

IN THE CROW COURT OF APPEALS

IN AND FOR THE CROW INDIAN RESERVATION

CROW AGENCY, MONTANA

CRIM. APP. DKT. NO. 00-410

**CROW TRIBE OF INDIANS,
Plaintiff/Appellee,**

vs.

**LANCE BIG MAN,
Defendant/Appellant.**

Decision entered October 12, 2000

[Cite as 2000 CROW 7]

Before Stewart, C.J., Gros-Ventre, J., and Watt, J.

OPINION

¶1 This is an appeal by Defendant Lance Big Man from his conviction by the Tribal Court (Stovall, S. J.) for driving under the influence of alcohol under Crow Tribal Code Section 3-302 (“DUI”). On appeal, Mr. Big Man argues that the Tribal Court erred in not dismissing the charge against him because the arresting officer failed to read him his *Miranda* rights and he did not waive his *Miranda* rights to allow the officer to conduct sobriety tests.

¶2 The Tribal Prosecutor has not filed a responsive brief in this appeal. This court’s last scheduling order advised the Prosecutor that this appeal would be decided without a further appearance by the Tribe’s if its response brief was not timely filed. Considering the Defendant’s due process right to a timely determination of his appeal, we therefore decide this matter without hearing argument from the Tribe, and without oral argument.

¶3 For the reasons explained below, we affirm the Tribal Court’s conviction.

A. *Facts and Course of Proceedings*

¶4 At approximately 10:00 p.m. on March 2, 2000, Crow Tribal police officers responded to a complaint from two Tribal members about a dark-colored van, possibly being driven by

Lance Big Man, almost running their pickup off the road. Officers Eastman and Stops drove to the Appsalooka Heights area in Crow Agency, where they saw a blue van drive over a curb as it entered the highway. When the officers turned on their overhead lights to stop it, the van accelerated, drove through a borrow pit, and sped through the residential area. The officers followed the van until it parked in the driveway of the Defendant's residence.

¶5 When Mr. Big Man got out of his vehicle, Officer Eastman smelled alcohol on his breath, and observed that his speech was slurred and he was not steady on his feet. Officer Eastman placed him under arrest for reckless driving, but did not inform Mr. Big Man of his *Miranda* rights. After Officer White Hip arrived in another patrol car, he assisted Officer Eastman with handcuffing Mr. Big Man. At that time, Officer White Hip gave Mr. Big Man his *Miranda* rights. Officer White Hip then transported Mr. Big Man to the Crow jail. Officer White Hip testified that on the way to the jail, Mr. Big Man asked about the charges against him and was offered a breathalyzer test, but refused.

¶6 At the booking area of the jail, Officer Eastman administered several field sobriety tests on Mr. Big Man, including the "one leg stand," "walk and turn," and "ABC's." When Mr. Big Man was not able to successfully perform any of the tests, Officer Eastman advised him that he was being charged with DUI, and Mr. Big Man was booked and jailed.

¶7 At the bench trial conducted by Special Judge Stovall on March 21, 2000, Defendant Big Man was represented by the Tribal public defender Cloyce Little Light. The original complainants testified, as did all three officers involved in Mr. Big Man's arrest and booking. At the conclusion of the trial, the public defender asked the court to dismiss the charges because Mr. Big Man was not informed of his *Miranda* rights by the Officer Eastman, the arresting officer, but the Tribal Court denied the motion.

¶8 The Tribal Court found Mr. Big Man guilty of violating the Tribal DUI statute "Persons Under the Influence of Alcohol or Drugs," Section 13-3-302, Crow Tribal Code. Although the Tribal Court did not enter written findings of fact and conclusions of law to support its judgment of conviction, Judge Stovall explained his findings and reasoning to Mr. Big Man in open court. The public defender filed Mr. Big Man's notice of appeal that same day.

¶9 On March 23, Judge Stovall sentenced Mr. Big Man to 5 days in jail (with credit for one day already served) and 90 days supervised probation, including a substance abuse evaluation. Pursuant to Rule 6 of the Crow Rules of Appellate Procedure, Jude Stovall granted Mr. Big Man's request to stay his jail sentence pending the outcome of this appeal.

