UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Criminal No. 23-CR-23 (KMM/LIB)

United States of America, Plaintiff, v. Trina Mae Johnson, Defendant.	)	**DEFENDANT'S OBJECTIONS TO THE REPORT AND RECOMMENDATION**

Ms. Trina Johnson, through and by her lawyer, and in accordance with 28 U.S.C. 636 and Local Rule 72.2(b)(1), objects to the Report and Recommendation that her Motions to Dismiss, to Strike Surplusage, and Suppress all be denied. Pages 16-37. The review is de novo review, Rule 59(A)(1), (3), and 28 U.S.C. 636(b)(1), and we request oral argument at the January 4, 2024 pretrial.

Introduction

From initial awareness of the offense, and in the F.B.I.'s immediate and unambiguous consultation with the United States Attorney's office, the Government's intent, from May 2, 2022 (when the investigation opened) was to secure an indictment. The two cases – tribal and federal – were never going to be distinct, and the Report and Recommendation holding otherwise, at p. 19, is not consistent with the record.

The Red Lake Reservation and Tribal Court did not act as a sovereign entity.

The Tribal Court and the Red Lake Reservation police force were only used as a vessel for the F.B.I. to deny Ms. Johnson her right to due process.

Sad as it is to say this, she would have been far better off being Caucasian charged with the same crime. With that skin status, she would have at least been brought to this Court and presented, had a licensed lawyer appointed, reviewed discovery, been released, enjoyed a speedy trial, and her case heard before an actual judge. Ms. Johnson's experience in the Red Lake Tribal Court was instead one of hollowing out, a due process empty of substance, and gross denial of her right to equal protection under the law.

Our claims are rooted in both fact and law. We begin with the investigation, reach the Tribal Court proceedings, then argue the merits of our motions and why the Report and Recommendation is in error.

The initial investigation and interviews, and the arrest and searches

On May 2, 2022, F.B.I. Special Ryan Nilson received notice of the alleged crime. T. 105. The child had been brought to the Evergreen shelter in Bemidji, Minnesota where a mandatory report of abuse lodged. T. 80. The child had been starved, and, described the Agent, "had a lot of wounds, burns as well." T. 82. From the photographs alone, the Agent believed the crime was "terribly serious, yes. Yeah." T. 81.

He was asked whether a major crime had occurred on the Red Lake Indian Reservation. Q. "By any definition?" A. "Yes." T. 81.

At Agent Nilson's suggestion, the child was brought to Sanford Medical Center for an evaluation, where two other F.B.I. Agents were present. T. 81. Hence from the start, three agents worked on the investigation.

Agent Nilson consulted with the F.B.I.'s "Behavioral Analysis Unit in Quantico." T. 84. That unit provided investigative strategies and set out for the Agent the elements of torture, a federal offense. The Agent was also given a check list from the "Child Accountability Commission." T. 85. F.B.I. Officials at Quantico also provided an article to Agent Nilson, titled "Child Torture as a Form of Child Abuse," T. 85, which was forwarded to the United States Attorney's office. T. 85. There is no evidence that the same article was sent to Red Lake Tribal prosecutors.

In addition to the three Agents, a team from Quantico, the D.O.J. was made aware of Ms. Johnson's investigation, and theories of prosecution (including torture). The direction of Ms. Johnson's case was pointed in no other direction than a review up on the Sixth floor of the United States Courthouse in Minneapolis.

Agent Nilson on cross: "You've been at this eight years. If this doesn't go

federal, nothing goes federal. Fair enough? Am I exaggerating or not?" A. "I wouldn't say you're exaggerating . . ." T. 86. His answer appears nowhere in the Report and Recommendation. Compare pages 2-3.

When Ms. Johnson was summoned to the local F.B.I. office for an interview, on May 3rd, she had been F.B.I. identified as the child's assailant, her arrest a fait accompli. T. 105, 107. Agent Nilson agreed, "There's a lot of probable cause there for sure." T. 88.

During the interview at the F.B.I. station, Agent Nilson was in further contact with AUSA Laura Provinzino. T. 92. There is no reference of this conversation in the Report and Recommendation, either.

At the interview's conclusion, Agent Nilson didn't allow Ms. Johnson to leave. He insisted that he drive her to her home on the Red Lake Reservation, thereby restricting her freedom. Once at the house, he secured a consent to search, whereupon Ms. Johnson was arrested by Red Lake Tribal Authorities. Agent Nilson agreed with that decision: "There was probable cause for an arrest, absolutely." T. 94.

Ms. Johnson was transported by the Tribal police to the Red Lake Jail. T. 94. There to await Tribal charges which would not be filed until May 6th, 2022, two days later. She was incarcerated on charges that would never see a production

of discovery. For charges she would never have a licensed lawyer to defend. Charges for which there would no bail. By joint design, there would never be a Red Lake trial, either speedy or otherwise.

On May 4th, Agent Nilson consulted anew with AUSA Provinzino, T. 95, receiving no indication that the case would be declined for prosecution. T. 96.

On May 5th, Agent Nilson interviewed Ms. Johnson for a second time, before she would be presented to the Red Lake Tribal Court and be assigned an advocate. T. 94. Agent Nilson arrived at the jail with Red Lake investigator Richardson in tow. T. 72. He announced to Ms. Johnson, "these rez dogs all around your house get treated better than [the child.]" T. 97. He may have meant to say, "I have never seen anything like this in my career." T. 98.

