UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

UNITED STATES OF AMERICA, **Plaintiff,** **vs.** **KORILYN M. WHIPPLE-WRIGHT,** **Defendant.**	**3:24-CR-30050-ECS** **REPORT AND RECOMMENDATION GRANTING DEFENDANT'S MOTION TO SUPPRESS**

Unremarkable events may undermine constitutional guarantees. This is one such occasion. Korilyn Whipple-Wright was arrested and booked at a tribal correctional facility. A day later an investigator asked for her tribal-enrollment status without first Mirandizing her. Since the question elicited an essential element of her charged offenses, Whipple-Wright's answer should be suppressed.

FACTS

On February 17, 2024, a tribal patrol officer notified Richard Kumley, the Supervisory Special Agent with the Rosebud Sioux Tribe Law Enforcement Service (RSTLES) of an assault and wanted Kumley to investigate.[1] Agreeing, Kumley went to

[1] Docket No. 42, at 12:4–8, 15:8–16:2.

the emergency room, spoke with the alleged victim, Donna Morrisette, and took pictures of her injuries.[2]

Kumley proceeded then to the Rosebud Sioux Tribe Adult Correctional Facility (RSTACF) to talk to the alleged perpetrator, Whipple-Wright.[3] He knew her already,[4] having arrested her in the past on charges the Rosebud Sioux Tribe (RST) prosecuted her for.[5]

Upon arrival at the RSTACF, Kumley's investigation hit a snag; Whipple-Wright was reportedly intoxicated.[6] So he waited until the next day to question her.[7] In the interim, he made no effort to dig into her background or criminal history.[8]

Returning the following afternoon, Kumley met with Whipple-Wright.[9] The recorded conversation began with Kumley explaining he "just need[ed] to get some basic information from [her] real quick."[10] He posed questions seeking her name, birthday, social security number, education, and other identifying information.[11] Nestled among them, however, was one question asking where she was tribally enrolled.[12]

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[2] *Id.* at 31:8–15, 31:25–32:2.
[3] *Id.* at 32:1–3.
[4] *Id.* at 56:25–57:1.
[5] *Id.* at 14:1–8, 29:17–30:1, 42:24–43:18, 51:1–8, 55:11–13, 56:4–15.
[6] *Id.* at 31:22–32:14, 37:20–22.
[7] *Id.* at 32:6–8.
[8] *Id.* at 32:21–33:10, 35:17–36:4, 59:1–5.
[9] *Id.* at 21:12–25, 33:11–16.
[10] Docket No. 43, Ex. 1, at 0:03–0:05.
[11] *Id.* at 0:15–1:55.
[12] *Id.* at 1:11.

Whipple-Wright responded that she was a member of the RST.[13] Kumley then read Whipple-Wright her *Miranda* warnings and she requested a lawyer.[14] He ended his questioning, documented her injuries, and left.[15]

ANALYSIS

The Fifth Amendment guards against compelled self-incrimination.[16] To secure the right the Supreme Court has adopted a prophylactic "constitutional rule" to apprise an accused of her rights.[17] Lest a suspect unwittingly relinquish her Fifth Amendment rights, the so-called *Miranda* warnings advise the suspect that she may remain silent, that her statements may be used against her, and that she may demand an attorney's presence.[18] Unwarned statements cannot be admitted into evidence at trial.[19] But they may be used for impeachment purposes if made voluntarily.[20]

To be entitled to *Miranda* warnings, a suspect must be subject to custodial interrogation.[21] "Custody" exists when a "reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave."[22]

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[13] *Id.* at 1:13.
[14] *Id.* at 2:00–2:44.
[15] Docket No. 42, at 36:5–14.
[16] U.S. Const. amend. V.
[17] *Vega v. Tekoh*, 597 U.S. 134, 148 (2022) (citing *Miranda*, 530 U.S. 436, 438–39 (1966)).
[18] *Miranda*, 530 U.S. at 444, 467.
[19] *See Dickerson v. United States*, 530 U.S. 428, 443–44 (2000); *Miranda*, 384 U.S. at 444.
[20] *Harris v. New York*, 401 U.S. 222, 224–26 (1971).
[21] *Miranda*, 530 U.S. at 471.
[22] *Howes v. Fields*, 565 U.S. 499, 509 (2012) (quoting *Thompson v. Keohane*, 516 U.S. 99, 112 (1995) (first alteration in original)).