B. Issues on Appeal

¶10 In this appeal, Defendant Big Man does not challenge the officers' reasons for stopping him and arresting him for reckless driving. Mr. Big Man also does not argue that Officer Eastman lacked probable cause to arrest him for DUI, or that the evidence heard at trial was not sufficient to convict him on that charge.

¶11 Rather, Mr. Big Man argues on appeal that Officer Eastman, the "arresting officer," never read Mr. Big Man his *Miranda* rights, thereby violating Rule 8(f) of the Crow Rules of Criminal Procedure. Appellant's Brief at 1.

¶12 Mr. Big Man further argues that as a result of this alleged violation, together with the fact that Officer Eastman initially informed him only that he was being arrested for reckless

driving, Mr. Big Man could not have made a knowing and intelligent waiver his *Miranda* rights in order to permit Officer Eastman to perform the field sobriety tests that provided the evidence for Mr. Big Man's conviction. Appellant's Brief at 2.

¶13 Therefore, Mr. Big Man argues, the Tribal Court erred by not dismissing the charge against him on either one of these grounds.

¶14 The facts behind Mr. Big Man's legal arguments are not disputed. This case raises pure issues of law as to the scope of the protections guaranteed by Rule 8(f) of the Crow Rules of Criminal Procedure, the Indian Civil Rights Act, and the *Miranda* law developed by the federal courts. This court will conduct an independent or *de novo* review of these questions of first impression.

C. Applicable Law

¶15 The United States Supreme Court's landmark decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), with its requirement for "reading a defendant his rights," was only recently reaffirmed as a constitutional principle.

¶16 In the *Miranda* case, the Court held that in order for a suspect's statements made while he was in custody to be admissible against him, he must first receive certain warnings about his constitutional rights. Those four warnings are "that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Miranda*, 384 U.S. at 479.

¶17 Two years later, Congress enacted a statute that was intended to overrule the Supreme Court's requirement for *Miranda* warnings, and instead go back to the previous test of whether the suspect's confession was "voluntarily given" under the totality of the circumstances. 18 U.S.C. § 3501. That statute was largely ignored, and the U.S. Justice Department apparently took the position that it was never a valid law. However, more than thirty years later, the court in *United States v. Dickerson*, 166 F.3d 667 (4th Cir. 1999), held that Section 3501 was valid and did in fact overrule the need for the procedural safeguards provided by *Miranda* warnings.

¶18 The Supreme Court reversed, holding that *Miranda* is a "constitutional rule" based on the Fifth and Fourteenth Amendments to the U.S. Constitution, and thus could not be superseded by an act of Congress. *Dickerson v. United States*, ___ U.S. ___, 120 S. Ct. 2326 (June 26, 2000). The Court also declined to use its own power to overrule *Miranda*. Chief Justice Rehnquist, writing for the majority of the Court, observed that "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture." *Id.*, 120 S. Ct. at 2336.

¶19 Of course, *Miranda* does not apply directly here, because Tribal governments are not subject to the Bill of Rights or the Fourteenth Amendment of the United States Constitution. See *Talton v. Mayes*, 163 U.S. 376, 384 (1896)(Tribal self-government powers, which existed prior to Constitution, are not subject to the Fifth Amendment); *United States v. Wheeler*, 435 U.S. 313 (1978)(Tribal criminal prosecution was based on independent sovereign powers, not delegation of Federal power). However, by enacting the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301 – 1303 (the "ICRA"), Congress exercised its plenary power over Indian Tribes to grant similar (although not identical)^[1] protections to persons

subjected to Tribal government actions.

1. *The Indian Civil Rights Act*

¶20 In the present case, the pertinent provisions of the ICRA are its prohibitions against compelling a person to be a witness against himself, and against depriving any person of liberty or property without due process of law. 25 U.S.C. § 1302(4) and (8). The wording of these provisions is nearly identical to the Fifth Amendment. However, in view of the legislative history of the ICRA, and subsequent court interpretations, it is not certain how closely this court is bound to apply federal constitutional law in interpreting these rights.

