



USING FEDERAL LAW TO PROSECUTE DOMESTIC VIOLENCE CRIMES IN INDIAN COUNTRY



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Office for Victims of Crime

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USING FEDERAL LAW TO PROSECUTE DOMESTIC VIOLENCE CRIMES IN INDIAN COUNTRY



Facilitator's Guide to the Training DVD



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MESSAGE FROM THE DIRECTOR

American Indian and Alaska Native communities suffer from violent crime at rates far greater than other Americans, with violence against tribal women at epidemic proportions. In response to the urgent need for assistance, the Department of Justice has undertaken a major initiative to improve tribal justice and public safety throughout Indian Country.

Essential to the Department's success is strengthening the legal structure for prosecuting domestic violence offenders in Indian Country. A critical aspect of that work is enhancing the legal knowledge and skills of the professionals who work tirelessly in pursuit of justice on federal lands. I am very pleased to present this facilitator's guide, *Using Federal Law To Prosecute Domestic Violence Crimes in Indian Country*, which was produced under the auspices of the Executive Office for United States Attorneys and the Office for Victims of Crime. The guide and its companion video are intended to educate federal prosecutors, law enforcement officers, and other members of the justice system about using federal law more effectively to combat the escalating pattern of violence in Indian Country.

Making justice a reality for tribal victims of domestic violence presents enormous challenges for criminal justice professionals, whose scarce resources must be stretched across vast geographic areas. The victims face even greater challenges, as many live in small, isolated communities where they may feel intense pressure to remain silent, or fear violent retaliation. The material in this guide offers the promise of more offenders being called to account for their crimes and, in turn, the hope of breaking cycles of family violence that would otherwise afflict multiple generations.

We are all grateful to—and humbled by—the four women you will meet in the video, who tell powerful stories of horrific abuse, yet, in seeking justice, succeeded in reclaiming their lives. Their willingness to share their experiences in order to help others reflects remarkable generosity, strength, and spirit. They have made an invaluable contribution to our effort to convey critical information while honoring tribal dignity and autonomy.

This guide is the result of many individuals who are dedicated to achieving the Department's goal of improving justice, safety, and the quality of life in Indian Country. We are indebted to Leslie A. Hagen, National Indian Country Training Coordinator, U.S. Department of Justice, who was responsible for the development of the guide. We also would like to express our appreciation to Robin Smith, President of Video/Action, and her team, who movingly portrayed the victims and their individual paths to justice.

Joye E. Frost
Acting Director
Office for Victims of Crime



INTRODUCTION

Using *Federal Law To Prosecute Domestic Violence Crimes in Indian Country* consists of a DVD and facilitator's guide intended to increase the knowledge of all federal, state, local, and tribal criminal justice and social service professionals working on domestic violence cases in Indian Country. The DVD is structured to allow users to view the production in full or by section. While the DVD itself conveys a tremendous amount of information, a discussion led by a facilitator with knowledge of and experience in domestic violence cases in Indian Country may be helpful, particularly if the training audience is new to the subject matter. This guide is intended to assist a facilitator with leading a discussion that will encourage the audience to consider the policies and practices within their own agencies and how the case scenarios would play out if investigated and prosecuted in their own jurisdiction. It will be up to the facilitator to inform a student if his or her response to a similar case scenario is feasible and practical, or if, in fact, it could jeopardize victim safety. Therefore, it is critical that anyone using this guide and/or the DVD have sufficient knowledge and experience with the subject matter.

This project would not have been possible without the bravery of the victims profiled, each of whom demonstrated a selfless commitment to ending violence against American Indian and Alaska Native women by courageously sharing her story. To them, we all owe a great deal of gratitude and appreciation.

If you have any questions concerning the information in this guide or on the training DVD, please contact Leslie A. Hagen, National Indian Country Training Coordinator, U.S. Department of Justice, via e-mail at Leslie.Hagen3@usdoj.gov.

BACKGROUND



Domestic violence is a crime that manifests itself in every community. Tragically, some of these assaults result in homicide. Although it can be characterized by physical assault, sexual abuse, and stalking, domestic violence is frequently not an overtly criminal act; instead, it may be evidenced by name-calling, isolating the victim from friends and family, controlling the family's finances, manipulating the children in the home, or threatening physical harm to the victim, her children, or family pets.

While domestic violence is experienced by members of every race, religious creed, and socioeconomic strata, it has reached epidemic levels in tribal communities. American Indian and Alaska Native (AI/AN) communities suffer from violent crime at far greater rates than other Americans; some experience rates of violent crime that are twice, four times, and, in some cases, more than 10 times the national average. Violence against AI/AN women and children is particularly problematic—murder rates against Native women are well above 10 times the national average in some communities, and reservation-based clinical research shows very high rates of intimate-partner violence against AI/AN women as well.

