Indian Tribal Matters

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Domestic Violence Crimes in Indian Country

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I. Introduction

It was after 1:00 a.m. on a cold December day in Michigan's Upper Peninsula when the victim, Jane Doe, saw a truck pull into her driveway and then leave. The next thing she heard was a knock on her front door. Because the door did not have a peephole, Jane cracked open the front door to see who was knocking. At that point, the defendant, R.C., pushed his way inside the house. Jane and R.C. had an "on again, off again" relationship and had a daughter together. Jane saw that R.C. was drunk. He was babbling about the couple's daughter and Jane's apparent failure to return his telephone calls. Jane told R.C. to leave the house. When he refused, she grabbed a cell phone, ran into the bathroom, and locked the door. The defendant kicked the bathroom door in, grabbed the cell phone, and smashed it on the floor. Jane yelled at her 8-year old son to run to a neighbor for help. After kicking in the bathroom door, R.C. threw Jane to the floor, punched her in the mouth, and strangled her. Jane told the police that during the assault, R.C. made several threatening statements to her.

Responding officers observed that Jane had scratches to the right, front, and left sides of her neck, scratches to the left side of her face above the eyebrow, swelling to the left side of her lower lip, and scrapes on the front of her right knee. None of her injuries required medical treatment.

During the course of the investigation, a neighbor was interviewed and told police that when Jane's son pounded on her door he was screaming and crying. The boy was wearing only his underwear and he told the neighbor that R.C. was choking his mother. The boy said he was afraid R.C. would find him and kill him. The neighbor reported that R.C. called her house frequently trying to contact Jane. Earlier on the day of the assault, R.C. phoned the neighbor's house and said that he was headed to the reservation and that "something was going to happen."

At the time of the crime, Jane, a Native American, was living on land held in trust for the use of the Sault Ste. Marie Tribe of Chippewa Indians. Jane and R.C. had not lived together for at least 6 months preceding the assault. In fact, R.C., a non-Indian, was living in Michigan's lower peninsula. Prior to the December incident, R.C. had been convicted three times for misdemeanor domestic violence offenses. Jane was the victim in each case. All of these prior cases were prosecuted in state court and R.C. received the maximum possible penalty of 90 days in jail.

Clearly, R.C. presented a significant safety risk to Jane and her children. Prior intervention efforts and criminal prosecution seemingly provided no deterrent to his committing additional domestic violence offenses. The Assistant United States Attorney assigned to the case was interested in charging R.C. with something other than a misdemeanor domestic violence crime, but was unsure of which path to take.

Given that the victim sustained no serious bodily injury, it was possible that a jury could acquit him of a felony-level assault charge. The answer was found in the Violence Against Women Act of 1994 (VAWA). Pub. L. No. 103-322, 108 Stat. 1796 (Sept. 13, 1994).

The problems in tribal communities are severe. American Indians and Alaska Native communities suffer from violent crime at rates far higher than those of other Americans. Some tribes have experienced rates of violent crime over 10 times the national average. Violence against Native women and children is a particular problem, with some counties facing murder rates of Native women well over 10 times the national average. Reservation-based and clinical research show very high rates of intimate partner violence against American Indian and Alaska Native women.

In 1994, Congress, as part of a comprehensive crime bill, enacted legislation empowering the federal government to participate in the fight against domestic violence. VAWA recognized that "violence against women is a crime with far-reaching, harmful consequences for families, children, and society." Domestic and Sexual Violence Data Collection, A Report to Congress under the Violence Against Women Act, 1 (NIJ Research Report 1996). To combat this violent crime problem, VAWA created federal domestic violence crimes that can be prosecuted by the Department of Justice. Consistent with this federal initiative, the bill also amended the Gun Control Act of 1968 to include domestic violence-related crimes. Gun Control Act of 1968, Pub. L. 90-618, 82 Stat.1213 (Oct. 22,1968). Congress reaffirmed its commitment to fight crimes of domestic violence and to protect victims of domestic violence by enacting, in the fall of 1996, additional legislation addressing federal domestic violence crimes through both VAWA and the Gun Control Act, and by the passage of amendments to the criminal VAWA statutes in 2000 and 2006.

Historically, the federal government has lacked jurisdiction over many domestic violence crimes. These crimes, however, pose a serious problem both in our communities and in Indian country. Accordingly, while domestic violence remains primarily a matter of state, local, and tribal jurisdiction, both VAWA and the Gun Control Act provide federal tools to prosecute domestic violence offenders in certain situations involving firearms or interstate travel or activity.

This article provides a concise summary of the federal domestic violence offenses found in both VAWA and the Gun Control Act. It also provides a list of the statutory offenses. These statutes strive to achieve the Congressional goal which is to "treat[] violence against women as a major law enforcement priority, take[] aim at the attitudes that nurture violence against women, and provide[] the help that survivors need." S.Rep. No. 102-197, at 34-35 (1991). Through enforcement of these available laws, the Department of Justice can and will assist state, local, and tribal jurisdictions in their efforts to combat domestic violence. The Federal Bureau of Investigation (FBI) is the lead federal investigatory agency for VAWA violations, while the Bureau of Alcohol, Tobacco & Firearms (ATF) is the lead federal investigatory agency for Gun Control Act violations.

II. The Violence Against Women Act

A. Interstate travel to commit domestic violence - 18 U.S.C. § 2261

It is a federal crime for a person to cross state or foreign boundaries or enter or leave Indian country or the special maritime and territorial jurisdiction of the United States with the intent to kill, injure, harass, or intimidate that person's intimate partner or dating partner when in the course of, or as a result of such travel, the defendant commits or attempts to commit a violent crime. The law requires specific intent to commit domestic violence at the time of interstate travel. The term "intimate partner" includes a spouse, a former spouse, a past or present co-habitant (as long as the parties co-habitated as spouses), and parents of a child in common. The term "dating partner" (added in the 2006 VAWA

Amendments) refers to a person who is or has been in a social relationship of a romantic or intimate nature with the abuser. Factors to consider in making this determination are the length of the relationship, the type of the relationship, and the frequency of the interaction between the persons involved in the relationship.

18 U.S.C. § 2261(a)(2)

It is also a federal crime to cause an intimate partner or dating partner to cross state or foreign boundaries or enter or leave Indian country by force, coercion, duress, or fraud, and in the course of, or as a result of, or to facilitate such conduct or travel, to attempt or commit a crime of violence. This subsection does not require a showing of specific intent to cause the spouse or intimate partner to travel interstate. It does, however, require proof that the interstate travel resulted from force, coercion, duress, or fraud.

B. Interstate stalking

18 U.S.C. § 2261A

The interstate stalking law was enacted in 1996 and amended in 2000 and 2006. It now provides that it is a federal crime to cross a state or foreign boundary or to enter or leave Indian country with the intent to kill, injure, harass, or place under surveillance with the intent to kill, injure, harass, or intimidate another person, if in the course of, or as a result of such travel, the defendant places such person in reasonable fear of the death of or serious bodily injury to that person or a member of that person's immediate family, or causes substantial emotional distress to that person or a member of that person's immediate family. The law requires specific intent to violate this subsection at the time of interjurisdictional travel. "Immediate family" includes a spouse, parent, sibling, child, or any other person living in the same household and related by blood or marriage. It is also a federal crime to "stalk" within the special territorial or maritime jurisdiction of the United States.

The Violence Against Women Act of 2000 created an additional crime of cyberstalking. 18 U.S.C. § 2261A(2) (2009). This statute, amended in 2006, provides that it is now a federal crime to use the mail, any interactive computer service, or any facility of interstate commerce (including the Internet), with the intent

> (A) to kill, injure, harass, or place under surveillance with intent to kill, injure, harass, or intimidate, or cause substantial emotional distress to a person in another state or tribal jurisdiction or within the special maritime or territorial jurisdiction of the United States; or (B) place a person in another State or tribal jurisdiction or within the special maritime or territorial jurisdiction of the United States in reasonable fear of death or serious bodily injury to (i) that person [or] (ii) a member of [that person's] immediate family.

18 U.S.C. § 2261A(2)(A) and (B)(i)(ii) (2009). Under both prongs of the statute, the defendant must engage in a course of conduct that places the stalking victim in reasonable fear of the death of, or serious bodily injury to, or that causes substantial emotional distress to that person or a member of that person's immediate family or that person's intimate partner. A single communication is not sufficient. The statute

defines a "course of conduct" as a "pattern of conduct composed of [two] or more acts, evidencing a continuity of purpose." 18 U.S.C. § 2266(2) (2009).

C. Interstate travel to violate an order of protection - 18 U.S.C. § 2262

18 U.S.C. § 2262(a)(1)

This law prohibits interstate or foreign travel and travel into and out of Indian country with the intent to violate the portion of a valid protection order that prohibits or provides protection against violence, threats, or harassment against, contact or communication with, or physical proximity to another person. To establish a violation of this statute, the Government must demonstrate that a person had the specific intent to violate the relevant portion of the protection order at the time of interstate travel and that a violation actually occurred. This statute does not require an intimate partner relationship (although this relationship may be required by the state or other governmental body issuing the order), nor does it require bodily injury. It is also a federal crime to violate this statute within the special maritime or territorial jurisdiction of the United States.

18 U.S.C. § 2262(a)(2)

It is a federal crime to cause a person to cross state or foreign lines or enter or leave Indian country by force, coercion, duress, or fraud, and in the course of, or as a result of, or to facilitate such conduct or travel, to engage in conduct that violates the portion of the order of protection that prohibits or provides protection against violence, threats, or harassment against, contact or communication with, or physical proximity to another person. This subsection does not require a showing of specific intent to cause another person to travel interstate. It does, however, require proof that the interstate travel resulted from force, coercion, duress, or fraud. The Government must also prove that a person violated the relevant portion of the protection order.

Verification of the terms and validity of the protection order is critical when investigating a potential violation under either § 2262(a)(1) or (2). To assist in this effort, in addition to state registries, the FBI's National Crime Information Center (NCIC) maintains a Protection Order File into which almost all states voluntarily provide, in full or in part, their protection order information. The Protection Order File allows law enforcement and prosecutors to immediately verify the existence of protection orders and is of enormous benefit to federal authorities when prosecuting cases under § 2262. However, this file is not the exclusive repository of protection orders.

To assist in prosecution under § 2262, it is necessary to examine the protection order currently used in your jurisdiction. In Maine, for example, at one time the Protection From Abuse Order did not conform to the language of § 2262 and made no provision for a judicial finding that the defendant posed a credible threat of violence, repeated harassment, or bodily injury. To correct this statutory deficiency, the United States Attorney's Office in the District of Maine, with the support of key members of the state legislature, proposed legislation that would bring the state into conformity with the VAWA provisions.

D. Penalties

Penalties for violations of §§ 2261, 2261A, and 2262 hinge on the extent of the bodily injury to the victim. Terms of imprisonment range from 5 years to life imprisonment, if the crime of violence results in the victim's death. The 2006 VAWA Amendments added a 1-year mandatory term of

imprisonment for a defendant convicted of stalking in violation of a temporary or permanent civil or criminal injunction, restraining order, no-contact order, or other order as defined in 18 U.S.C. § 2266.

E. Domestic assault by an habitual offender - 18 U.S.C. § 117

This new offense was created with the passage of the 2006 VAWA amendments. It punishes any person who commits a domestic assault within the special maritime and territorial jurisdiction of the United States or within Indian country, and who has two prior federal, state, or Indian tribal court convictions for offenses that would, if subject to federal jurisdiction, qualify as assault, sexual abuse, an offense under Chapter 110A, or a violent felony against a spouse or intimate partner. This crime is punishable by a prison term not to exceed 5 years. However, the maximum sentence is increased to 10 years if the offense results in substantial bodily injury.

Research shows that many domestic violence offenders are recidivists. This fact, combined with the unacceptably high rates of domestic violence in Indian country, makes this statute a potentially valuable tool for federal prosecutors. Recently, the utility of the statute as currently written has been questioned. On January 14, 2009, Roman Cavanaugh, Jr. was indicted in the District of North Dakota for one count of domestic assault by an habitual offender. Cavanaugh is a member of the Spirit Lake Sioux Tribe and resides on the reservation. Prior to the assault resulting in the indictment, Cavanaugh had been convicted three times in the Spirit Lake Tribal Court for domestic assault. On December 18, 2009, the district court dismissed the indictment and found 18 U.S.C. § 117(a) unconstitutional insofar as it permits the use of an uncounseled tribal court misdemeanor conviction as a predicate final conviction. *United States v. Cavanaugh*, 680 F. Supp. 2d 1062 (D.N.D. 2009). This case presents a question of first impression and the Department of Justice recently filed an appeal in the Eighth Circuit Court of Appeals.

The Bill of Rights does not apply to Indian tribal governments. *Duro v. Reina*, 495 U.S. 676, 693 (1990). Consequently, the Sixth Amendment right to counsel does not apply in tribal court prosecutions. Rather, the minimum federal rights guaranteed to defendants in tribal courts are the statutory rights provided by the Indian Civil Rights Act of 1968. 25 U.S.C. §1301(2009). This statute provides that a defendant in tribal court may have, at his own expense, the assistance of counsel for his defense. 25 U.S.C. § 1302(6) (2009). There is no right to appointed counsel for indigent defendants.

The United States appellate brief in *Cavanaugh* was filed in the Eight Circuit on March 19, 2010. The government argues on appeal that it does not violate the Sixth Amendment or the Due Process Clause for Congress to provide that such a tribal court conviction be used as a predicate "final conviction" under 18 U.S.C. § 117(a). The brief states that

> Congress has broad authority to define offenses, and can include as an element the fact of a defendant's prior conviction. When it does so, the Due Process Clause does not require that the defendant's guilt of the underlying prior offense independently be established in the subsequent federal prosecution. If the element is defined in terms of the existence of a prior conviction, proof of the fact of that conviction is all that is required to satisfy the statutory element.

Brief of Appellant at 16, *United States of America v. Roman Cavanaugh, Jr.*, No. 10-1154 (8th Cir. Mar. 19, 2010). Until such time as there is a published circuit court opinion finding the use of uncounseled tribal court convictions in a prosecution under 18 U.S.C. § 117(a) unconstitutional, federal prosecutors are encouraged to continue using this statute.

III. Firearm offenses - 18 U.S.C. § 922

A. Possession of firearm while subject to order of protection - 18 U.S.C. § 922(g)(8)

It is illegal for a person to possess a firearm while subject to a court order restraining such person from harassing, stalking, or threatening an intimate partner or the child of an intimate partner. The protection order must have been issued following a hearing of which the defendant had notice and an opportunity to appear. The protection order must also include a specific finding that the defendant represents a credible threat to the physical safety of the victim or must include an explicit prohibition against the use of force that would reasonably be expected to cause bodily injury. This prohibition only lasts for the life of the qualifying order. This prohibition also provides an opportunity to review any given jurisdiction's protection order to determine if it conforms with the federal requirements. Please note if your jurisdiction's protection order contains a discretionary firearm ban. If so, even if the order complies with the federal law, failure of the state court to preclude firearm possession and to put the defendant on notice of a possible violation for possessing a firearm while the order is in effect may make federal prosecution difficult. The 2006 VAWA amendments require each state, in order to maintain its VAWA STOP grant funding, to certify that its judicial practices and procedures include notification to domestic violence offenders of the firearm prohibitions contained in §§ 922(g)(8) and (g)(9). *See* 42 U.S.C. § 3796gg-4(e) (2009). Again, please refer any questions about the applicability of this statute to the United States Attorney's office in your district.

B. Transfer of firearm to person subject to order of protection - 18 U.S.C. § 922(d)(8)

It is also illegal to transfer a firearm and/or ammunition to a person who is subject to a court order that meets the same qualifying criteria found in § 922(g)(8). A violation of section 922(d)(8) must be knowing. Proof beyond a reasonable doubt of knowledge on the part of the supplier may be difficult to establish.

C. Official use exemption - 18 U.S.C. § 925

The restrictions of §§ 922(d)(8) and (g)(8) do not apply to firearms issued by governmental agencies to a law enforcement officer or military personnel, so long as the firearm is for official use.

D. Possession of firearm after conviction of misdemeanor crime of domestic violence - 18 U.S.C. § 922(g)(9)

It is illegal to possess a firearm and/or ammunition after one is convicted of a misdemeanor crime of domestic violence (MCDV). This prohibition applies to persons convicted of such misdemeanors at any time, even if the conviction occurred prior to the new law's effective date. A qualifying misdemeanor domestic violence crime must have as an element the use or attempted use of physical force, or the threatened use of a deadly weapon. For example, a conviction for a misdemeanor violation of a protection order will not qualify, even if the violation was committed by a violent act, if the statutory elements do not require the use or attempted use of physical force or the threatened use of a deadly weapon.

In addition, the statute contains due process requirements regarding the defendant's right to counsel and the defendant's right to a jury trial, if applicable. Absent compliance with these due process requirements, the misdemeanor conviction will not qualify as a domestic violence conviction for purposes of § 922(g)(9). Moreover, a person may be able to possess a firearm if the conviction has been expunged,

set aside, or if his civil rights have been restored, unless the pardon or restoration contain a firearm restriction.

Section 908 of the Violence Against Women Act of 2005 amended 18 U.S.C. § 921(33)(A)(I) and expands a MCDV to include tribal court convictions for purposes of the firearm prohibitions found in the Gun Control Act. Gun Control Act of 1968, Pub. L. 90-618, 82 Stat.1213 (Oct. 22,1968).

On August 16, 2006, ATF issued a memorandum stating that a person is not considered convicted unless they were represented by counsel in the proceeding for the underlying offense, or they knowingly and intelligently waived the right to counsel. The memorandum cites 18 U.S.C. § 921(a)(33)(B))(i) and distinguishes tribal court convictions in the following manner:

> if a person has no constitutional or statutory right to appointed counsel for a particular offense, then he or she cannot knowingly and intelligently waive that right and such a person cannot be considered convicted of an MCDV if they were not represented by counsel . . . . Similarly, a person is not considered convicted of an MCDV unless they had a jury trial or knowingly and intelligently waived the right to a jury trial. However, in contrast with the right to counsel discussed above, this exception only applies if the person was entitled to a jury trial.

Lewis P. Raden, *Open Letter to Tribal Law Enforcement Departments,* Aug. 16, 2006, *available at* http://www.atf.gov/press/releases/2006/08/081606-openletter-tribal-law-enforcement.pdf.

E. Transfer of firearm to person convicted of a misdemeanor crime of domestic violence - 18 U.S.C. § 922(d)(9)

It is illegal to transfer a firearm and/or ammunition to a person convicted of a misdemeanor crime of domestic violence. A violation of § 922(d)(9) must be knowing. As with § 922(d)(8), proof beyond a reasonable doubt concerning knowledge on the part of the supplier may be difficult to establish.

F. Official use exemption -18 U.S.C. § 925(a)(1)

The official use exemption does not apply to §§ 922(d)(9) and 922(g)(9). This means that law enforcement officers or military personnel who have been convicted of qualifying domestic violence misdemeanors will not be able to possess or receive firearms for any purpose, including the performance of official duties.

G. Penalties

The maximum term of imprisonment for a violation of Title 18 §§ 922(d)(8), 922(g)(8), 922(d)(9), and 922(g)(9) is 10 years.

IV. Other relevant statutes

A. Full faith and credit to orders of protection - 18 U.S.C. § 2265

This law provides that a civil or criminal domestic protection order issued by a court in one state, Indian tribe, or territory, shall be accorded full faith and credit by the court of another state, tribe, or territory, and is to be enforced as if it were the order of the court of the second state, tribe, or territory.

This law applies to permanent, temporary, and ex parte protection orders that comply with the statute's requirements. To comply, the protection order must provide the defendant with reasonable notice and an opportunity to be heard in a manner consistent with due process. This law does not apply to mutual protection orders if the original respondent did not file a cross or counter petition seeking a protective order, or if such a cross or counter petition was filed but the court did not make specific findings that each party was entitled to such an order.

Full faith and credit is to be accorded to qualifying protection orders even if the order is not registered in the enforcing jurisdiction. This statute further prohibits a jurisdiction from notifying a respondent of the registration of a protection order in the enforcing jurisdiction unless requested by the protected party. 18 U.S.C. § 2265(d) (2009).

B. Bureau of Indian Affairs (BIA) authority to arrest

Section 908(a) of the Violence Against Women Act of 2005 amended 25 U.S.C. § 2803(3) to provide warrantless arrest authority to BIA law enforcement officers for misdemeanor crimes of domestic violence, dating violence, stalking, or violation of a protection order where the offense

> has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is co-habitating with or has co-habitated with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent or guardian of the victim, and the employee has reasonable grounds to believe that the person to be arrested has committed, or is committing a crime.

25 U.S.C. § 2803(3) (2009).

C. Amendment to ATF Form 4473

ATF revised Form 4473 (July 2005), incorporating all the disqualifiers of the Gun Control Act. Accordingly, a purchaser of a firearm from a licensed firearm dealer must complete this amended ATF form certifying, among other things, that he is not subject to a valid protection order and has not been convicted of a qualifying misdemeanor crime of domestic violence. Providing false information on this form may provide the basis for prosecution under 18 U.S.C. §922(a)(6).

D. Right of victim to speak at bail hearing - 18 U.S.C. § 2263

The victim of a VAWA crime has the right, though it need not be exercised, to be heard at a bail hearing with regard to the danger posed by the defendant. In addition, depending upon the circumstances of the case, the United States Attorney's office may move for pre-trial detention of the defendant.

E. Rights of crime victims - 18 U.S.C. § 3771(a)

Under the Crime Victims' Rights Act of 2004, Pub. L. No. 108-405, 118 Stat. 2261 (Oct. 30, 2004), all federal crime victims, including those of domestic violence, have the following rights:

- the right to be reasonably protected from the accused
- the right to reasonable, accurate, and timely notice of any public court or parole proceeding involving the crime, release, or escape of the accused

- the right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding
- the right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding
- the reasonable right to confer with the attorney for the government in the case
- the right to full and timely restitution as provided in law
- the right to proceedings free from unreasonable delay
- the right to be treated with fairness and with respect for the victim's dignity and privacy

18 U.S.C. § 3771(a)(1-8) (2009).

F. Restitution - 18 U.S.C. § 2264

In a VAWA case, the court must order restitution after conviction to reimburse the victim for the full amount of losses incurred. These losses may include costs for medical or psychological care, physical therapy, transportation, temporary housing, child care, lost income, attorney's fees, costs incurred in obtaining a civil protection order, and any other losses suffered by the victim as a result of the offense. In a conviction under the Gun Control Act, the court may order restitution.

G. Self-petitioning for battered immigrant women and children - 18 U.S.C. § 1154

VAWA specifically provides that battered and abused spouses and children of citizens and lawful permanent residents may self-petition for independent legal residency. This statute prevents citizens or residents from using the residency process as a means to exert control over an alien spouse or child. It also allows victims to remain in the United States independent of their abusive husbands or parents.

V. Conclusion

On December 21, 2004, R.C. was sentenced in federal court for one count of interstate travel to commit domestic violence, in violation of 18 U.S.C. § 2261(a)(1). He was sentenced to 57 months in prison, a $2,000.00 fine, and 3 years supervised release upon discharge from prison. More importantly, the victim and her children, along with the tribal community, had a sense of safety and renewed peace of mind. For a period of nearly 5 years, the victim no longer had to fear that the defendant was on the other side of her front door, ready to push through it and physically assault her or her children. The federal domestic violence statutes provide powerful weapons for United States Attorneys' offices around the country to assist state, local, and tribal law enforcement in their fight against domestic violence. Increased awareness of these federal laws will allow the Department of Justice to work in a collaborative manner with our state, local, and tribal counterparts to reduce one of our nation's most serious crime problems.

List of federal domestic violence statutes and offenses

Domestic violence offenses

- Interstate domestic violence - 18 U.S.C. § 2261
- Interstate stalking and cyberstalking - 18 U.S.C. § 2261(A)
- Interstate violation of a protection order - 18 U.S.C. § 2262
- Domestic assault by an habitual offender - 18 U.S.C. § 117

Firearms offenses

- Possession of a firearm while subject to a protection order - 18 U.S.C. § 922(g)(8)
- Transfer of a firearm to a person subject to a protection order - 18 U.S.C. § 922(d)(8)
- Possession of a firearm after conviction of a misdemeanor crime of domestic violence - 18 U.S.C. § 922(g)(9)
- Transfer of a firearm to a person convicted of a misdemeanor crime of domestic violence - 18 U.S.C. § 922(d)(9)
- Official use exemption from firearms offenses (except §§ 922(d)(9) and 922(g)(9)) - 18 U.S.C. § 925(a)(1)

Other relevant statutes

- Full faith and credit - 18 U.S.C. § 2265
- Bureau of Indian Affairs arrest authority - 25 U.S.C. § 2803(3)
- Right of victim to be heard at bail hearing - 18 U.S.C. § 2263
- Rights of crime victims - 18 U.S.C. § 3771(a)
- Restitution - 18 U.S.C. § 2264
- Self-petitioning for battered immigrant women and children - 8 U.S.C. § 1154. ❖

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A Primer on the Prosecution of Child Sexual Abuse

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Sexual abuse is a frequent subject of prosecution throughout Indian country. It is committed in a variety of manners ranging from sexual contact to forcible rape. A subset of this crime is child sexual abuse. Child sexual abuse can also be perpetrated in different ways, but while investigation and prosecution of adult versus child sexual abuse cases draw on similar tools, skills, and legal principles, child sexual abuse presents a host of unique challenges for the prosecutor. While many of the suggestions and observations made below apply with equal force to the prosecution of adult sexual abuse, this article will attempt to focus on best practices when prosecuting the child sexual abuser accused of perpetrating this egregious crime.