¶21 In its only case devoted to interpreting the ICRA, the Supreme Court in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), held that federal-court remedies for violations of the ICRA were limited to the one expressly provided by Congress, *i.e.*, the writ of habeas corpus “to test the legality of [any person’s] detention by order of an Indian tribe.” 25 U.S.C. § 1303. Thus, in *Martinez*, the federal courts lacked jurisdiction of a mother’s civil action to enforce the equal protection clause of the ICRA against a Tribal law that denied membership to children of female members who married outside the Tribe. Instead, the Court stated:

Tribal forums are available to vindicate rights created by the ICRA . . . which these forums are obliged to apply. Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.

Martinez, 436 U.S. at 65 (footnotes omitted).

¶22 The legislative history of the ICRA, as described by the *Martinez* Court, supports a view that Tribal courts have some flexibility in interpreting the specific provisions of ICRA. The Court in *Martinez* clearly recognized the competing Congressional purpose manifest in the ICRA, that of promoting Tribal self-government. *Martinez*, 436 U.S. at 62. In view of this competing purpose, Congress decided that restricting federal-court review of alleged violations “would adequately protect the individual interests at stake while avoiding unnecessary intrusions on tribal governments.” *Id.* at 67; *see also, id.* at 68 (quoting Edison Real Bird’s objections on behalf of the Crow Tribe to a previous version of the bill that would have required the U.S. Attorney General to investigate alleged violations).

¶23 Congress may also have considered that ICRA’s interpretation “will frequently depend on question of tribal tradition and custom which tribal forums may be in a better position to evaluate than federal courts.” *Martinez*, 436 U.S. at 71. Finally, the Court agreed with the district court that “efforts by the federal judiciary to apply the statutory prohibitions of § 1302 in a civil context may substantially interfere with a tribe’s ability to maintain itself as a culturally and politically distinct entity.” *Id.* at 72 (citing in a footnote the importance of a Tribe being able to define its own membership).^[2]

¶24 The above-quoted language from *Martinez* echoes an earlier Ninth Circuit opinion that summarized some of the federal appeals courts’ views of how ICRA should be interpreted:

We note in passing that the courts have been careful to construe the terms “due process” and “equal protection” as

used in the Indian Bill of Rights with due regard for the historical governmental and cultural values of an Indian tribe. As a result, these terms are not always given the same meaning as they have come to represent under the United States Constitution.

Tom v. Sutton, 533 F.2d 1101, 1104-05 n.5 (9th Cir. 1976)(citations omitted)(due process right does not entitle indigent defendant to appointed counsel).

¶25 In a later criminal case in which the Ninth Circuit reversed the district court's grant of habeas corpus relief, the court stated: "The procedures that the Tribal Courts choose to adopt are not necessarily the same procedures that the federal courts follow. Federal courts must avoid undue or intrusive interference in reviewing Tribal Court procedures." *Smith v. Confederated Tribes of Warm Springs*, 783 F.2d 1409, 1412 (9th Cir. 1986), cert. denied, 479 U.S. 964 (1986)(citations omitted)(deferring to Tribal interpretation of when Tribal prosecution commenced under Tribal law).

¶26 On the other hand, the Ninth Circuit has stated that when Tribal court procedures and rights parallel those found in Anglo-Saxon society, "*federal constitutional standards are employed* in determining whether the challenged procedure violates the Act." *Randall v. Yakima Nation Tribal Court*, 841 F.2d 897 (9th Cir. 1988)(emphasis added). In *Randall*, the court concluded that the appellate procedures provided under Tribal law "parallel exactly those employed by the United States courts," and the requirement for paying a \$60 appeal filing fee had nothing to do with Tribal custom and tradition. *Id.* at 902. The *Randall* court therefore held that a criminal defendant's procedural due process rights under the ICRA were violated when her appeal was dismissed for failing to pay the filing fee within 10 days because the Tribal court had neglected to rule on her pending motion to waive the fee.

¶27 In the present case, as further explained below, the Tribe has adopted a requirement for *Miranda* warnings that appears to parallel the requirement under current federal constitutional law. The requirement for these warnings is not grounded in Tribal custom or tradition – nor is the rest of the adversarial criminal prosecution process set out in the Crow Rules of Criminal Procedure.