There are many reasons for the epidemic of domestic violence in tribal communities. Historical trauma, geographic isolation, drug and alcohol abuse, the threat of homelessness, pressure from friends and family, too few law enforcement officials policing a vast amount of land, and an unwillingness to report offenses due to dissatisfaction with the criminal justice system are all factors that contribute to the prevalence of domestic violence in Indian Country.

Historically, the Federal Government generally lacked jurisdiction over many domestic violence crimes. These crimes, however, pose a serious threat to our communities and in Indian Country. In 1994, the United States Congress, as part of a comprehensive crime bill, enacted legislation empowering the Federal Government to participate in the fight against domestic violence. This legislation, called the Violence Against Women Act (VAWA), recognized that violence against women is a serious crime with harmful consequences for families, children, and society, and set out certain federal domestic violence crimes that can be prosecuted by the U.S. Department of Justice. Consistent with this federal initiative,

the crime bill also amended the Gun Control Act to include a federal firearms prohibition regarding persons subject to a protection order. In fall of 1996, Congress reaffirmed its commitment to fighting domestic violence crimes and protecting domestic violence victims by naming additional federal domestic violence crimes to both VAWA and the Gun Control Act. Further amendments to VAWA were passed in 2000 and 2005.

While domestic violence remains primarily a matter of state, local, and tribal jurisdiction, both VAWA and the Gun Control Act provide federal tools for prosecuting domestic violence offenders in certain situations involving firearms or interstate travel or activity. Unfortunately, United States Attorneys' Offices (USAO) throughout the country receive very few referrals for prosecution of VAWA or Gun Control Act offenses occurring in Indian Country. This may be due in part to the fact that first responders to domestic violence crimes in Indian Country—usually tribal law enforcement officials or agents from the Bureau of Indian Affairs—are simply unaware of these federal domestic violence statutes.



MODULE ONE

Prologue and Introduction

Topics for Discussion

- ▶ Section 901 of VAWA contains Congressional findings that highlight the high rate of sexual assault and domestic violence perpetrated against AI/AN women. Do you or does your agency attempt to quantify the rates of domestic violence and sexual assault committed against women in your community? If so, have the victim reporting rates for domestic violence and sexual assault increased or decreased since the passage of VAWA in 1994? In your opinion, have the rates of domestic violence and sexual assault in your community increased or decreased in the past decade? To what do you attribute the increased or decreased rates of domestic violence and sexual assault offenses?
- ▶ On the DVD, a police officer says that domestic violence is a community problem. How do you define “community”? In what ways has the community where you live or work come together to fight violence against AI/AN women? What barriers or obstacles has your community experienced? In what ways does your community work collaboratively with other tribal, state, or federal agencies to assist battered women and hold offenders accountable?
- ▶ What is meant by “the federal trust responsibility” owed by the Federal Government to tribes? Does this trust responsibility extend to public safety issues?
- ▶ According to the DVD, domestic violence crimes are “very difficult to prosecute.” In what ways are they more difficult to prosecute than, for instance, a larceny or a drug case? What steps can first responders take to make the criminal justice process easier for the victim? What actions can be taken early in an investigation to ensure a more successful prosecution outcome? In a domestic violence case, is a criminal prosecution the only form of justice for the victim? If not, what other types of resolution can mean justice for a victim and/or the community?
- ▶ What reasons might a domestic violence victim have for not wanting to file criminal charges against her assailant?

- ▶ What is burnout or secondary trauma? Can law enforcement officers, prosecutors, and advocates who work on domestic violence cases suffer burnout or secondary trauma? If so, why is that the case? What steps can be taken to prevent burnout or secondary trauma?

Case Study: Rosebud Sioux Tribe, District of South Dakota

Topics for Discussion

- ▶ Agent Calvin “Hawkeye” Waln, Jr., states that domestic violence calls are one of the most dangerous calls for law enforcement. Do you agree? What can police departments do to increase the safety of responding officers and any victims or witnesses still at a crime scene when law enforcement arrives?
- ▶ Are children who grow up in a home where domestic abuse is present more likely to be batterers or victims as adults?
- ▶ The DVD raises questions about the effectiveness of personal protection orders in keeping victims safe. What are the pros and cons of personal protection orders? Is there anything that can be done to make personal protection orders more effective? Must a victim get a personal protection order in every jurisdiction in which the victim lives, works, visits, or goes to school? What does the legal term “full faith and credit” mean?
- ▶ In this case study, the victim’s assailant was a known methamphetamine user. How do drugs and alcohol influence domestic violence and sexual assault?
- ▶ The victim was kidnapped by her assailant. What are the federal criminal elements of kidnapping? Is kidnapping part of the Major Crimes Act?
- ▶ It was reported that the defendant used a belt to whip the victim. Under the federal criminal code, what type of assault is chargeable when a weapon such as a belt is used?
- ▶ The Special Agent for the Federal Bureau of Investigation (FBI) states that when he first interviewed the victim, she was very quiet. Is this the type of response you would expect from a woman who has been kidnapped and assaulted? Is there a “typical” response elicited by victims of crime? What can you do in your professional environment to make a victim feel comfortable during the interviewing process?
- ▶ The defendant was indicted on charges of aggravated sexual abuse, assault with a dangerous weapon, and assault resulting in serious bodily injury. What elements does the prosecutor need to prove beyond a reasonable doubt in order for the defendant to be found guilty? What types of evidence were present in this case?