It is perhaps best to begin with a recognition that sexual abuse, of either an adult or a child, is a crime which uniquely impacts the victim. Perhaps more than any other crime, sexual abuse is highly personal and humiliating and often carries with it long-lasting physical and psychological consequences for the victim. Resulting irreparable familial and community disruption is common.

Needless to say, many people in Indian country are all too familiar with the expected consequences of bringing an allegation of sexual abuse to light. Some are past victims of sexual abuse while others have family members who have suffered from this crime. Many will be reluctant to pursue a complaint of sexual abuse. Too often we encounter victims who, understandably, do not accept that pursuit of the perpetrator is worth the additional adverse consequences they may suffer.

It will be part of your mission to dissuade the child victims and those members of the family supporting them of this unfortunate, yet understandable, sentiment. We have a duty not only to the victims of a crime to see to it that the perpetrators are prosecuted, but also to the community which demands safety through the removal of a person prepared to commit a sex crime.

Without going into the myriad of research establishing a high level of recidivism among sexual abusers, suffice it to say that you will rarely encounter a sex abuser on his first offense. And while you

may obtain his first conviction, it will likely not be his last offense. I have found that this kind of discussion with victims of sexual abuse goes a long way in convincing them of the importance of pursuing charges against a sexual abuser. No victim wants what happened to them to happen to someone else in the future.

This is not a treatise on the law of prosecuting child sexual abuse. Rather, this article is meant to convey practical considerations and practice tips for the prosecution of these cases. I have tried to anticipate issues and questions that might arise in the areas I discuss below and provide insight into each.

This article is based upon my 15 years of experience in prosecuting these matters. The experience of others may differ significantly. With that caveat, I have endeavored to keep my suggestions more general rather than specific to the Indian reservations where I have worked. For additional questions not answered here, I encourage you to email me at any time using Outlook.

A note about usage: most child victims are female and most perpetrators are male. For this reason, and for ease of reference here, I will use the female gender when referring to the child victim and the male gender when referring to the perpetrator.

I. Allegation

A. What evidence should prompt an investigation?

An investigation will ordinarily begin with the discovery of a simple allegation. The allegation may take the form of an outright claim by a child that she has been touched in an inappropriate manner. Perhaps more common is an expression of fear on the part of a child in response to being left with a particular relative, family friend, or neighbor. This is then followed up on by the non-offending parent, guardian, or friend to whom the child expressed the fear. As more information is learned, action is hopefully taken.

Allegations of having been abused in some way also arise from non-specific claims by the child to an immediate or distant relative, teacher, counselor, pastor, or some other person in whom the child places a degree of trust. Do not be surprised to find this kind of informal revelation among children as old as teenagers. Given the subject matter of the crime, it is just as embarrassing for a teenager to report as it is for a toddler.

B. What do children disclose?

Initial allegations are often devoid of detail. A full-scale recitation of facts surrounding an act of child sexual abuse will rarely be made initially. As I pointed out above, sometimes a mere expression of (unexpected) fear on the part of a child gets the investigation rolling within the family. It is not uncommon for parents to make a report to investigators based simply upon their child's concerning behavior alone. Other times, a child reveals just enough information for the parent or other reporter to lodge a distinct enough claim, such as that the child said someone "touched" her and "it hurt," to warrant formal law enforcement follow-up. These initial reports by the child form the law enforcement impetus to dig deeper.

II. Investigation

A. Child advocacy centers

In our district, we are fortunate to have the services of a number of child advocacy centers (CACs) serving Indian country around the state. In the jurisdictions where they exist, CACs are critical components in the criminal justice system. A CAC serves three primary purposes. First, the center performs a physical examination of the child for signs of sexual abuse. Second, the center provides a "forensic" interview of the child in a controlled setting. Finally, under certain circumstances, the interviews are admissible in court through the testimony of the interviewer or through a recording of the same.

In most, if not all, circuits, the first key to admission of the child's interview at the CAC is the interviewer's training and the appropriate use of child interview protocol in the course of the interview. These are not the only legal issues you will encounter on the road to admission, but for the purposes of this article I urge you only to focus on the practical considerations of admission. If you do, you may be able to overcome the lack of a CAC by utilizing the interview services of an FBI or BIA Special Agent who has received training in the universally-accepted protocols for interviewing child sexual abuse victims.

At least twice each year, a national conference addressing the investigation and prosecution of child sexual abuse is held in San Diego, CA, and Huntsville, AL. Throughout the year, additional training is held around the country to instruct prospective interviewers on the correct protocol to utilize in these interviews. This training is necessary because it is accepted in some quarters that children are overly susceptible to suggestion and, therefore, only persons trained to interview children without the slightest hint of suggestion may have the results of their interview admitted in court. To ensure even a chance of admission, limit your child interviews to those persons who have received this specialized training.

For those with access to a CAC, I cannot overemphasize the importance of utilizing the center in these cases. Children who are too fearful, embarrassed, or reluctant for other reasons to reveal details of abuse even to a parent often reveal precisely what occurred in the comforting setting of the CAC. There are many reasons why this happens. First, the interviewer strives to ensure that the child understands they have done nothing wrong. Second, the interviewer strives to ensure that the child understands that it is safe (and imperative) that she tell the truth. Third, the setting of the interview is "child friendly." Finally, I have found that child forensic interviewers have a way with children that differs significantly from the officer on the street or the case agent at his or her desk.

The forensic interviewers we have used in the past devote their entire day to interviewing the child. Coupled with off-site training, they have learned to exhibit more patience, understanding, and insight into the child interview process, which makes them uniquely qualified to conduct this very difficult interview. Remember, we are talking about a witness who does not really want to talk about the crime. Add to the equation the fact the perpetrator may be the victim's father, uncle, or brother, and the process becomes all the more difficult and all the more taxing on the interviewer.

If you do not have a CAC, lobby for one. Much can be accomplished with minimal resources. The key is the training of the interviewer. A room appropriately furnished and equipped with good-quality recording equipment is the preferable location for a CAC. Barring access to a CAC, find an agent or officer interested in serving in this capacity on an as-needed basis or in conjunction with other like-minded agents or officers. The training can be obtained relatively inexpensively.

Bear in mind, however, that one can successfully try a child sexual abuse case never having moved into admission any portion of the CAC interview. What is most important is the information you

learn from the child in the course of the interview, not whether you can get the interview itself admitted into evidence. Most often, what the child tells the forensic interviewer becomes the basis for additional investigation and, ultimately, the leveling of charges.

B. Protocol for handling initial allegations of child sexual abuse

We have found that, given the large number of agencies with an institutional interest in the protection of children, duties and interests overlap, and sometimes in the process cases are adversely affected. The following groups have an interest in the welfare of a child who may have been sexually abused: child protection agencies (state and tribal); mental health agencies; tribal police officers; federal agents (BIA and FBI); Indian Health Service personnel; and tribal prosecutors.

The problem most often arises when someone from one or more of these agencies takes upon themselves the role of forensic interviewer and sends out a representative to ask questions of the child about sexual abuse, sometimes in the child's home, which could be the very place that the abuse took place. This is the last place the child wants to talk with a stranger about the sexual abuse and she will usually (falsely) deny that anything occurred. While a CAC interview can still take place, you will now have to call an expert to explain the initial denial by the child.

To the extent practicable, children should be interviewed in a controlled setting by a trained child forensic interviewer. The next best scenario involves an interview by a trained child forensic interviewer in a non-controlled setting. The least desirable scenario involves an interview conducted by a person not properly trained to interview children. Things only get worse when the prosecutor discovers that a number of such interviews have occurred. While this scenario is uncommon, it has occurred. If the child fails to disclose the abuse (but later discloses to a trained interviewer in a controlled setting), the prosecutor faces a potentially monumental obstacle to a successful prosecution.

In order to avoid these kinds of scenarios, we must ensure that in our geographical area of concern we have in place a universally complied-with protocol for interviewing children who allege sexual abuse. It is not difficult to draft an operating protocol in which all parties are on board and working together in the best interests of the children. The key to this protocol is that no matter who initially gets involved in the investigation, all agencies agree to defer to the forensic interviewer to conduct the interview with the child victim. Contact me through Outlook for a copy of a protocol we have successfully implemented.

C. Multi-disciplinary teams (MDTs)

These teams are statutorily authorized and they are becoming the norm around the country. If you do not have a MDT on an Indian reservation where you are working, consider taking steps to implement one. Depending upon the reservation, we usually have participating representatives from the following agencies:

- United States Attorney's Office
- FBI (victim-witness representative and special agent)
- Bureau of Indian Affairs Office of Law Enforcement Services
- Tribal Police Department
- Indian Health Service
    - Nurse Midwife Program

- Mental Health Services
- Tribal Child Welfare
- Tribal Attorney General's Office
- State Child Protection
- Tribal Victim Services

The MDT model has proven to be invaluable in Indian country primarily because of the distance between most United States Attorney's offices and the reservations for which they are responsible (a 100-mile trip between sites is not at all unusual). The MDT facilitates frequent, in-depth, and, ultimately, effective communication. Tribal organizations are represented by employees who both work and live on the reservation. This puts them close not only to the victims but also to the families who are so important to successful prosecution.

In the MDT meetings, the federal and tribal prosecutors share information and thoughts concerning evidentiary matters; the whereabouts of victims, families, and witnesses; and the welfare of victims and families. In addition, participants review information about new allegations of child sexual abuse, the progress of pending investigations, and the likely outcome of cases tribal prosecutors are considering charging in tribal court. While this give-and-take could obviously take place over the phone, we have found that our 2 to 3-hour meeting once a month, either at the United States Attorney's Office or in an office on the reservation with all parties present, has proven to be much more valuable.

The MDT meetings also serve as a forum for discussion by all represented groups on a wide variety of institutional and legal investigative issues, give-and-take between agencies with overlapping duties, and proposals for improvements to services and training. Ultimately, much more than simply talking about actual cases occurs. Because it is important to have a presence in the tribal communities we are serving, and that presence is hampered by distance, the MDT serves as a very useful tool for engagement with tribal partners.

D. What you need in an investigative report

In order to make an appropriate assessment of the case, you must have an investigative report comprised of a number of critical components. In somewhat of a descending order, beginning with most important, I have listed below what I like to see in the investigative report before I am comfortable making a prosecutorial determination.

1. Forensic interview of the child

I assume the interview will be recorded on digital media. Depending upon the particular interviewing agency, you may also receive a written report consisting of a summary of all that occurred in the course of the pre-interview meeting, followed by a summary of the interview. Below are some pointers to bear in mind when reviewing the recording:

- The interviewer *must* utilize non-leading, non-suggestive questions.
- The interviewer should never put an opinion about the child's credibility in the report.
- If you see persistent technical issues in recordings, such as low sound or light levels, unhelpful camera angles, or poor quality reproduction, make the interviewing agency aware of this. Otherwise, the same issues will pop up in future interviews. You do not

help your case by introducing a recording at trial in which the jury cannot clearly hear or see what the child is saying.

- If the interviewer asks a leading question or displays a tone or attitude in the questioning (such as inappropriate frustration) or does *anything* during the course of an interview which causes you concern, raise it with the interviewer immediately. If the interviewer does not get feedback from you, she will understandably believe she is doing perfectly well and continue to make the same mistakes over and over. Everything the interviewer does on that recording (and more) will be subject to expert scrutiny by the defense if your case goes to trial. If there is a problem, immediately make your concerns known.

2. Physical examination report

This report consists of a sexual abuse examination by a pediatrician, preferably one who has been specifically trained to conduct sexual assault exams. In a case involving a female child, the pediatrician will take a "history" from the child consisting of asking the child whether anything has happened to her such that the doctor should examine her or whether she knows why she has been brought to see the doctor. The pediatrician should then examine the child's entire body with emphasis on her mouth, breasts, buttocks and anus, lower legs, thighs, and vaginal area (with a male victim, an examination of the boy's penis should also be done). Swabs should also be taken and examined for signs of the contraction of any sexually-transmitted diseases.

If your pediatrician has not attended the conference in either Huntsville or San Diego, encourage them to do so. If you do not have ready access to a pediatrician prepared to conduct sexual assault examinations (and many will not do the exams as they have reservations about the intrusive nature of the exam, have difficulty dealing with the emotional trauma associated with the event precipitating the exam, or are reluctant to appear in court to testify), consider utilizing the services of a nurse midwife. Many midwives are trained in the area of sexual assault examinations and are prepared to examine teenagers who are deemed too old for certain pediatricians to examine.

We have taken it upon ourselves to provide training for nurse midwives on report writing, documentation, evidence collection and preservation, and court testimony. Like any expert, qualification depends upon experience and training. The Eighth Circuit Court of Appeals has upheld the admission of this evidence. The main point is that you must have a physical examination in order to fully assess the quality of your case and sometimes a pediatrician is simply not available to perform the examination.

Be prepared to receive a negative finding from the pediatric sexual assault examination. Few examinations actually result in documented findings of bruising, lacerations, cuts and tears, or other damage to the vaginal area. This does not mean the pediatrician will be of no use to you. It simply means you will be calling the doctor for purposes other than to explain the non-naturally occurring presence of an injury to that area of the child's anatomy.

If physical findings of any questionable nature are documented and you desire clarification, obtain it before you present the evidence to the grand jury. You may be surprised by what the doctor tells you. At first glance, it may appear that the findings are fairly innocuous, but after a visit with the pediatrician you may feel much more emboldened by how the doctor interprets the findings. A brief call to the doctor's office is worth it.

3. Corroborating evidence

The following is a non-exhaustive list of other items you may see discussed in the investigative report or about which you may inquire of the case agent:

- **Eye witness statements**, as perpetrators are sometimes caught in the act or shortly thereafter, especially when the crime occurred in a home.
- **Eye witness reports of statements made by the child**, not to the forensic interviewer but to others such as teachers, relatives, friends, or social workers.
- **Physical evidence** seized either from the scene or elsewhere, such as bed sheets, blankets, carpeting, or rugs.
- **Clothing** from both the perpetrator and the child (with an emphasis on underwear of both in light of transference of bodily fluids and/or pubic hair).
- **Documentation of the scene** through seizure of identifying objects or photographs. This is especially important as children molested outside their own home may be able to describe certain identifying characteristics of the physical location where the sexual molestation took place. To the extent you can corroborate the description, you should do so.
- **Proof of the defendant's prior commission of sexual offenses**, as these are ordinarily admissible in your case-in-chief. Because the accuracy of an NCIC report (or "rap sheet") is often suspect, you should seek a certified copy of the defendant's Judgement & Conviction in the prior case(s).
- **The suspect's statement,** as it is not unusual in a child sexual abuse case to have multiple versions of the event provided by the suspect in the course of the same interview. The better the interviewer, the more versions of the event a suspect tends to give and, short of an admission or an alibi you can easily defeat, this is the best you can ask for at trial. This is because one who is conducting an interrogation, and not simply a "tell-me-your-side-of-the-story" interview, will press the reluctant abuser.
- **DNA** of the perpetrator discovered on vaginal or other swabs taken from the child, her clothing, or bedding. Note also that vaginal fluid of the child can transfer to the perpetrator or his clothing. Be sure to have both closely examined. Case in point: at our request, the FBI Laboratory recently examined a perpetrator's jeans and discovered vaginal fluid on the *inside* zipper flap of the pants (the suspect wore no underwear following the sexual assault).

Sexual abusers seem more prone than other criminals to give different versions of the event as the interview goes on. It seems to be tied to the reluctance to confess to committing an act of child sexual abuse, given the stigma society places on such an abuser. The suspect will usually start with an outright denial that anything occurred. Next may come the "it was consensual" version of the event. Finally, if you are lucky, you may end up with the "she may have been asleep when I did it" version or the "it may have occurred but I was too intoxicated to recall it now" version. Whatever it turns out to be, you should have in hand an interview with the suspect from the case agent before you proceed to the grand jury.

III. Grand jury preparation and presentation

It goes without saying that as a general proposition, before you enter the grand jury room prepared to present evidence and seek an indictment, you should have a good idea about the strength of your principal witness, the child. Very often, your case will rise or fall on how strong a witness she will make. There are two ways to begin to get a sense of the answers you will get from her. You can either pay a visit to the child or you can view the child on the recording (if there is one) of the forensic interview. Even in those instances where a recording is available for review, it may still be prudent to talk to the child personally. Having worked with many children in these cases over the years, I have found that it is not so much age, but personality and confidence, that govern how well the child is going to fare in a courtroom setting. I have put 6-year old children on the stand who fared better than 16-year olds.

You may read a report from the forensic interview and conclude that the child did a wonderful job providing the forensic interviewer with important details of how she was molested by the defendant. You may then review the recording of the interview and discover a number of things about the child's "presentation" which cause you great concern. I suggest you visit with the child for a friendly chat, not about the crime perpetrated against her, but merely for the purpose of providing you with an introduction. Put yourself in the child's presence because only in her presence (and not viewing a recording) can you begin to get a true sense of what difficulties you may encounter at trial.

The main point I want to stress is that before you go into the grand jury, you should have seen the child in some forum, either in the forensic interview or through a personal visit.

A. Agent

Ordinarily, and depending upon the practice in your district, the case agent is sufficient to put on the entire case. While some offices prefer to "save" the agent for the trial, our practice is to present a short, succinct review of the evidence such that the case agent is minimally exposed. The case agent can summarize the child's statement, any eyewitness statements, corroborating evidence, and pediatric examination findings.

B. Victim

For good reason, the almost universal practice among prosecutors is to not put the victim in front of the grand jury. We must always be careful not to needlessly put a child victim through the ordeal of recounting the horrific offense at issue. Secondarily, grand jury testimony may constitute *Jencks* material and each time we have a victim describe the event, we create more grist for the cross-examination mill. *See* 18 U.S.C. § 3500 (2009). Short of some overwhelming need to call the victim to the grand jury, it simply should not be done (and if there is some sort of grave issue necessitating calling the child victim, one might want to reconsider the prudence of going forward with the case in the first place).

C. Eye witness

A great deal of child sexual abuse occurs within immediate and extended family units (this state of affairs is not unique to Indian country and is apparently the norm with child sexual abuse elsewhere). This fact presents a closer question on the issue of calling persons other than the case agent to the grand jury. A family member who observed the event or its aftermath may initially be a great witness for you, but 6 months later may no longer be interested in testifying against his brother, uncle, father, or friend

who is sitting in the defendant's seat at trial. The witness's version of the event may begin to change in subtle or not-so-subtle ways sufficient to deem him to have turned on the child and your case.

For this reason, the witnesses we most often put into the grand jury (in addition to the case agent) in this kind of case are eyewitness family members whose testimony we fear may begin to weaken as trial approaches. If you preserve their testimony at the outset of the case when the event is fresh in their minds and, more importantly, they are still enraged about what happened to their child relative, you will have sworn testimony with which to impeach them much later if they begin to abandon you at trial.

D. Medical professional

Barring something highly unusual in the medical findings necessitating explanation by the pediatrician or another medical professional, the case agent should be sufficient to convey the medical findings to the grand jury. It may seem obvious, but we find it useful to contact the pediatrician prior to presenting his or her findings in the grand jury in order to review them. Medical terminology sometimes carries different meanings for different doctors and it is important at this early stage to ensure that you and the pediatrician are on the exact same page. Some agents will go so far as to complete a report of their interview with the pediatrician in addition to reviewing their medical findings. All of these steps help avoid disagreements later at trial about something the agent may have said about such findings in the grand jury. It also gives you a heads-up on other expert testimony you may want to include in your case-in-chief.

> **A Practice Point**: Under Federal Rule of Evidence 414, evidence of prior acts of child sexual abuse are admissible at a trial for a new act of child sexual abuse. I usually avoid putting 414 evidence into the grand jury, however, to see if we can prevail without citing it. If your case "needs" the 414 evidence in order to prevail, and the district court later refuses to admit it at trial citing Rule 403, you may be in trouble. A prosecutor must know beforehand (to the extent this can be learned in the course of the grand jury) whether the case is strong enough without the 414 evidence. If the prosecutor did not rely upon it in the grand jury, and still obtained an indictment, he/she will at least have some sense that a conviction may not be contingent upon receipt of the 414 evidence.

IV. Indictment

Because the purpose of this article is not to present a comprehensive review of the law of child sexual abuse, but rather to provide a practice guide for these prosecutions, I will not review Title 18 U.S.C. § 2241 (2009), *et. seq*. These provisions must, however, be considered as you formulate your indictment.

A. Charge the highest provable offense

We charge the highest provable sexual abuse charge and every other provable sexual offense (except for charges based solely upon their being lesser-included offenses). This is primarily because juries sometimes want to compromise, and if you do not give them a fall-back position they may feel forced to acquit. A typical example is to charge aggravated sexual abuse (by force), 18 U.S.C. § 2241(a) (2009), as well as, where applicable, sexual abuse of a minor, also known as statutory rape. *See* 18 U.S.C. § 2243(a) (2009). While it is important to achieve a § 2241 conviction in a case involving force, for a variety of reasons (often associated with excessive abuse of alcohol by both parties to the crime) juries have great difficulty with these cases, and giving them an "either/or" verdict sheet with only the force

charge may result in an acquittal. It is much easier to prove statutory rape, and this strategy gives a jury that is reluctant to convict on the force charge a palatable alternative charge upon which to convict.

B. Specificity of acts alleged by victim

Child sexual abuse victims often describe a number of acts committed by the perpetrator. These usually include such things as touching and rubbing of the breasts and inner thigh area, non-penetrating touching of the vulva, and penetration of the vulva and anus by fingers, the tongue, the penis, and various non-anatomical objects (all acts prohibited under Title 18 when a child is the object of the acts). No matter how certain you believe the child is about what precisely the perpetrator used for penetration, in later interrogations children are not always so certain. That is to say, what they believe initially to have been a finger may turn out to have possibly been a penis or an object such as a toy. No matter which is correct, a crime has been committed.

You can charge the defendant in such a way that you are not pinned down with an obligation to prove the penetrating was done with a penis. A simple way to do this is to closely track the statutory definition at 18 U.S.C. § 2246(2)(C), which defines "sexual act" as, among other things, the penetration by "a hand or finger or by any object . . . ." If the court does not require you to include a "to wit" section in your indictment specifying a finger, tongue, or other organ, you should be able to pass muster tracking the statute which allows for prosecution of penetration "by any object." *See* 18 U.S.C. § 2246 (2) (2009). Consider doing this when you are confident that the perpetrator inserted *something* into the child but you are not certain what it was.

> **A Practice Point**: Have no fear when you learn from the interview of the child that a seemingly impossible object was used to molest her. For instance, a young child once revealed her father put a tree branch inside her. We later realized that this is what the object felt like to the child and so she believed that is what it was. A child victim may never be able to tell us specifically what the perpetrator used to molest her. What is important for purposes of proof in a "sexual act" case is that penetration by *some* object occurred.

C. Include each act alleged by victim

If the child is able to describe, for instance, being touched on her breasts by the perpetrator's hands and then penetrated with his fingers in her vulva and again in her anus, charge all three acts in separate counts. Each act constitutes a distinct crime and may be charged as such. There is no reason to limit the event to one charge and throw all the acts in together. If you do so, you run the risk of getting a jury split on which precise acts within the single count occurred. Some jurors may believe there was, for instance, touching of the breasts but not penetration of the anus, while others may disagree.

Breaking the event up into discrete counts permits the jury to distinguish between the acts and gives you a better opportunity for a favorable verdict. This also helps on appeal by allowing you to argue that the jury was very discriminating in their deliberations by going so far as to convict on some counts and acquit on others.

D. Date range

Because children sometimes have difficulty remembering with specificity the date range of their victimization, we tend to broaden the range considerably in the indictment to ensure we encompass the time period we expect the child will be able to recall at trial.

In preparing the child who is not able to pinpoint the date(s) of victimization, it is useful to question her about such things as:

- During which season did the abuse occur? (for example, was there snow on the ground? Was the playground open?)
- What birthday was last celebrated?
- What was the nearest holiday she remembers?
- Who resided in the home at the time the sexual abuse occurred? This is particularly useful information where there is transience in the family with relatives coming and going from the home. Adults permanently residing in the home can assist us in pinpointing date ranges if they know who was residing in the home at a particular time. Tribal Housing Department records are occasionally useful as well.
- In what grade was she at school?

V. Post-indictment considerations

A. Preparing to reveal a child sexual abuse indictment in Indian country

Defendants often know they are being investigated for these offenses because the FBI or BIA will ordinarily seek to obtain an interview prior to presentation of the case to the grand jury. Still, for the sake of the child's privacy and to maintain calm within the family, one might want to consider sealing the indictment until an arrest is made.

B. Protecting the victim's family

If the crime is inter-familial in nature, meaning the victim and perpetrator come from different families, it is very helpful to the victim's family to be notified as soon as practicable after an arrest has been made. Retaliation from the defendant's family, neighbors, and the larger community is not unheard of, and giving the victim's family a timely heads-up about an arrest will be much appreciated by them.

C. Protecting the child victim from her family

If the crime involves a child and a perpetrator from her own family, it is important to ensure that the child is protected from members of the family who will exert undue influence upon her in an effort to convince her to withdraw her claims against the defendant. This is where the MDT becomes particularly useful. Tribal social service agencies often already have a case file on the child and have hopefully taken steps to either remove her from the home or to ensure that there is a responsible family member present who can be relied upon to keep the child safe. As the pre-indictment investigation progresses, we use the MDT to keep frequent tabs on the whereabouts and well-being of the children in cases we anticipate will go to the grand jury. Also, tribal prosecutors in particular can be of great service to you if the child is getting into trouble by drinking, using drugs, skipping school, and so forth. There are a number of tribal juvenile mechanisms at their disposal to keep the children from getting further into trouble such that you might "lose" them to the ravages of delinquency prior to trial.