The Agent understood that BOP prison time Ms. Johnson faced was beyond what could be imposed by the Tribal Court. T. 97. The one-year cap for offenses litigated in that venue. See 25 U.S.C. 1302(a)(7)(C) (setting out the maximum). The federal penalty for assault is a ten-year statutory maximum for an adult victim, 18 U.S.C. 113(a)(6) (serious bodily injury).

Agent Nilson already knew where Ms. Johnson's case was heading, and this is why he asked Ms. Johnson if she thought "five years . . . would be fair?" for what she had done. T. 97. The Agent predicted that Ms. Johnson could try,

without likely success, to "explain to a judge or potentially a jury that for some reason you should only spend five years of your life in jail for what you did." T. 98. The certain threat of federal hard time was no oblique.

He announced to Ms. Johnson: "we have a bunch of attorneys that sit out in the city at the U.S. Attorney's Office. They're the ones that are going to go to court and present the case and the person in the robe which is the judge." T. 100.

Agent Nilson, on cross.

Q. "There's no question but that Trina was going to be indicted?

A. "Yes, that's what – that's what the investigation was about."

Q. "She's the lead defendant?"

A. "She is." T. 101.

Which is why he told Ms. Johnson, during that jail interview, "I just don't think it's a tribal matter at this point because of the tribal system." T. 102 (emphasis added). Thus, he knew the Tribal Court and the Red Lake jail would be used as a mere holding cell. He kept track of Ms. Johnson's tribal court proceedings. T. 78-79.

The Red Lake Tribal Court Proceedings

Ms. Johnson's advocate, Clayton Van Wert, testified as to what occurred next. How a discouraging Tribal Court process was delayed, and delayed, and

delayed yet again. He was told by the Red Lake prosecutor, this was the F.B.I.'s case.

Because the substance of his testimony is left out of the Report and Recommendation, we discuss it here in detail. Mr. Van Wert graduated from Bemidji State University, in 1989. He served as a post-certified Deputy for the Beltrami County Sheriff as a jailor and field deputy. T. 21. He taught law enforcement classes at both the Hibbing Community College and the Leech Lake Tribal College. T. 21. His qualifications are unique. There was no finding that he lacked credibility. Our complaint is that the Magistrate Judge ignored what he really had to say.

Mr. Van Wert has been a Red Lake Tribal "lawyer" for 2.5 years. T. 22. The process to become such a "lawyer" he described as "simplistic," for "all you have to do is make an application and pay the fees. They do some vetting," and a background check. T. 22. Approval by the Red Lake Tribal Council is required. T. 22. But there is no need to attend law school. Or pass the bar. T. 23.

At the Motions hearing, Mr. Van Wert reviewed the Red Lake Tribal Court record with respect to Ms. Johnson's case, Exh. 11, and made the following observations that will assist this Court's de novo review.

Charges against Ms. Johnson were filed on May 6, 2022, based upon the

same facts alleged in Ms. Johnson's indictment – assault and torture. T. 25. The brief investigative summary, attached to the charge, indicated that Special Agent Ryan Nilson had been notified by Tribal authorities of the assault, and was aware the child was taken to the Sanford Medical Center for an evaluation. T. 26. The F.B.I. had also requested of the Red Lake Investigator Richardson that the victim submit to a "FI", denoting a forensic interview. T. 26-27.

Ms. Johnson appeared in Red Lake Tribal Court on May 6th, 2022. She was detained without bail "until further order of the court." T. 27. A Red Lake advocate was assigned, and her the case was delayed to June 7, 2022. T. 28.

To say the advocate was a "public defender" infers a status of licensure. Advocates in the Red Lake Tribal Court need not be, as noted, licensed attorneys.

Ms. Johnson's renewed motion for bail was filed May 22, 2022, and summarily denied.

On May 26, 2022, Ms. Johnson's case was continued to July 7, 2022, with no change in her bail status, i,e., there was no bail whatsoever.

Mr. Van Wert entered the case and filed his Certificate of Representation on July 14, 2022, T. 30, and moved again for Ms. Johnson's release on bail. By then, Ms. Johnson was undergoing cancer treatment while incarcerated. T. 30. Attached to the motion is a memorandum authored by Danielle Nelson, "Programs

Coordinator/Trainer" for the "Red Lake Criminal Justice Complex Detention Services." She worked in the jail.

Ms. Nelson summarized Mr. Johnson's bi-weekly cancer treatments at the Sanford clinic in Bemidji, with radiation to follow. Basic transportation issues to and from the clinic were a "concern" given "the short amount of staff we have available for transports." Ms. Nelson interjected her own personal plea for release: "I strongly encourage you to reconsider allowing her a medical furlough, as other complications can and may arise during her treatment." T. 31. She wrote in her memorandum that the jail medical staff could not address Ms. Johnson's round-the-clock needs. Ms. Johnson's medical records confirming her diagnosis were also attached to Mr. Van Wert's motion.

The deficiencies in Ms. Johnson's medical treatment were further explained at the motions hearing. Mr. Van Wert testified that the Red Lake jail "had gone through several practical nurses and registered nurses and PAs to attempt to make some sort of medical needs met at the detention center; but because of the conditions inside the jail, the medical staff refused to work." T. 33. Whether there was a pause in the radiation treatment, from July 21, to mid-October, 2022, Mr. Van Wert had ongoing concerns. T. 46. The Government offered no rebuttal testimony to Mr. Van Wert's observations. Nor Ms. Nelson's.