- ▶ Investigators learned that other women were similarly victimized by the defendant. If the police learn of additional victims, is it legally possible to bring additional charges against the defendant after an indictment is filed? Is there a way for the prosecutor to have additional victims testify in court even if the offenses committed against them are not the subject of the current case?
- ▶ The victim on the DVD and the other victims in this case were understandably afraid to testify against the defendant. Does the Crime Victims' Rights Act afford victims any protection against defendants?
- ▶ What are the differences between the roles and responsibilities of a victim witness specialist working for a federal law enforcement agency or United States Attorney's Office (USAO) and those of a victim advocate working for a tribe or local domestic violence or sexual assault service provider program? Do the federal victim witness specialists, the tribe's victim advocates, or the domestic violence or sexual assault service provider programs have a confidential relationship with the victim? In Indian Country cases prosecuted in federal court, the victim witness specialist and the victim advocate may be involved in the same case. How can and should their efforts be coordinated to most effectively assist the victim?
- ▶ The defendant in this case received a lengthy prison sentence. How can a victim keep track of where the defendant is incarcerated within the Federal Bureau of Prisons system? The defendant also received 5 years of supervised release following his term of incarceration. What is supervised release? Does supervised release provide any protection for the victim? Will the victims be notified before the defendant is released from the custody of the Federal Bureau of Prisons?

Relevant Federal Statutes

Topics for Discussion

- ▶ Multiple jurisdictions may have legal authority to prosecute the same case. To determine which jurisdiction has authority or is most appropriate to investigate and prosecute a case, law enforcement must first determine the Indian/non-Indian statuses of both the defendant(s) and the victim(s) and whether the offense occurred in Indian Country as defined by federal law. How do officials make the determination that a particular defendant or victim is Indian or non-Indian? Where does the investigator go to gather evidence to establish the Indian status of a defendant or victim? Where does the investigator go to gather evidence proving that an offense occurred in Indian Country?
- ▶ The DVD references the Major Crimes Act (18 U.S.C. § 1153). The Major Crimes Act establishes federal jurisdiction in non-PL 280 states over an enumerated list of offenses committed by Indians in Indian Country, regardless of whether the victim is Indian or non-Indian.

- ▶ Specifically mentioned is the offense of Assault Resulting in Serious Bodily Injury (18 U.S.C. § 113(6)). What types of injuries support a charge of assault resulting in serious bodily injury? One way to prove assault resulting in serious bodily injury is to prove that the victim experienced “extreme physical pain.” Given this, what types of questions should an investigator or first responder ask a domestic violence victim about her injuries?
- ▶ The DVD talks about strangulation offenses constituting assault resulting in serious bodily injury. What are the signs and symptoms of strangulation? If a strangulation victim sustains no permanent injuries, how can a prosecutor prove to the judge or jury that strangulation presents a substantial risk of death? What professions can serve as an expert witness in a strangulation case?
- ▶ Another federal offense included in the Major Crimes Act is Assault with a Dangerous Weapon (18 U.S.C. § 113(3)). What types of weapons have you seen used against domestic violence victims?
- ▶ The Assimilative Crimes Act (18 U.S.C. § 13) provides that, where there is a gap in the federal criminal code, the prosecutor can “borrow” from the state criminal code and charge the defendant in federal court with a state law violation; thus, the crime is defined and the sentence is prescribed by state law. In what types of factual situations have you looked to state law for a chargeable offense to use in federal court for a crime committed in Indian Country?
- ▶ Prior to the Tribal Law and Order Act (TLOA) of 2010, the Indian Civil Rights Act limited tribal courts’ sentencing authority to a maximum jail term of 1 year and a \$5,000 fine. With the passage of TLOA, for certain offenses, tribal courts may now sentence a person to up to 3 years for a single offense provided certain due process protections for the defendant are in place. Discuss what offenses are subject to enhanced sentencing authority and what due process protections are required. Is your tribe considering implementing the felony sentencing authority provided by TLOA? Has your tribe experienced any barriers or obstacles to implementing the enhanced sentencing authority?
- ▶ VAWA includes a number of federal domestic violence offenses that are considered crimes of general federal applicability. What does this mean? Does the particular race or ethnicity of the offender or victim (for example, Indian or non-Indian) have to be established in order for these statutes to be used? Does the crime have to occur in Indian Country?
- ▶ Congress included the word “interstate” in the titles of several of the offenses created under VAWA. Does this mean that they can only be used where the defendant traveled between two states to commit a criminal offense? Is the sole focus the travel of the defendant, or can the victim’s travel also be used to prove one of these offenses beyond a