D. Find a friend in the family

Because of the unique nature of child sexual abuse prosecutions, given such factors as an underage victim, intra-familial perpetrators, close-knit communities, and underfunded and poorly-staffed social service agencies, the federal prosecutor must often take steps which resemble social work more than prosecution. Nonetheless, for the sake of the child, such steps must be taken. One such step, in addition to securing the safety of each victim, is to acquaint oneself with the family dynamic (both immediate and extended) and find "friends" in the family upon whom you can rely for both protection of the child and information that may prove useful as the litigation progresses towards trial.

Regular and reliable communication between your office and the reservation is not always easily achieved. Family members who are willing to cooperate and assist us with the prosecution may prove to be invaluable when that communication is necessary. A great deal can be achieved by leaving our offices and traveling into the tribal community to make contact with the child, her family, and others. It is incumbent upon us to take these steps and, in the end, they will strengthen our cases.

E. Utilize victim-witness resources

Very often the familial and community pressure upon the victim and/or her immediate supportive family members becomes unbearable. If not addressed quickly, you may lose these key witnesses to the tide of opposition to your prosecution. Many tribes have victim-witness offices designed to assist with such problems. Our own offices have victim-witness coordinators with knowledge of and access to resources to protect victims and their families.

We have frequently gone so far as to physically move a young victim and one or two supportive family members off of a reservation to another community after repeated untraceable threats and other menacing actions were taken following the return of an indictment against a neighborhood perpetrator. Short of relocating them, reservation-based safe houses and shelters are another option, as is increased police department presence in the form of hourly drive-bys.

The key is to make the victim and her cooperating family members aware of the need to keep you and the case agent informed of threats against them, aware that you care about their well-being, and aware that you will prosecute obstruction of justice or witness tampering by others. Sometimes, merely the knowledge that you care about their welfare allows them to stay in place and maintain resolve in the face of non-illegal ostracization in the neighborhood. Conversely, ignoring these key parties is the worst course of action, and only we are to blame for the consequences we suffer from doing so.

VI. Pre-trial litigation and preparation

In all sexual abuse cases, including child sexual abuse cases, there are a number of unique evidentiary concerns which bear noting. As I have stated above, this is not intended to be a complete explication of the law governing these rules, but is meant only to serve as a heads-up to their existence.

A. Federal Rule of Evidence 412

This rule governs admission of evidence by the defense of prior sexual behavior by the victim of a sexual assault (children or adult victims). Admission of such evidence is strictly circumscribed. Also, among other things, notice of an intention to admit such evidence must be provided in writing at least 14 days prior to trial and must be provided to the victim or her guardian or representative.

If this deadline has passed with no notice, I file a motion in limine seeking to bar the admission of any such evidence for failure to comply with this rule's time limitation. Circuit courts have been fairly vigilant in upholding rulings barring admission for failure to follow the mandates of Rule 412.

B. Federal Rule of Evidence 414

As mentioned above, this rule permits introduction of evidence of the defendant's prior commission of child sexual abuse offenses. Convictions for such conduct are not necessary. You may introduce this evidence through victims of, or witnesses to, the previous offense. Rule 413 is the adult sexual assault offense counterpart to Rule 414. Be sure not to miss the notice deadline of at least 15 days before the scheduled date for trial or thereafter for good cause.

C. Expert witnesses

There are many circumstances that may prompt you to consider calling an expert witness at trial. The following issues arise frequently.

1. Recantation

For reasons other than the truth, children sometimes retract their allegations prior to testifying at trial, particularly with an intra-family offense. Many credible experts in the field are prepared to explain that this not-uncommon phenomenon does not mean the offense did not occur and that the recantation is more likely a function of familial and other pressures brought to bear upon the child. Under the rubric of expert testimony explaining "behavioral characteristics typical of child victims of sexual abuse" (almost universally accepted), testimony explaining recantation is admissible.

2. Late disclosure

It is probably safe to say that most child victims of sexual abuse do not report the offense right away. There are many reasons for this:

- The child or a member of her family is warned in the course of the offense not to report it.
- The child may be too stunned by the gravity of the offense to tell anyone.
- Children often blame themselves for what has occurred and are afraid to report for this reason.
- The child believes that what occurred was wrong, but they are aware that reporting the incident will bring shame, disruption, and possibly dissolution of the family, and for this reason keep the event to themselves.
- For some, sexual abuse may be a recurring event within the family and its occurrence, while recognized as inherently wrong, does not give rise to what we would expect from a family *not* ordinarily experiencing such a thing, i.e., a report of the abuse.

3. Incomplete disclosure

It is not uncommon for children, when they do make a report of being sexually abused, to fail to include all the details. While the defense usually insists a child's mother is the one person in the world to whom we should expect a child to have given a complete recitation of the event, experts in the field know through research and experience that, in fact, for all the reasons set out above concerning humiliation, threats, and fear, a child's mother is *not* necessarily that person.

Even a forensic interviewer, a person with no apparent familial interest in the case, sometimes must interview a recalcitrant child more than once before obtaining particularly humiliating details of the sexual abuse. Experts tell us children disclose when they believe it is "safe" to disclose, not necessarily when another person simply asks them to disclose. Like the other issues above, courts allow experts to explain incomplete disclosure to a jury unfamiliar with such phenomenon.

4. Lack of physical injury or DNA

In child sexual abuse cases, we often are presented with a lack of any corroborating physical injury. We must address this apparent weakness in our case because jurors expect injury to occur, particularly with a child victim. An expert can explain that the absence of a tear, abrasion, or laceration does not mean a sexual assault did not occur. Thousands of instances of child sexual assault are investigated each year and, by far, most sexual assaults do not leave behind evidence of an injury. Yet, we know the assaults do take place. A short anatomy lesson is often in order for some jurors and allows them to see precisely how the child was molested (using the child's allegation) and why injury might not have resulted.

5. Characteristics typical of child sexual abuse victims

This is a parameter I mentioned above which encompasses many different behaviors. In addition to those I have already identified, the following psychological and physiological behaviors are matters you may want to explore at trial as they may corroborate the child's central allegation: bed wetting, humping siblings, humping of objects, inappropriate touching of pets, sudden and frequent occurrences of sexual playacting, precipitate drop in school grades, unexplainable diminution in energy, insomnia, fear of leaving home, fear of remaining with certain persons, and sudden onset of depression.

6. Physical findings by a pediatrician

A qualified pediatrician may testify about his physical examination of the child, including his examination of the child's anatomy for signs of injury. Not all pediatricians regularly conduct child sexual assault exams. We employ pediatricians well-versed in child sexual assault examinations because, given the breadth of their experience, they may be permitted to testify beyond their examination as to what precisely the jury should conclude from their findings.

When preparing such expert, be sure to remind the doctor she cannot opine that the child was sexually molested. In most jurisdictions, the pediatrician can testify the physical findings are *consistent* with the "history" (essentially, the child's complaint) provided by the child. I also suspect that in most jurisdictions, like ours, the doctor can further testify that the injury to the child (for example, a tear in her vulva) is not a naturally-occurring event and that, given the depth of the injury inside the vulva, resulted from penetration of the vulva by some object. The same pediatrician can also testify about the occurrence of chlamydia in the child and how, in only certain circumstances, can a child contract this disease.

Note, finally, that an inexperienced defense counsel often opens the door on cross-examination of the pediatrician to allow further conjecture on the part of the doctor as to the source of the injury. Be alert as counsel may stumble into this and then try to cut off the doctor's response when he recognizes his blunder.

D. Forensic interview

There are a number of reasons to consider calling the child forensic interviewer as a witness at trial. Most, if not all, jurisdictions allow, in certain instances, for the admission of some of the statements made by the child in the (hopefully-recorded) forensic interview. The confrontation decision in *Crawford v. Washington*, 541 U.S. 36 (2004), caused many courts to believe they could no longer permit introduction of such testimony. Appellate courts have since resolved the issue and the bottom line is so long as the child testifies and the defendant is able to conduct meaningful cross-examination, admission of some of the statements or details provided by the child to the forensic interviewer (details the child is, for some reason, unable to provide at trial) is permitted. *See United States v. Wipf*, 397 F.3d 677, 682 (8th Cir. 2005) (citing *Bear Stops v. United States*, 339 F.3d 777, 781 (8th Cir. 2003)). This testimony usually comes in under Federal Rule of Evidence 807. Do not forget to file a notice evincing your intention to move for the admission of this testimony under Rule 807.

It is important, however, not to rely upon admission of the forensic interview statements even where you are confident they will be admitted. We should still strive to elicit as much material testimony as we can from the child (we will need to, anyway, if we want to admit any of the forensic interview). This is because of a simple principle of communication. A face-to-face exchange of information from the child to the jury sitting just a few feet away will have far more impact upon them than will a recitation of information from a third source or, worse, from a recording of the forensic interview.

The courtroom forum with live testimony from the child also impacts the child in a very different way. Her fear, humiliation, and anger while testifying live is often far more palpable than it is in the relatively (from the child's point of view) safe setting of a forensic interview room. Jurors can "read" these emotions face-to-face with the child if they are apparent enough, and this usually has a strong impact upon them. These concerns also come into play with the plan to have the child testify from a remote location via video pursuant to 18 U.S.C. § 3509.

For all these reasons, I believe we should approach each case with the goal of putting the child on the stand before the jury. Using the forensic interviewer or video testimony should be viewed as a secondary option.

E. Meet with the child

I cannot overstate the importance of meeting with the child-victim prior to calling her to the stand. On average, prior to trial, I will meet upwards of four times with a child who has good recall of the details of the event and does not express overwhelming fear of testifying such that I am very concerned (obviously, we expect fear but some children handle it better than others). Each of you will decide exactly what you need to talk about in these meetings. I tend not to go over the details of the crime each time we meet unless the child is having great difficulty with the preparation.

Basically, I arrange these meetings so that the child and I can get to know each other and build trust and a rapport with each other. After all, I am going to ask her to do something she has never been asked to do. It is bad enough that I will ask her to talk about something that she considers private, but I also want her to talk about it in detail and about someone else who was present. I want her to do this in a great big room in a place far from home and in that room will be a group of strangers, including a person

sitting high above everyone else wearing a black robe. More often than not those strangers will be non-Indian rather than Indian persons. Worse, I will not be the only person who is going to ask her about these private issues in court. Perhaps worst of all, the person who touched her will be present in the courtroom while she testifies.

Think about the kind of trust and comfort the child must have with you in order for you to be able to elicit from her what you need in this most frightening of forums. Your job is to convince the child that she can do it and that you will never leave her side (figuratively, but sometimes literally) while she is in the courtroom. Many children put all their trust in you and when that occurs not only will you have a child who will tell everything she can but she will be able to do it with less fear than might otherwise be experienced. Thus, for both her sake and yours, meetings with the child are a must.

Some of the items to ponder as you plan to meet the child are:

- **What is frightening to the child?** The answer may surprise you and will differ in some respects from case to case.
- **What information must you glean from the child?** Know ahead of time what general and specific pieces of information you will want to elicit from her. If you think an adult does not like surprises on the stand, imagine how a child would handle it. Let the child know the sensitive topics you will need to explore with her well ahead of time. They deserve to not have a bombshell dropped upon them just before trial.
- **Show the child the courtroom before trial.** This has been a regular practice of mine for many years. It likely will not turn around a terribly frightened child, but we do not want children to see the place where these hard questions are going to be asked for the first time moments before the process begins. Courtrooms are frightening enough without the addition of having to be subjected to intrusive questioning. Acquainting the child with the courtroom may allay some of this fear.
- **Acquaint the child with your victim-witness coordinator.** We have found that absent a supportive family member in the gallery, a friendly face from the victim-witness coordinator during the child's testimony goes a long way to providing the child additional comfort in the courtroom.
- **Have a comfortable place for the child outside the courtroom.** Waiting to testify resembles waiting to see the doctor, but is probably worse for a child victim of sexual abuse. Consider designating a small, child-friendly room furnished specifically for child victims and child witnesses to wait before they testify.

VII. Trial

A. Witnesses

Below is the general order of witness testimony that I follow when presenting a sexual abuse case to the jury.

1. Background on the family dynamic

I use a witness to introduce the jury to the family makeup in a case of intra-familial sexual abuse or simply to set the stage for the circumstances which permitted the defendant to have access to the child. Knowledge of the family situation in particular has the potential to play an important role in the jury's consideration of your case.

2. First officer or reporter

This is an especially useful witness in cases of acute events, those reported within 72 hours of occurrence. In most cases, officers have their best chance of obtaining an incriminating statement right after the event, and the same holds true with child sexual abuse cases. Early officers on scene are also useful for impeachment of witnesses who initially give helpful statements but later water them down at trial.

3. Eye witnesses

While corroboration is a necessary element of all cases, it is even more important in child sexual abuse cases because of the relentless attack the defense mounts against the child victim. Every credible eyewitness should be used.

4. Child

Here is just a sampling of what you may encounter from the child at trial: fear, reluctance, freezing up (the child refuses to respond to any more questions), minimization, humiliation, shame, anger, resentment (sometimes even directed toward the prosecutor for asking terribly private questions), or even statements such as "Hi Daddy!" (A young and particularly happy child I was examining greeted her father, the defendant, this way from the stand before testifying how he molested her. Not all children realize that what has happened to them is wrong and should be met with punishment.)

All of the pre-trial meetings and rapport-building with the child come to fruition when she is on the stand facing strange faces in the jury box. There will be moments in your examination of the child when there is utter silence in the courtroom (including her own) and everyone is waiting to hear her answer a particularly difficult question. Or, there will be moments when the child is too distraught and sobbing to answer your question. If you have developed the trust the child needs, moments like this allow you to approach her, stand right next to her at the witness stand if necessary, and softly question her. If she trusts you and feels protected by you, your presence alone can have a calming effect.

A sympathetic judge will allow you to question the child from that close so long as all the jurors can hear. At these most difficult times, the most important testimony often occurs. If the jury does not hear it, you accomplish nothing. Calmly, quietly elicit the information you need. Remember, at these moments, no one in the world is more entitled to our patience than that child. Courts with experience trying these cases should allow us and the child the time we need in order to accomplish the mission.

5. Forensic interviewer

Remember, the most important element of this testimony, beyond the substance of the child's statement (if you are moving to admit any of it), is that the interviewer followed established protocol for the taking of such a statement. Failure to follow the protocol will subject your witness to withering cross-examination. You should be vigilant in searching for even potential examples of suggestion in the forensic interview and prepare your witness to be ready to respond to the defense's attack.

6. Physical exam

If an anatomical lesson is necessary, do not shy away from utilizing graphic, descriptive representations of a child's sexual organs. A mature jury will understand your need to explain and make

absolutely clear the location and source of the injury to the child. Many textbooks have usable anatomical representations. The jury will quickly put aside their embarrassment about looking at such exhibits and will focus on the testimony.

7. Defendant's statement to law enforcement officers

When admissions are made or multiple versions of the event are given in the course of the investigation, the prosecutor can expect yet more versions to come out on both direct and cross examination.

B. Exhibits

1. Photographs

Because our trials take place some distance from the reservations, jurors tend to be unfamiliar with reservation life. To address this, I almost always admit photographs of the location of the offense. The more familiar the jurors are with the circumstances of the event, including the surrounding environment, the more they can identify with the child's trauma. Not all these locations are pleasant settings either, and that is part of the point. They are often very frightening to a child. If the jury does not see those settings, though, they are that much less collectively knowledgeable about the event.

2. Clothing

I will admit clothing or photographs of clothing for two purposes: to corroborate the child's description of her assailant (perhaps he wore a distinctive shirt which was later seized using a search warrant); and, to the extent necessary, to lay the foundation for the admission of DNA or fiber evidence.

3. Diagrams

Diagrams further assist the jury in understanding the movement of key persons in the course of the event. As in any case, attempt to visit the scene of the crime and take along graph paper to begin to formulate a diagram of the location (ordinarily the interior of a home). Access to a high-end graphics department is not necessary. A simple sketch often satisfies the jury's need. Remember, each time you tell the jury something, they collectively receive it and there is less chance of a divergence of understanding of the event.

4. Photograph of the child

Often, the trial does not take place until well after the event, sometimes even years later. Of great help, especially in establishing the unreasonableness of a defendant's claim to have believed the child was at least 16-years old at the time of the offense, is to admit a photograph of the child taken contemporaneous (or as close as possible) with the time of the sexual abuse. School yearbooks are an excellent source for these purposes.

VIII. Conclusion

The investigation and prosecution of a child sexual abuse case presents unique, difficult, and highly challenging obstacles. Given the heart-wrenching subject matter, few trials in your career will provide more sense of accomplishment when the jury convicts and, conversely, more sense of loss when the jury acquits. These prosecutions take a certain toll on us unlike anything else we prosecute. It is rarely a pleasant experience for anyone involved.

In the end, however, the experience can be cathartic for the children because they are given a rare opportunity to say in front of their abuser, their own family, and the court exactly what crime the defendant perpetrated. Win or lose, there is still some value to the child.❖

ABOUT THE AUTHOR

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Sex Offender Registration in Indian Country

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A pure hand needs no glove to cover it.
Nathaniel Hawthorne, The Scarlet Letter (1850)

I. Introduction

There are 564 federally-recognized Indian tribes and nearly 56 million acres of "Indian country" scattered throughout 33 states in the country. Indian tribes occupy a unique place in the federal system. In 1831, Supreme Court Chief Justice John Marshall coined the term "domestic dependent nations" in describing the unique relationship the United States has with Indian tribes. *The Cherokee Nation v. The State of Georgia*, 30 U.S. (5 Pet.) 1 (1831).

Indian country exists in a variety of forms, ranging from the more common large reservations to checkerboarded trust lands and even to "dependent Indian communities." 18 U.S.C. § 1151(b) (2009). Regardless of the shape or title in which these various forms of Indian country appear, they are often located in rural areas. Unfortunately, many unaccounted for sex offenders may seek refuge and a safe haven in Indian country. There are roughly 600,000 registered sex offenders nationwide. Of them,

100,000 are unaccounted for either because they never registered or because they have disappeared from the location in which they were originally registered.

II. History

A registration system for criminals in the United States dates as far back as the 1930s, when several cities required local registration of felons. The Supreme Court later struck down these municipal registrations, having determined that such laws constituted a violation of due process rights. Registration laws later made a comeback, but with a new focus on sex offenders.

The first state to implement a sex offender registry was California in 1947. The state of Washington expanded this concept after the brutal molestations of several boys in 1989 and 1990, by experimenting with a community notification system. By 1993, nearly half of the states had their own sex offender registration. These early sex offender registration laws were enacted for the purpose of aiding sex crime investigations by "rounding up" possible suspects, but they did not provide for public access to the registry information.

Like every other area in the world, Indian country is not immune from criminal conduct. Sex offenses on tribal lands are among the most prevalent and have recently been widely reported in the press. Of the federal sex offense cases reported nationwide, over 60 percent occur in Indian country, with one in every four Native American girls, and one in every seven Native American boys having been sexually abused. After several shocking sex abuse cases on multiple reservations, many of which were perpetrated by Bureau of Indian Affairs (BIA) school teachers against children, Congress enacted the Indian Child Protection and Family Violence Prevention Act (ICPA) in 1990. Pub. L. 101-630, § 402, 104 Stat. 4544 (1990). Among other things, ICPA was created to allow the Secretary of the Interior to look into the possibility of implementing one central registry for all sex offenders. *Id.*

In the 1990s, a number of tribes developed tribal sex offender registrations. However, due to the lack of criminal jurisdiction over non-Indians on tribal lands, ICPA had to impose different penalties for the non-Indian and the Indian sex offenders who were noncompliant with registration requirements. Those of Indian descent could receive a sentence of incarceration, while the tribal court had no jurisdiction for non-Indian offenders. To address this inequity, some tribes incorporated banishment from the tribal lands as a form of punishment for non-Indians. By 2002, 54 tribal nations were submitting information on sex offenders to the National Sex Offender Registry.

In 1994, Congress enacted the Jacob Wetterling Crimes Against Children and Sexually Violent Offenders Registration Act (Wetterling Act). Pub. L. 103-322, § 170101, 108 Stat. 2038 (1994). The Wetterling Act mandates that every state maintain its own sex offender registry in accordance with sex offender registration laws. The obvious gap in the Wetterling Act is the failure to require registration of a convicted sex offender residing in Indian country. Without effective information-sharing procedures, tribal communities are subject to becoming safe havens for sex offenders.

The Wetterling Act was amended in 1996 by what is popularly known as "Megan's Law." Megan's Law, Pub. L. 104-145, § 13701, 110 Stat. 1345 (1996). Megan's Law was passed after 7-year old Megan Kanka was raped and murdered by a repeat, violent sex offender who lived with two other sex offenders across the street from Megan, and whose history was not readily available to anyone. Megan's Law took the sex offender registry to the next step by mandating that states develop a community notification system to inform residents of any registered sex offenders who live in, live near, or move into in their area. *Id.*

The Tohono O'odham tribe enacted its own sex offender registry in 2000. This tribal code gave the tribe the authority to share sex offender information with other law enforcement agencies and to

provide notification to the community. *See* Tohono O'odham Nation Ordinance No. 2000-02 (May 10, 2000).

By 2006, every state had its own system for registering of sex offenders; however, the registration laws from state to state were inconsistent. Sex offenders could easily avoid registration by moving from one state to another and by looking for jurisdictions whose laws were more favorable to them. For example, while one state would not require registration after an offender had been a resident for a certain amount of time, the movement of the newly unregistered sex offender into a state that would otherwise require registration proved problematic. Ultimately, a new federal law was needed to address the growing problem of sex offenders who were missing from the registration rolls.

Consequently, tribes again looked for their own system of sex offender registration that would enable them to share public safety information. In January 2006, a provision was added to the Violence Against Women Act to help tribal nations develop a national tribal sex offender registry. Violence Against Women Act of 2000, Pub. L. 109-271, § 7d, 120 Stat. 765 (2006).

III. The Adam Walsh Act

On July 27, 2006, President George W. Bush signed into law the Adam Walsh Act, which included the Sex Offender Registration and Notification Act (SORNA). 18 U.S.C. § 2250 (2009). The stated purpose of SORNA is to "close potential gaps and loopholes under the old law, and generally strengthen the nationwide network of sex offender registration and notification programs." *Id.* SORNA created a uniform baseline for registration and notification, and applies when a sex offender is required to register on the basis of a federal, District of Columbia, tribal, or territorial offense; when he travels in interstate or foreign commerce; when he enters, leaves, or resides in Indian country; and when he knowingly fails to register or to update a registration as required. *Id.*

Punishment for a convicted sex offender who fails to register or to update a registration carries a maximum sentence of 10 years imprisonment. A sex offender who fails to register and also commits a crime of violence will be imprisoned for not less than 5 years and not more than 30 years. The latter enhancement is required to run consecutively with the punishment provided for the failure to register or to update a registration. 18 U.S.C. § 2250(c) (2009).

To address noncompliance with registration laws among sex offenders, SORNA made key changes to the Wetterling Act. SORNA requires each participating jurisdiction, whether tribal or state, to use a public Web site registry to track sex offenders. *Id.* It also requires state and applicable tribal jurisdictions to legislate new, or to amend the current registration laws to address additional offenses such as child pornography, additional sexual assault crimes, and inchoate offenses. SORNA calls for the registration of certain juvenile sex offenders and conforms its criminal code to a three-tiered system for classifying sex offenders, with periods of registration ranging from 15 years to life.

SORNA requires registration "in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student." 18 U.S.C. § 2250 (2009). When an offender registers with a jurisdiction, that jurisdiction must provide all of the necessary information to all other jurisdictions in which the sex offender is required to register. Sex offenders are now required to appear in person for registration confirmation and updates, as well as to provide more information, such as social security numbers, employment and school information, email addresses, details of the offense prompting registration, information on vehicles to which he has access, current photographs, DNA samples, palm prints, and fingerprints. SORNA also increased the penalty for failing to register from the old maximum of 1 year imprisonment to the current maximum of 10 years imprisonment.

There are two ways a sex offender can violate SORNA and be charged in federal court. The first applies to individuals who have federal sex offense convictions and the second applies to individuals who have qualifying state sex offense convictions. It is easy for the government to obtain jurisdiction over federally-convicted sex offenders because their prior conviction constitutes the necessary jurisdictional hook. Under § 2250(a), federal sex offenders must satisfy three elements in order to be found in violation of SORNA. First, they must be required to register under SORNA. Second, they must have a federal sex offense conviction, such as a conviction that occurred on tribal land or in violation of a federal statute. This federal conviction serves as the jurisdictional link. Finally, the sex offender must knowingly fail to register or update a registration as required by SORNA.

In order for the government to obtain jurisdiction over state sex offenders, there must be an additional federal hook. For offenders with qualifying state convictions, that hook is interstate travel. To establish federal jurisdiction over a state sex offender, three slightly different elements must be established. First, the offender must be required to register under SORNA. Second, the sex offender must travel in interstate or foreign commerce, or enter, leave, or reside in Indian country. Third, the sex offender must knowingly fail to register or update a registration as required under SORNA. 18 U.S.C. § 2250 (2009).

IV. Defenses

The most common defense in failure to register cases is a demonstration that the failure to register or to update a sex offender registration was not done "knowingly." In other words, the defendant did not know of the requirement to register or to update a previous registration. This defense is often countered with documentation from the offender's initial release from prison or from prior registrations signed by the defendant acknowledging his continuing obligation to register. However, it is possible for this defense to succeed because there are some sex offenders who were convicted prior to the establishment of a registration system and who are truly unaware of the requirements. Most, however, are conveniently embracing the concept of burying one's head in the sand.

Another defense, that of "impossibility," exists where tribes have opted to set up their own registration but have yet to become compliant with the law. It is an affirmative defense that "uncontrollable circumstances prevented the individual from complying" with the law. 18 U.S.C. § 2250(b) (2009). Simply put, a tribe's inability to implement the registration system is capitalized upon and used as a defense by an unregistered sex offender. Until a tribal registration system is substantially compliant, tribal land will be an attractive alternative to those sex offenders who wish to avoid detection.