¶28 Under *Randall*, then, it is arguable that the ICRA gives this court no choice but to apply federal constitutional law. However, this approach is extremely rigid, and could lead us down the wrong path when the Tribal Council has adopted a protection for criminal defendants that the U.S. Congress and the federal courts have sought to deny to other American citizens. See, e.g., discussion of *Dickerson* and Section 3501, above.

¶29 Thus, consistent with *Martinez* and *Smith*, rather than deciding this appeal based on the ICRA, we believe it is more appropriate to look to the intent of the Tribal Council in enacting the requirement for *Miranda* warnings under Tribal law.

2. Crow Tribal Law

¶30 The Crow Rules of Criminal Procedure, adopted in 1978, provide in pertinent part:

Arrest Procedure. Unless exigent circumstances exist, when arresting an individual, Police Officers shall use the following procedure:

- (b) Officer shall inform the individual that he is under arrest;
- (d) Officer shall inform the arrested party of the charges against him;
- (e) Officer shall inform the arrested party of his various rights including the right to remain silent, the right to have his attorney present during questioning, and if he cannot afford an attorney, the right to be represented by the Tribal Defender unless that position is vacant at any time during the court of proceedings against him;
- (g) Officer shall transport defendant to the closest Tribal detention facility.

Rule 8, Crow Rules of Criminal Procedure (Title 6, Crow Tribal Code).^[3] A preliminary analysis of this language in the context of Appellant's arguments will assist in determining the scope of the protections that the Council intended to provide when it enacted the Rule.

¶31 Appellant argues that Rule 8(f) requires that the defendant be given his *Miranda* rights by the "arresting officer." The phrase "arresting officer" is not used in Rule 8. Rather, the Rule refers to procedures that "Police Officers shall use," except in emergency situations, "when arresting an individual[.]" The language in the body of the Rule does not clearly state that the same officer who informs the defendant that he is under arrest must also be the one who informs the defendant of his *Miranda* rights. It is possible, though, that the use of the singular term "Officer" in subparagraphs (b), (d) and (f) implies that it is supposed to be the same officer. Subparagraph (e) also uses the term "Officer," so under the interpretation urged by Mr. Big Man, only Officer Eastman as the arresting officer would have been allowed to transport the defendant to the "closest Tribal detention facility."

¶32 Such an interpretation goes much too far. When a team of police officers is on the scene of an arrest, rigid legal restrictions on which officer Mirandizes the defendant, and which officer transports him to jail, would unnecessarily interfere with the officers' ability to perform their work efficiently while not advancing any substantial rights of the defendant. We do not believe that was the intent of the Tribal Council when it enacted Rule 8.

¶33 Instead, we believe that the Tribal Council intended to make it clear that criminal defendants are entitled to *Miranda* protections when they are prosecuted in the Crow Tribal Court. Except for the right to appointed counsel as modified by Rule 8(f), the Tribal Council intended to provide Crow Tribal members and non-member Indians who may be subject to Tribal criminal prosecution with the same *Miranda* rights enjoyed by all other Americans, as recognized and developed in the Supreme Court's decisions.^[4]

¶34 Our conclusion is reinforced by the Tribal Council's adoption in Crow R. Crim. P. 15(g) of the Federal Rules of Evidence as the applicable evidentiary rules in Tribal criminal trials. Although the Federal Rules do not specifically address *Miranda*, their adoption indicates the Council's intent that the admissibility of evidence in Tribal Court criminal proceedings should be consistent with federal law.

¶35 There can be no question that this holding provides at least the minimum protections

required by the ICRA. Any concern on the part of law enforcement that this holding goes further than the minimum protections required by the ICRA is best addressed by Chief Justice Rehnquist's recent observation that the *Miranda* rule actually simplifies the prosecution's burden of showing that statements were voluntary, and only in rare cases can the defendant show that his confession was involuntary despite the fact that police adhered to *Miranda*. *Dickerson*, 120 S.Ct. at 2336.