reasonable doubt? What does the prosecutor need to prove beyond a reasonable doubt in order to convict a defendant of the crime of Interstate Domestic Violence (18 U.S.C. § 2261) or Interstate Violation of a Protection Order (18 U.S.C. § 2262)?

- ▶ Federal law includes an Interstate Stalking offense (18 U.S.C. § 2261A(1)). What types of acts constitute a stalking crime? How many separate acts must be proved beyond a reasonable doubt in order to convict a person of interstate stalking? What type of intent does the defendant have to possess when committing the underlying stalking act in order to prove interstate stalking? How can a prosecutor prove intent?
- ▶ In order to be convicted of the federal offense of Cyberstalking (18 U.S.C. § 2261A(2)), must the defendant have used a computer? If not, what other types of acts constitute cyberstalking? Do the victim and the offender have to be in different state or tribal jurisdictions?
- ▶ The Gun Control Act provides that anyone convicted of a misdemeanor crime of domestic violence is prohibited from purchasing or possessing a firearm or ammunition (18 U.S.C. § 922(g)(9)). Can tribal court convictions count as qualifying misdemeanor convictions for the purposes of charging a violation of the Gun Control Act? If so, what are the challenges of using a tribal conviction for this purpose in a 922(g)(9) case?
- ▶ The crime of Domestic Assault by an Habitual Offender (18 U.S.C. § 117) was created with the passage of VAWA of 2005. This statute punishes any person who commits a domestic assault within the special maritime and territorial jurisdiction (SMTJ) of the United States or Indian Country who has two prior federal, state, or tribal court convictions for offenses that would be, if subject to federal jurisdiction, an assault, a sexual abuse offense, an offense under Chapter 110A, or a serious violent felony against a spouse or intimate partner. What types of records of previous domestic violence convictions does your tribal court maintain so that a defendant may be charged in federal court if he commits another act of domestic violence following two prior convictions? Can 18 U.S.C. § 117 be used for a federal prosecution if an indigent defendant was not offered counsel in the underlying proceeding? Has your law enforcement agency received training on this statute or initiated a protocol for prosecuting a defendant's third or subsequent domestic violence offense in federal court?

Case Study: Sault Ste. Marie Tribe of Chippewa Indians, Western District of Michigan

Topics for Discussion

- ▶ This case study involves two federal court judges. What role does the court system have in keeping victims safe and holding offenders accountable?

- ▶ What facts about the defendant, the victim, and the case can the court legally consider when determining whether the defendant can be released from custody pre-trial? Can the court put any restrictions on a defendant who is released from custody pre-trial? If so, what kinds? How are the restrictions enforced?
- ▶ The tribe's victim advocate remarks that the victim was beaten more than a dozen times. What do you tell victims you work with who have been repeatedly beaten by their partner yet remain in the relationship?
- ▶ What is safety planning? How can you perform effective safety planning if the battered victim returns home with the assailant?
- ▶ The defendant in this case was convicted of the federal offense of Domestic Assault by an Habitual Offender. Do law enforcement officers in your federal judicial district or tribe routinely check for a previous domestic or sexual assault record to determine whether a case can be federally prosecuted using this statute?
- ▶ Tribal court convictions may not appear on a check of federal criminal records databases. What procedures can you put in place to ensure that law enforcement and prosecutors have complete information concerning a defendant's prior record?
- ▶ In this case, the victim was also arrested because of an outstanding warrant. What is the policy of law enforcement in your area about arresting crime victims? Are there alternatives to an arrest that exist in your jurisdiction? Can arresting the victim jeopardize his or her willingness to cooperate with police and prosecutors in the domestic violence case?
- ▶ In this case, you saw a picture of the victim used to document the assault. What is your jurisdiction's policy concerning photographs of crime victims? Does the policy address the need to photograph the victim several days after the assault, when bruises may have had a chance to mature and become more visible?
- ▶ The Sault Ste. Marie Tribal Police Department has one officer who specializes in domestic violence cases. In your opinion, what are the strengths and weaknesses of this type of arrangement?
- ▶ The victim witness specialist for the USAO states that the victim had a lot of "crisis-related" situations in her life; for example, her children were not living with her, and she was battling substance abuse issues. Issues concerning substance abuse and the removal or threatened removal of children are common in domestic violence cases. How do you handle these issues when they are present in your cases? Have you threatened to remove minor children from the victim-parent if he or she refuses to testify at trial? Are you a mandated reporter? If so, in what situations do you have an obligation to report suspected child abuse or neglect? To whom do you make such a report?