V. Tribal registries and SORNA

SORNA also created the Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART) Office to provide guidance for establishing a sex offender registry and to assist Indian tribes in obtaining the computer software needed for the actual registration and tracking of sex offenders without cost to the tribe, as well as for publication into the national database (found at www.nsopr.gov). It is also worth noting that the Adam Walsh Act added "felony child abuse and neglect" to the list of crimes listed in the Major Crimes Act, found at 18 U.S.C. § 1153, over which prosecution may be brought in federal court. 18 U.S.C. § 2250 (2009).

Under SORNA, tribal nations can now accept the responsibility for establishing and joining in the national sex offender registration system or can choose to delegate this responsibility to the state. Of the 564 Indian tribes, 212 were eligible to make an election to opt-in or opt-out of establishing their own sex offender registration. A number of tribes found in Minnesota, Wisconsin, Nebraska, Oregon, California, and Alaska are subject to the criminal jurisdiction of a state under 18 U.S.C. § 1162 and are ineligible to

elect to serve as registry jurisdictions. 42 U.S.C. § 16927(a)(2)(A) (2009). Section 127 of the Adam Walsh Act includes a deadline for tribes to comply with the SORNA mandates. However, tribes that have elected to "opt-in" to implementing their own registry under section 127 may, at any time, choose to opt out, thereby delegating the SORNA responsibilities to the state. 18 U.S.C. § 1162 (2009).

State and participating tribal jurisdictions were required to conform their registration and notification laws to the federal standards before July 27, 2009. 18 U.S.C. § 2250 (2009). The SMART office was authorized to give tribes a 1-year extension for implementation plans and an additional year may also be granted (establishing a deadline of July 27, 2011) for tribes to receive final certification that they are in substantial compliance with SORNA. *Id.* Failure to comply could result in a loss of federal law enforcement funding. For tribal governments wishing to implement their own sex offender registration systems but who fail to meet the deadline, responsibility to register sex offenders will revert back to the state. Unfortunately, for tribes that opted to have their own sex offender registry and have not set up a registry, their tribal lands become safe havens for sex offenders.

VI. Tribal resources

There are a number of tribal governments that are among the poorest groups in the United States. The maintenance of a sex offender registry and ability to pay a staff to monitor the registry are the biggest concerns in setting up a tribal registry. Another challenge is the cost of the registry itself. The Kickapoo tribe of Oklahoma, for example, is a tribe whose registry is close to substantial compliance with the federal requirements, but the cost for the DNA collection system may be cost prohibitive and result in the tribe never reaching full compliance.

Many tribal governments also face infrastructure problems. While states have had sex offender registration systems since 1994 that have been modified to comply with SORNA, most tribes are just starting registries, and it will be cost prohibitive for smaller tribes to implement the infrastructure necessary to meet SORNA's mandates.

VII. Tribal convictions

Previous federal laws did not consider tribal court sex offense convictions that required a convicted defendant to register, nor did the laws penalize noncompliant sex offenders who entered or resided on tribal lands. Some sex offenders found tribal reservations to be safe havens for escaping the scrutiny of state law. SORNA made it a federal crime for a person who has been convicted of a qualifying sex crime in tribal court to fail to register as a sex offender and requires that all jurisdictions include tribal court convictions for qualifying sex offenses in their sex offender registries.

Tribes have the right to establish their own court systems and to decide whether or not to provide counsel. With the exception of the limitations placed on it by federal statutes, criminal jurisdiction in tribal court over Indians in Indian country is inherent and exclusive. *See Ex parte Crow Dog*, 109 U.S. 556 (1883). A possible consequence of uncounseled tribal convictions is that they may not be recognized in state or federal courts as a prior sex offense conviction. Some tribal courts do not have adequate resources to provide legal counsel at all times, but may provide a non-lawyer "advocate." Other, smaller tribes may not be able to provide representation of any kind. However, for a prior sex offense conviction to trigger subsequent sex offender registration, the person convicted must have been represented by an attorney, or knowingly and intelligently waived the right to an attorney. *See Faretta v. California*, 422 U.S. 806 (1975).

The United States Supreme Court in *Scott v. Illinois*, 440 U.S. 367 (1979), held that there is no Sixth Amendment right to counsel in a misdemeanor criminal proceeding where the defendant is not

sentenced to actual incarceration. The Court also held that an uncounseled conviction that results in imprisonment is an improper violation of the Sixth Amendment. Nearly 20 years later, in *Nichols v. United States*, 511 U.S. 738 (1994), the Supreme Court held that a valid, uncounseled conviction may be relied upon to enhance the sentence for a subsequent offense. The Court reasoned that an enhancement statute penalizes the defendant only for the subject offense and does not change the penalty imposed for the prior conviction. *Id.* The Court noted that judges traditionally consider prior convictions and prior criminal behavior when sentencing a defendant for criminal convictions. Thus, under *Scott* and *Nichols*, even uncounseled tribal court convictions resulting in imprisonment might lawfully be counted in federal sentencing, and in turn used as qualifying convictions in a SORNA prosecution.

VIII. Conclusion

Significant empirical research on child molesters has demonstrated that contrary to conventional wisdom, most second offenses do not occur within the first several years after release, but may occur as late as 20 years following release. R. Prentky, R. Knight, and A. Lee, U.S. Dept. Of Justice, National Institute of Justice, Child Sexual Molestation: Research Issues 14 (1997). Clearly, the implementation of a seamless, nationwide sex offender registration system to close all of the gaps in the law and the loopholes currently available to wayward sex offenders will require the federal government, especially proactive U.S. Attorneys' offices, along with tribal nations and states, working together to address the present and future issues. A victim does not care what uniform the law enforcement officer wears, what agency he works for, or whether or not he is a tribal member. A victim only wants to be protected.❖

ABOUT THE AUTHOR

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Implementing the Sex Offender Registration and Notification Act (SORNA) in Indian Country

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Department of Justice

In 1953, Congress gave certain states jurisdiction over crimes occurring in specified areas of the "Indian Country" in those states pursuant to Public Law 280, since codified in 18 U.S.C. § 1162(a) and 28 U.S.C. § 1360(a). Those states are known as PL 280 states.

On July 27, 2006, the Adam Walsh Child Protection and Safety Act of 2006 was signed into law. Pub. L. 109-248, 120 Stat. 587 (2006). Title 1 of SORNA created a new minimum standard for sex offender registration and notification nationwide. 42 U.S.C .§ 1690 (2009). For the first time, federally-recognized Indian tribes were included in a federal sex offender statute. For tribes that are located in PL 280 states, the states bear responsibility for sex offender registration, notification, and enforcement. The other 212 federally-recognized tribes had the option to elect to be registration and notification jurisdictions. One hundred and ninety-eight tribes originally elected to do so. Two of the 198 tribes have since rescinded their election pursuant to 25 U.S.C. § 1323 (2009). Consequently, 196 tribes have the same responsibilities that states, the five principal territories, and the District of Columbia have to substantially implement the provisions of SORNA. The tribes that opted out or failed to make an election had the responsibility for sex offender registration and notification delegated to the state.

The first implementation deadline for all SORNA jurisdictions was July 26, 2009. On May 26, 2009, the Attorney General (AG) issued a blanket extension to July 26, 2010. All jurisdictions may request one more 1-year extension of time to substantially implement SORNA or face the penalty for failing to do so. For states failing to meet the July 10, 2011 deadline, the penalty is the docking of 10 percent of their Byrne JAG grant funds for each year that they do not substantially implement SORNA. For tribes, it is a loss of sovereignty. If a SORNA tribe does not substantially implement SORNA by the deadline and the AG determines that they will not do so in a reasonable amount of time, responsibility for registration and notification will be delegated to the state, including a right of access for these purposes as well as enforcement. 42 U.S.C. § 16927 (2009).

Eligible sex offense convictions obtained in tribal court or a court that operates under the regulations in Volume 25 of the Code of Federal Regulations (CFR courts) are considered "convictions" for purposes of sex offender registration and notification in Indian country, as well as for these purposes in any place where the sex offender lives, works, or goes to school. Further, any sex offender convicted in federal, state, tribal, military, or foreign courts whose conviction is covered under SORNA must register if he or she lives, works, or goes to school in SORNA tribal jurisdictions. Like states, tribal SORNA jurisdictions must implement the minimum standards set by the statute but are free to enhance or increase the eligible registration guidelines, create additional penalties for tribal members, and expand their sex offender management programs.

SORNA's goal of creating a seamless web of sex offender registration and notification nationwide has served to provide a platform for enhancing criminal justice functions in some Indian Nations and created the vehicle for collaboration between states and tribes. SORNA requires that all jurisdictions share information and interface to effectively implement SORNA. Tribes are free to implement by setting up their own registration and notification programs or by entering into Memorandums of Understanding or cooperative agreements for all or part of their registration and notification programs. The Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering and Tracking (SMART) created by SORNA, is responsible for assisting all jurisdictions in implementing SORNA. 42 U.S.C. § 16945 (2009).

The SMART Office created a free Web-based sex offender registry and Web notification tool called the Tribe and Territory Sex Offender Registration System. The system is free and SORNA compliant. As of this writing, eight tribes have public sex offender Web sites uploaded onto the National Sex Offender Public Web site. Most tribes have utilized this free tool.

Tribes setting up their own sex offender registration and notification systems are required to collect and post all information delineated in SORNA and the National Guidelines for Sex Offender Registration and Notification issued June 2008 on their public Web site. This includes finger and palm prints, and DNA. Many tribes, with the assistance of grants, collaboration with the state, and the SMART Office are developing or enhancing their capacity to collect and submit this data to state and federal criminal justice systems.

SORNA also added a federal offense for failure to register that is a powerful tool for tribal nations. It is found at 18 U.S.C. § 2250. Tribal nations are limited in their enforcement of criminal violations against non-Indians. This statute, however, makes it a federal crime to fail to register and enter, leave, or reside in Indian country. The penalty is up to 10 years in jail. Prosecution of these offenses greatly aids in community safety not just in Indian country but in all communities. There is another article in this publication detailing the prosecution of these offenses.

The SMART Office has found four jurisdictions that have substantially implemented SORNA: the state of Ohio, the Confederated Tribes and Bands of the Yakama Nation, the Confederated Tribes of the Umatilla Reservation and the state of Delaware. More implementation packages are being submitted.

With the well-known rates of sex offenses in Indian country, SORNA has created an opportunity for tribes to prevent their nations and lands from being safe havens for sex offenders. The opportunity for collaboration and the enhancement of criminal justice systems and programs makes SORNA an important part of the initiative to address criminal justice issues in Indian county.

The SMART Office is available to provide to technical assistance to Assistant United States Attorneys as well as tribal nations on all issues related to sex offenders and SORNA. You may contact us at GetSMART@usdoj.gov and on our Web site at http://www.ojp.usdoj.gov/smart/. ❖

ABOUT THE AUTHOR

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Victim Rights Issues in Indian Country

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Crime victims in Indian country enjoy the same rights in the federal courts as any other victim. Although there are no mechanical or procedural differences, the nature of the crimes most typically prosecuted in Indian country makes the enforcement of those rights and the provision of services all the more essential. Indian country investigators and prosecutors often deal with victims of violent crime, including murder, assault, rape, child sexual abuse, and domestic violence. Children are often the victims of these crimes, either directly or indirectly. This article will discuss the requirements of the Crime Victims' Rights Act (18 U.S.C. § 3771), the Mandatory Victims Restitution Act of 1996 (18 U.S.C. § 3663A), the Attorney General Guidelines on Victim and Witness Assistance (2005), and some of the special protections afforded to child victims (18 U.S.C. § 3509) that are used routinely in Indian country prosecutions.

I. Who is a victim?

The Crime Victims' Rights Act (CVRA), found in 18 U.S.C. § 3771, defines a "victim" as

> a person directly and proximately harmed as a result of the commission of a Federal offense . . . . In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights . . . .

18 U.S.C. § 3771(e) (2009). A similar definition may be found in 18 U.S.C. § 3663A(a)(2) for purposes of restitution. *See also* Attorney General Guidelines on Victim and Witness Assistance (Guidelines), Art. II.D (2005).

II. What are the victim's rights?

The CVRA conveys eight rights to victims of crime. They are:

- The right to be reasonably protected from the accused.
- The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving a crime or of any release or escape of the accused.
- The right not to be excluded from any such public court proceeding unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
- The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
- The reasonable right to confer with the attorney for the Government in the case.
- The right to full and timely restitution as provided by law.
- The right to proceedings free from unreasonable delay.
- The right to be treated with fairness and with respect for the victim's dignity and privacy.

18 U.S.C. § 3771(a) (2009).

Both the Government and the courts are required to respect these rights, and the Government (including both federal prosecutors and investigators) must "make [the] best effort to see that crime victims are notified of, and accorded, [these] rights . . . ." *Id.* § 3771 (c)(1), (b)(1); Guidelines, Art. IV.B.2 (2005). This is more than a requirement not to affirmatively violate these rights; the United States must both inform victims of their rights and see to it that they are enforced. A victim must also be informed that he or she may seek the advice of an attorney with respect to these rights. 18 U.S.C. § 3771(c)(2) (2009). An effective way to ensure that the United States Attorney's office is in compliance with the notification requirements of the CVRA is for the office's Victim/Witness Coordinator to send out a form letter listing these rights to all known victims at the outset of the case. For this to work consistently, it is necessary for the investigating agent/officer to provide the United States Attorney's Office with accurate victim contact information, preferably along with the other discovery documents.

The court is required to "make every effort to permit the fullest attendance possible by the victim . . . ." *Id.* § 3771(b)(1). The prosecutor may need to remind the court of this requirement when scheduling hearings, particularly when, as is often the case in Indian country, the victim lives a considerable distance from the federal courthouse. Hearings in which a victim has a right to address the court should be scheduled late enough in the day to allow the victim time to travel.

In cases with multiple victims, the court may impose reasonable limits on these rights in order to avoid delays in the case. If the court finds it "impracticable to accord all of the victims [their] rights," the court may "fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings." *Id.* § 3771(d)(2). For example, the court may require the government to select a small number of spokespersons from the larger group of victims to address the court, rather than permitting them all to speak.

The victim also has the reasonable right to confer with the prosecutor about the case. *Id.* § 3771(a)(5). Note that the law does not require the AUSA to accede to the victim's wishes concerning case disposition. The CVRA specifically states that no rights created therein "shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction." *Id.* § 3771(d)(6). Nevertheless, it is always a good practice to keep victims "in the loop," particularly with regard to plea negotiations. It is impossible to please all of the victims all the time, but a consultation allows the victims to feel like they have been heard, even if they do not get all that they want from the process. In addition to simply being the right thing to do, having a consultation with the victims will greatly reduce the number of complaints filed with the United States Attorney about the handling of these cases.

III. What remedies do victims have?

A victim has both legal and administrative remedies for violations of the CVRA. The Government may assert error on appeal on behalf of a victim for court rulings that violate the CVRA. *Id.* § 3771(d)(4). The victim may also petition the Court of Appeals for a writ of mandamus within 14 days to re-open a plea or sentencing hearing, but only if the victim asserted a right to be heard at such hearing and was denied, or, in the case of a plea, if the defendant did not plead to the highest offense charged. *Id.* § 3771(d)(5). A victim may not sue the United States for damages, however. *Id.* § 3771(d)(6). Instead, a victim may file an administrative complaint with the Department of Justice if he or she feels that the Government did not diligently defend the victim's rights. The Attorney General must take and "investigate complaints relating to the provision or violation of the rights of a crime victim" and provide for disciplinary sanctions for Department employees who "willfully or wantonly fail" to protect those rights. *Id.* § 3771(f)(2); Guidelines, Art. I.D.2 (2005). Disciplinary sanctions may include suspension or termination for willful and wanton failure to comply with the CVRA. 18 U.S.C. § 3771(f)(2)(D) (2009); Guidelines, Art. III. C (2005).

IV. Restitution rights

The right to "full and timely restitution," 18 U.S.C. § 3771(a)(6), is codified in 18 U.S.C. § 3663 and § 3663A of the Mandatory Victims Restitution Act of 1996 (MVRA). The MVRA was enacted as Title II of the Antiterrorism and Effective Death Penalty Act of 1996. Pub. L. No. 104-132, 110 Stat. 1214 (1996). The MVRA, as the name implies, makes the imposition of restitution mandatory if it relates to a crime of violence, an offense against property for drug-involved premises (21 U.S.C. § 856), or a product tampering offense (18 U.S.C. § 1365). In Indian country, the vast majority of MVRA-eligible cases will be for a crime of violence, which is defined in 18 U.S.C. § 16 as:

> an offense that has an element the use, attempted use, or threatened use of physical force against the person or property of another, or . . . any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 16(a)(b) (2009). For offenses that have victims but are not "crimes of violence," § 3663 applies, and restitution is discretionary, not mandatory. *Id.* § 16. The types of recoverable losses are very similar in § 3663 and § 3663A. A restitution order may include the return of property or the payment of its replacement value, the cost of medical and/or psychiatric care, funeral expenses in the case of death, and even the costs associated with attendance in court and/or pretrial meetings, such as lost income, child care, and travel expenses. For identity theft cases (violations of 18 U.S.C. §§ 1028(a)(7) and 1028A(a)), a victim may also recover expenses related to time spent remedying the damage to his or her identity and credit history.

The victim is also entitled to "income lost . . . as a result of such offense." 18 U.S.C. §§ 3663(b)(2)(C) and 3663A(b)(2)(C) (2009). This provision bears special attention regarding homicide or other crimes of violence that result in death. The Government may seek future lost income for the decedent to be paid to the victim's family members or estate. *See United States v. Checora*, 175 F.3d 782, 795 (10th Cir. 1999) (defendants were convicted of voluntary manslaughter and were ordered to pay restitution for the support of the victim's minor children; the sentencing court found that the children were directly and proximately harmed as a result of their father's death as they lost, among other things, a source of financial support); *United States v. Razo-Leora*, 961 F.2d 1140, 1146 (5th Cir. 1992) (defendants were convicted of charges related to a murder-for-hire conspiracy and were ordered to pay restitution to the murder victim's widow); *Boyd v. United States*, 2006 WL 288079 (D.R.I. Feb. 1, 2006) (unreported) (court ordered restitution be paid to parents of murder victim). Case law supports the plain reading of the statute to include lost future earnings for the benefit of a murder victim's estate:

> It would be illogical to assume that the ultimate death of a person who suffered bodily injury eliminates restitution for lost income. To not award restitution for future lost income would lead to a perverse result where murderers would be liable for markedly less in restitution than criminals who merely assault and injure their victims.
>
> Reading the MVRA to exclude restitution for future lost income for homicide victims would conflict with Congress's stated intent to force offenders to "pay full restitution to identifiable victims of their crimes." The Senate Report states that the purpose of the MVRA is "to ensure that the loss to crime victims is recognized, and that they receive the restitution that they are due" because "[i]t is [ ] necessary to ensure that the offender realizes the damage caused by the offense and pays the debt owed to the victim as well as to society." In addition, the statute itself mandates that "[i]n each order of restitution, the court shall order restitution to each victim in the *full amount* of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant. Only by making restitution for future lost income can the perpetrator of a homicide fully pay the debt owed to the victim and to society."

United States v. Cienfuegos, 462 F.3d 1160, 1164-65 (9th Cir. 2006) (internal citations omitted). *See also United States v. Bedonie*, 317 F.Supp.2d 1285, 1318 (D. Utah 2004) (restitution for future lost income proper in murder case), *rev'd on other grounds*, 413 F.3d 1126 (10th Cir. 2005); *United States v. Serawop*, 505 F.3d 1112 (10th Cir. 2007) (defendant who murdered his 3-month old daughter properly liable for daughter's lost future income; losses not too speculative); *United States v. Marcello*, 2009 WL929959, *3 (N.D. Ill. Apr. 6, 2009) (defendants ordered to pay future lost earnings for murder victims); *United States v. Roach*, 2009 WL 163569 (W.D. N.C. Jan. 16, 2008, Thornburg, J.) (unreported) (restitution imposed for future lost wages and lost per capita income).

The difficult issue, therefore, is not whether to award future lost wages, but rather how to calculate the restitution award. Restitution orders cannot be based on pure speculation. However, it is proper for the court to base its restitution calculations upon certain economic assumptions. *Cienfuegos*, 462 F.3d at 1169. "The determination of appropriate restitution is by nature an inexact science." *United States v. Williams*, 292 F.3d 681, 688 (10th Cir. 2002) (quoting *United States v. Teehee*, 893 F.2d 271, 274 (10th Cir. 1990)). The government has the burden of demonstrating the loss amount sustained by a victim and proving it by a preponderance of the evidence. *See Razo-Elora*, 961 F.2d at 1146; 18 U.S.C. § 3664(e) (2009). It is not necessary that an expert be retained to provide such evidence, but only that the award be adequately supported. *Razo-Leora* at 1146.

Defendants often will attempt to seek offsets for a variety of reasons. However, several courts have held that certain factors should not be considered when determining damages and lost future wages, such as: (1) race (*Bedonie*, 317 F.Supp.2d at 1318; *Wheeler Tarpeh-Doe v. United States*, 771 F.Supp. 427, 455 (D.D.C. 1991), *rev'd on other grounds*, 28 F.3d 120 (D.C. Cir. 1994); *Serawop*, 505 F.3d at 1126-27); (2) gender (*Reilly v. United States*, 665 F.Supp. 976, 997 (D.R.I. 1987), *rev'd on other grounds*, 863 F.2d 149, 167 (1st Cir. 1988); *Serawop*, 505 F.3d at 1126; (3) personal consumption or expenses (*Bedonie* 317 F.Supp.2d at 1322-26; *Serawop*, 505 F.3d at 1127-28); (4) victim's health or lifestyle (*United States v. Marcello*, 2009 WL929959, *3 (N.D. Ill. Apr. 6, 2009)); and (5) geographic location (*Bedonie*, 317 F.Supp.2d at 1320-21). There does not, however, appear to be a consensus among all circuits on all factors, and the courts appear to have broad discretion as to setting reasonable restitution.

Two recent cases from the Western District of North Carolina illustrate both the challenges and advantages of the MVRA in murder cases. In *United States v. Roach*, 2008 WL 163569 (W.D. N.C. Jan. 16, 2008) (not reported), the district court awarded $1,459,854.22 for the murder of an 18-year old girl. The decedent had dropped out of high school, was unemployed, and had a 3-year old daughter. The court awarded not only funeral expenses but also future lost income. The Government identified two potential sources of income: per capita distributions (the Eastern Band of Cherokee Indians have a successful casino) and future lost wages. At the suggestion of the Government, the court consulted the North Carolina mortality tables to estimate the victim's life expectancy. The court then multiplied the difference between her life expectancy and her age at the time of the murder (59 years) by the average per capita distributions for the preceding several years to arrive at a conservative estimate of the lost income. Next, the court adopted the following assumptions that it found to be reasonable: that the victim could have worked 40 hours per week for 50 weeks per year until age 65; that North Carolina's current minimum wage of $6.15 per hour was a reasonable starting wage for an unemployed person who had not completed high school; and that she would receive an annual pay increase of 2 percent. These estimates yielded a restitution award of nearly $1.5 million dollars. Two accessories after the fact also were held to be jointly and severally liable for this amount, but the Fourth Circuit vacated their restitution awards, holding that their roles as accessories did not directly cause the death and the resulting loss. *United States v. Squirrel*, 588 F.3d 207, 216 (4th Cir. 2009). The judgment still stands as to the principal, Mr. Roach (his appeal was dismissed due to an appeal waiver in the plea agreement). *Id.* at 211.

The Government took a slightly more sophisticated approach in *United States v. Bigwitch*, 2:08-CR-36 (W.D. N.C. Dec. 10, 2009) (restitution order not reported). Defendants Bigwitch and Littlejohn pled guilty to second degree murder and co-defendant Reed pled to voluntary manslaughter. The judge ordered restitution in the amount of $862,369.68, even though the victim of the crime was an unemployed, convicted felon. In this case, the Government retained the services of an actuarial expert to calculate the future lost income of the decedent, just as one would for a wrongful death action. The expert prepared a report and testified about life expectancy, earning potential, and future per capita payment

estimates. As in *Roach*, the expert used the North Carolina mortality tables to calculate life expectancy. The expert then calculated the earning potential of the victim over his expected work life for a man who had earned his GED. However, because the court found that the victim's work history was sporadic, the court cut the expert's calculation in half, opining that the victim likely only would have worked half-time rather than full-time. The expert also reported estimates of future per capita payments. Finally, the expert calculated the present value of this future lost income.

As *Roach* and *Bigwitch* illustrate, the MVRA is a powerful tool to secure restitution for victims in homicide cases. In that it is difficult to calculate future lost income, the use of an expert at sentencing is advisable because it provides a more firm basis for the court's findings. In these two cases, the Government was able to secure sizeable restitution awards despite the lack of stable work histories for either victim.

V. Child victims' and child witnesses' rights

Unfortunately, many of the cases we see in Indian country involve child victims or child witnesses. In addition to the other rights bestowed on these victims, 18 U.S.C. § 3509 provides for extra procedural protections for children who must testify in court. Section 3509(h) allows the court to appoint a guardian ad litem (GAL) to protect the best interests of the child. This GAL is entitled to discovery and may attend all hearings to advocate for the child. This is a very useful tool in cases with unsupportive parents or custodians. Section 3509 also permits the court to use alternate courtroom procedures to lessen the detrimental impact of testifying on the child witness. These measures include: the use of two-way, closed-circuit television during direct and cross-examination; the use of a deposition rather than live testimony; closing the courtroom during the child's testimony; and the use of an adult attendant to reassure the child during testimony. In *United States v. Ricks*, 166 Fed. Appx. 37, 38 (4th Cir. 2006) (unpublished), the court of appeals upheld the use of an adult attendant who served as a "whisper interpreter" in the face of a confrontation clause challenge pursuant to *Crawford v. Washington*, 541 U.S. 36 (2004). In this case, from the Western District of North Carolina, the 6-year old victim/witness was unable to provide audible responses and would not lift her head from her folded arms on the witness stand. The prosecutor swore in the adult attendant, the victim/witness coordinator for the United States Attorney's Office, as a "whisper interpreter," and she faithfully repeated the whispered answers aloud for the jury.