The Government does not dispute that Whipple-Wright was in custody.[23] She had been formally arrested the day before and was incarcerated at the time of her interview. Her status as a jailed arrestee is quintessentially custodial.[24]

What remains then is whether Kumley's question on tribal enrollment constitutes interrogation under *Miranda*. The term "interrogation" refers to "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."[25]

Incriminating statements—and thus what is interrogative—are charge-dependent. So while age is seldom incriminating, when the questions are attached to an underaged drinking investigation, they are interrogative.[26] The same is true for citizenship or immigration status,[27] and whether a suspect in possession of a gun is a felon.[28]

Whipple-Wright is accused of committing three Major Crimes Act (MCA) offenses.[29] The MCA extends federal jurisdiction over "major" crimes committed by

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[23] Docket No. 42, at 4:2–4.
[24] *See California v. Beheler*, 463 U.S. 1121, 1125 (1983).
[25] *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980) (footnote omitted).
[26] *See, e.g.*, *City of Missoula v. Kroschel*, 419 P.3d 1208, 1224 (Mont. 2018).
[27] *E.g.*, *United States v. Sepulveda-Sandoval*, 729 F. Supp. 2d 1078, 1101 (D.S.D. 2010); *see also United States v. Henley*, 984 F.2d 1040, 1042 (9th Cir. 1993) ("[W]hile there is usually nothing objectionable about asking a detainee his place of birth, the same question assumes a completely different character when an INS agent asks it of a person he suspects is an illegal alien.").
[28] *E.g.*, *United States v. Sims*, 423 F. Supp. 3d 1156, 1161–62 (D. Kan. 2019); *United States v. Hood*, 551 F. Supp. 2d 766, 771 (W.D. Ark. 2008).
[29] Docket No. 1 (citing violations of 18 U.S.C. § 1153).

Indians within Indian country.[30] Prosecution under the MCA requires that the offender be an Indian.[31] Her Indian status is more than a jurisdictional hook; it is an element of the offense.[32]

A defendant's Indian status thus must be proven for every MCA offense beyond a reasonable doubt.[33] To do so, the Government must show that "the defendant (1) has some Indian blood, and (2) is recognized as an Indian by a tribe or the federal government or both."[34] Over time, enrollment has become "the common evidentiary means of establishing Indian status."[35]

So Whipple-Wright's Indian status is an element of her charged crimes. Even so, the Government insists Kumley's tribal-enrollment query was a mere "routine booking question." Such a question is only intended to collect "biographical data necessary to complete booking or pretrial services."[36] As long as the question is asked "for record-keeping purposes only,"[37] it is not interrogation—even if the question evokes an

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[30] *Ex parte Kan-gi-shun-ca* (*Crow Dog*), 109 U.S. 556, 572 (1883); *United States v. Kagama*, 118 U.S. 375, 384–85 (1886).
[31] 18 U.S.C. § 1153(a).
[32] *United States v. Bagola*, 108 F.4th 722, 726 (8th Cir. 2024); *United States v. Graham*, 572 F.3d 954, 956 (8th Cir. 2009).
[33] *United States v. Stymiest*, 581 F.3d 759, 763 (8th Cir. 2009).
[34] *Bagola*, 108 F.4th at 726 (quoting *Stymiest*, 581 F.3d at 762); *see also United States v. Martin*, 777 F.3d 984, 993 (8th Cir. 2015) (permitting stipulation to Indian status).
[35] *United States v. Pemberton*, 405 F.3d 656, 660 (8th Cir. 2005) (quoting *United States v. Broncheau*, 597 F.2d 1260, 1263 (9th Cir. 1979)); *accord Stymiest*, 581 F.3d at 764 n.2.
[36] *Pennsylvania v. Muniz*, 496 U.S. 582, 601 (1990) (plurality opinion) (quoting *United States v. Horton*, 873 F.2d 180, 181 n.2 (8th Cir. 1989)).
[37] *United States v. Armstrong*, 39 F.4th 1053, 1057 (8th Cir. 2022) (quoting *Muniz*, 496 U.S. at 584).