Sentencing

Topics for Discussion

- ▶ Persons convicted in federal court of a criminal offense may be ordered to serve a period of supervised release. Depending on the offense, supervised release can last for years or up to a lifetime. Supervised release is similar to probation in that the defendant's behavior is monitored for a specific period of time, and he or she may be court-ordered to do certain things, like attend counseling or refrain from using alcohol. What are some of the terms of supervised release or probation that a judge can impose on a defendant that would be helpful to a victim in a domestic violence case?
- ▶ It is important to provide the sentencing judge with all of the information concerning a defendant's criminal history. If the defendant has moved from reservation to reservation or location to location, it can be difficult for the tribal court or federal court judge to get an accurate picture of the defendant's criminal history. Are tribal court convictions always entered into a federal criminal database, like the FBI's National Crime Information Center (NCIC)? What strategies should law enforcement or prosecutors employ to ensure that the sentencing judge has all the necessary background information on a defendant?
- ▶ How have you or your agency integrated traditional practices and culture into the healing process for victims and the community? If you feel comfortable discussing it, in what ways have you or your agency woven AI/AN tradition and culture into your work with battered women? In your community, are traditional practices used with domestic violence offenders?
- ▶ In the federal system, victims have the right to address the court prior to sentencing. Do victims in tribal court have the right or an opportunity to tell the judge what they believe is a fair sentence? How do you or your agency work with domestic violence victims to prepare them for federal or tribal court hearings, facing the defendant, and possibly being confronted by the defendant's family? How do you gather and present to the judge information concerning restitution that may be owed to the victim?
- ▶ What is the protocol in your community if a defendant violates a court order while on probation or supervised release? What is your community's or agency's strategy for keeping domestic violence victims safe when a defendant returns to the community?



MODULE TWO

Introduction

Topics for Discussion

- ▶ The DVD references the need to listen to victims of domestic violence. How soon after a report of domestic violence do you or others in your agency first meet with a victim? If you are a law enforcement officer, do you take a statement from the victim or do you leave a form for the victim to fill out and return to you? What are some pitfalls of the latter practice? If you are a victim advocate, do you engage in risk assessment and safety planning during your first meeting with the victim? If you are a prosecutor taking a case to trial, do you meet with the victim prior to trial? If so, at what point in the process do you meet with the victim? Where, and how many times, do you meet with the victim prior to trial?
- ▶ Studies show that in the majority of domestic violence cases the suspect flees the scene prior to the arrival of law enforcement. What efforts are made by law enforcement in your jurisdiction to interview a defendant who has fled the scene? Why is it important for law enforcement to interview the defendant and victim separately and obtain statements from both the defendant and the victim(s)?
- ▶ What do you do if you become aware that a victim is likely to minimize or recant her report of the violence that occurred? If you are the prosecutor, do you address the issue of minimizing or recanting in jury voir dire or in your opening statement? If you are a prosecutor, should you subpoena a victim to testify at trial?
- ▶ Many reports concerning a domestic assault are received by law enforcement via a 911 emergency call for service. Do you have 911 in your jurisdiction? If so, are the calls recorded, and does law enforcement get a copy of all domestic violence calls? May these recorded calls be played at trial? What is the evidentiary foundation that must be laid by the prosecutor prior to playing a 911 recording?
- ▶ What is an “evidence-based” prosecution? How has your trial strategy been affected by the case of *Crawford v. Washington* (541 U.S. 36 (2004)), and subsequent cases

determining whether evidence is testimonial or non-testimonial? What is hearsay evidence? What types of hearsay evidence are frequently used in domestic violence cases? What are the foundational requirements for introducing each of these types of hearsay evidence?

- ▶ Does your tribe have a victim advocate? What agencies in the federal system have a victim advocate? In a case that is being prosecuted federally, how do the victim advocates for the tribe and the federal agencies coordinate the provision of services to the victim and the victim's family?