VI. Conclusion

Dispensing justice should mean more than simply doling out punishment to the accused. For a victim to feel a sense of justice, he or she must feel safe, secure, and perhaps most importantly, that he or she has been heard and considered by the legal system. The statutes and guidelines addressed herein help to ensure that the courts, the prosecutors, and the investigators protect and serve the needs of victims during traumatic times.❖

ABOUT THE AUTHOR

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Utilization of Special Law Enforcement Commissions to Strengthen Law Enforcement Response in Indian Country

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Hypothetical #1: Officer Smith of the Eagle Mesa Tribal Police Department is on patrol on the Eagle Mesa Reservation. While on patrol, he sees a vehicle speeding and weaving in and out of its lane of traffic. Noting the traffic violations and suspecting possible driving under the influence, Officer Smith pulls over the vehicle. He exits his patrol car and as he approaches the vehicle on foot, the officer notices that the female driver is being struck by a male who is sitting in the passenger seat of the vehicle. Investigation reveals that the driver is not intoxicated, is a local member of the tribe, and reveals that the man who had been striking her is her non-Indian boyfriend. Officer Smith correctly surmises that if he decides to cite the driver for a traffic violation, the tribal court will have exclusive jurisdiction. However, he also correctly determines that there is exclusive federal jurisdiction over the assault committed by the boyfriend. Since the tribal police officer does not have federal law enforcement authority, he should either detain the male suspect and wait for a federal law enforcement officer to show up at the scene or he should reluctantly let the abuser go. His hands are tied by the technical restrictions of Indian country criminal jurisdiction. As he contemplates his options, Officer Smith resolves to see the Tribal Police Chief about getting federally deputized so this situation does not happen again.

When a police officer encounters someone who has committed a crime, he typically makes an arrest, transports the suspect to the local lock-up, and then does the paperwork necessary to support charging decisions made by the prosecuting attorney. In Indian country, all of this is true; however, the arresting officer is also called upon to make a determination as to the limits of his or her policing authority. Depending upon the Indian or non-Indian status of the suspect, the Indian or non-Indian status

of the victim, and the type of crime involved, jurisdiction may reside in federal court, tribal court, or state court. An arresting officer in Indian country must possess police authority from the correct sovereign or the arrest may be found to be invalid. Fortunately, there is hope in the form of authority to detain and law enforcement cross-commissioning.

I. Authority to detain

In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), the Supreme Court held that tribal courts did not have criminal jurisdiction over non-Indians. However, the Supreme Court has stated that, "where jurisdiction to try and punish an offender rests outside the tribe, tribal officers may exercise their power to detain the offender and transport him to the proper authorities." *Duro v. Reina*, 495 U.S. 676, 697 (1990). The Supreme Court restated this principle in another case noting that, "We do not here question the authority of tribal police to patrol roads within a reservation, including rights-of-way made part of a state highway, and to detain and turn over to state officers nonmembers stopped on the highway for conduct violating state law." *Strate v. A-1 Contractors*, 520 U.S. 438, 456 n. 11 (1997) (citing *State v. Schmuck*, 850 P.2d 1332 (Wash. 1993)) (en banc), *cert. denied*, 501 U.S. 931(1993).

The authority of an officer to temporarily detain a suspect in Indian country until an officer with the appropriate jurisdictional authority can take the suspect into custody is also recognized in a number of state court decisions. In *Schmuck*, a Suquamish Tribal Police officer patrolling on the reservation engaged his emergency lights in order to pull over a speeding vehicle. The driver responded by speeding faster and running a stop sign. When the driver eventually stopped, it became apparent that he had been driving under the influence of alcohol. The driver was a non-Indian, so the tribal police officer detained the suspect and called for the State Patrol, who arrived and took him into custody. Citing *Duro*, the Washington Supreme Court affirmed the driver's subsequent conviction. 850 P.2d. at 1339; *see also*, *State v. Pamperien*, 967 P.2d 503 (Or. App. 1998); *State v. Haskins*, 887 P.2d 1189 (Mont. 1994); *Primeaux v. Leapley*, 502 N.W.2d 265 (S.D. 1993). Authority to detain also exists if a federal Bureau of Indian Affairs (BIA) police officer encounters a non-Indian suspect in Indian country. *Ryder v. State*, 648 P.2d 774 (N.M. 1982). In *Ortiz-Barraza v. United States*, 512 F.2d 1176, (9th Cir. 1975), the court affirmed the conviction of a non-Indian illegal immigrant who had been apprehended on the reservation by a Papago (now Tohono O'odham) Tribal Police Officer for marijuana smuggling and then placed into the tribal jail until he could be transported to the custody of federal Drug Enforcement Administration agents.

II. Cross-commissioning

More and more jurisdictions throughout Indian country have come to the conclusion that unless and until Congress changes the framework of criminal jurisdiction in Indian country, the best and most immediate way to overcome jurisdictional challenges is to cross-deputize or cross-commission law enforcement officers who serve tribal communities. *See*, Matthew L. M. Fletcher, Kathryn E. Fort, and Wenona T. Singel, *Indian Country Law Enforcement and Cooperative Public Safety Agreements*, 89 MICH. BAR JRNL. 42 (Feb. 2010). For example, the tribal police officer in Hypothetical #1 above could have arrested the assault suspect if he had been commissioned with federal law enforcement authority. In addition, if he had been commissioned by the local county sheriff's office, he could have also enforced state law when applicable.

Hypothetical #2: Deputy Jones of the Red River County Sheriff's Department is patrolling off-reservation when he clocks a motorist going 20 miles per hour over the speed limit. As he engages his emergency lights, the vehicle speeds up to 90 miles per hour and heads down a county road toward the Eagle Mesa

Reservation. The high speed chase continues onto the reservation for 5 miles, then the driver slows down and pulls over. When Deputy Jones approaches the vehicle, the driver identifies himself as a member of the Eagle Mesa Tribe and tells the officer that he cannot arrest him because the officer is on the reservation and therefore outside of his jurisdiction. Deputy Jones makes a mental note to have the Sheriff contact the tribal police chief about getting the county deputies commissioned with tribal law enforcement authority in order to minimize legal problems in future hot pursuit cases.

Like Officer Smith in Hypothetical #1, Deputy Jones is merely doing his job; however, the complexities of Indian country criminal jurisdiction have hampered his ability to protect the public, both on and off of the reservation. The speeding driver knew that by crossing into the reservation he would be able to limit what the officer could do to enforce the law, so he made a run for the line and endangered himself, his passengers, and other motorists. Rather than let suspects determine the course of police work in Indian country, proactive law enforcement agencies can utilize cross-commissioning to improve public safety.

There are a number of policy and resource reasons why cross-commissioning makes good sense. First, it provides a mechanism whereby federal, tribal, state, and local law enforcement can develop better working relationships. Second, cross-commissioning expands the legal authority of police officers in the field. Third, it minimizes the effects of jurisdictional confusion by allowing officers to make the arrest when it is needed in order to protect the public. Fourth, it expands law enforcement resources by authorizing more officers to enforce the granting jurisdiction's laws. Fifth, as law enforcement operations increase their efficiency due to cross-commissioning, those who might otherwise commit crime in Indian country will be more likely to be deterred from illegal conduct. Finally, and most importantly, cross-commissioning increases the quality of the community and makes Indian country safer for residents, employees, and visitors.

When tribal, state, county, or city law enforcement agencies deputize officers from other jurisdictions, a variety of factors come into play. Some of these factors, such as local politics, can impair (or enhance) this process. Other factors, such as resources, local policies, and tort liability, may require more thought and deliberation before an agreement between the granting jurisdiction and the receiving jurisdiction is reached.

III. Special Law Enforcement Commissions

Much of the federal cross-commissioning activity that goes on in Indian country is done under the authority of the Indian Law Enforcement Reform Act of 1990. Specifically, 25 U.S.C. § 2804(a) provides, in relevant part, that the Department of the Interior may authorize tribal and state government agencies "to perform any activity the Secretary [of the Interior] may authorize under section 2803 of this title." Section 2803 sets forth the federal law enforcement authority of the law enforcement officers in the Bureau of Indian Affairs' Office of Justice Services. *See* 25 U.S.C. § 2803 (2009).

The BIA refers to federal commissions for tribal, state, and local law enforcement officers as Special Law Enforcement Commissions (SLECs). Prior to issuing a SLEC to an individual officer, the BIA and the receiving jurisdiction must have entered into a SLEC agreement. To this end, the BIA has developed two standard agreement forms which are utilized to authorize cross-commissioning with tribal law enforcement agencies. There is one form used for tribes that are subject to state jurisdiction pursuant to "Public Law 280" (18 U.S.C. § 1162) and one form for tribes that are not subject to "Public Law 280."

In order to provide public notice of the BIA's policies regarding SLECs for non-federal officers, the BIA has published a formal policy which can be found at 69 FR 6321 (Feb. 10, 2004). The policy notes that "the federal government has an interest in promoting strong tribal governments with the ability to protect the health and welfare of their members. Inherent in this relationship is strong and effective law enforcement in Indian country." *Id*.

The BIA policy states that:

> SLECs support the sovereignty of tribes by allowing tribal law enforcement officers to enforce [f]ederal law, to investigate [f]ederal crimes, and to protect the rights of people in Indian country, particularly against crimes perpetrated by non-Indians against tribal members. Without such commissions, tribal law enforcement in many jurisdictions is limited to restraining these perpetrators until a . . . [f]ederal officer arrives.

Id. As officers from a tribal, state, or local police department receive their federal cross-commission authority pursuant to a SLEC agreement, they should be made aware that their new authority should be exercised in conformity with the policies and procedures of the local United States Attorney's office. The BIA SLEC policy states that "there must . . . be coordination and communication among law enforcement entities, including local United States Attorney's offices, on federal policing and prosecutorial practices and on particular cases and prosecutions. . . ." *Id*. at 6322. Coordination with Department of Justice components will also come up when federally-commissioned officers are working on multi-jurisdictional task forces and when claims are filed under the Federal Tort Claims Act. *See generally*, 28 U.S.C. § 1346(b)(1) (2009).

IV. Conclusion

Had tribal police officer Smith in Hypothetical #1 been commissioned with federal law enforcement authority when he witnessed the assault take place, he would have been able to make a valid, federal arrest at the scene of the crime. Likewise, had Deputy Jones in Hypothetical #2 been commissioned with tribal law enforcement authority, he could have arrested or cited the speeding driver with violating offenses under tribal law.

Cross-commissioning is an effective way to level the playing field in Indian country. By improving the efficiency and effectiveness of the law enforcement response, cross-commissioning improves public safety and gives law enforcement officers the authority they need to protect and serve those who live, work, and recreate in Indian country.❖

ABOUT THE AUTHOR

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Multi-Jurisdictional Task Forces in Indian Country: The Northern Plains Safe Trails Example

Gretchen Shappert
National Coordinator for Project Safe Neighborhoods

Travis Whirlwind Soldier did not look like a drug dealer. College and law school educated, he was a respected member of the Rosebud Sioux Tribe in South Dakota. He attended grade school and high school on the Rosebud Indian Reservation. He worked to put himself through college, and while in law school he returned to the reservation to work in the Tribal Court and the local Legal Services Offices to help Native Americans with various legal issues. In time, Travis Whirlwind Soldier was appointed as the Tribal Public Defender for the Rosebud Sioux Tribe. He was also the father of seven children, all living on the reservation.

Unbeknownst to his colleagues, Travis Whirlwind Soldier was leading a double life. Not only was he the Tribal Public Defender and an officer of the court, but he was also involved in drug distribution on the reservation. Indeed, his involvement in the drug business was enhanced by his reputation as a lawyer: he told some of his clients that he could get their criminal charges dismissed or that he could keep their cases out of federal court in exchange for methamphetamine. For more than a year, Travis Whirlwind Soldier distributed and traded quantities of methamphetamine, cocaine, and marijuana while routinely using methamphetamine with several of his co-conspirators.

Travis Whirlwind Soldier's involvement in drug distribution and his assurances to his clients of "special" treatment in the court system came to an abrupt halt in December of 2005 when he was indicted in a federal drug conspiracy case prosecuted by the South Dakota United States Attorney's Office. Approximately 1 year later, following his jury trial in federal court, Travis Whirlwind Soldier was

sentenced to 188 months in federal prison. The dismantlement of Travis Whirlwind Soldier's drug operation was yet another important success for the Northern Plains Safe Trails Drug Enforcement Task Force (NPSTDETF).

Created in June of 1999, the NPSTDETF is one of 18 FBI-funded Safe Trails Task Forces (STTF) currently operating in Indian country. The purpose of the STTF is to unite the FBI with other federal, state, local, and tribal law enforcement agencies to improve the delivery of law enforcement services in Indian country by addressing violent crime, drug and gang-related crime, and Indian gaming offenses. The STTF is a force multiplier, intended to leverage limited law enforcement resources and share vital intelligence while addressing the unique challenges associated with Indian country.

The Northern Plains Safe Trails Drug Enforcement Task Force, Front Row: Daniel Fields (SD National Guard); Mike Yellow (BIA); Mark Fendrich (FBI); Matt Mohr (FBI); Jeff Metzinger (DCI). Back Row: John Wollman (Pierre PD); Ted McBride (SAUSA); Kevin Krull (AUSA); Dane Rasmussen (DCI); Dustin Baxter (Mellette Co. Sheriff); Ben Estes (Mellette Co. Deputy Sheriff)

The NPSTDETF is one of the most successful and comprehensive of all the STTFs. Members of the NPSTDETF are located in the South Dakota state capital of Pierre. In addition to Special Agents of the FBI, the Task Force is staffed by representatives of the Bureau of Indian Affairs, the South Dakota Division of Criminal Investigation, the South Dakota National Guard, and representatives of local sheriff offices and police departments. Task Force cases are prosecuted by an Assistant United States Attorney (AUSA) and a Special Assistant United States Attorney (SAUSA) from the State Attorney General's Office. The SAUSA position is funded by a grant through Project Safe Neighborhoods.

Indian country is a major focus of the United States Attorney's Office (USAO) in South Dakota. According to United States Attorney Brendan V. Johnson, 55 to 60 percent of the criminal cases prosecuted by the USAO involve Indian country. South Dakota has limited law enforcement resources, especially in Indian country, and the Task Force is vital because it allows for a sharing of resources and

especially of confidential information. Multi-jurisdictional task forces are uniquely situated to access and develop informant information. In South Dakota, for example, the NPSTDETF includes representatives with strong personal ties in the Native American communities and ties to critical intelligence sources needed to investigate criminal cases. This is especially true with regard to drug trafficking prosecutions.

The Task Force also allows for a collaborative sharing of information and data-bases. The FBI, for example, contributes international intelligence resources that would not ordinarily be available to local law enforcement. Likewise, local police officers and sheriff deputies provide human intelligence that is based upon personal contacts developed over many years of direct involvement with tribal communities. The Task Force arrangement helps to insulate law enforcement from the political and personnel issues which sometimes stymie sensitive investigations. In the case of Travis Whirlwind Soldier, for instance, Task Force officers' personal familiarity with the Rosebud Sioux community was critical to identifying prospective witnesses and convincing them to testify in federal court.

One witness testified that after he was arrested on domestic violence charges, Travis Whirlwind Soldier offered to get him out of jail in return for the witness's assistance in making Soldier's drug deliveries. Approximately 30 minutes after the witness was released from jail, Soldier gave the witness the first of several packages of methamphetamine, which the witness delivered to various individuals in Indian country on behalf of Soldier. A second witness corroborated the testimony, stating that she too became involved in Soldier's drug business in exchange for Soldier's assistance in obtaining a dismissal of her charges in Tribal Court.

Indeed, the majority of the evidence presented against Soldier in his federal drug conspiracy case was provided by individuals developed as witnesses by Task Force officers. The witnesses described their direct involvement in numerous drug transactions with Soldier over a period of more than a year. The testimony of these cooperating witnesses was critical in order for the Government to prove the existence of the drug conspiracy because Soldier testified that he was only a drug user and that he was not a seller or distributor of narcotics.

The South Dakota experience in the Travis Whirlwind Soldier prosecution is representative of what other jurisdictions are seeing throughout Indian country: the multi-jurisdictional task force is a vital component of law enforcement when investigating narcotics trafficking and public corruption. The unique configuration of the Task Force with multiple agencies operating as one unit, independent and apart from more routine law enforcement operations, enables the Task Force to conduct long-term, highly sensitive investigations where confidential sources and federal grand jury work are key components of the investigation.

Another important attribute of the NPSTDETF is the Task Force's ability to operate across jurisdictional boundaries. All of the members of the Task Force are cross-deputized, which enables them to work throughout Indian country and to prosecute their cases in federal and state court. As noted, the Task Force has both an AUSA and a Special Assistant United States Attorney (SAUSA). The SAUSA ensures that cases more suitable for state prosecution are directed to local state prosecutors or the South Dakota Attorney General's Office.

One of the longest-serving members of the Task Force is Jeff Metzinger, who first joined the Task Force while working as a Pierre Police Department investigator nearly 10 years ago. He is currently a Special Agent with the South Dakota Division of Criminal Investigation.

According to Metzinger, virtually all of the Task Force cases involve illegal drug distribution in Indian country. Approximately half of these cases also include the presence of firearms. Metzinger noted that the Task Force's reputation in tribal communities and its strong ties to Indian country have enabled Task Force Officers to develop relationships with informants and to investigate major drug operations on the five reservations in South Dakota. Metzinger described taking a phone call in 2009 at the Task Force Office from an anonymous resident of the Rosebud Reservation, who called with information: "He had recently kicked his cocaine habit. He wanted to relocate to another community, but before he left he wanted to 'clean up the place.' He said that he was tired of watching drug dealers on the reservation live beyond their means while selling drugs to tribal members." Telephone Interview with Jeff Metzinger, Special Agent, South Dakota Division of Criminal Investigation (Mar. 29, 2010).

For 8 months, the former cocaine addict worked with Metzinger and other Task Force officers by making undercover drug buys. As a result of the informant's work, five federal indictments were returned and additional drug cases were initiated. Agent Metzinger was especially grateful for the informant's assistance in the prosecution of a well-known local drug dealer. "We heard that the guy had dealt drugs on the reservation for 30 years and was untouchable. But with this informant's help, we got the drug dealer, and the dealer pled guilty in federal court." *Id.*

The informant has since left the vicinity but remains in contact with Meztinger. "He still calls me about every couple of months. He's working construction and staying out of trouble. Information he helped us develop is still being used to make drug cases." *Id.*

Despite many recent successful prosecutions of drug traffickers in Indian country, illegal narcotics remain a scourge to tribal communities. "Tribal leaders do not want drug dealers operating in their communities," observed U.S. Attorney Johnson. "At the same time, tribal law enforcement may not have the resources needed to conduct lengthy investigations of drug organizations. That's why the Task Force is vital in Indian country." Telephone Interview with U. S. Attorney Brendan V. Johnson (Mar. 29, 2010).❖

ABOUT THE AUTHOR

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Federal Prosecution of Juveniles

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I. Background

Contrary to the common misconception that the federal government generally does not prosecute juveniles, there are a significant number of offenders under the age of 18 who engage in criminal conduct that, in fact, are subject to juvenile proceedings in the U.S. District Courts. While juvenile offenders have long been subject to federal court proceedings, the Juvenile Justice and Delinquency Prevention Act (the Act) refined the special treatment of juveniles who have committed violations of criminal law within the federal system. *See* Pub. L. No. 93-415, 88 Stat. 1109 (1974) (codified at 18 U.S.C. §§ 5031-42 (2009)). While the state and local court systems handle the vast majority of juvenile offenders nationwide, there is a growing number of U.S. Attorneys' offices that are proceeding against juveniles not only due to the increase in gang activity and violent crime committed by those under the age of 18, but also due to an increased emphasis on the prosecution of crime in Indian country.

II. Unique status of juvenile offenders

Under the Act, the adjudication of a juvenile as a delinquent is not considered to be a conviction of a crime but rather is a determination of status. *United States v. Brian N.*, 900 F.2d 218, 220 (10th Cir. 1990); *United States v. Frasquillo-Zomosa*, 626 F.2d 99, 101-02 (9th Cir. 1980); *United States v. King*, 482 F.2d 454, 456 (6th Cir. 1973). Thus, a juvenile is determined to have committed an act of juvenile delinquency rather than technically being found guilty of a crime. Logically, if an individual has attained the age of 18 and then commits a criminal act, he or she is treated as an adult by the federal criminal justice system and the unique juvenile procedures under the Act will not apply. *United States v. Smith*, 675 F. Supp. 307, 312-13 (E.D. N.C. 1987). If an individual under the age of 18 commits a crime or act of juvenile delinquency, the fact that the defendant may be older than 18 on the date when he or she is ultimately charged, sentenced, or placed in official detention, does not change his or her continuing status as a juvenile within the federal system. *United States v. Smith*, 851 F.2d 706, 710 (4th Cir. 1988). Once charged as a juvenile delinquent, the offender will continue to be treated as a juvenile and be subject to the specialized procedures involving juveniles unless he or she is transferred to adult status by a federal district judge, as discussed herein.

The overall purpose of the Act is to aid in the rehabilitation of juveniles who have been determined to have engaged in criminal activity. The objective behind removing federal juvenile delinquency proceedings from the ordinary criminal process is to "avoid the stigma of a prior criminal conviction and to encourage treatment and rehabilitation" of the juvenile. *United States v. Juvenile Male*, 554 F.3d 456, 460 (4th Cir. 2009); *See also United States v. One Juvenile Male*, 40 F.3d 841, 844 (6th Cir. 1994); *Brian N.*, 900 F.2d at 220. The courts, however, must balance this objective with the competing need to protect the public from violent and dangerous individuals. *United States v. Bilbo*, 19 F.3d 912, 916 (5th Cir. 1994); *One Juvenile Male*, 40 F.3d at 844. The scope of the Act is limited to the prosecution of federal offenses or state laws, where authorized, *United States v. Male Juvenile*, 280 F.3d 1008, 1018-19 (9th Cir. 2002), and applies to United States citizens and illegal aliens equally. *United States v. Doe*, 701 F.2d 819, 822 (9th Cir. 1983). Due to the lack of state jurisdiction over Indian offenders on lands defined

as Indian country under 18 U.S.C. § 1151, the majority of juveniles prosecuted in federal court are American Indians charged with Major Crimes Act offenses while on Indian country lands. 18 U.S.C. § 1153(a) (2009). *See* Federal Bureau of Prisons, Juveniles in the Bureau, http://www.bop.gov/inmate_programs/juveniles.jsp.

III. Procedures and charging documents

The records of all juvenile proceedings in federal court are sealed and subject to strict confidentiality requirements. 18 U.S.C. § 5038 (2009). Charges involving juveniles cannot be presented for indictment to a federal grand jury; rather, proceedings against a juvenile are commenced by the filing of an information. 18 U.S.C. § 5032 (2009). The information should be filed separately and contain all of the required factual allegations and elements of the underlying criminal offense. Failure to describe the necessary elements in the information may constitute a due process violation. *In Re Gault*, 387 U.S. 1, 27-28 (1967).

Federal jurisdiction over the juvenile occurs through the juvenile's commission of an act that, if he or she were an adult, would be a federal crime. While the information may be signed by an Assistant United States Attorney, the designated United States Attorney must sign a certification to proceed against the juvenile in federal court. United States Attorneys are delegated the authority to file the certification, usually relegated to the Assistant Attorney General in charge of the Criminal Division, pursuant to 18 U.S.C. § 5032 and 28 C.F.R. § 0.57. *See* U.S. Attorneys' Manual § 9 - 8.110, citing Memorandum from Assistant Attorney General Jo Ann Harris for all United States Attorneys, July 20, 1995, http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00120.htm; *United States v. Juvenile Male (Kenneth C.)*, 241 F.3d 684, 686 (9th Cir. 2001). Certification is not required, however, if the maximum term of imprisonment for the offense involved does not exceed 6 months. 18 U.S.C. § 5032 (2009).

In the certification, the United States Attorney for the district must state one or more of the grounds for the exercise of federal jurisdiction in the case:

- The juvenile court or other appropriate court of a state does not have jurisdiction or refuses to assume jurisdiction over said juvenile with respect to such alleged act of juvenile delinquency

- The state does not have available programs and services adequate for the needs of juveniles

- The offense charged is a crime of violence that is a felony or an offense described in 21 U.S.C. §§ 841, 952(a), 953, 955, 959, 960(b)(1),(2),(3); 18 U.S.C.§ 922(x); or 18 U.S.C.§ 924(b),(g), or (h), and there is a substantial federal interest in the case or the offense to warrant the exercise of federal jurisdiction

18 U.S.C. § 5032 (2010).

While "crime of violence" is not defined in the Act, courts have relied upon the general definition, found at 18 U.S.C. § 16. Thus, "an offense that has as an element as the use, attempted use, or threatened use of physical force against the person or property of another" would logically qualify. *United States v. Doe*, 49 F.3d 859, 866 (2d Cir. 1995). Conspiracy to commit a crime of violence or the commission of a

crime, the underlying objective of which is a violent crime, may also qualify. *Id.* at 866. However, conspiracies to commit nonviolent or drug crimes would not qualify. *United States v. Baker*, 10 F.3d 1374, 1394 (9th Cir. 1993), *rev'd on other grounds, United States v. Nordby*, 225 F.3d 1053 (9th Cir. 2000); *United States v. Cruz,* 805 F.2d 1464, 1475 (11th Cir. 1986).