The Red Lake Court summarily denied the motion for release/bail. T. 30.

Yet another motion for release was filed on September 13, 2022, and denied. T. 31.

Finally, on October 19th, at a pretrial, Ms. Johnson was released.

Compare Ms. Johnson's detention status in this case, with no case bail required. She was sent home by this Court under the standard conditions. Docket Entry 23. She has remained law-abiding ever since.

The Indian Civil Rights Act of 1968

Mr. Van Wert was conversant with the Indian Civil Rights Act, 25 U.S.C. 1302. T. 33. He observed that Ms. Johnson was denied her guaranteed right to a speedy trial under that statute. T. 33. "Every time I asked for an expedited hearing for, as, for a trial, it was denied." T. 34.

The Act provides that "No Indian tribe in exercising powers of self-government shall . . . deny any person in any criminal proceeding the right to a speedy and public trial . . ." Sec. 1302(6). This is, of course, the same speedy trial right recognized in Barker v. Wingo, 407 U.S. 514, 519 (1972).

Under the Act, Ms. Johnson couldn't be detained for reason of "excessive bail," 25 U.S.C. 1302(7), yet no bail was set for 169 days. T. 34. The right to bail, with certain exceptions the Government cannot offer here (because she has

been released) is likewise a protected constitutional right. See United States v. Salerno, 481 U.S. 739, 754 (1987) (noting that the Eighth Amendment provides that "bail shall not be excessive in those cases where it proper to grant bail").

She had a concomitant right under the Act "to be informed of the nature and cause of the accusation . . ." 25 U.S.C. 1302(6). To "due process of law." 25 U.S.C. 1302(8). Mr. Van Wert received no investigative materials from the F.B.I., including Ms. Johnson's two long interviews, Exhs. 2 and 7 (quoted at length in the Report and Recommendation, at pp. 3-6. Nor did he receive the medical records of the child. Nor the F.B.I. 302 reports of statements obtained by her co-defendants in this case. Mr. Van Wert was not unaware of the search warrants offered at the motions hearing. T. 34-35; Exhs. 9 and 10. He had no way to bring motions to suppress, which Ms. Johnson also had the right to do. 25 U.S.C. 1302(2).

A criminal defendant's right to "due process" includes the right to "broad discovery." Wardius v. Oregon, 412 U.S. 470, 474 (1973).

> The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played. We find ample room in that system, at least as far as 'due process' is concerned for [a rule] which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence.

Id. (quoting Williams v. Florida, 399 U.S. 78, 82 (1970)).

Mr. Van Wert testified that he "had repeatedly requested" the discovery from the prosecution but had received nothing. In the Red Lake Tribal Court, he observed, again sans rebuttal, the investigative materials are "only afforded to the defense counsel seven days before trial," he said. And "there would be absolutely no way that a one-week period would be enough time to muster a very good defense with that amount of information that I knew would be forthcoming." T. 35.

Our case features 25,000 pages of PDF documents. E.g., Docket Entry 83 (statement of reasons to exclude and referencing the page number). Mr. Van Wert was never given those pages. He was not told of their existence.

Consistent with the right to discovery is the right to discovery that contains exculpatory information. Brady v. Maryland, 373 U.S. 83, 87 (1963). Several co-defendants have admitted to their own responsibility, thereby impeaching the Tribal Court charges that Ms. Johnson had exclusive culpability. See the plea agreements of Bertram Lussier, Docket Entry 172; Patricia Johnson, Docket Entry 171; and Ellie Mae Johnson, Docket Entry 184.

The Indian Civil Rights Act also assures Ms. Johnson that she "have assistance of counsel." 25 U.S.C. 1302(6). As noted, she was facing up to a year

in jail on the Red Lake charges. 25 U.S.C. 1302(7). That right to counsel when the defendant faces incarceration has long been recognized, too. Gideon v. Wainwright, 372 U.S.C. 335, 344 (1963).

Heartlessly below, the United States argued that, for a remedy, Ms. Johnson could have filed a habeas corpus petition, under 25 U.S.C. 1303 citing Stanko v. Oglala Sioux Tribe, 916 F.3d 694, 697 (8th Cir. 2019). Docket Entry 145 at p. 16. No mention is made of when Ms. Johnson could have done that. Mr. Van Wert wasn't licensed in federal court, and there is no right to counsel in habeas cases. 18 U.S.C. 2006A(a)(2)(B).

This question was posed to Mr. Van Wert with respect to Mr. Johnson's due process rights: "Did you voice these objections as you've articulated them today?" A. "Yes." Q. "Was there a favorable response to those objections?" A. "No." T. 37-38.

All of this was by the Government's design. Only one reasonable inference may be drawn from the testimony. The D.O.J. was never going to give up 25,000 documents to Mr. Van Wert, so that he could litigate Ms. Johnson's constitutional rights in the Tribal Court. Indeed, the last entry of Exh. 11, the Red Lake Court record, indicates a pretrial was set for January 31, 2023. By then Ms. Johnson had been indicted. T. 40, 79. She would have no trial on the Reservation.

With all of this in the record, the Magistrate Judge nonetheless opines "there is no evidence in the record nor any provided by Defendant that the Tribe (its law enforcement, prosecutors, or Court officials) actually operated under the direction and control of the federal government in regard to Defendant's tribal case." Report and Recommendation at p. 19 (emphasis in original). We disagree. The failure to give up discovery, to continue and continue the case, was only for the benefit of the United States. But we have more evidence, again ignored.