Case Study: Eastern Band of the Cherokee Nation, Western District of North Carolina

Topics for Discussion

- ▶ The victim in this case has a history of recanting her statements. Why do victims recant? If the federal prosecutor anticipates that a victim may recant, should he or she call the victim to testify in front of the grand jury? How can the prosecutor use grand jury testimony at trial?
- ▶ In this case, the victim recants her earlier statements to law enforcement. If a victim takes the witness stand and denies the assault, or says that she lied to the police about the incident, can the prosecutor proceed with the criminal case? What is meant by an "evidence-based" prosecution?
- ▶ Can the prosecutor call an expert witness to testify about why battered women recant or minimize the violence perpetrated against them? If so, what are the legal parameters (Federal Rules of Evidence 702) for using this type of witness? How does a prosecutor locate an expert witness on the characteristics of battered women?
- ▶ The prosecutor indicates that in his jurisdiction there is a "no-drop" policy for domestic violence cases. What does a "no-drop" policy mean in practical terms? What are the pros and cons of a "no-drop" policy for domestic violence offenses?
- ▶ We learned that the victim in this case study had, in an earlier incident, been stabbed in the stomach while pregnant. If you were assessing this case for lethality indicators, how potentially lethal would you rate this type of assault? Are pregnant women at increased risk for domestic assault?
- ▶ The case leading to the conviction of the defendant involved a firearm. In addition to the use of a weapon, are there other factors that would lead you to believe that the victim may be in grave danger of serious injury or death? Regarding safety planning for the victim, what additional steps should be taken when firearms are present in the home?

- ▶ The Assistant United States Attorney told the jury in his opening statement that the victim would take the witness stand and “tell a very different story than what she told in the emergency room and what she told the day after the assault.” Must a prosecutor call the victim to the witness stand to testify, especially if he believes she will not be truthful? What are some of the reasons why a victim would recant? Can the prosecutor prove his case beyond a reasonable doubt based on the testimony of the emergency room personnel and law enforcement officials who took the victim’s first statement? What impact has the United States Supreme Court’s decision in *Crawford v. Washington*, 541 U.S. 36 (2004), had on prosecutors’ trial strategies?
- ▶ In this case, the prosecutor introduced evidence of “other crimes, wrongs, or acts” committed by the defendant during earlier assaults on the victim. If you were investigating this case, where would you look for this type of evidence? What is the legal threshold for admitting this type of evidence during trial? Are there any restrictions on the prosecutor regarding how evidence under the Federal Rules of Evidence 404(b) can be used in court?
- ▶ In this case, the defendant was sentenced to an 87-month prison term. If you were prosecuting this case, what type of information would you want the sentencing judge to have prior to imposing the defendant’s sentence?
- ▶ The federal Crime Victims’ Rights Act was passed in 2004 (18 U.S.C. § 3771). What rights do victims have concerning sentencing? Do victims have a right to address the sentencing judge, even if they recant during trial or take the witness stand and deny the abuse occurred?
- ▶ What type of restitution is available under federal law to victims of domestic violence? Does your tribal code provide for the payment of restitution to victims?
- ▶ Can batterers receive treatment while incarcerated in the Federal Bureau of Prisons? What type(s) of treatment are available for batterers in your tribal correctional facility?
- ▶ Does federal law or your tribal code instruct a sentencing judge to consider ordering the defendant to participate in a batterer’s intervention program?

Firearm Offenses

Topics for Discussion

- ▶ Domestic violence cases can lead to homicide. What are some of the indicators that a domestic assault may be escalating toward a lethal event? Who in your jurisdiction is responsible for performing a lethality assessment? How is this task accomplished? Is the victim interviewed? Are children or other witnesses in the home interviewed? Are previous reports of violence between the parties considered? If so, where and how do you obtain this information? Is the defendant’s previous criminal history considered?

Does your jurisdiction use a particular form when conducting a lethality assessment?

- ▶ The Federal Gun Control Act prohibits anyone convicted of a misdemeanor crime of domestic violence from purchasing or possessing a firearm or ammunition. Per the federal statute, what constitutes a qualifying misdemeanor crime of domestic violence? How does this provision apply to tribal court convictions of domestic violence? How does this provision impact persons such as law enforcement officers or military personnel who have been convicted of a qualifying domestic violence misdemeanor?
- ▶ The Federal Gun Control Act provides that persons with a qualifying protection order against them may be prohibited from purchasing or possessing a firearm or ammunition. Per the federal statute, what constitutes a qualifying protection order? How does this particular provision impact law enforcement officers or military personnel who may have a protection order against them?

Case Study: Northern Cheyenne Tribe, District of Montana

Topics for Discussion

- ▶ The prosecutor says that the victim had been abused by her batterer for years, and the victim reported that her bruises were becoming “more and more obvious.” Can this be a significant indicator of potential lethality in a home where domestic violence is present? If so, why?
- ▶ We learned from the DVD that the defendant had been arrested numerous times by several different police departments but was never held accountable. What effect does this type of criminal justice system response have on the victim, defendant, and minor children in the home?
- ▶ The victim reports using drugs. Is drug or alcohol use common for victims of domestic violence in Indian Country? What are some of the reasons for drug and alcohol use by crime victims? If a victim was using drugs or alcohol prior to a domestic assault, does it complicate the case for the investigator or prosecutor? If so, in what way, and why?
- ▶ The victim in this case moved out at least seven times prior to the assault resulting in federal prosecution. Is it unusual for a victim of domestic violence to return to her batterer? Do you think it is harder for victims of domestic violence living in tribal communities to leave their assailants? If so, why? Is there anything that the criminal justice system can or should do to facilitate a victim leaving her batterer?
- ▶ In this case, the victim and defendant have minor children together. What effect can minor children have on a victim’s willingness to report a crime or leave a batterer? What are the possible immediate and long-term effects of domestic violence on children living