¶36 Rule 8 provides a sound, specific guide for proper police procedure in making an arrest. However, we do not believe that the Tribal Council intended for this court to create new remedies for technical violations of the arrest process set forth in Rule 8 that would greatly expand upon the *Miranda* rights recognized by the Supreme Court. In any event, no violation of the arrest procedures specified in Rule 8 occurred in this case, when the Defendant was given his rights and transported to the Crow jail by an officer who was present at the scene of the arrest. Therefore, consistent with the Tribal Council's intent, this court will determine Mr. Big Man's claims of error with reference to the rules developed by the Supreme Court in *Miranda* and subsequent cases.

D. Resolution of Issues under *Miranda*

¶37 Compared to the popular misconception that any violation of a defendant's *Miranda* rights will allow him to "get off on a technicality," the scope of the *Miranda* rule is quite limited.

¶38 In essence, the *Miranda* rule only prohibits the prosecution from using in its "case in chief" any statements made by the defendant after he was in police custody or otherwise significantly deprived of his freedom. *Miranda*, 384 U.S. at 444. Confessions are the main type of statements with which *Miranda* is concerned, but it also applies to exculpatory statements. *Id.* However, regardless of whether or not *Miranda* warnings were given, statements made by the defendant can be used to impeach contradictory testimony given by the defendant if he chooses to testify in the defense case. *Harris v. New York*, 401 U.S. 222 (1971).

¶39 When the police fail to give a *Miranda* warning at the time of arrest, the defendant's remedy is not to have the charges automatically thrown out. Rather, the defendant's exclusive remedy is to suppress his statements – that is, to obtain a ruling by the court that any statements made while in custody and before the defendant was read his *Miranda* rights may not be introduced into evidence as part of the prosecution's case. If the prosecution's case depends on these "unwarned" statements to show guilt, then the prosecution will lose and the failure to give *Miranda* rights will have the effect of throwing the case out. However, if the prosecution is able to prove the defendant's guilt without using the inadmissible unwarned statements, the failure to give a *Miranda* warning will not affect the outcome of the trial.

¶40 In the present case, under *Miranda*, the mere undisputed fact that the "arresting officer" failed to give Mr. Big Man his rights does not by itself entitle Mr. Big Man to dismissal of the charge. Granting the dismissal requested by Mr. Big Man would stretch *Miranda* far beyond any form of relief ever discussed by the Supreme Court, and beyond what the Tribal Council intended when it adopted Crow R. Crim. P. 8(f). The Defendant's sole remedy is to exclude evidence of statements or confessions that were obtained in violation of *Miranda*.

¶41 We thus turn to Mr. Big Man's second argument – that he could not have knowingly

and intelligently waived his *Miranda* rights to allow Officer Eastman to perform field sobriety tests at the jail, when Big Man had not yet been informed that he was under arrest for suspected DUI.

¶42 Under *Miranda*, “[o]nce warnings have been given, the subsequent procedure is clear.” *Miranda*, 384 U.S. at 474. “If the individual indicates in any manner, at any time prior to or during questioning that he wishes to remain silent, the interrogation must cease.” *Id.* at 473-74. If the individual requests legal counsel, the questioning must cease until the defendant’s counsel is present, unless the defendant himself “initiates further communication, exchanges or conversations with the police.” *Edwards v. Arizona*, 451 U.S. 477, 485 (1981).

¶43 The defendant’s other alternative after receiving his *Miranda* rights is to waive those rights, “provided the waiver is made voluntarily, knowingly and intelligently.” *Miranda*, 384 U.S. at 444. The prosecution has the burden of proving any waiver.

¶44 In this regard, the Supreme Court has specifically addressed the situation where the defendant does not know what crime he is going to be questioned about when he waives his *Miranda* rights. In *Colorado v. Spring*, 479 U.S. 564 (1987), the suspect was arrested for illegal trafficking in stolen firearms, but after he waived his *Miranda* rights, the police questioned him about a murder. The Court held that “the suspect’s awareness of all possible subjects of questioning in advance of interrogation is *not relevant* to determining whether the suspect voluntarily, knowingly, and intelligently waived his Fifth Amendment privilege.” *Id.* at 577 (emphasis added).