From a conversation with Ogema Neadeau, the tribal prosecutor, Mr. Van Wert became aware "that the F.B.I. was the primary focus of the investigation they were conducting." T. 36. The F.B.I. controlled the investigation from day one and never would give it up.

With this background, we reach the rulings below.

Motion to Dismiss

A. The Tribal Court was not an independent sovereign

For years, this District Court has taken a hands-off approach to what occurs in the Red Lake Tribal Court. Since the Red Lake Tribe is a presumed sovereign nation, the rulings have been that the Federal Court will not intrude upon the workings of its Court system. See e.g., United States v. Stately, 19-CR-342 (ECT/LIB), Opinion and Order, at p. 8, Docket Entry 161. This deferential

jurisprudence, nice to look at on paper, is at odds with our facts.

In theory, Ms. Johnson was supposed to have distinct privileges by virtue of her Tribal membership. Those distinct jurisdictional privileges are supposed to reflect a "special treatment" required by her Tribal membership and her Native American race "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress's unique obligation toward the Indians." Morton v. Mancari, 417 U.S. 535, 554-555 (1974). The "inherent sovereign authority," of Ms. Johnson demanded no less. Michigan v. Bay Mills Indian Cmty, 572 U.S. 782, 788 (2014).

But the Constitution is "intended to preserve practical and substantial rights, not maintain theories." Davis v. Mills, 194 U.S. 451, 457 (1903). The reality of what has happened cannot be ignored. The so-called "special privileges" rooted in the "inherent sovereign authority" of Red Lake resulted, for Ms. Johnson, in no bail, a long stay in jail while undergoing cancer treatment, no lawyer, no discovery, and no ability to prepare for trial. The premise of "special treatment" in the sovereign nation is a thought divorced from Ms. Johnson's Red Lake Tribal experience, her protections there under the Indian Civil Rights Act of 1968 a complete nullity.

B. The Investigation was controlled by the F.B.I. with the intention of securing an Indictment

There has also been, in past litigation, the repeated claim by the Magistrate Judge that local and federal authorities of course investigate cases together as a matter of typical and routine cooperation. United States v. Lussier, 21-CR-145 (PAM/LIB), Report and Recommendation, at p. 24, Docket Entry 92; United States v. Begay, No. 21-CR-119 (NEB/LIB), 2022 WL 683090 at * 5 (D. Minn. March 8, 2022). Our Report and Recommendation says the same thing, at p. 19. We object to that conclusion as inconsistent with the uncontested facts.

The F.B.I. Agent announced the deficiencies of the local tribal court, because of the limited sentences/punishment available. "I just don't think it's a tribal matter at this point because of the tribal system," he announced to Ms. Johnson. T. 102. Ms. Johnson couldn't get five years in the Tribal Court, and the Agent thought she should receive far more than that.

We have evidence of an intention to charge in only one venue. The D.O.J., by AUSA Provinzino, was aware of the alleged crime right after it was discovered; aware of Ms. Johnson's interview and arrest. If the basis of the denial of our motion to dismiss is that the agencies shared their investigative data, then it follows that the F.B.I. was aware of the Tribal Court proceedings, the continuances, the stalling out, Ms. Johnson's cancer treatment. To hold that the

Government knew nothing of this has no support in the record. We object to the Report and Recommendation's absurd conclusion, at p. 19.

C. A Lack of Sovereignty Permits Review of the Tribal Court

With the F.B.I.'s knowledge of where she was housed, and what she was charged with (shared with the D.O.J.). Ms. Johnson was adversely punished by virtue of her race. Had she been Black, Caucasian, Asian, accused of the same crime, the Red Lake Tribal Court would have had no jurisdiction over her. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 195 (1978).

The jurisdictional uniqueness of Red Lake is rooted in Public Law 280, codified in 18 U.S.C. 1162(a). That statute granted certain states broad jurisdiction over "offenses committed by or against Indians in the areas of Indian country," and contains a provision that state court jurisdiction extends to "all Indian country within the State, except the Red Lake Reservation." Id. An Indian who committed a major felony against either another Indian or non-Indian falls within the exclusive jurisdiction of the United States. 18 U.S.C. 1153(a).

Though briefed, the Magistrate Judge did not discuss in any detail the changing United States Supreme Court case law with respect to Public Law 280. Report and Recommendation at p. 19. We now request that review.

Three years ago, Tribal Court jurisdiction, shared by the Federal

Government, was deemed exclusive of state court venue, at least with respect to the Oklahoma Reservation at issue in McGirt v. Oklahoma, 140 S.Ct. 2452, 2478 (2020). In so holding, McGirt noted the legal efficacy of Public Law 280. Id. at 2478.

McGirt turned out to be a temporary opinion. Its central tenant – the exclusivity of federal jurisdiction over Indian defendants – was questioned and dispatched away two terms later. Oklahoma v. Castro-Huerta, 142 S.Ct. 2486 (2022) held that federal and state courts have concurrent jurisdiction over major crimes on the Indian reservation. Castro-Huerta's facts were arguably limited to a non-Indian defendant committing a crime against an Indian in an Oklahoma reservation, which was the Magistrate Judge's viewpoint, Report and Recommendation at pp. 19-20; see also Lussier, Report and Recommendation at p. 25, n. 21.