in the home? Do you think that children who grow up in homes where domestic violence is present will themselves become abusers or victims? What types of services should be provided to children who witness or experience domestic violence? Can and/or should a defendant's sentence be enhanced for committing domestic violence in front of minor children?

- ▶ In this case, investigators and prosecutors had the benefit of medical records documenting injuries suffered by the victim. Does your agency have policies and procedures for domestic violence cases encouraging victims to seek medical attention? Are medical providers in your jurisdiction mandated to report their findings to law enforcement? What are the pros and cons of mandatory medical reporting?
- ▶ The victim provided a victim impact statement to the sentencing court. What type of information should be included in a victim impact statement? How important is it for victims to be able to address the court at the time of sentencing? Are there any risks to victims for making a statement at sentencing?
- ▶ The defendant received an 8- to 14-month prison sentence. What should the victim be doing to prepare for the defendant's release from prison? Should the criminal justice system and/or social services continue to be involved in the case post-sentencing? Are there services and/or referrals that could assist the victim and her family after the criminal case is completed?
- ▶ The prosecutor talked about the "ripple effect" the defendant's prosecution had on investigators, who now see how a federal statute can be used to prosecute a domestic abuser. What will you do in your jurisdiction to ensure that first responders are aware of these federal statutes? When a case is successfully prosecuted in federal court, do you see a similar "ripple effect," with victims in the community feeling more confident in reporting crimes?
- ▶ On January 11, 2010, the Deputy Attorney General (DAG) issued a memorandum declaring public safety in tribal communities a top priority for the U.S. Department of Justice. The DAG directed all USAOs with Indian Country to consult at least annually with the tribes in their districts and to develop an Operational Plan addressing public safety issues in Indian Country. Have you had an opportunity to participate in the USAO/tribal consultation sessions?
- ▶ The DAG memorandum stated that "addressing violence against women and children in Indian Country is a Department of Justice priority." Accordingly, each USAO Operational Plan should address the proper handling of cases involving violence against women and children. Have the Federal Government and the tribal communities in your jurisdiction taken steps to ensure that a plan exists to address misdemeanor-level domestic violence crimes committed by non-Indian offenders against Indian victims? Has your agency instituted a plan, policy, or procedures to ensure that lethality risks and victim safety considerations are adequately addressed in domestic violence and sexual assault cases,

including misdemeanor offenses? While there were no allegations of sexual assault in this particular case, many victims of domestic violence are also victims of sexual abuse. In your jurisdiction, are victims of domestic violence asked about the presence of sexual violence in the relationship? What steps were taken by your agency or in your jurisdiction to ensure that medical professionals and law enforcement personnel have rape kits, and that competent and compassionate medical professionals are available to perform forensic medical examinations on victims reporting sexual assault?

Perspectives on the Future

Topics for Discussion

- ▶ List three things you and your agency can do to work more proactively on domestic violence cases with your tribal, state, and federal counterparts.
- ▶ Name one thing that you personally intend to do for the first time, or to do differently going forward, to ensure that victims of domestic violence get the help and support they need.
- ▶ As your agency and jurisdiction work toward creating a multidisciplinary and/or multi-jurisdictional response to domestic violence, do you solicit advice from domestic violence victims? What value may the victims' voices add?
- ▶ Sometimes when there are changes in leadership, a government or an agency's response to a particular issue changes. What steps can you or your agency take to institutionalize positive changes in the response to victims of domestic violence so that these improvements remain in place even if there is a change in leadership?



SUPPLEMENTAL INFORMATION: RELEVANT FEDERAL STATUTES

The Violence Against Women Act (VAWA)

Interstate Travel to Commit Domestic Violence - 18 U.S.C. § 2261

18 U.S.C. § 2261(a)(1)

It is a federal crime for a person to cross state or foreign boundaries or enter or leave Indian Country or within the SMTJ 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, former spouse, past or present cohabitant (as long as the parties cohabitated as spouses), and parents of a child in common. The term "dating partner" (added in the 2005 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 relationship, the type of 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, 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.

Interstate Stalking - 18 U.S.C. § 2261A

The interstate stalking law was enacted in 1996 and amended in 2000 and 2005. It now provides that it is a federal crime to cross a state or foreign boundary or 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, 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 SMTJ of the United States.

