an audio recording that contained a coerced confession from Minor Victim 1 about abusing two other children. (Gov. Ex. 9 at bates 00506-507). It was certainly a reasonable inference that this "confession" was relevant to the abuse of Minor

Victim 1 and that Johnson created the audio file on her cell phone. But in any event, there is no deficiency in the May 5 statements referenced in the warrant affidavit, so this argument can be summarily rejected.

Johnson's only challenge to the Facebook warrant is that it was based on findings from the phone warrant. (Johnson Br. at 21, ECF No. 180). Since the phone warrant is valid, so too is the Facebook warrant.

5. Motion to Strike Surplusage (ECF No. 106)

Johnson says very little about this motion in her post-hearing brief and thus the Government relies principally on its own prior briefing on this subject (ECF No. 145 at 5-8). Johnson's only new suggestion is that there is no reason for the indictment to discuss co-defendants who have pleaded guilty. But the evidence at trial will undoubtedly include facts concerning the conduct of co-defendants, given that all were family members and all but one lived in the same household as Johnson and the victim. These defendants' role in the abuse and their actions, often taken at the express direction of Johnson, will remain a central part of her culpability. None of the allegations should be stricken.

6. Conclusion

For all the reasons above, Johnson's motions should be denied in full.

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