inculpatory response.[38] But a question "designed to elicit [an] incriminatory admission[ ]"—even unintentionally—is not excepted.[39] Interrogation occurs when the questioning "agent should reasonably be aware that the information sought, while merely for basic identification purposes in the usual case, is directly relevant to the substantive offense charged."[40]

The Government cites two cases[41] as instances when the questions asked—which produced incriminatory statements—fit the routine booking question exception to the *Miranda* rule. Yet neither case dealt with questions directly germane to the offenses charged.[42] In one, questions focusing on which bedroom the defendant occupied in a two-bed apartment were not interrogative because they "were reasonably related to obtaining consent to search, did not ask what the officers might find in the bedroom, and [the officers] did not know that there was contraband in the . . . bedroom."[43] Similarly, questions about the defendant's employment in the other case were not interrogations because "employment status is not so central to a drug investigation that it must be excised from the routine biographical information collected in the course of arrest and booking."[44]

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[38] *United States v. Tapia-Rodriguez*, 968 F.3d 891, 895 (8th Cir. 2020).
[39] *Armstrong*, 39 F.4th at 1056; *accord United States v. McLaughlin*, 777 F.2d 388, 391–92 (8th Cir. 1985); *see also Muniz*, 496 U.S. at 610–11 (Marshall, J., concurring).
[40] *Armstrong*, 39 F.4th at 1057 (quoting *McLaughlin*, 777 F.2d at 391–92).
[41] *Tapia-Rodriguez*, 968 F.3d 891; *Armstrong*, 39 F.4th 1053.
[42] *Brown*, 101 F.3d at 1274.
[43] *Tapia-Rodriguez*, 968 F.3d at 896.
[44] *Armstrong*, 39 F.4th at 1057.

Kumley's tribal enrollment question is different. The question strikes at the heart of Whipple-Wright's charges under the MCA. He should have known that the question was reasonably likely to engender a self-incriminating response. His question was interrogation, not excepted from the *Miranda* rule, and her answer to it is inadmissible as substantive evidence at trial.[45]

The Government tries to work around the interrogation problem in two ways. It first claims that questions related to establishing jurisdiction should always trigger the routine booking question exception.[46] Secondly, it claims that Kumley's subjective intent should be central to the exception's analysis.[47] If Kumley did not intend to extract inculpatory information from Whipple-Wright, the Government says, then the exception should apply. Neither claim is persuasive.

Jurisdictional Hook. Indian status anchors federal jurisdiction to crimes that would otherwise be committed to the tribe or state. That makes Whipple-Wright's tribal status material to the investigation. The status of the parties involved in purported criminal conduct matter because different sovereigns have jurisdiction to prosecute them. Kumley believed that Morrisette was an Indian at the time he spoke with Whipple-Wright.[48] But jurisdiction could change, depending on Whipple-Wright's status. The RST or

[45] *See United States v. Herman*, No. 06-cr-30095, Tr. of R. & R., at 10 (D.S.D. Dec. 14, 2006), *R. & R. adopted*, (D.S.D. Jan. 26, 2007) (Docket No. 37).
[46] Docket No. 42, at 6:24–8:14.
[47] *Id.* at 9:5–10:5.
[48] *Id.* at 38:22–39:3.

Government could charge her if she is an Indian.[49] And the State of South Dakota or Government could exercise criminal jurisdiction if she is non-Indian.[50]

It goes further. Whether the RSTACF even had the authority to house Whipple-Wright turned on her Indian status. Tribes have finite power to hold non-Indians. Unless the RST is certified to exercise "special Tribal criminal jurisdiction"[51]—which it is not[52]—the Tribe can only temporarily detain non-Indians.[53] So if Whipple-Wright was non-Indian, the RSTACF could keep her only for the time it took to corroborate this and then would have to hand her off to the proper authorities.[54]

Kumley testified that—though it is the arresting officer's responsibility to find out a person's tribal status—there have been times a non-Indian was improperly confined at the RSTACF.[55] So there is good reason to confirm Indian status rather than assume it. That said, while legitimate administrative reasons could exist for checking if a suspect in