The first ground for certification, lack of jurisdiction by the state over the juvenile, most often arises in the context of crimes occurring on Indian country lands. In other instances, the refusal of a court to exercise jurisdiction over a juvenile or the declination of a case by state authorities may provide the requisite "lack of jurisdiction" that would allow the U.S. Attorney to provide such a certification. *United States v. Juvenile Male*, 595 F.3d 885, 894-95 (9th Cir. 2010) (discussing certification where the state court does not possess or refuses to exercise jurisdiction under 18 U.S.C. § 5032). Absent unusual circumstances, and given the extensive juvenile programs available in most states, certification under the second rationale is not very common. Charges can be brought under the third rationale when the juvenile has committed a felony crime of violence or one of the enumerated drug or firearms offenses referred to in the Act, and the U.S. Attorney has identified and described a substantial federal interest behind prosecution of the juvenile. While federal prosecution may be an option in many individual cases, the certification should be factually specific enough for a reviewing court to analyze the exact reasons why it is being sought in the particular case.

While the filing of a certification is not required prior to the filing of a complaint and issuance of an arrest warrant, it is suggested that it be filed early on in the case. *See* United States Attorneys' Manual, Title 9-8.120. It is customary to have the certification filed as a separate document, although the certification language may be included in other pleadings filed with the court, such as the information. *United States v. Juvenile Male*, 554 F.3d 456 (4th Cir. 2009). The certification requirement is a prerequisite to the district court's having subject matter jurisdiction not only in juvenile delinquency proceedings but also in cases where ultimate transfer to adult status is being sought. *United States v. Wellington*, 102 F.3d 499, 503 (11th Cir. 1996); *United States v. Chambers*, 944 F.2d 1253, 1259 (6th Cir. 1991).

The certification may be judicially reviewed to determine whether or not the procedural prerequisites have been properly complied with by the government. *United States v. Juvenile Male*, 923 F.2d 614, 618 (8th Cir. 1991); *United States v. C.G.*, 736 F.2d 1474, 1477 (11th Cir. 1984). In at least one instance, an appellate court has found that an Assistant U.S. Attorney was not the proper official to sign a certification and vacated the ultimate adjudication of delinquency made by the district court. *United States v. Doe*, 98 F.3d 459, 460-61 (9th Cir. 1996). Similarly, if a certification is not timely filed or if it does not properly allege that the state courts lack or decline jurisdiction or lack appropriate juvenile services, its validity may be subject to challenge by the district court. *C.G.*, 736 F.2d at 1477.

Aside from the procedural challenges described above, a majority of courts has determined that the United States Attorney's underlying rationale for certification, including whether there exists an appropriate state court with jurisdiction over the juvenile or whether the case in fact implicates a "substantial federal interest," is not a matter for judicial review. *See United States v. Juvenile Male J.A.J.*, 134 F.3d 905 (8th Cir. 1998); *United States v. Jarrett,* 133 F.3d 519, 538-40 (7th Cir. 1998); *In Re Sealed Case*, 131 F.3d 208, 210-15 (D.C. Cir. 1997); *United States v. Juvenile No. 1*, 118 F.3d 298 (5th Cir. 1997); *United States v. I.D.P.*, 102 F.3d 507 (11th Cir. 1996). Nonetheless, the fourth circuit has held that the government's assertions that a particular incident qualified as a crime of violence and involved a

substantial federal interest is subject to review. *See United States v. Juvenile Male No. 1*, 86 F.3d 1314, 1319-21 (4th Cir. 1996).

IV. Proceeding against the juvenile as a delinquent

Once a federal proceeding is initiated against a juvenile, the case may proceed by one of two routes, depending upon whether the government seeks to treat the juvenile as a delinquent or as an adult. In the first scenario, the case may proceed strictly as a federal juvenile delinquency proceeding from beginning to end. In such an instance, the government presents its evidence in a juvenile delinquency adjudicatory hearing which proceeds essentially as a bench trial, since no constitutional right to a jury trial exists in such cases and the Act does not provide for one. *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

At the juvenile delinquency adjudicatory hearing before the federal district judge, a juvenile still possesses the customary rights to challenge the evidence offered by the government. *Kent v. United States*, 383 U.S. 541 (1966). While a determination of a juvenile's status as a delinquent is characterized as an adjudication of status rather than a finding of criminal guilt, the government is still required to prove delinquency under the "beyond a reasonable doubt" standard. *In re Winship*, 397 U.S. 358, 361-62 (1970).

Upon adjudication of delinquency following the bench trial, the court will conduct a dispositional hearing which is analogous to a sentencing hearing for adult offenders. Certified copies of any prior juvenile court records of the juvenile or a written certification that there are no such records from the clerk of the juvenile court must be filed with the district court before the dispositional hearing is conducted. 18 U.S.C. § 5032 (2010). The dispositional hearing must be held within 20 days of the adjudication of delinquency, unless the court orders a continuance to conduct "further study." 18 U.S.C. § 5037(a) (2009). At the disposition hearing, the court may suspend the findings of juvenile delinquency, place the juvenile on probation, or commit the juvenile to official detention. *Id*. The court may also require payment of restitution and impose a period of juvenile supervision following a term of detention, which is similar to supervised release in adult cases. There is no provision in the Act requiring a juvenile to pay a fine.

The length of time that detention can be imposed depends on whether the juvenile has reached 18 years of age at the time of disposition. 18 U.S.C. § 5037(c)(1) (2009). If the juvenile is less than 18 years old on the date of the disposition hearing, the court can impose a term of official detention that may not extend beyond the lesser of the date when the juvenile becomes 21, the maximum advisory guideline range applicable to a similarly situated adult offender (unless the court finds an aggravating factor warranting an upward departure), or the maximum term that could be imposed if the juvenile had been tried and convicted as an adult. *Id*.

If the juvenile is between 18 and 21 on the date of the disposition hearing for a class A, B, or C felony, the juvenile can be subject to a maximum term of official detention which is the lesser of 5 years or the maximum advisory guideline range applicable to a similarly situated adult (unless the court finds an aggravating factor warranting an upward departure). 18 U.S.C. § 5037(c)(2)(A) (2009). In all other cases, the juvenile is subject to a term of detention which cannot extend beyond the lesser of 3 years, the maximum advisory guideline range applicable to a similarly situated adult (unless the court finds an aggravating factor warranting an upward departure), or the maximum term that could be imposed if the juvenile had been tried and convicted as an adult. 18 U.S.C. § 5037(c)(2)(B) (2009). The Federal Bureau of Prisons currently has no juvenile detention facilities of its own, but rather leases space from state, local, and private agencies for juveniles who are subject to official detention.

If official detention is ordered, the court may include the requirement that a juvenile be placed on a term of juvenile delinquent supervision after official detention. 18 U.S.C. § 5037(d)(1) (2009). If the juvenile is under 18 at time of the disposition, the term of supervision cannot exceed the period of time until the juvenile reaches 21. 18 U.S.C. § 5037(d)(2)(A) (2009). If the juvenile is between 18 and 21, the term of supervision cannot be longer than the maximum term of official detention ordered under 18 U.S.C. § 5037 (c)(2)(A) and (B), less the term of official detention ordered. 18 U.S.C. § 5037 (d)(2)(B) (2009). The court may, prior to the expiration of the term and after a dispositional hearing, modify, reduce, or enlarge the conditions of supervision. 18 U.S.C. § 5037(d)(4) (2009). If the juvenile violates a condition of supervision, the court may order a dispositional hearing, revoke the term of supervision, and order a term of official detention. 18 U.S.C. § 5037(d)(5) (2009). The length of the authorized additional term of detention or an additional period of supervision following revocation is set forth in 18 U.S.C. § 5037(d)(5), (6). The district court may also, after notice and a hearing with counsel for the juvenile, commit the juvenile to the custody of the Attorney General for observation and study on an inpatient or outpatient basis for a period not to exceed 30 days, unless additional time is ordered. 18 U.S.C. § 5037(e) (2009). Inpatient commitment is only allowed with the consent of the juvenile and his or her attorney. The results of the study are to be provided to the court and to counsel for the juvenile. 18 U.S.C. § 5037(e) (2009).

Probation may be ordered by the court for a juvenile found to be delinquent, the length of time of which is determined by the age of the juvenile at disposition. If a juvenile is less than 18 years of age, the term may not extend beyond the lesser of the date the juvenile becomes 21 or the maximum term that would have been authorized by 18 U.S.C. § 3561(c) had the juvenile been tried and convicted as an adult. 18 U.S.C. §5037(b)(1) (2009). If the juvenile is between 18 and 21 years of age, the term may not extend beyond the lesser of 3 years or the maximum term that would have been authorized by 18 U.S.C. § 3561(c) had the juvenile been tried and convicted as an adult. 18 U.S.C. § 5037(b)(2) (2009). If the juvenile violates a condition of probation prior to expiration of the term, the court may, after a dispositional hearing, revoke the term and order a term of official detention, including a term of juvenile delinquent supervision. 18 U.S.C. § 5037(b) (2009). The length of official detention permissible on revocation of probation is set forth in 18 U.S.C. § 5037(b) and is determined by the age of the juvenile at the time of the revocation disposition hearing and the class of the offense.

V. Proceeding against a juvenile as an adult

The second alternative that is available in cases involving a juvenile offender is to proceed against the juvenile as an adult. While some charges require a formal motion from the government seeking certification to charge the juvenile as an adult, which is discretionary with the court, in cases involving repeat offenders, the court must certify the juvenile as an adult under the Act's mandatory transfer provisions. 18 U.S.C. § 5032 (2009). A juvenile also has the option of formally requesting that the court treat him or her as an adult, which could occur if the juvenile for strategic reasons desires a jury trial as opposed to a bench trial. In a case where an individual committed an offense before the age of 18 but he or she was not charged in court until after turning 21, the juvenile must be treated as an adult from the outset of the filing. *United States v. Blake*, 571 F.3d 331, 344 (4th Cir. 2009); *United States v. Wright*, 540 F.3d 833, 838-39 (8th Cir. 2008); *United States v. Hoo*, 825 F.2d 667, 670 (2d Cir. 1987). However, the government's improper delay in filing a charge for an offense committed by a juvenile when he was under 18 could be scrutinized as prejudicial if the filing were postponed solely for the purpose of obtaining an adult prosecution because the offender had turned 21 by the time the charge was brought. *Hoo* at 671.

Authority to file a motion for transfer to adult status and proceed against a juvenile as an adult has been delegated from the Attorney General to the U. S. Attorney. Where such a transfer is sought, the U.S. Attorney should file a separate motion and supporting memorandum of law seeking to transfer the juvenile to adult status. 18 U.S.C. § 5032 para. 4 and 28 C.F.R. § 0.57 (1997). *See* Memorandum from Assistant Attorney General Jo Ann Harris for all United States Attorneys (July 20, 1995). Certified copies of the juvenile's previous court records, or the lack thereof as confirmed by written certifications from court clerks for the juvenile courts of all jurisdictions where the juvenile has lived, must be filed before the juvenile's transfer hearing. 18 U.S.C. § 5032 (2009). Where transfer to adult status is anticipated, the motion to transfer should be filed at the outset so that a juvenile will not enter a plea before the transfer to adult status can be sought. Under the provisions of 18 U.S.C. § 5032 para. 7, once a juvenile has entered a guilty plea or the proceeding has reached a stage where evidence has begun to be taken, subsequent prosecution or juvenile delinquency proceedings are barred.

A. Mandatory transfer provisions for repeat offenders

Under 18 U.S.C. § 5032 para. 4, transfer to adult status is mandatory if the juvenile is over the age of 16 at the time the offense is committed; the underlying offense is a felony that "has as an element of the use, attempted use, or threatened use of physical force against the person of another;" the offense is one that by its very nature involves a substantial risk that physical force against another may be used; or the offense is one of the enumerated drug or firearms offenses; and the juvenile has previously been found guilty of an act, which committed by an adult, would have been one of the enumerated federal crimes or the corollary state crimes described in the section of the Act. *Id.* In such circumstances, the government should file a motion seeking such transfer, arguing for stated reasons that mandatory transfer to adult status is required.

B. Discretionary transfer provisions

With respect to the discretionary transfer to adult status, there first must be a determination made as to the eligibility for such treatment under the Act, based on the juvenile's age and the nature of the underlying offense. 18 U.S.C. § 5032 paras. 4, 5 (2009). Where a juvenile is alleged to have committed specified acts of juvenile delinquency after his or her 13th birthday, the Attorney General may move to transfer the juvenile to adult status for specified offenses. Juveniles 13 years of age and older who commit crimes of violence under 18 U.S.C. §§ 113(a) and (b) (assaults), 1111 (murder), 1113 (attempted murder or manslaughter), or juveniles who possess a firearm during the commission of violations of 18 U.S.C. §§ 2111 (robbery), 2113 (bank robbery),and 2241(a) and (c) (aggravated sexual abuse), can be transferred to adult status for prosecution. 18 U.S.C. § 5032 para. 4 (2009). However, this provision does not apply where the offense is predicated upon Indian country jurisdiction unless the tribe's governing body, located where the offense took place, has elected to subject Indian juveniles ages 13 and 14 to such prosecution. To date, only one tribe in the country, the Sac and Fox Nation in Oklahoma, has authorized treatment of 13 and 14 year olds as adults under this statute. Because this prerequisite applies to juveniles under the age of 15 who are subject to tribal jurisdiction, and non-Indians are not "subject to" a tribe's criminal authority under *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), proceedings against non-Indians under the age of 15 should be permissible, absent any formal tribal government action or "opt-in" procedure.

A transfer to adult status is available for juveniles who have committed offenses after turning 15 years of age for the following crimes of violence: violations of 21 U.S.C. §§ 841(drug trafficking), 952(a) (drug importation), 955 (drugs on vessels), 959 (drug manufacture or distribution with intent to import); violations of 18 U.S.C. § 922(x) (possession of a handgun by a juvenile or transferring a handgun to a juvenile); or violations of 18 U.S.C. § 924(b) (transporting firearms or ammunition with intent to commit a

felony), (g) (interstate travel to acquire/transfer firearms for criminal purposes), or (h) (transferring a firearm to be used in a violent or drug trafficking crime). 18 U.S.C. § 5032 para. 4 (2009).

While the Act is designed to keep juveniles out of the traditional criminal process in order to encourage treatment and rehabilitation, the court may balance this priority with the need to protect the public from violent and dangerous individuals when rehabilitation would likely prove to be nothing more than "a futile gesture." *United States v. Bilbo*, 19 F.3d at 912 (5th Cir. 1994); *One Juvenile Male*, 40 F.3d at 841 (6th Cir. 1994). In such instances, "a motion to transfer is properly granted where a court determines that the risk of harm to society posed by affording the defendant more lenient treatment within the juvenile justice system outweighs the defendant's chance for rehabilitation." *United States v. T.F.F.*, 55 F.3d 1118, 1121 (6th Cir. 1995) (quoting *One Juvenile Male*, 40 F.3d at 844). Thus, in order to effect a transfer to adult status, sufficient information and evidence demonstrating that the particular defendant's treatment as a juvenile would be futile should be presented to the court.

In considering the motion to transfer to adult status, the court customarily conducts an evidentiary transfer hearing. The court is required to give reasonable notice of the transfer hearing to the juvenile, the juvenile's parents, guardian, or custodian, and to the juvenile's counsel. 18 U.S.C. § 5032 (2009); *United States v. Three Male Juveniles*, 49 F.3d 1058, 1060 (5th Cir. 1995). The juvenile is entitled to the assistance of counsel during the transfer hearing and at every other critical stage of the proceeding.18 U.S.C. § 5032(6) (2009); *United States v. E.K.*, 471 F. Supp. 924, 929 (D. Or. 1979).

A motion to proceed against a juvenile as an adult may be granted where the court finds that such transfer would be in the interest of justice. 18 U.S.C. § 5032 paras. 4, 5 (2009). Evidence of the following factors are considered: the age and social background of the juvenile; the nature of the alleged offense; the extent and nature of the juvenile's prior delinquency record; the juvenile's present intellectual development and psychological maturity; the nature of past treatment efforts and the juvenile's response to such efforts; and the availability of programs designed to treat the juvenile's behavioral problems. 18 U.S.C. § 5032 para. 5 (2009).

1. Age and social background of the juvenile

The "age and social background of the juvenile," which would presumably be the offender's age at the time when the offense was committed, should be considered by the court. *United States v. Nelson*, 68 F.3d 583 (2d Cir. 1995). Yet given the concern about juvenile rehabilitation programs and the fact that the more mature a juvenile becomes, the harder it may be for rehabilitation to be successful, the juvenile's age at the time of disposition is also relevant. *United States v. H.S.*, 717 F. Supp. 911, 917 (D. Me. 1989), *rev'd on other grounds*; *In re Sealed Case (Juvenile Transfer)*, 893 F.2d 363 (D.C. Cir. 1990) (court impermissibly relied upon uncharged alleged criminal conduct in considering nature of the offense). While there is no specific formula to apply, as a general matter, older juveniles are more likely to be transferred to adult status. *See United States v. T.F.F.*, 55 F.3d 1118, 1120 (6th Cir. 1995); *United States v. Doe*, 49 F.3d 859, 867 (2d Cir. 1995); *United States v. Gerald N.*, 900 F.2d 189, 191 (9th Cir. 1990).

2. The nature of the alleged offense

With regard to the nature of the offense, the district court should assume that, for the purposes of the transfer hearing, the juvenile committed the charged offense. *In Re Sealed Case (Juvenile Transfer)*, 893 F.2d 363, 369 (D.C. Cir. 1990); *United States v. Nelson*, 68 F.3d at 589; *United States v. Doe*, 871 F.2d 1248, 1250 (5th Cir. 1989); *In Re T.W.*, 652 F. Supp. 1440, 1442 (E.D. Wis. 1987). Such a presumption is

not necessarily prejudicial because the trial itself would provide an opportunity to correct inaccurate allegations made at the transfer stage. *In Re Sealed Case (Juvenile Transfer)*, 893 F.2d at 369.

The district court may properly give the seriousness of the crime more weight than other factors. *United States v. Nelson*, 68 F.3d at 590; *United States v. A.R.*, 38 F.3d 669, 705 (3d Cir. 1994); *United States v. Elwood*, 993 F.2d 1146, 1149 (5th Cir. 1993) (large amount of drugs involved in offense); *United States v. Henmer*, 729 F.2d 10, 17-18 (1st Cir. 1984); *United States v. R.I.M.A.*, 963 F. Supp. 1264, 1272 (D.P.R. 1997) (seriousness of car-jacking and bank robbery with a weapon and juvenile's active role in offense determinative). Additionally, the leadership role and influence executed by the juvenile over others and encouraging participation in criminal activities involving the use or distribution of controlled substances or firearms weighs in favor of transfer to adult status. 18 U.S.C. § 5032 (2009).

3. The extent and nature of the juvenile's prior delinquency record

The seriousness, extent, and circumstances surrounding the juvenile's prior record, past arrests, and periods of incarceration are relevant in evaluating whether transfer to adult status is appropriate. While a serious record would weigh in favor of transfer, the lack of a prior record of delinquency would necessarily weigh against it. *See United States v. M.L.*, 811 F. Supp. 491 (C.D. Cal. 1992). A record showing the seriousness of criminal episodes increasing over time would also support a transfer request. *United States v. M.H.*, 901 F. Supp. 1211, 1215 (E.D. Tex. 1995).

4. The juvenile's present intellectual development and psychological maturity

The juvenile's intellectual development and psychological state should be evaluated by a qualified psychologist or psychiatrist to provide the court with necessary information regarding this important factor. One court noted that a more psychologically mature juvenile is more likely to be "beyond redemption," and therefore concluded that "it is in keeping with the statutory premise to view immaturity and lack of development as factors weighing against transfer to adult status, and maturity and development as factors weighing in favor of transfer." *United States v. J.D.*, 525 F. Supp. 101, 104 (S.D. N.Y. 1981). A juvenile who is capable of functioning more like an adult both intellectually and emotionally, but has limited potential for rehabilitation, will likely be transferred. *United States v. M.H.*, 901 F.Supp. at 1216. On the other hand, limited intellectual ability weighs against transfer. *United States v. Leon D.M.*, 953 F. Supp. 346, 349 (D.N.M. 1996).

A juvenile's attorney might object to a psychological evaluation because it would compel the defendant to give potentially self-incriminating testimony in violation of the Fifth Amendment. *United States v. J.D.*, 517 F. Supp. 69, 70 (S.D. N.Y. 1981). In *J.D.*, the court found that the Fifth Amendment applied to transfer proceedings and ruled that a juvenile defendant can be compelled to give statements in relation to psychiatric or psychological evaluations to assess psychological maturity and intellectual development. However, the government was required to segregate records pertaining to the psychiatric interviews from investigatory files to prevent their use at trial or in connection with the investigation. *Id.* at 74.

5. The juvenile's response to past treatment efforts and the nature of those efforts

While rehabilitation is one a goal of delinquency proceedings, the "courts are not required to apply the juvenile justice system" when it would be nothing "more than a futile gesture." *United States v. Nelson*, 68 F.3d at 590. Possible progress through treatment alone would not be sufficient to warrant a finding that

rehabilitation is likely. *Id.* Conversely, no prior treatment efforts favor the defendant's retention of juvenile status. *Leon.*, 953 F. Supp. at 349. Accordingly, continued criminal behavior despite prior rehabilitation suggests that transfer to adult status would be appropriate.

6. The availability of programs designed to treat the juvenile's behavioral problems

The availability of programs for similarly-aged juveniles is also a factor to be considered when deciding whether to transfer a juvenile to adult status. *Nelson* 68 F.3d at 590-91.The court should determine how the juvenile would fit into such programs and how long the juvenile might be detained. *Id.* The government bears the burden of showing that there is a lack of available programs designed to treat the juvenile's problems and must do more to carry the burden of persuasion than merely asserting the unavailability of appropriate programs. *Id.* The government must make a showing that it has investigated various options but is still unable to find available and suitable programs. Even where the district court determines that there is a better chance of rehabilitation in adult programs, it must base the decision on a comparison of adult and juvenile facilities. *Id.*; *United States v. Gerald N.*, 900 F.2d at 191. This required showing, however, should not be applicable in cases where a juvenile has reached adulthood. *United States v. Doe*, 109 F.3d 626 (9th Cir. 1997).

The strict rules of evidence do not apply to the transfer proceeding. *United States v. Juvenile Male*, 554 F.3d at 459; *United States v. Doe*, 871 F.2d at 1254-55. Therefore, hearsay is admissible at the hearing. *United States v. Parker*, 956 F.2d 169, 171 (8th Cir. 1992). Unlike the requirement of proving delinquency beyond a reasonable doubt, the court makes its determination as to whether transfer to adult status is in the interest of justice by a preponderance of the evidence. *United States v. Brandon P.*, 387 F.3d 969, 976-77 (9th Cir. 2004); *United States v. Doe*, 49 F.3d at 868; *United States v. A.R.*, 38 F.3d at 703; *United States v. Parker*, 956 F.2d at 171. The preponderance standard applies because a transfer hearing is not a criminal proceeding that results in adjudication of guilt or innocence, but rather a civil proceeding that results in the adjudication of the juvenile's status. *United States v. Brandon P.*, 387 F.3d at 976-77; *United States v. Doe*, 49 F.3d at 868; *United States v. A. R.*, 38 F.3d at 703.

The ultimate decision to transfer a juvenile to adult status is based upon the court's findings as to each of the six statutory factors. *United States v. Brandon P.*, 387 F.3d at 977; *United States v. Three Male Juveniles*, 49 F.3d at 1060. Although the district court must consider and make written findings as to each of the specified factors, it is appropriate for the court to place more emphasis on one factor and less emphasis on another. *United States v. Brandon P.*, 387 F.3d at 977; *United States v. Three Male Juveniles*, 49 F.3d 1060. *See also United States v. Juvenile JG*, 139 F.3d 584, 586-87 (8th Cir. 1998) ("weight assigned to any one factor listed in the statute is within the sound discretion of the district court"); *United States v. Doe*, 871 F.2d at 1255. As one court has held when rejecting a defense challenge to the manner in which the district court evaluated the evidence, "the district court need only make specific findings as to the six factors and then balance them." *United States v. Brandon P.*, 387 F.3d at 976-78.

An order transferring a juvenile to adult status for prosecution is subject to immediate interlocutory appeal under the "collateral order doctrine." *United States v. Juvenile Male*, 554 F.3d at 461; *United States v. Angelo D.*, 88 F.3d 856, 858 (10th Cir. 1996); *United States v. Leon DM*, 132 F. 3d. at 587. Appellate review of a district court's decision to transfer a juvenile to adult status is considered under an abuse of discretion standard. *United States v. Brandon P.*, 387 F.3d at 976-77; *United States v. Juvenile Male MC*, 322 F.3d 482 (8th Cir. 2002) (transfer to adult status reviewed for abuse of discretion and underlying factual findings reviewed for clear error); *United States v. Doe*, 94 F.3d 532, 536 (9th Cir.1996).

VI. Special considerations in juvenile proceedings

A. Interviews, arrests, and detention of juveniles

Investigators and federal agents questioning juveniles should be aware of special requirements that will likely be applicable when a juvenile offender is interviewed. A *Miranda* warning, even if the juvenile is not in custody, will likely be a threshold requirement to show the voluntariness of a confession. While a juvenile can waive his or her Fifth Amendment rights and consent to questioning or interrogation by law enforcement, *United States v. Michael C.*, 442 U.S. 707, 725 (1979), any such waivers are likely to be suspect if given without the advice of a parent or guardian. Ultimately, a reviewing court will examine the juvenile's age, experience, education, background, intelligence, and understanding of a waiver of rights in determining whether any confession will be admissible. *United States v. Palmer*, 604 F.2d 64 (10th Cir. 1979). Such a waiver will be analyzed under a "totality of the circumstances" test as to whether it was knowing and voluntary. *See United States vs. White Bear*, 668 F.2d 409 (8th Cir. 1982); *West v. United States*, 399 F.2d 467 (5th Cir. 1968).