But Justice Kavanaugh's opinion writ larger than a boundary in Oklahoma. Castro-Huerta's holding was that "Indian Country is part of a State, not separate from a State." Id. at 2502. The specific sentence we're talking about is this one: "Nothing in the language or legislative history of Pub.L. 280 indicates that it was meant to divest States of pre-existing and otherwise lawfully assumed jurisdiction." Id. at 499-500.

That sentence was not limned to just Oklahoma, and the Magistrate Judge's narrow view. In light of Justice Kavanaugh's above quoted sentences, as Justice Gorsuch noted in his Castro-Huerta dissent, Reservations no longer have "tribal self-government." Id. at 2526.

We urged the Magistrate Judge to accept Justice Gorsuch's reading of the Castro-Huerta holding, that Indian Tribes are no longer sovereign. What happens in the Tribal Court is now subject to review rather than a hands-off washing. We cannot look to see whether a Native Indian has actually received "special treatment" instead of, as here, a diminution. We can evaluate whether she received her statutory and case law guarantee of "due process." And we can evaluate the F.B.I.'s claim that the Tribal Court would never be used as a venue in this case.

It can't be said that the reason a Native American doesn't receive the same rights in the Tribal court setting is somehow, someway beyond review because it is "tied rationally to the Congress' unique obligation toward the Indians." Mancari, 417 U.S. at 554-555 (1974), cited in United States v. Stately, 19-342 (ECT/LIB), Opinion and Order, at p. 8; Docket Entry 161.

D. Equal Protection

In addition to the Government's deprivation of Ms. Johnson's basic due process rights, her right of equal protection has been impaired to her prejudice.

The most recent discussion of that right is found in Haaland v. Brackeen, 994 F.3d 249 (5th Cir. 2021) (en banc), where the "constitutionality of the Indian Child Welfare Act (ICWA), 25 U.S.C. Sec. 1901 et seq." was challenged. Id. at 265. Multiple issues were presented, but the essential one, for our purposes, was whether non-Indian families were denied equal protection under the law by the ICWA's adoptive placement preference for "other Indian families" and the like preference for placement in an "Indian foster home," Id. at 268 (quoting 25 U.S.C. 1915 (a)(3)), given that the preferences were based upon race. Id. at 288-89. Under the ICWA, the local Tribal Court has jurisdiction over the Indian child living on a reservation. But the state court had concurrent jurisdiction if the child is living off-reservation. Id. at 286, 363.

The Brackeen opinion runs out over 325 pages, illustrating how vexing not only the issues presented were, the fundamental disagreements the en banc Court had in interpreting Indian law.

The Brackeen majority's ultimate ruling, after nearly 100 pages of text, was that the ICWA, with its designation of the "Indian Child" and a preference for Indian family adoption and foster care, and the provision which allowed the state

court to decide custodial issues, did "not offend equal protection principles because they are based on a political classification and are rationally related to the fulfillment of Congress's unique obligation toward Indians." Id. at 361.

In a persuasive dissent, Judge Duncan agreed with the non-Indian plaintiffs' claim that the ICWA "violates equal protection: (1) by treating 'Indian children' differently from non-Indian children; and (2) by preferring 'Indian families' over non-Indian families." Id. at 392. Both classifications, Judge Duncan discerned, "exist in the twilight between tribe and race." Id. at 396. The "ICWA's separate standards for Indian children – standards which govern state proceedings, applies to children with tenuous connections to a tribe, and allow birth parents' wishes to be overridden – fails to rationally further tribal interests. That is even more evident with respect to ICWA's preference for Indian over non-Indian families, which is divorced from Congress's goal of keeping children linked to their tribe." Id. at 396.

The Supreme Court granted Certiorari, but did not reach the Equal Protection Clause question, for lack of standing. Brackeen v. Haaland, 143 S.Ct. 1609, 1640 (2023).

The Circuit opinion in Haaland is important to us because it addressed a near akin question we raise. Which is: whether the equal protection clause is violated

when an Indian is treated differently than a non-Indian for reasons of race when charged with the same crime.

Justice Kavanaugh's concurrence in Haaland gives us the encouragement to pursue the question. He recognized that, in the context of Indian adoptions in Haaland, that the non-Indian litigants' "the equal protection issue is serious" Id. at 1661. In "some cases," he wrote, an equal protection claim will resonate, where the differences in how the non-Indian and American Indian litigant is treated merely because of their "race." Id. He added: "Courts, ultimately this Court, will be able to address the equal protection issue when it is properly raised by a plaintiff with standing . . ." Id.

The Magistrate Judge suggests past Supreme Court decisions have foreclosed Ms. Johnson's equal protection claim. Report and Recommendation at p. 20. No reference is made, however, to Justice Kavanaugh's invitation. Report and Recommendation at p. 20, n. 12 (discussing Haaland but omitting mention of the Kavanaugh concurrence).

A door was opened for Ms. Johnson. She has standing, given her jail time in Red Lake. Our claim has been "properly raised."

On the merits, there are two classes of defendants in consideration. The first class features Ms. Johnson, a Native American. With full knowledge of the

F.B.I. and the D.O.J., she was deposited into the Red Lake Court and there denied due process of law assured to her by the Indian Civil Rights Act. No bail, no trained lawyer, no discovery, no speedy trial, delay upon delay, all while receiving chemotherapy in jail despite repeated pleas for her release.

The second class features the non-Indian defendant, perhaps Caucasian, perhaps Black, perhaps Asian, who, for the same charges occurring on the Red Lake Reservation, would have been brought to this Court, to be charged by Complaint, Rule 3, Fed.R.Crim.P. with a prompt presentment, informed of her constitutional rights, including appointed counsel, Rule 5(d), Fed.R.Crim.P.