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[49] *United States v. Lara*, 541 U.S. 193, 210 (2004) (interpreting 25 U.S.C. § 1301(2) as relaxing restrictions on tribal sovereignty to permit tribes to prosecute non-member Indians); 18 U.S.C. § 1153 (federal jurisdiction).
[50] 18 U.S.C. § 1152 (federal jurisdiction); *Oklahoma v. Castro-Huerta*, 597 U.S. 629, 656 (2022) (state has concurrent jurisdiction). *But see State v. Larson*, 455 N.W.2d 600, 601–02 (S.D. 1990) (interpreting pre-*Castro-Huerta* federal law to hold that the state could not prosecute non-Indians for crimes committed against Indians in Indian country).
[51] 25 U.S.C. § 1304(a)(14).
[52] *See Implementing Tribes*, Tribal L. & Pol'y Inst., https://www.tribalvawa.org/implementing-tribes (last updated Jan. 28, 2025) (listing the tribes authorized to exercise special Tribal criminal jurisdiction over non-Indians, the Rosebud Sioux not being one).
[53] *United States v. Cooley*, 593 U.S. 345, 351–52 (2021) (citing *Duro v. Reina*, 495 U.S. 676, 697 (1990)); *see also United States v. Terry*, 400 F.3d 575, 579–80 (8th Cir. 2005) ("Because the power of tribal authorities to exclude non-Indian law violators from the reservation would be meaningless if tribal police were not empowered to investigate such violations, tribal police must have such power." (citing *Ortiz-Barraza v. United States*, 512 F.2d 1176, 1180 (9th Cir. 1975)).
[54] *Cooley*, 593 U.S. at 352 (citing *Duro*, 495 U.S. at 697).
[55] Docket No. 42, at 35:7–16, 38:5–20.

custody is an Indian, they do not make Kumley's question to Whipple-Wright any less an interrogation.

There were also several other ways to verify Whipple-Wright's Indian status besides asking her. Had Kumley's intent been to substantiate her race, he had a day to research before talking to her.[56] That time could have been spent conferring with the arresting officers or accessing Whipple-Wright's records on a RSTLES computer.[57] The RSTACF, RSTLES's secretary, or Indian Health Services could have also been useful resources.[58] Moreover, Kumley could have delved into Whipple-Wright's tribal criminal history, to see if the tribe had convicted her before,[59] or reviewed her booking card, that identified her as American Indian and that she signed attesting to the accuracy of.[60]

The factual background of this case further undermines the Government's claim that Kumley needed to ask his question to establish jurisdiction. Kumley had arrested Whipple-Wright before;[61] as the arresting officer, he should have determined her Indian status then.[62] He also knew that Whipple-Wright had been prosecuted in tribal court

[56] *Id.* at 25:23–25, 26:7–10, 32:2–33:10, 43:20–25, 59:1–5.
[57] *Id.* at 26:4–10, 35:17–36:4.
[58] *Id.* at 39:12–17.
[59] *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978) (tribal courts do not have criminal jurisdiction over non-Indians).
[60] Docket No. 41, at 12, *see also* Docket No. 42, at 58:9–25 (Kumley could have requested booking card).
[61] Docket No. 42, at 14:3–4, 42:23–43:18.
[62] *See id.* at 35:3–4, 45:20–47:14, 55:11–57:1.

before.[63] And because tribal tribunals only have criminal jurisdiction over Indians, he could have scanned the available records and gathered information on her tribal status.

Demanding a *Miranda* warning when an arrestee faces potential MCA charges does not impose unworkable constraints on a tribal investigation.[64] Arresting officers will still be able to confirm Indian status before placing a suspect in custody. And in a situation like this one, an investigating officer is free to double-check with the suspect that she is an Indian—it just requires a *Miranda* warning before doing so. Should a suspect assert her right against self-incrimination when doubts remain about her Indian status, the tribe can hold her as it works to clarify the issue.[65] Even barring those procedures, an officer may still ask an unwarned suspect where she is enrolled; her response simply cannot be used as evidence in the Government's case-in-chief at trial.