Additionally, the Act requires that a parent be immediately notified if an arrest occurs, and some courts have found that a juvenile's waiver of rights prior to any such notification renders it invalid. *United States v. Nash*, 620 F. Supp. 1439 (S.D. N.Y. 1985). Not only must the juvenile's parent or guardian be immediately advised of any arrest of a juvenile, they must also be advised of his rights, custodial status, and the nature of the alleged offense. 18 U.S.C. § 5033 (2009). The juvenile must be brought before a magistrate without any delay or dismissal may result. For example, a delay as short as 3 and one half hours between time of arrest and notification of the juvenile's parents and a delay of 32 hours before arraignment due to a U.S. Marshal's policy of non-acceptance of detainees after a certain hour has been held to be unreasonable and in violation of the Act. *United States v. Doe*, 210 F.3d 1009, 1014 (9th Cir. 2000). In another case, where a delay of 12 hours between arrest and arraignment was found, the court rejected a challenge holding that "the Act does not specify any remedy for a violation of its provisions." *United States v. Juvenile Male*, 554 F.3d at 467. If the juvenile is from another country and it would be impossible to advise his parents or guardian with reasonable effort, the government may notify a consular official as a substitute. *United States v. Juvenile Male*, 595 F.3d at 903.

B. Confidentiality requirements

Once a determination is made to proceed against a juvenile delinquent, the entire proceeding is subject to the limitations set forth in 18 U.S.C. § 5038, which prevents disclosure of the identity of the juvenile offender, as well as information and records related to the juvenile proceedings, to anyone except the court, the prosecuting authorities, the juvenile's counsel, and others specifically authorized to receive such records. 18 U.S.C. § 5038 (2009). Other authorized disclosures of such information include inquiries from other courts, 18 U.S.C. § 5038(a)(1) & (2) (2009), law enforcement agencies investigating a crime or relating to a position at that agency, 18 U.S.C. § 5038(a)(3) (2009), juvenile treatment facility directors seeking information, 18 U.S.C. § 5038(a)(4) (2009), or in matters relating to national security, 18 U.S.C. § 5038(a)(5) (2009). The only other authorized disclosure is when a victim of a crime petitions for information regarding the disposition of the juvenile's case under 18 U.S.C. § 5037. 18 U.S.C. § 5038(a)(6) (2009). Restriction on the finger printing and photography of the juvenile are contained in 18 U.S.C. § 5038(d) (2009).

As a practical matter, all pleadings and documents in a juvenile proceeding should be filed under seal using the juvenile's initials in the pleadings. Furthermore, all proceedings pertaining to the juvenile

should not be placed on the court's published docketing calendar, accessible to the general public. Not only does the statute strictly restrict the release of records regarding the juvenile's adjudication, but court proceedings pertaining to a juvenile in federal court should be held in a closed courtroom or in chambers, without public access. Indeed, as one circuit court has held, "Section 5038 does require the sealing of 'the entire file and record of (the juvenile) proceeding' and prohibits later release, other than to meet an enumerated exception." *United States v. Bates*, 617 F.2d 585, 587 (10th Cir. 1980). While some other courts have allowed limited disclosure of juvenile records, it has primarily been in the context of the use of juvenile records where they might implicate or infringe upon the rights of other defendants in pending criminal actions. *See, e.g. United States v. Bates*, 617 F.2d at 588; *United States v. Chacon*, 564 F.2d 1373, 1376 (9th Cir. 1977). District courts are also required to inform the juvenile, and the juvenile's parent or guardian, in writing, of the rights relating to the protection of the juvenile record. 18 U.S.C. § 5038 (2009).

C. Speedy Trial Act concerns

As noted earlier, a 30-day speedy trial period begins to run from the date upon which a juvenile is taken into federal custody on the federal juvenile charge alleged, if the juvenile is detained. *United States v. Doe*, 366 F.3d 1069, 1074 (9th Cir. 2004); *United States v. Three Male Juveniles*, 49 F.3d at 1064; *United States v. Doe*, 642 F.2d 1206, 1208 (10th Cir. 1981). Prior detention, unrelated to the federal charge, does not start the speedy trial clock running. *United States v. Doe*, 366 F.3d at 1074. Also excluded from the 30-day time period are delays 1) caused by the juvenile or his counsel, 2) consented to by the juvenile and his counsel, or 3) in the interests of justice in the particular case. *United States v. Juvenile Male*, 595 F.3d at 895. Delays occasioned by the motions of defense counsel are considered to be delays "caused by the juvenile or his counsel." *Id.* at 896; *United States v. Baker*, 10 F.3d 1374, 1397 (9th Cir. 1993), *rev'd on other grounds*, *United States v. Nordby*, 225 F.3d 1053 (9th Cir. 2000).

Similarly, an illegal alien juvenile who lied about his age, necessitating various evidentiary hearings, was held to be "excludable delay" caused by the juvenile himself. *United States v. Juvenile Male*, 595 F.3d at 896. In instances of doubt regarding the juvenile's true age, one court has held that it is initially the government's burden to prove the individual's age and offer some prima facie evidence. In *Juvenile Male*, the court held that a previous statement from the individual charged that he was an adult can constitute such prima facie evidence. This then shifts the burden to the defense to prove juvenile status, which the government can then rebut. *Id.* at 897.

The time that elapses between the date that the government moves to proceed against a juvenile as an adult until the court rules upon the government's motion is also excluded from the running of the 30- day period under 18 U.S.C. § 5036. *United States v. Romulus*, 949 F.2d 713, 716 (4th Cir. 1991). If the motion to transfer to adult status is granted and the defendant is subject to prosecution as an adult, the normal 70-day Speedy Trial Act deadline then becomes applicable.

D. Obtaining a juvenile's prior records

Under the provisions found at 18 U.S.C. § 5032, para. 10, certified copies of the juvenile's actual juvenile court records from all municipal, state, tribal, and federal courts must be obtained and filed prior to either the transfer hearing or the final disposition hearing. *United States v. Doe*, 366 F.3d 1069, 1076 (9th Cir. 2004). Accordingly, because of the relatively quick time period between a finding of delinquency and disposition, which is normally 20 days, it is wise to begin the process of acquiring the prior juvenile court

records as early in the proceedings as possible, especially since many juvenile courts sometimes require orders and special permission to release such records.

Logistical difficulties in determining all of the jurisdictions that the juvenile has lived in, as well as contacting all of the various juvenile court clerks to obtain the official certified copies of the court record, may further compound this process. Not only must the government produce and file copies of all of the juvenile's prior court cases, but it must also alternatively obtain a certification from the "juvenile court clerks" of each jurisdiction where the juvenile has lived certifying that there are no such records, if indeed there have been no prior juvenile proceedings. While this may be viewed as a substantial burden, that alone does not excuse the government's obligation to assemble these records. Failure to do so may subject the case to later reversal for lack of jurisdiction. *United States v. Brian N.*, 900 F.2d at 222-223 (interpreting a prior version of the Act that required juvenile records to be filed with the information at the commencement of the case). In that case the court had little sympathy for the government's argument that obtaining such information from every jurisdiction where the defendant lived was onerous, noting that the statute made such a requirement mandatory. *Id.* at 222. The Ninth Circuit, however, more recently rejected the argument that failure to file the necessary tribal court juvenile records was a fatal jurisdictional flaw requiring the appellate court to vacate the lower court proceedings, describing the omission as more a procedural error. *United States v. Doe*, 366 F.3d at 1076.

VII. Conclusion

Because many more juvenile cases have been brought under the Act since the early 1990s, further clarification of its provisions by the courts has made the somewhat complicated federal juvenile procedures more understandable for practitioners. While the federal courts will likely never handle the bulk of juvenile cases, with the continuing spread of gang activity, violence, and drug trafficking among ever-younger participants, and the continued violent crime on Indian country lands, more prosecutors will be faced with the challenges posed by juvenile offenders. Processing juvenile offenders through the federal system is one part of this overall effort to combat youth crime. Addressing these developments in a collaborative approach among local, state, tribal, and federal agencies will undoubtedly make our streets, communities, counties, tribal jurisdictions, and nation safer for all citizens.❖

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Indian Gaming Offenses and Tribal White Collar Crime

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I. Introduction

The latest edition of the "Indian Gaming Industry Report," authored by Dr. Alan Meister (Casino City Press 2009), reveals that Indian gaming facilities brought in approximately $26.8 billion in 2008. The tribal gaming industry consists of approximately 450 gaming venues run by more than 235 tribes in 28 states. The operations range from world class, Vegas-style, destination resorts with sophisticated security and accounting systems to tiny bingo games conducted in community buildings with only minimal accounting controls and record keeping.

A mere 6 percent of all of the tribal gaming enterprises collected over 40 percent of the wagers in 2008. The top two states, California and Oklahoma, generated 38 percent of total gaming revenue in 2008, with Oklahoma passing Connecticut to become the second largest Indian gaming revenue source. The states that experienced the most growth in Indian gaming revenue in 2008 were Alaska, Alabama, Nebraska, and Wyoming. At the other end of the scale, the bottom third of all tribal casinos shared only 3 percent of the total tribal gaming revenue.

The impact of Indian gaming's vast and growing profits extends beyond Indian country. In 2008, the tribal gaming industry directly and indirectly created over 700,000 jobs, supplied $27 billion in wages, and generated $10.8 billion in federal, state, and local tax revenue. Additionally, tribes paid $1.6 billion in gaming profits directly to federal, state, and local governments. The proliferation of Native gaming sites and profits since the passage of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-21 (2009), has not gone unnoticed by white collar criminals.

The Eastern District of Oklahoma (EDOK) has aggressively pursued cases against casino employees, security guards, and gaming patrons. From 2000 to 2008, the EDOK prosecuted more than 35 patrons and employees, resulting in restitution orders of nearly $750,000 for EDOK tribal gaming operations. Most of the cases involved losses in the $20,000 range. One case involved a loss of only $1,400, but the defendant's job status as a security guard required that formal action be taken. Charging defendants who are casino employees, even where loss amounts are minimal, generates publicity that deters future thefts and creates felony records barring convicted employees from later holding other jobs in the gaming industry.

While violent crime in Indian country must remain a top priority for prosecution efforts, the prompt investigation of white collar crime is also important to safeguard tribal assets and protect the public at large. This article examines the variety of cases which arise out of tribal casinos, including gaming economic crime, non-gaming offenses, and civil regulatory enforcement. The second half of the article looks at tribal white collar crime generally and identifies resources to aid in the prosecution of economic crime in Indian country.

II. Offenses involving Indian gaming

A. Gaming crimes - 18 U.S.C. §§ 1167 and 1168

Title 18 contains two separate statutes aimed at casino-related economic crime. Section 1167(b) (Theft from gaming establishments on Indian lands) targets customers who engage in casino ripoff schemes:

> Whoever abstracts, purloins, willfully misapplies, or takes and carries away with intent to steal, any money, funds, or other property of a value in excess of $1,000 belonging to a gaming establishment operated by or for or licensed by an Indian tribe pursuant to an ordinance or resolution approved by the National Indian Gaming Commission shall be fined under this title, or imprisoned for not more than ten years, or both.

18 U.S.C. § 1167(b) (2009). Loss amounts less than $1,000 result in a class A misdemeanor under §1167(a). Gaming operation employees are addressed in Section 1168(b) (theft by officers or employees of gaming establishments on Indian lands):

> Whoever, being an officer, employee, or individual licensee of a gaming establishment operated by or for or licensed by an Indian tribe pursuant to an ordinance or resolution approved by the National Indian Gaming Commission, embezzles, abstracts, purloins, willfully misapplies, or takes and carries away with intent to steal, any moneys, funds, assets, or other property of such establishment of a value in excess of $1,000 shall be fined not more than $1,000,000 or imprisoned for not more than twenty years, or both.

18 U.S.C. § 1168(b) (2009). There is no misdemeanor offense for casino employees. Even loss amounts of less than $1,000 are treated as felonies and can result in a 5 year prison term, a fine of $250,000, or both. *Id*.

The elements are identical for each charge, with the exception of the employment factor in § 1168(b). Most cases result in guilty pleas, leaving the amount of loss as the only item to be litigated before the sentencing judge. Whether the land where the casino is located is "Indian country," as defined by 18 U.S.C. §1151, is not an element of the offense. The casino must simply be located on "Indian Lands," as defined by Indian Gaming Regulation (IGA) at 25 U.S.C. § 2703 (4)(B). At the time of the theft, the tribal casino must have been operating under a tribal gaming ordinance approved by the National Indian Gaming Commission (NIGC). If the operation is operating under an approved NIGC ordinance, the facility is operating on "Indian Lands."

The FBI handles these cases by referral, but in many venues the casino security staff and tribal investigators are fully competent to conduct the underlying investigation. The proof often includes not only a full confession but also partial recovery of the stolen funds if the loss is discovered promptly. Casino security cameras sometimes provide video evidence of the crime in progress. Sentencing for these crimes, like other white collar crimes, is driven by the loss tables set forth in 2B1.1 of the United States Sentencing Guidelines, and investigators should be trained to look for evidence to support sentencing enhancements, such as abuse of a position of trust or employment of sophisticated means in the commission of the crime. U.S. SENTENCING GUIDELINES MANUAL §2B1.1(b)(1) (2009).

Examples of crimes prosecuted under §1167 and §1168 include employees who palm winning tickets, chips, or other items of value and, to avoid detection, have a non-employee friend or family member redeem the winning ticket or chip; patrons who use stolen checks or credit cards; cage workers who pocket funds; casino hosts who credit co-conspirators with unearned sums of players' club points redeemable for cash or prizes; and accounting personnel or currency transfer guards who lift cash or checks from regular deposits.

B. Crimes other than § 1167 and § 1168 offenses

While the small-scale crimes detailed above can quickly add up to substantial losses for gaming tribes, the sheer scale of Indian gaming has also attracted more organized white collar criminals who seek venues for money laundering and fraud schemes. Drug dealers have also found a haven in casinos, as they offer a place to conduct business 24 hours a day, 365 days a year. Violent crime also spills into Indian casinos, endangering both targeted victims and innocent bystanders. Strategies are needed to combat these threats.

Lacking the expertise and personnel of certain entities like the Nevada Gaming Board, fledgling tribal casinos have been ripe targets for professional white collar criminals. Neither the tribes nor the NIGC are equipped with resources or systems to identify and apprehend sophisticated criminal enterprises. As a result, isolated incidents occur where organized crime investors back or manage new casino ventures. Individuals of dubious character are also arriving in Indian country, offering to "help" tribes get casinos built while influencing tribal elections, bribing tribal officials, and helping themselves to a generous skim off the top of the profits. By calling themselves investors or vendors, such shady actors are able to avoid mandatory NIGC background checks.

In the Eastern District of Oklahoma, a con artist known as Ivy Ong infiltrated tribal casinos in the Seminole Nation of Oklahoma. Ong was the operator of Carlo Worldwide Operations, LLC, a Nevada corporation headquartered in El Paso, which was active in supplying video gaming machines to illegal Mexican casinos. He gained an introduction from a Louisiana promoter who was a player in the debacle surrounding the awarding of casino licenses in New Orleans. Ong was the front man for a group of investors from Costa Rico and a thrice-convicted bookie from California. *United States v. Ivy Kwok Ong, aka Ivy Ong*, Case No. CR-07-44-RAW (E.D. Okla. Sept. 9, 2007, Sept. 21, 2007, May 20, 2008); *United States v. Brannon*, Case No. CR-07-76-RAW (E.D. Okla. Nov. 10, 2008, Nov. 12, 2008).

While federal authorities were attempting to close the Class II Seminole casinos in 2001 for operating illegal Class III slot machines, the Bureau of Indian Affairs (BIA) was approached by local law enforcement officials who believed that a prostitution and drug ring was operating out of the parking lot of the Seminole Nation's travel plaza/casino located on a major interstate highway. The investigation's direction quickly shifted from the parking lot to activities inside the casino, where it focused on the operators and developers of the casino. Ong became the focus of a 6-year investigation by the BIA, the United States Internal Revenue Service (IRS), the Inspector General from United States Department of the Interior, the FBI, and the NIGC.

Ong and the Seminole Nation entered into a series of agreements for Carlo Worldwide to build or update four casinos in Seminole County and to provide video games at those locations. Under the agreements, Ong's company received 40 percent of the net win and the tribe received the remaining 60 percent. Because he negotiated with the tribe as a machine vendor rather than a gaming manager, Ong avoided the routine background checks and review by the NIGC. A background check of public records

would have revealed a federal felony conviction in California, alleged ties to organized crime in Nevada, and an unpaid tax debt to the IRS of nearly $200,000 for tax years 1991, 1995, 1997, 1999, 2000, and 2001. Ong used the cash generated from the Seminole casinos to set up multiple bank accounts and manipulate financial records to hide his assets from the IRS.

Tracing Ong's finances revealed unusual payments to three tribal leaders and required the investigation of additional conspirators. Records from over 70 bank accounts were reviewed and rooms of documents were examined. Funds flowed through Ong, Carlo Worldwide, and Seminole casinos to multiple states and several foreign countries. Ong's later attempts to open an Indian casino in the Hamptons, his direction that the percentage of the monthly payments he received be split with gambling-connected companies in Costa Rica, and his pursuit of gaming interests in Macau helped create a money trail which stretched far beyond a travel plaza in rural Oklahoma. Each new account generated another list of individuals to be interviewed, records to be subpoenaed, and leads to be followed.

At least three tribal officials requested and received illegal gratuities from Ong intended to advance and protect Ong's gambling business with the tribe. The payments were so small that Ong later told IRS agents he viewed the payments as a "cost of doing business - liking buying a dinner." Agents' interview with Ivy Ong, Sept. 21-22, 2007, FBI/IRS Conf. Rm., Muskogee, Okla. One economic development board member received at least 16 payments totaling $44,100. Ong paid a mortgage deficiency and attorney fees in the amount of $7,190.82 for the Acting Chairman of the General Council. Another General Council member received home renovations for which Ong paid $8,607. A Tribal Chief who fought to oust such corruption was stunned at how his fellow leaders could be bought for so little money, but noted that a few thousand dollars was a lot of money to a traditional Indian family in Oklahoma. That the payments were, in fact, bribes or illegal gratuities was clear from the false documents that were created and the business records that were doctored to conceal the payments.

The battle for control of the tribe between the pro-Ong and anti-Ong forces split the small tribe into two contentious camps, resulting in more than one standoff which could have easily escalated into a violent confrontation. The NIGC shut down the casinos for nearly a year, which caused severe economic hardship for the tribe. When the casinos reopened with tightly-imposed NIGC conditions, the tribe faced a civil fine of $11 million imposed by the NIGC. NIGC also imposed a $5.15 million fine on Ong.

Ong eventually entered a guilty plea to a two-count felony charge of conspiracy to commit tax evasion and conspiracy to pay and receive illegal gratuities, in violation of 18 U.S.C. §371, 18 U.S.C. § 201(c)(1)(A)&(B), and 26 U.S.C. §7201. He also agreed to forfeit a home in a gated community in Choctaw, Oklahoma, and a 15-acre horse farm in Lexington, Kentucky, which were both purchased with proceeds from his criminal activities, but titled in the names of his girlfriends.

Ong was sentenced to 39 months in prison. At the time of sentencing, United States Attorney Sheldon Sperling stated:

> Bottom line? This was a man who should never have been allowed anywhere near an Indian gaming facility. Until we have a method of tracing not only those who manage, but also those who supply or invest in tribal casinos, Indian country remains vulnerable to infiltration by those like Mr. Ong.

Press Release, Sheldon J. Sperling (May 20, 2008). *See generally, Seminole Financier Tied to Las Vegas Mobster,* DAILY OKLAHOMAN , Feb. 24,2003; *Former Seminole Casino Partner to Plead Guilty,* DAILY OKLAHOMAN, Sept. 21, 2007; *Indian Casino Financier Going to Jail,* DAILY OKLAHOMAN , May 20, 2008;

Ex-Seminole Council Member Indicted for Bribery, DAILY OKLAHOMAN , Mar. 13, 2008. *See also, Carruthers v. Flaum*, 450 F. Supp. 2d 288 (S.D. N.Y. 2006).

On another front, prosecutors are finding more frequently that drug dealers, from small-time, independent retailers to multistate trafficking organizations, are drawn to the convenient location and round-the-clock crowds at Indian casinos. In the EDOK, two investigations in recent years by DEA Mobile Enforcement Teams (MET) yielded significant results. In "Hell on the Border," a takedown arising in a casino on the Oklahoma/Arkansas border, the MET team identified a clear connection between drug trafficking and violent crime. The county where the casino was located had the third highest homicide rate in the state and most murders were drug-related. MET agents made 47 buys of methamphetamine, averaging 47.5 grams sold per defendant, with purity levels ranging from 6 to 98 percent. Five methamphetamine trafficking organizations with links to California and Mexico were dismantled and 44 traffickers were successfully prosecuted. Press Release, U.S. Drug Enforcement Agency (Jan. 18, 2005).

Attention then turned to three casinos near the Oklahoma/Texas border for the "700 Ranch Roundup." The OCEDFT case sought to dismantle the Gainesville, Texas, satellite of the Chicago-based Satan's Disciples gang and to determine whether the casinos were being used as distribution points for drugs, cash, and firearms. On "roundup" day in March 2006, over 200 law enforcement agents served 5 federal search warrants and 103 federal and state arrest warrants. All 15 federal defendants and 103 state defendants were successfully prosecuted. The takedown disrupted the flow of methamphetamine from Texas into Oklahoma, tied the Gainesville cell to the Chicago Satan's Disciples gang, and stemmed the transfer of contraband firearms from the Red River region to the upper Midwest. Press Release, Sheldon J. Sperling (Mar. 7, 2006).

Violent crimes can and do occur at tribal gaming facilities. Under the Violence Against Women Act (VAWA), batterers who enter or leave Indian country with the intent to violate a protective order or to commit an act of domestic violence may be federally prosecuted. Violence Against Women Act of 1994, 42 U.S.C.A. § 13701 (2009). Therefore, in states like Oklahoma which have "checkerboard" jurisdiction, incidents of domestic violence and stalking involving tribal casinos should be evaluated as potential VAWA cases. U.S. Attorney's offices (USAOs) can offer training and resources to tribal gaming entities on domestic violence indicators, procedures to protect employees from domestic violence in the workplace, policies to bar known batterers from casino property, and safety planning for employees and patrons.

Other violent crimes, such as rapes in casino hotel rooms, robberies in parking lots, and fights between drunk or disgruntled gamblers must be evaluated on a case-by-case basis to determine whether federal jurisdiction exists. Unlike cases under 18 U.S.C §§ 1167 or 1168, drug crimes, and VAWA crimes, all other violent crimes must be filtered through a jurisdictional formula which evaluates whether the situs is Indian country, whether the suspect and victim are Indian or non-Indian, and whether the crime is a major crime. *See generally*, 18 U.S.C. §§ 1151-53 (2009). As in all Indian country crimes, cross-deputization agreements are essential because they allow an officer to respond to the emergency at hand and leave jurisdictional determinations to be analyzed later. Developing relationships with tribal law enforcement and casino security personnel fosters a comfort zone and leads to increased cooperation.

C. IGRA violations and NIGC enforcement

Occasionally, gaming facilities operate completely outside the realm of the NIGC and in total violation of the IGRA. Typically, this occurs when casinos are not located on Indian lands or are not operated by federally-recognized tribes. If the games in question violate state law, state authorities are responsible for shutting down the illegal casino. Sometimes state officials are reluctant to move against

"Indian" enterprises. In such cases, the USAO may be required to evaluate, with assistance from the NIGC, Department of Interior Office of the Field Solicitor, and the USAO's tribal liaison, whether there is a federal nexus for action. Casinos operated by fictitious tribes or located off of Indian lands which offer slot machines, for example, can be evaluated for Johnson Act violations or illegal gambling organization charges under the RICO laws. *See generally* 15 U.S.C.A. § 1171 (2010). At the very least, the USAO may find it necessary to seek civil injunctive relief against the operation.

Even tribes engaged in gaming on Indian land under an NIGC-approved ordinance can still require the attention of the USAO if the tribe opts to ignore civil closure orders or other enforcement actions undertaken by the NIGC. *See United States v. Seminole Nation*, 321 F. 3d 939 (10th Cir. 2002). *Seminole Nation* declared that NIGC can issue a temporary closure order for an entire gaming operation and established that the United States is authorized to seek enforcement of the closure order in federal court. If tribes ignore NIGC closure orders, the USAO represents the agency in obtaining federal judicial assistance to force compliance.

III. Other tribal white collar crime

A. Theft, fraud, and embezzlement

Non-gaming financial crimes committed against a tribe, tribal subdivision, or tribal corporation are prosecuted under 18 U.S.C. §1163, which provides:

> Whoever embezzles, steals, knowingly converts to his use or the use of another, willfully misapplies, or willfully permits to be misapplied, any of the moneys, funds, credits, goods, assets, or other property belonging to any Indian tribal organization or intrusted to the custody or care of any officer, employee, or agent of an Indian tribal organization; or Whoever, knowing any such moneys, funds, credits, goods, assets, or other property to have been so embezzled, stolen, converted, misapplied or permitted to be misapplied, receives, conceals, or retains the same with intent to convert it to his use or the use of another – Shall be fined under this title, or imprisoned not more than five years, or both; but if the value of such property does not exceed the sum of $1,000, he shall be fined under this title, or imprisoned not more than one year, or both.