And if we accept Justice Kavanaugh's view in Castro-Huerta – "Nothing in the language or legislative history of Pub.L. 280 indicates that it was meant to divest States of pre-existing and otherwise lawfully assumed jurisdiction." Id. at 499-500, the defendant committing a crime on Red Lake can now be brought to the Beltrami County District Court, there to be appointed a licensed public defender free of charge, and with a prompt presentment. Rules 5.01 and 8.01, Minn.R. Crim.P.

The first class sits in jail, ill. The second is released.

The first class receives no process due. The second receives liberal discovery, and having read the discovery has the right to file motions.

The Government offered no rebuttal to Mr. Van Wert's testimony, that Ms. Johnson was unfairly denied all the due process protections. The same protections the non-Indian defendant would have enjoyed in the state or federal court – bail, discovery, speedy trial, due process. T. 36. The F.B.I. followed the proceedings in Tribal Court, T. 101, and stood back and did nothing to correct its unfairness.

We object, in light of the record below, particularly the Agent's disclosures of the D.O.J. involvement in his investigation and the certainty of charges to follow, that there was "no evidence" that Ms. Johnson was placed in a "holding cell" by the Government. Report and Recommendation, at p. 31. She was.

E. The Remedy

What happened to Ms. Johnson falls within a sad progression. The literature, left undiscussed in the Report and Recommendation, is conclusive. From Dee Brown's Bury My Heart at Wounded Knee (Henry Holt 1970), to Ned Blackhawk's The Rediscovery of America (Yale 2022) (which won the National Book Award last fall), the Government's mistreatment of the Native American has been abysmal. Ms. Johnson has been joined into a long and sad tradition.

There are very few cases interpreting the Indian Civil Rights Act, 25 U.S.C. 1302 et seq., which confers due process protections upon Ms. Johnson. May this case be the first in this District to interpret that statute. The Magistrate Judge

rejected our claim. Report and Recommendation, at p. 31 (finding no collusion between law enforcement agencies).

The question we raise is the same concern voiced by Mr. Van Wert. The statute provides for due process protections, of which Ms. Johnson received none. There is no statutory right without a remedy.

The case law has held out the possibility the courts "may someday be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." United States v. Russell, 411 U.S. 423, 431-32 (1973). A denial of "fundamental fairness" gets us to that ridge. Id. at 432. The phrase "shocking to the conscience" tells us what "outrageous" is supposed to mean. Rochin v. California, 342 U.S. 165, 172 (1952). Holding a cancer patient in a jail where even the transportation to and from the clinic is fraught, is cruel and pernicious.

What happens in the Red Lake Court has been hushed for decades. The Magistrate Judge's ruling maintains the gloss of sorrow, the sad and dim patina that all is well in the Red Lake Tribal Court, and that the F.B.I. in this case has not used that institution to its gross advantage. Please say it isn't so.

Motions to Suppress

The initial question is whether Ms. Johnson was in custody on May 3, 2022, at the F.B.I. field office. Despite the Agent's suggestion that Ms. Johnson was free to leave the interview, she was not. We disagree with the Magistrate Judge's ruling otherwise. Report and Recommendation at pp. 3-4, 21, 24, 27. We thus object to the Report and Recommendation order that our motion be denied. Id. at p. 37.

A formal arrest is unnecessary for a finding of custodial interrogation. Six factors are considered: 1) whether Ms. Johnson was informed she was free to leave; 2) whether she in fact had freedom of movement, 3) whether she initiated the contact with the F.B.I. or "voluntarily acquiesced to it"; 4) whether strong-arm tactics or like tactics were employed; 5) whether the atmosphere was police dominated; and 6) whether Ms. Johnson was placed under arrest "at the end of questioning." United States v. Elzahabi, 557 F.3d 879, 883 (8th Cir. 2009)(citing United States v. Griffin, 922 F.2d 1343, 1349 (8th Cir. 1990)); Report and Recommendation at p. 22 (citations omitted). The six factors are not exclusive, for the question we raise "cannot be resolved merely by counting up the number of factors on each side of the balance and rendering a decision accordingly." Id. (quoting United States v. Czichray, 378 F.3d 822, 827-28 (8th Cir. 2003)).

Surely the interview in Bemidji was police dominated, with the F.B.I. Agent

and Red Lake Investigator questioning Ms. Johnson, who herself had no experience in this arena. A two on one is never very fair. We disagree with the Magistrate Judge's ruling to the contrary. Report and Recommendation at p. 27.

The Court will soon see that Ms. Johnson is not sophisticated at our hearing set for January 4, 2024. Cunning is not a word that describes her.

The key inquiry of the six factors is whether Ms. Johnson's "freedom to depart was restricted in any way." Id. at 884 (citing United States v. LeBrum, 363 F.3d 715, 720 (8th Cir. 2004) (en banc) (quoting in turn Oregon v. Mathiason, 429 U.S. 492, 495 (1977)). Agent Nilson's promise that Ms. Johnson was free to leave would have had weight, if true. United States v. Sanchez, 676 F.3d 627, 631 (8th Cir. 2012). The Magistrate Judge splits hairs, with the claim that the initial F.B.I. interview ended without an arrest, while failing to acknowledge that Ms. Johnson was in the Agent's control thereafter as well. Report and Recommendation at p. 27-28. There were no Miranda warnings, as there had to be in a custodial interview. T. 57-58.