Subjective Intent. The Government urges separating the routine booking question exception from the definition of an interrogation to create a two-step approach. It asks the Court to determine first whether the challenged question meets the definition of an interrogation, then surmise whether the officer intended the question for record-keeping purposes. It posits that if the question was interrogatory, but the officer had not posed it with a mind to incriminate, then the exception applies. Consequently, though an

[63] *Id.* at 14:7–12, 29:17–25, 43:5–18, 51:4–8.
[64] *See id.* at 53:2–13 (Kumley admitting that demanding a *Miranda* warning before his enrollment question would not affect his ability to investigate and "probably would have eliminated" any issues).
[65] *Cf. United States v. Keys*, 390 F. Supp. 2d 875, 884 (D.N.D. 2005) (approving temporary hold on suspect when officers were "genuinely confused" about his race and seeking clarification).

interrogation "focuses primarily upon the perceptions of the suspect . . . without regard to objective proof of the underlying intent of the police,"[66] the Government's proposal will make the officer's intent the centerpiece.

The proposal, however, does not square with Eighth Circuit precedent. The caveat to *Miranda*'s booking question exception uses objective language, requiring judicial scrutiny if the officer *reasonably* should have known that the question asked was directly relevant to an offense charged.[67] And despite an interrogation's divisibility into a definition, exception, and caveat to the exception—the ultimate inquiry encompasses a singular issue: whether an interrogation has occurred.[68] An officer's subjective intent in his question is no more relevant in the routine-booking-question-exception context than the interrogation one.

Kumley should have reasonably expected that his question would provoke an inculpatory response. He is RST's supervisory special agent and a cross-deputized federal officer through the Bureau of Indian Affairs.[69] He was the investigating officer and is the case agent in Whipple-Wright's federal prosecution.[70] He knows that Indian status is an element of every MCA prosecution.[71] And he should have known that

[66] *Innis*, 446 U.S. at 301.
[67] *Armstrong*, 39 F.4th at 1057.
[68] *E.g.*, *Tapia-Rodriguez*, 968 F.3d at 896–97 (holding that the routine booking question exception applied, so the challenged questions did not constitute an interrogation).
[69] Docket No. 42, at 13:4–7.
[70] *Id.* at 49:6–50:25.
[71] *Id.* at 28:6–23.

Whipple-Wright's response to his tribal enrollment question could be used to prove the charges brought against her.

But to the extent that the Government argues the officer's subjective intent matters, Kumley's aim here does not help its cause. Kumley admitted his question had no jurisdictional basis or administrative purpose. He only asked the question to test Whipple-Wright's cognitive abilities.[72] While no mal-intent underlaid the question—though it was misguided and lacked critical thought[73]—Kumley's purpose is at best neutral for the Government. Even with the inordinate value the Government places on Kumley's motive, it does not change the outcome.

CONCLUSION

Since Indian status is an element of every MCA offense, Kumley's question—seeking to know where Whipple-Wright—was tribally enrolled was designed to elicit an inculpatory answer. The routine booking question exception does not apply because Kumley should have reasonably known that his question would prompt an incriminatory response. The question was therefore an interrogation, and required *Miranda* warnings be given before he posed it and she answered. Because they were not, her response cannot

[72] *Id.* at 51:9–52:22, 57:14–58:4.

[73] *Id.* at 27:10–24 (Kumley testifying he did not think his question had any relevance to the prosecution); *id.* at 29:6–16, 52:22 (mentioning partially why he asked the enrollment question was because he "had been trained" that way).

be used or referred to in the prosecution's case. But since Whipple-Wright made her response voluntarily (and concedes doing so),[74] it may be admissible as impeachment.

RECOMMENDATION

Based on the authorities and legal analysis outlined in this report, and the record now before the Court, it is

RECOMMENDED that Whipple-Wright's motion to suppress[75] be granted.

NOTICE

The parties have 14 calendar days after service of this report and recommendation to object.[76] Unless an extension of time for cause is later obtained, failure to timely object will result in the waiver of the rights to appeal questions of fact.[77] Objections must "identify[ ] those issues on which further review is desired."[78]

DATED this 28th day of January, 2025.

BY THE COURT:

MARK A. MORENO
UNITED STATES MAGISTRATE JUDGE

[74] Docket No. 42, at 4:5–8.
[75] Docket No. 29.
[76] 28 U.S.C. § 636(b)(1); Fed. R. Crim. P. 59(b)(2).
[77] *Thompson v. Nix*, 897 F.2d 356, 357 (8th Cir. 1990) (per curiam); *Nash v. Black*, 781 F.2d 665, 667 & n.3 (8th Cir. 1986).
[78] *Nash*, 781 F.2d at 667 (quoting *Thomas v. Arn*, 474 U.S. 140, 155 (1985)).