¶45 Therefore, Mr. Big Man’s second argument, that he was not informed he was under investigation for suspected DUI, even if supported by the record, would not be relevant in determining whether Mr. Big Man knowingly and intelligently waived his rights.

¶46 In the present case, there is no evidence that the defendant stated that he wished to remain silent, or that he requested legal counsel. On the other hand, there is also no evidence that Mr. Big Man made any waiver, knowing or otherwise, of these rights. Therefore, in the absence of an effective waiver, any statements or confessions covered by *Miranda* were not admissible. The only remaining question in this case is whether Mr. Big Man’s conviction was based on any such statements or confessions.

¶47 It is important to understand that the Fifth Amendment’s prohibition against compelling a defendant be a witness against himself only covers so-called “testimonial” evidence, *i.e.*, the content of verbal and written communications by the defendant. As the Supreme Court explained shortly after issuing its *Miranda* decision:

[B]oth federal and state courts have usually held that it [the privilege against self-incrimination] offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture.

Schmerber v. California, 384 U.S. 757, 764 (1966)(defendant may be compelled to supply blood samples in DUI case). Because these other forms of “non-testimonial” evidence are not protected by the Fifth Amendment’s protection against self-incrimination, they are not

subject to *Miranda* warnings and waivers.

¶48 The Crow Traffic Code, which establishes the crime of DUI for which Mr. Big Man was convicted, does provide greater protections for defendants in this area than would be required under *Schmerber* and federal constitutional law. It prohibits the police from taking chemical tests of blood, breath or urine without the defendant's consent. Crow Tribal Code § 13-3-303(3). If the defendant refuses, the tests may not be given, but the defendant's driving privileges may be suspended, and the fact of his refusal may be used against him in court. *Id.*; § 13-3-305(2). Interpreting a similar Tribal DUI code provision, the Court of Appeals of the Confederated Salish and Kootenai Tribes has held that when the police forced the defendant to submit to a blood test, the results of the blood test must be suppressed and excluded from evidence. *See Tribes v. Conko*, Cause No. AP-96-1066-CR (CS&K Ct. App. 1998).

¶49 In the present case, the sobriety tests administered by Officer Eastman at the jail did not involve any chemical tests that required Mr. Big Man's consent under Section 13-3-303 (3). The Traffic Code, Section 13-3-305(3), specifically states that it is not intended to limit the introduction of "other competent evidence" such as these types of test results. The results of these sobriety tests (and Mr. Big Man's unsteadiness and slurred speech observed by the officers at the time of his arrest) fall within the above list of recognized non-testimonial evidence. They are not the type of statements or confessions that are subject to *Miranda*, and the Defendant could be forced to submit to the tests without any *Miranda* warning or waiver.

¶50 Because Mr. Big Man's conviction was based entirely on those test results, there is no basis under *Miranda*, and therefore no basis under Tribal law, for overturning his conviction.

E. Specific Warnings Required

¶51 In view of this court's adoption herein of the Supreme Court's *Miranda* caselaw, it is important to clarify some ambiguous wording in the Tribal Rule 8(f) about the warnings that must be given.

¶52 The language of Rule 8(f), with its use of the word "including," does not purport to be a complete list of the warnings that must be given. For example, it omits a specific warning held to be essential in *Miranda*: "The warning of the right to remain silent must be accompanied by the explanation that *anything said can and will be used against the individual in court*. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of forgoing it." *Miranda*, 384 U.S. at 469 (emphasis added).

¶53 Furthermore, although the Rule properly states Tribal law (that the arrested party may be represented by the public defender "unless that position in vacant"), the defendant is entitled under *Miranda* to know precisely what kind of legal assistance may actually be available to him if he cannot afford an attorney. *See Miranda*, 384 U.S. at 473.

¶54 Therefore, consistent with *Miranda*, and with adaptations for the more limited right to counsel under Tribal law and the ICRA, criminal defendants prosecuted under Crow Tribal

law are entitled to the following warnings:

1. You have the right to remain silent.
2. Anything you say can and will be used against you in a court of law.
3. You have the right to hire an attorney or lay counselor at your own expense to be present during questioning.