The Agent's promise that Ms. Johnson could walk away whenever, it turned out, was disingenuous. After the interview in downtown Bemidji, the Agent ferried Ms. Johnson back to her home, using an F.B.I. vehicle. In that car, she couldn't leave the Agent's view. She would never be able to leave.

The Agent admitted to abundant probable cause to keep Ms. Johnson. Hers not a close call. T. 70. The Agent's odd demurral – the thought he had nothing to do with the arrest – does not erase the arrest itself. T. 61. The Government is not permitted to infer (and then argue), as Agent Nilson claimed in testimony, that the decision to arrest was not his own. That this Court should ignore the cuffs applied to Ms. Johnson's wrists because he had not done so at the F.B.I. office in Bemidji. Yet that is the Report and Recommendation's ruling, at p. 28.

Under the doctrine of "collective knowledge," this Court must "presume the officers have shared relevant information which informs the decision to seize evidence or to detain a particular person . . ." United States v. O'Connell, 841 F.2d 1408, 1419 (8th Cir. 1988) (citing United States v. Wright, 641 F.3d 602, 606 (8th Cir.), cert. denied, 451 U.S. 1021 (1981)), cert. denied, 488 U.S. 1011 (1989). By this doctrine, Agent Nilson's claim of being unaware of the impeding arrest and its fruition is to be discounted. The knowledge of the Red Lake Police was imputed onto his gestalt. Though the doctrine of "collective knowledge" was briefed, the Report and Recommendation ignored it.

The Doctrine also explains why the D.O.J. shared in the "collective knowledge," which included Ms. Johnson's arrest, and communicating with Ms. Johnson's Tribal Prosecutor that the F.B.I. would be handling the investigation

leading to, of course, the instant charges.

Ms. Johnson's statement was also involuntary. Coercive law enforcement conduct is the predicate for this claim. Colorado v. Connolly, 479 U.S. 157 (1986). Recent scholarship has taken a long view at voluntariness, discerning several factors to consider, including the defendant's isolation and the power differential involved between the questioner and subject. J. Kaplan et al., "Evaluating Coercion in Suspect Interviews and Interrogations," Advances in Psychology and Law 1-40 and note 27 (2019). Additional voluntariness factors include the location of the questioning, Miranda v. Arizona, 384 U.S. 436, 457-58 (1966), whether, as noted, a Miranda warning was not given, United States v. Morgan, 729 F.3d 1086, 1091-92 (8th Cir. 2014) and United States v. Aguilar, 384 F.3d 520, 525 (8th Cir. 2004); whether Ms. Johnson initiated contact (which she did not) coupled with her lack of experience in the criminal justice system (minimal), Gray v. Norman, 739 F.3d 1112, 1116-17 (8th Cir. 2014).

Compared to the sophistication of her interviewers, Ms. Johnson was hapless, and her voluntariness was rooted in the sense that she could leave at any time. In the end, she could not. We disagree with the Report and Recommendation's suggestion that the interview was voluntary. Id. at p. 23.

Ms. Johnson's consent to search her home, Exh. 4; T. 64, was under the

same misleading pretense, namely that she was free to go anytime. Her consent is to be judged upon the totality of circumstances, Schneckloth v. Bustamonte, 412 U.S. 218, 242-43 (1973), which included "both the characteristics of the accused and the details of the interrogation." Id. at 226. And whether the precursor questioning, as here, was "prolonged." Id. All the "surrounding circumstances" of Ms. Johnson's consent must undergo "careful scrutiny." Id. At the very least, Agent Nilson should have told Ms. Johnson that, once she signed the consent form, she'd be arrested. He misled her by unfair omission.

This leaves us with the jail interview of May 5th, which was Mirandized. Exh. 7. Not satisfied with his 113 pages of transcript generated from the May 3rd dialogue, Agent Nilson returned to the Red Lake Jail two days later while she was in custody on tribal charges to be filed the next day. Ms. Johnson signed a Miranda waiver, but that is not determinative.

The second statement was the product of undue delay in her presentment. We appreciate the federal court's right of presentment, requiring that the defendant within six hours of arrest to appear before Magistrate Judge, Corley v. United States, 556 U.S. 303 (2009), has not been extended to the Tribal Court. United States v. Alvarez-Sanchez, 511 U.S. 350, 358 (1994). Ms. Johnson was not arrested for a federal offense, notes United States v. Pugh, 25 F.3d 669, 674 (8th

Cir. 1994). This is the Report and Recommendation ruling, at p. 30. We object.

Ms. Johnson, of course, was indicted by a federal grand jury for the exact same conduct. Agent Nilson's consultations with AUSA Provinzino were not the subject of idle chatter. He wanted more than five years in prison for Ms. Johnson, and he knew couldn't get that amount of time in the Tribal Court setting. T. 97. He took unfair advantage of a delay in Red Lake (formal charges filed the next day) to secure a second confession.

We persist in raising the presentment claim because the use of the Red Lake Tribal Court as a holding cell for federal defendants awaiting certain indictment violates 25 U.S.C. 1302(A)(6) and (7) of the Indian Civil Rights Act. Specifically, the practice employed here denied Ms. Johnson her due process rights, which includes timely presentment. See 25 U.S.C. 1302(D)(8).