18 U.S.C. § 1163 (2009). The term "Indian tribal organization" means "any tribe, band, or community of Indians which is subject to the laws of the United States relating to Indian affairs or any corporation, association, or group which is organized under any of such laws." *Id.*

The EDOK utilized §1163 to prosecute the following: a tribal accountant who took cash from the tribal safe, smokeshop managers who failed to make deposits or who rang up fake returns, housing authority employees who required kickbacks on loan applications, an independent computer contractor who stole and negotiated blank checks from a tribal housing authority, employees who used tribal credit cards for personal gain, boys who broke into a smokeshop to steal cigarettes and the video security system, and defendants who stole tribal vehicles. Anytime anything of value is taken from an Indian organization, §1163 should be explored as a possible remedy. Cases involving tribal employees and outright theft usually come with a confession and a paper trail of evidence. Sentencing is driven by the financial tables at 2B1.1 of the United States Sentencing Guidelines. U.S. SENTENCING GUIDELINES MANUAL §2B1.1(b)(1) (2009).

Unlike violent Indian country crimes, §1163 violations are crimes of general applicability, meaning that the situs of the crime is not an issue and it does not matter whether the perpetrator is an Indian or a non-Indian. Courts have rejected claims by defendants that the general laws of the United States, including §1163, do not apply in Indian country pursuant to 18 U.S.C. §1152. *See United States v. Markiewicz*, 978 F.2d 786, 797-800 (2d Cir. 1992); *United States v. McGrady*, 508 F.2d 13, 15-16 (8th Cir. 1974).

Defenses commonly found in other financial crime cases are applicable to §1163 actions. Lack of capacity, insanity, misidentification, mistake, or advice of counsel could all conceivably be employed as a defense. Yet, repayment or an offer to repay are not defenses to embezzlement or misapplication under §1163. *United States v. Coin*, 753 F.2d 1510, 1511 (9th Cir.1985).

The vast majority of reported cases attempts to determine whether a particular entity is or is not a tribal organization under §1163. Groups that have been determined to be tribal organizations include:

- Tribal housing authorities - *United States v. Brame*, 657 F.2d 1090, 1091-92 (9th Cir. 1981); *United States v. Crossland*, 642 F.2d 1113, 1114 (10th Cir. 1981); *United States v. Eldred*, 588 F.2d 746, 749 (9th Cir. 1978)

- Tribal community colleges - *United States v. Foote*, 635 F.2d 671, 672 (8th Cir. 1980)

- For-profit corporations owned by a tribe but incorporated under state law - *United States v. Logan*, 641 F.2d 860, 861-62 (10th Cir. 1981)

- Not-for-profit learning centers founded by several tribes - *United States v. Zephier*, 916 F.2d 1368, 1369-73 (8th Cir. 1990)

- Tribal telephone authorities - *United States v. White Horse*, 807 F.2d 1426, 1427-28 (8th Cir. 1986)

- Sub-entities of a tribal business committee established to provide self-insurance/risk management - *United States v. Pemberton*, 121 F.3d 1157, 1160-63 (8th Cir. 1997)

If the stolen funds come from discrete federal program funding or the crimes involve property that actually belonged to a federal agency, the defendant is charged with theft from government programs under 18 U.S.C. §666.

Respecting a tribe's sovereign status means exercising prosecutorial discretion in charging decisions, particularly when dealing with misapplication cases and self-governing tribes. The first step towards federal recognition of self-governance was the passage of Pub. L. No. 93-638, 88 Stat. 2203 (1975). *See generally*, Todd M. Johnson & James Hamilton, *Self-Governance for Indian Tribes: From Paternalism to Empowerment*, 27 CONN. L. REV. 1251, 1262 (1995). Under "638" contracts, tribes enter into agreements to run eligible programs formerly staffed by the BIA. The BIA provides funding and the tribe remains subject to BIA performance and reporting requirements. *Id.* at 1263-65.

In 1988, Congress authorized a self-governance demonstration project. Tribal Self-Governance Demonstration Project Act of 1988, Pub. L. No. 100-472, 102 Stat. 2285 (1988). The project became permanent with the addition of Title IV to the Indian Self-Determination and Education Assistance Act. Tribal Self-Governance Act Amendments of 1994, Pub. L. No. 103-413, 108 Stat. 4250 (1994). Today,

over 40 percent of all tribes nationwide are participants in the self-governance program. *See* Department of the Interior, Indian Affairs, Office of Self-Governance, http://www.bia.gov/WhoWeAre/AS-IA/OSG/index.htm. The purpose of the Act is to allow tribes to reinvent programs to better meet their needs. 25 U.S.C. §403(b) (2009). The compacts usually state that the document should be liberally construed to allow the tribe to "redesign programs, activities, functions and services of the Bureau of Indian Affairs . . . to reallocate funds for such programs . . . to provide such programs . . . as determined by tribal priorities." 25 C.F.R. Part 1000, App. A (Model Compact of Self-Governance Between the Tribe and the Department of Interior).

One obvious difficulty in attempting to prosecute officials for "misapplication" in the absence of personal profit by the wrongdoer is determining whether such a re-appropriation of funds is "appropriate or allowable" under current Department of Interior regulations and tribal law. In other words, was the tribal leader trying to fulfill the goals of the self-governance program by "redesigning a program to meet tribal needs" or was the misapplication knowingly undertaken for an illegitimate purpose? On June 1, 1995, then-Attorney General Janet Reno issued the DOJ's Policy on Indian Sovereignty and Government-to-Government Relations with Indian Tribes which states that DOJ should seek to strengthen and assist tribes in developing and promoting Indian self-governance. *See* http://www.justice.gov/ag/readingroom/sovereignty.htm. However, the DOJ is also instructed to "investigate government corruption when necessary." *Id*.

Occasionally, a USAO receives a referral when tribal funds have allegedly been spent in violation of a tribal law or appear to have been misused or spent in a fiscally irresponsible manner. These referrals may be the result of a lack of competitive bidding, paying more than seems reasonable for a particular good or service, or simply a complaint by a political opponent regarding the tribal administration's priorities. Where there is no evidence that a tribal administration official has pocketed money or proof that anyone embezzled, stole, or converted any tribal funds, the offense must be based on the theory that the funds were "willfully misapplied." If the government is unable to show unjust enrichment, the misapplication issue often centers on whether the scrutinized transactions violated an established tribal law or were undertaken for an improper purpose. Tribes, like all governments and organizations, sometimes invest in failing ventures, pursue unprofitable investment opportunities, and reward politically-supportive areas with special projects or additional funding. Each USAO must carefully consider as a matter of public and prosecutorial policy whether a prosecution under §1163, based purely upon violations of tribal law, is warranted in the absence of personal unjust enrichment. Not only are such referrals ripe for misuse as a political tool in tribal power struggles, but the cases can place the USAO in the uncomfortable position of having to interpret tribal law or take actions which second-guess the innocent, if misguided, decisions of a sovereign people.

B. Bribery and corruption

Federal authorities frequently receive referrals from tribal members who oppose a sitting tribal government, and such complaints are often riddled with allegations of political corruption and abuse of power. The tribal liaisons across the country make a practice of staying up-to-date on the political developments of tribes in their districts and can provide assistance in separating meaningful allegations from political fodder. When bribery, corruption, or unjust enrichment are present, a careful examination of the public corruption statutes may provide prosecutorial avenues to stop such abuses of power. In the Ivy Ong case described above, a charge of conspiracy to commit honest services fraud was utilized. (Before launching an honest services fraud investigation or prosecution today, however, DOJ policies on approval should be reviewed and the Public Corruption Section should be consulted, particularly given the anticipated Supreme Court rulings in three pending cases which could impact such matters).

As with any public corruption investigation, charges under RICO should be carefully considered. Whether based upon statements to investigators or by signing federal funding documents, corrupt tribal officials may have made actionable false statements under 18 U.S.C. §1001. Any or all such charges could be combined with conspiracy counts and violations of 18 U.S.C. §1163 or §666.

IV. Use of general white collar crime resources within DOJ

When economic crime in a tribal government or an Indian gaming facility becomes more sophisticated than a low-level employee who simply commits a crime of opportunity by pocketing available cash, Indian country AUSAs should not hesitate to call upon the abundance of white collar crime resources provided by DOJ and other federal agencies. Too often, white collar prosecutors focusing on federal, state, and local governments know little of Indian country crime, and Indian country prosecutors skilled in handling violent events are not well-versed in complex economic crimes. A few simple steps could help to bridge this gap in institutional knowledge.

First, AUSAs should think broadly about all of the resources that are available to combat economic crime. Tribal liaisons can supply information about the tribe being investigated and make helpful introductions to tribal investigators. DOJ's Asset Forfeiture and Money Laundering Section provides both publications and online resources which are indispensable in money laundering prosecutions and in tracing assets. The Public Corruption and Organized Crime Sections can provide expertise to Indian country AUSAs. Indian country AUSAs should consider attending OLE offerings on white collar crime, financial investigations, money laundering, and public corruption. Finally, AUSAs can consult the tribal components in federal agencies like IRS, FBI, DOI/OIG, HUD, and EPA. The IRS has a very active component, the Office of Indian Tribal Government, which not only offers assistance to AUSAs but also conducts outreach to tribal governments and casinos to insure compliance with tax law and federal financial reporting requirements. FBI's Indian country crime unit lists financial crime as one of its priorities and can refer AUSAs to other FBI components that specialize in casino gambling, organized crime, or public corruption. The agency also hosts a Web page devoted to stolen Native art, including images of stolen artwork, in an effort to prevent re-sale by thieves and to promote recovery of the items. USABOOK's topic pages often contain links to these and other helpful agency Web sites. The IRS is usually eager to assist in Indian country prosecutions and their expertise in tracking assets, analyzing financial data, and preparing courtroom exhibits is immeasurable.

Second, AUSAs should consult other AUSAs who specialize in white collar crime, including the Asset Forfeiture Unit. Through their training and expertise in the field, these experts can point fellow AUSAs to resources like FINCEN and other specialized databases.

Finally, AUSAs should consider statutes beyond those specifically applicable to Indian gaming or tribal property. The nature of the property stolen or the program involved may lead to additional options under statutes designed to protect the environment, natural resources, public lands, archeological treasures, historic sites, or defense secrets. What the criminal does with the stolen funds may lead to tax charges, financial reporting violations, or money laundering charges.

Tribal governments, many infused with copious amounts of liquid assets from thriving gaming operations, are big players in the current financial landscape. Limited federal resources in general, and violent crime priorities in Indian country law enforcement specifically, mean that USAOs must utilize all available resources in new and creative ways to protect the integrity of Indian country's assets for future generations.❖

ABOUT THE AUTHOR

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The Archaeological Resources Protection Act and The Native American Graves Protection and Repatriation Act

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I. Cultural resources: why should they be protected?

The 1876 Centennial Exposition in Philadelphia and the 1893 World's Columbian Exposition in Chicago stimulated great interest in North American archaeology and anthropology through the inclusion of Native American artifacts at both events. In fact, Native Americans themselves appeared as part of the exhibits. PBS's *American Experience* describes it thus:

> Over 300 Native Americans from 53 tribes were brought to the Expo, and they camped on the Centennial grounds. According to James McCabe's 1876 description of the Expo, "the object of the encampment is to show, in as perfect a degree as is now possible, the original inhabitants of this country and their mode of life."

PBS.org, People & Events: The Centennial Exposition of 1876, http://www.pbs.org/wgbh/amex/grant/peopleevents/e_expo.html.

Although the treatment of Native Americans and their culture in these expositions was less than respectful, the result was an increased curiosity on the part of both collectors and museums. Subsequent surveys of southwest sites stirred interest in collecting artifacts, resulting in increased looting of

archaeological sites. Many of these looted materials were eventually sold to museums unless, as in some cases, the museums themselves actually sponsored the expeditions.

The cultural and archaeological resources of the North American continent include religious, spiritual, historic, scientific, and artistic components of Native American culture. Although not all archaeology involves Native American remains or cultural items, such items are certainly the subject of a large number of the violations of cultural resource protection laws. Preserving and protecting these cultural resources is both a legal and moral obligation.

II. What kinds of acts are committed against cultural resources?

Archaeological crime includes vandalism of and theft from archaeological sites and collections, and trafficking of restricted Native American archaeological remains. Native American target sites include:

- Prehistoric sites such as rock shelters, caves, rock art, rock alignments, earthen mounds, earthen middens, mound complexes, ceremonial centers, shell mounds, middens, refuse pits, burial pits, graves, and cemeteries.

- Later sites, including domestic and ceremonial structures, storage structures, ruins, and graves.

Common motives to commit artifact theft and vandalism include a fascination with the past, a desire to collect artifacts, and knowledge of the monetary value of the artifacts coupled with an intent to sell. For some, artifact hunting, or "pot-hunting," is a family tradition that, to the perpetrator, seems harmless and perhaps even victimless. Beyond the obvious legal violations, some collectors do not understand the moral and historical implications of separating an item from where it was found and thus separating it from its historical context, its story, and from what it could tell us about how it was used and valued in the past. The item simply becomes an object, and its larger meaning is lost. The piece of the historical and cultural puzzle that it would provide may be gone forever, and when human remains are involved, the spiritual link is disturbed.

III. What legal protections exist for cultural resources?

There is a division of legal authority and responsibility between federal and state governments relating to this issue. Issues involving the Archaeological Resources Protection Act (ARPA) and the Native American Graves Protection and Repatriation Act (NAGPRA) are part of a unitary scheme for federally-owned and controlled lands, including tribal lands. Other than the trafficking provisions of ARPA and NAGPRA, states are responsible for state-owned and controlled lands, in addition to those that are locally-owned.

The first significant protection for archaeological and Native American cultural resources came about in the Antiquities Act of 1906. 16 U.S.C. §§ 431- 433 (2009). The Antiquities Act is the federal mechanism for establishing national monuments. Its purpose was to establish historic and prehistoric structures and other objects of historic or scientific interest on federal lands as national monuments. It was an attempt to prevent looting, but it also played a major role in the professionalization of American archaeology by restricting excavation to professionals and requiring a permit for excavation which is issued only by The Smithsonian. For better or worse, the Antiquities Act vested control over Native American sites in the museum establishment. After the Ninth Circuit found the Antiquities Act to be unconstitutional

because certain terms were not clearly defined, *U.S. v. Diaz*, 499 F.2d 113, 115 (9th Cir. 1974), additional legislation was deemed necessary.

A. Archaeological Resources Protection Act

Probably the most-used enforcement tool for the protection of cultural resources is the Archaeological Resources Protection Act, 16 U.S.C. § 470aa-470mm, enacted October 31, 1979, the purpose of which is " to protect irreplaceable archaeological resources and sites on federal, public, and Indian lands." Pub. L. No. 96-95, § 2, 93 Stat. 721 (1979).

An ARPA violation can be either a felony or a misdemeanor, depending upon the severity of the violation. It can also be pursued civilly when deemed appropriate or necessary. The elements of an ARPA violation include the following:

- The act must involve an archaeological resource more than 100 years old. "Archaeological Resource" is defined as: (1) material remains of past human life of (2) archaeological interest (3) over 100 years old (4) including, but not limited to, pottery, basketry, bottles, weapons, projectiles, tools, structures, pit houses, rock paintings, graves, and human skeletal materials

- With the exception of the trafficking provisions of 16 U.S.C. § 470ee(c), the act must occur on public lands for ARPA jurisdiction to attach. Such lands include lands owned and administered by the United States as part of the National Park Service, National Wildlife Refuge System or National Forest System; all other lands to which fee title is held by the United States; Indian lands; land held in trust by the United States; and land subject to the restriction against alienation imposed by the United States

- The act must be one prohibited by ARPA as listed under:

    - 16 U.S.C. § 470ee(a): Excavate, remove, damage . . . alter or deface an archaeological resource or attempt to do so

    - 16 U.S.C. § 470ee(b): Sell, purchase, exchange, transport, receive, or . . . offer to do so

    - 16 U.S.C. § 470ee(c): Sell, purchase, exchange, transport, receive, or offer to . . . in interstate or foreign commerce any archaeological resource . . . in violation of any provision, rule, regulation, ordinance, or permit in effect under State or local law

    - 16 U.S.C. § 470ee(d): Violates, counsels, procures, solicits, or employs any other person to violate any provision in subsection (a), (b), or (c)

- Under ARPA's Excavation and Removal provision, a permit is required, notification must be sent to any tribes that may consider the site as having religious or cultural importance (§ 470cc), and the consent of the tribes involved must be received when the site is on Indian Land (§ 470cc(g)(2))

ARPA is considered a General Intent Crime under 16 U.S.C. § 470ee(d). Determination of the severity of the offense must take into consideration the value of the archaeological resource and the cost of

restoration and repair, which must exceed $500 to be classified as a felony. A total cost below $500 is considered a misdemeanor, if it is a first offense.

ARPA excludes coins, bullets, unworked minerals, and rocks, unless they are found in direct physical relationship with another archaeological resource; arrowheads found on the surface (defined as any projectile point designed for use with an arrow, 43 C.F.R. § 7.3(5)(b) (2010); items found on private lands; and items in one's lawful possession prior to October 31, 1979. 16 U.S.C. § 470kk (2009).

When considering a civil action, thought should be given to the issue of responsibility in relation to the damage caused. While there may not be intent, there may be an element of negligence. The amount of damage may also affect the decision as how to approach a violation.

ARPA's criminal penalties are as follows:

- A first offense is considered a misdemeanor if there is less than $500 in damage, with a possible penalty of a fine up to $100,000 and/or 1-year imprisonment
- A first offense is considered a felony if there is more than $500 in damage, with a possible penalty of a fine up to $250,000 and/or 2-years imprisonment
- A second offense is an automatic felony with a penalty of a fine up to $250,000 and/or 5-years imprisonment
- ARPA penalties include forfeiture of vehicles, equipment, and materials, and are subject to the Sentencing Guidelines

16 U.S.C. §470ee (2009).

Forfeiture is used in ARPA cases and can be done criminally, civilly, or in rem. In a criminal case, the forfeiture count will be in the indictment or information and may be part of any plea negotiations. Forfeiture may also be used as part of civil proceedings or initiated after assessment of a criminal or civil penalty. In an in rem proceeding, no individual defendant is identified, so forfeiture does not have the breadth in these types of cases as it does in other areas of law enforcement, and is limited to objects, vehicles, and tools.

B. Native American Graves Protection and Repatriation Act of 1990

The second major protection for human remains and cultural resources is the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA). 25 U.S.C. § 3001 (2009). NAGPRA contains definitions and procedures for repatriation, pertaining especially to museums which receive some federal funding and may possess applicable material, including remains of Native Americans.

C. The focus of NAGPRA

NAGPRA focuses on three areas:

- Restitution of human remains and cultural items located in museums that receive federal funds

- Restitution to Native Americans of newly-discovered human remains and associated burial items

- Anti-trafficking provisions dealing both with human remains and communally-owned sacred and cultural objects

Four areas of federal law which the legislation sought to reconcile have been identified:

- Civil rights (Native American remains and funerary objects were treated differently than those of other ethnic groups)
- Religious freedom based on Constitutional recognition of tribal sovereignty

- Property law (recognizing traditional concepts of communal property in use by some Indian tribes)

- Administrative law (i.e., giving the Interior Department authority to issue regulations)

C. Timothy McKeown & Sherry Hutt, *In the Smaller Scope of Conscience: The Native American Graves Protection & Repatriation Act Twelve Years Later*, 21 UCLA J. ENVTL. L. & POL'Y 153 (2002-2003) (detailing the history of the passage of the Native American Graves Protection & Repatriation Act).

NAGPRA enforcement, specifically related to trafficking, is found under 18 U.S.C. § 1170. The penalties for trafficking are similar to those for violating ARPA in that the first offense is generally considered a misdemeanor, whereas the second is an automatic felony. 18 U.S.C. § 1170(a),(b) (2009).

Title 18 U.S.C. § 1170(a) addresses the trafficking of Native American remains, and defines a trafficker as one who "knowingly sells, purchases, uses for profit, or transports for sale or profit the human remains of a Native American without the right of possession to those remains as provided in the Native American Graves Protection and Repatriation Act." *Id.*

Title 18 U.S.C. § 1170(b) addresses the trafficking of Native American cultural items and defines a trafficker as one who " knowingly sells, purchases, uses for profit, or transports for sale or profit any Native American cultural items obtained in violation of the Native American Graves Protection and Repatriation Act." *Id.* For purposes of this Act, cultural items include human remains, associated funerary items, unassociated funerary items, objects of cultural patrimony, and sacred objects.

D. Alternative statutes

There are a variety of additional statutes which can be used when prosecuting cultural heritage crimes. These include:

- Conspiracy (18 U.S.C. § 371)

- Theft of government property (18 U.S.C. § 641) (does not use archaeological value)

- Damage of government property (18 U.S.C. § 1361)

- Theft from a tribal organization (18 U.S.C. § 1163)

- Interstate transportation of stolen property (18 U.S.C. § 2314)
- Aiding and abetting (18 U.S.C. § 2)
- Accessory after the fact (18 U.S.C. § 3)
- Theft of major artwork (18 U.S.C. § 668)
- Migratory Bird Treaty Act (16 U.S.C.A. § 710)
- Agency regulations, CFRs, etc.

E. Indian Arts and Crafts Act of 1990

The Indian Arts and Crafts Act of 1990 (IACA) also works to protect cultural resources. Indian Arts and Crafts Act of 1990, Pub. L. 101-644, §104, 104 Stat. 4662 (1990). The Indian Arts and Crafts Web page describes the IACA as follows:

> a "truth-in-advertising" law that prohibits misrepresentation in the marketing of Indian arts and crafts products within the United States. It is illegal to offer or display for sale, or to sell any art or craft product in a manner that falsely suggests it is Indian-produced, an Indian product, or the product of a particular Indian, Indian Tribe, or Indian arts and crafts organization, resident within the United States. For a first time violation of the Act, an individual can face civil or criminal penalties up to a $250,000 fine or a 5 year prison term, or both. If a business violates the Act, it can face civil penalties or can be prosecuted and fined up to $1,000,000.

Indian Arts and Crafts Act of 1990, http://www.artnatam.com/law.html. The IACA Web page goes on to say that:

> The law covers all Indian and Indian-style traditional and contemporary arts and crafts produced after 1935, and broadly applies to the marketing of arts and crafts by any person in the United States. Some traditional items frequently copied by non-Indians include Indian-style jewelry, pottery, baskets, carved stone fetishes, woven rugs, kachina dolls, and clothing. All products must be marketed truthfully regarding the Indian heritage and tribal affiliation of the producers so as not to mislead the consumer . . . . It is illegal to market art or a craft item using the name of a tribe if a member or certified Indian artisan of that tribe did not actually create the art or craft item.

Id. Besides the truth-in-advertising aspect of this law, which allows the purchaser to know that "Indian-made" is, in fact, made by Indians as defined in the Act, the IACA provides critical economic benefits for Native American cultural development. Forgery and fraudulent Indian arts and crafts diminish the livelihood of Native American artists and craftspeople by lowering both market prices and standards. *Id*.

IV. Issues in ARPA/NAGPRA investigations and prosecutions

A. Proving intent

In *United States v. Lynch*, 233 F.3d 1139 (9th Cir. 2000), the defendant, while hiking in Alaska, saw a human skull partially exposed and partially covered by soil, scraped away the dirt with his hands, and lifted the skull from a rocky hillside. The court found no evidence that the defendant had reason to know that the location was a burial place or that the skull was of ancient origin. The Ninth Circuit held that to convict the defendant, the government had to show that Lynch knew or had reason to know that he was removing an "archaeological resource." *Id.* at 1142.

The court decided that, in most cases, a "knowing" violation means that the defendant must "know the facts that make his conduct illegal." *Id.* at 1143. In a later case, *United States v. Quarrell*, 310 F.3d 664, (10th Cir. 2002), the court interpreted the intent requirement differently when deciding whether the defendants knew they were on public land. The court stated that "a person excavating on someone else's land, whether public or private, cannot reasonably expect to be free from regulation." *Id.* at 672.

B. Origin of the artifacts or remains, and valuing the loss

Determining the value of the loss is important both because it is relevant to the penalty aspect of the charge and because it affects application of the sentencing guidelines. It should always be remembered, however, that the cultural and historical loss may be devastating even if the financial loss caused by an archaeological crime is relatively small.

In *United States v. Shumway*, 112 F.3d 1413 (10th Cir. 1997), the court found that the fair market value and cost of repair were "grossly insufficient to quantify the devastating and irremediable cultural, scientific, and spiritual damage Mr. Shumway caused to the American people in general and to the Native American community in particular," and supported the provisions of 43 C.F.R. §714, which defines archaeological value as "the value of the information associated with the archaeological resource . . . in terms of the costs of the retrieval of the scientific information which would have been obtainable prior to the violation." *Id.* at 1425.

C. Mixed jurisdictional status

Many states and tribes also have legislation and codes to protect burial sites and other sacred sites. Some states have laws on these issues but do not specifically address Native American remains. Some states have laws which apply to these issues when they occur on private property.

The issue of non-federal archaeological sites was addressed in *United States v. Gerber*, 999 F.2d 1112 (7th Cir. 1993). Title 16 U.S.C. §470ee(c) is a trafficking provision that does not require that the activity in question be conducted on public or Indian land. Under this law, one may not "sell, purchase, exchange, transport, receive, or offer . . . in interstate or foreign commerce any archaeological resource . . . in violation of any provision, rule, regulation, ordinance, or permit in effect under State or local law."

V. Conclusion

Native American cultural heritage is a precious, non-renewable resource for historical, spiritual, and creative experiences and knowledge. Many priorities tug at our time and treasury, but it is important to all

that we protect the past and provide the proper respect to those whose creations and remains are seen by some as simple retail commodities.❖

ABOUT THE AUTHOR

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