If the office of Tribal public defender is filled at the time of the arrest, a fourth warning must be given, depending on how that office is filled:

4. If you cannot afford an attorney, a non-attorney lay counselor [or “attorney” if one is available] from the Tribal public defender’s office will be appointed for you prior to questioning, if you so desire.

¶55 The above warnings are the minimum requirements for satisfying *Miranda* and Rule 8 (f) of the Crow Rules of Criminal Procedure. This court does not express an opinion on any other warnings or advice of rights that may be required or desirable under Tribal law or the ICRA.

¶56 By setting out these warnings, and confirming Tribal defendants’ *Miranda* rights under Tribal law, the court does not intend to imply that Tribal police officers have ever done anything differently. To the contrary, if the present case is any guide, Tribal law enforcement officers have consistently respected defendants’ *Miranda* rights, and will continue to do so.

F. Conclusion

¶57 This court holds that the protections guaranteed to individual criminal defendants under Rule 8(f) of the Crow Rules of Criminal Procedure are co-extensive with those guaranteed under the Fifth and Fourteenth Amendments by the Supreme Court’s current *Miranda* jurisprudence, as affirmed in *Dickerson*, 120 S.Ct. 2326 (2000). The only exception is that indigent Tribal defendants must be informed that they are entitled to free legal counsel only to the extent that the Tribe funds the public defender’s office.

¶58 A criminal defendant’s right to relief under *Miranda* has always been limited to suppressing unwarned statements or confessions, so as to prevent them from being used in the prosecution’s case in chief. *Miranda* and the Fifth Amendment have never prevented the police from forcing a defendant to submit to tests that did not involve “testimonial” evidence, and using that evidence against the defendant.

¶59 In the present case, Mr. Big Man’s conviction was not based on any testimonial evidence covered by *Miranda* or Rule 8(f) of the Crow Rules of Criminal Procedure. Mr. Big

Man was not entitled to dismissal of the charge against him merely because the arresting officer failed to inform him of this *Miranda* rights.

¶60 For the foregoing reasons, the judgment of the Tribal Court is **AFFIRMED**. Pursuant to Rule 16 of the Crow Rules of Appellate Procedure, this court’s Mandate will issue automatically ten (10) days from the date of this decision, unless a motion for rehearing is filed and granted before that time. Mr. Big Man is directed to contact the public defender on or before that time so that arrangements can be made to serve the remainder of his jail time that was stayed pending this appeal. This case is **REMANDED** to the Tribal Court for execution of the sentence.

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[Endnotes](#)

Endnotes

[1] There is an important exception in the criminal context – the ICRA does not require Tribes to provide a court-appointed (free) attorney for indigent persons, as guaranteed by the Sixth Amendment. Instead, under the ICRA, the defendant’s right to have an attorney is “at his own expense.” 25 U.S.C. § 1302(6); *Martinez*, 436 U.S. at 63; *United States v. Ant*, 882 F.2d 1389, 1392 (9th Cir. 1989). However, the Crow Tribe has seen fit to fund the position of Tribal public defender and fill it with a lay advocate who represented the Defendant in all stages of the present case.

[2] *See also, Duro v. Reina*, 495 U.S. 676, 694 (1990)(citing the Tribes’ “broad freedom not enjoyed by any other governmental authority” with respect to their internal laws and usages under *Martinez* and the ICRA as a rationale for rejecting Tribal criminal jurisdiction over non-member Indians).

[3] A similar Tribal code provision requiring *Miranda* warnings to be given “[p]rior to questioning any person in custody” was recently enacted on the Flathead Reservation. *See* Section 2-2-405, Laws of the Confederated Salish and Kootenai Tribes, Codified (Dec. 9, 1999).

[4] This is not to say that Crow Tribal law would never depart from federal constitutional jurisprudence in this area. If, for example, the Supreme Court had eliminated the requirement for *Miranda* warnings in *Dickerson*, we would not have been able to follow suit because the Crow Rules of Criminal Procedure would still have required *Miranda*-type warnings. As to questions that the Supreme Court has not specifically addressed, the decisions of the lower federal courts will be persuasive but not binding authority for the Crow Tribal Courts. The experience in *Dickerson* shows the wisdom of this approach.