The Magistrate Judge in this case and in the past has held that there is no presentment right and that the cases, federal and Red Lake, are distinct, and would be, with all due respect, an error in our context. Lussier, Report and Recommendation at p. 19-21; our Report and Recommendation at p. 29. Where the investigations are joined, where the Tribal Court prosecutor is aware, recalled Mr. Van Wert, that the F.B.I. was the "primary focus of the investigation they were conducting," T. 36, and where an indictment was predicted with certainty, T. 86,

standing back and concluding the Red Lake Tribal Court practices are good enough when due process protections are available in a fair venue is an awful ruling to make.

"29" hours was too long a wait in Corely. Id. at 312. For more than two days Ms. Johnson sat. We object thus to the Report and Recommendation's ruling, at p. 37, that our motion to suppress be denied.

Ms. Johnson's second signed consent, Exh. 8, to search her phone is moot. Agent Nilson decided on a warrant. T. 77. Exh. 9 was signed by Magistrate Judge Jon T. Huseby on August 5, 2022. Probable cause came from Ms. Johnson's second interview at the Red Lake Jail. Affidavit paras. 11, 12, 13, 14, 15, 16, 17, and 18. Paragraph 16 indicates that Ms. Johnson used her phone to film the alleged abuse.

For a four corners challenge like ours, the question is whether "there is a fair probability that contraband or evidence of a crime will be found in a particular place," Illinois v. Gates, 462 U.S. 213, 238 (1983), to wit: her cell phone. The "totality of circumstances" is of course considered. United States v. Hager, 710 F.3d 830, 836 (8th Cir. 2013) (citation omitted). Deference is due to the discretion of the signing jurist. Gates, 462 U.S. at 236; United States v. Smith, 581 F.3d 692, 694 (8th Cir. 2009).

Still, a "fair probability" that evidence of assault and torture would be discovered on her phone had to have been shown. United States v. Alexander, 574 F.3d 484, 489 (8th Cir. 2009). In other words, a nexus must have existed between the cell phone to be searched and the evidence suspected to be there. United States v. Tellez, 217 F.3d 547, 550 (8th Cir. 2000); Rule 41(c), Fed.R.Crim.P.

There had to have been a "substantial basis" of probable cause within the affidavit, Gates, 462 U.S. at 238-39, which is lacking. This warrant is based upon a statement obtained by lack of timely presentment. Without her statements, the warrant lacks a connection, or nexus, to the alleged crime.

A second warrant, Exh. 10, is for the search and seizure of Ms. Johnson's Facebook data, Bates 1571, signed by Magistrate Tony N. Leung on November 2022. The warrant's affidavit begins with a word-for-word copy of the cell phone search warrant affidavit. The additional information concerns data, since discovered on her cell phone, including "chat excerpts recovered from the Facebook Messenger application," and references, in those chats, to the alleged victim and "the source of his injuries." Para. 18. A select number of Ms. Johnson's messages are quoted. Paras. 19, 20, 21, 22, and 23.

This second search warrant is tainted by the illegality of the first. Take

away Ms. Johnson's statements, and there is no basis to search. We don't make this argument in "passing." Report and Recommendation at p. 35.

The Good Faith doctrine permits this Court to avoid even deciding the probable cause predicate. United States v. Leon, 468 U.S. 897, 916 (1984). United States v. Washington, 455 F.3d 824, 828 (8th Cir. 2006). Without the statements of Ms. Johnson, the affidavit becomes, though, an empty vessel, "so lacking in the indicia of probable cause as to render official belief in its existence entirely unreasonable." Leon, 468 U.S. at 923 (quoting Brown v. Illinois, 422 U.S. 590, 610-11 (1975) (Powell, J., concurring in part). It becomes bare bones, the Leon exception. Id. at 923, n. 24.

Motion to Strike Surplusage

The allegations, without amplification, are bad enough. Ours is not, as the Government would have it, "a factual and legally complex case such as this." Report and Recommendation at p. 17. This motion calls for a discretionary call. States v. Figueroa, 900 F.2d 1211, 1218 (8th Cir.), cert. denied, 496 U.S. 942 (1990).

An Indictment is sufficient if it states an offense and elements thereof, Rule 7(c)(1), Fed.R.Crim.P.; United States v. Redzic, 627 F.3d 683, 689 (8th Cir. 2010), thus providing notice to putative defendant. Hamling v. United States, 418 U.S.

87, 117-118 (1974); United States v. Beasley, 688 F.3d 523, 533 (8th Cir. 2012). We know what the charges are, the statutes in play, and the elements. The listing of the victim's injuries is not necessary. Indictment at p. 4. In light of the co-defendant guilty pleas, there is no longer a need "to outline the relationships between the various defendants and the victim," Id. at 6, because three of the defendants, Bertram Calvin Lussier and Patricia Ann Johnson, are no longer part of the case.

There is no need to announce that the Grand Jury has indicted Ms. Johnson because she "committed, caused, and/or permitted severe and pervasive abuse towards Minor Victim 1, including but not limited to" starvation, deprivation of sleep, assaults, threats, withholding medical care and social isolation. And that as a result, the "Minor Victim 1 suffered serious and substantial harm to his physical, mental, and emotional health." Id. It's all inflammatory and prejudicial, language, the key factors to be considered. Dranow v. United States, 307 F.2d 545, 558 (8th Cir. 1962); United States v. DeRosier, 501 F.3d 888, 897-98 (8th Cir. 2007). A narrowing of an indictment's scope, so as to bar prejudicial impact, is a permitted use of Rule 7(d). Given the severity of the penalties, it's not a big ask.

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Respectfully submitted,

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