VAWA created an additional crime of cyberstalking. This statute, amended in 2005, now provides that it is a federal crime to use the mail, or any interactive computer service, or any facility of interstate commerce (including the Internet), with the intent to kill, injure, harass, or place under surveillance with intent to kill, injure, harass, intimidate, or cause substantial emotional distress to, a person in another state or tribal jurisdiction or within the SMTJ of the United States; or to place a person in another state or tribal jurisdiction or within the SMTJ of the United States in reasonable fear of death or serious bodily injury to that person or a member of that person's immediate family. Under both prongs of the statute, the defendant must also 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 (18 U.S.C. § 2266(2)) defines a "course of conduct" as a "pattern of conduct composed of two or more acts, evidencing a continuity of purpose."

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 or travel into and out of Indian Country with the intent to engage in conduct that violates 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 Federal 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 SMTJ 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 Federal 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 (a)(2). To assist in this effort, in addition to state registries, NCIC maintains a Protection Order File into which almost all states voluntarily provide, in full or in part, their protection order information. Tribal protection orders may also be entered. This Protection Order File allows law enforcement and prosecutors to verify instantaneously the existence of protection orders, and is of enormous benefit to federal authorities in the prosecution of criminal cases under § 2262; however, this file is not the exclusive repository of protection orders and it should not be assumed that a protection order is invalid if it is not located following an NCIC query.

Applicability to Same Sex Relationships

In 2010, the Office of Legal Counsel issued an opinion that addressed whether the criminal provisions of VAWA apply to otherwise-covered conduct when the offender and the victim are the same sex. The statutes in question are 18 U.S.C. §§ 2261, 2261A, and 2262. The opinion concludes that the protection of “persons” and “intimate partners” and “dating partners” is governed by the plain language of the statute encompassing persons of both sexes and “nothing in the text or the structure or purpose of VAWA indicates that a departure from plain meaning would be appropriate.” This analysis applies to “person,” “intimate partners,” and “dating partners,” as defined in 18 U.S.C. § 2266(7). These statutes also cover prohibited conduct against a spouse. The opinion can be found at www.justice.gov/olc/2010/vawa-opinion-04272010.pdf.

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 2005 VAWA amendments add 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.

Domestic Assault by an Habitual Offender - 18 U.S.C. § 117

This offense was created with the passage of the 2005 VAWA amendments; it punishes any person who commits a domestic assault in Indian Country or within the SMTJ of the United States who has two prior federal, state, or tribal court convictions for offenses that would be—subject to federal jurisdiction—an assault, a sexual abuse offense, an offense under Chapter 110A, or a serious 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.

In July 2011, the United States Courts of Appeals for the Eighth and Tenth Circuits upheld the constitutionality of 18 USC § 117. See *United States v. Cavanaugh*, 643 F.3d 592 (8th Cir. 2011), and *United States v. Shavanaux*, 647 F.3d 993 (10th Cir. 2011). Both courts rejected a constitutional challenge to the use of uncounseled tribal court convictions as predicates for prosecution under the Domestic Assault by an Habitual Offender statute.

The *Cavanaugh* court found that “predicate convictions, valid at their inception, and not alleged to be otherwise unreliable, may be used to prove the elements of § 117.” Cavanaugh did not allege any irregularities in the proceedings that led to his prior tribal court convictions beyond the absence of counsel. The Bill of Rights does not apply to Indian tribal governments (*Duro v. Reina*, 495 U.S. 676, 693 (1990)). Rather, the minimum federal rights guaranteed to defendants in tribal courts are statutory rights provided by the Indian Civil Rights Act of 1968; 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(a)(6)). The Indian Civil Rights Act only requires the appointment of counsel for indigent defendants in tribal court for prosecutions that result in a term of incarceration greater than 1 year (25 U.S.C. § 1302(C)). Therefore, Cavanaugh was not entitled to the appointment of counsel in the tribal court. The Eighth Circuit found that Cavanaugh’s tribal court convictions were valid from their inception.

The *Shavanaux* decision held that the use of Shavanaux’s uncounseled tribal court convictions as predicate offenses under § 117(a) did not violate the Sixth Amendment because the Bill of Rights does not apply to Indian tribes. Therefore, the only requirement is that Shavanaux’s convictions complied with the Indian Civil Rights Act, which they did. The court also held that the use of Shavanaux’s uncounseled convictions did not violate the Due Process Clause of the Fifth Amendment because the tribal court convictions were obtained through “procedures compatible with due process of law” and Shavanaux did not contest the tribal court’s jurisdiction. Lastly, the court held that § 117(a) does not violate equal protection because the special treatment of Indians under the law is rationally related to the government’s legitimate interest in protecting Indians from domestic violence.

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.

Firearm Offenses

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 as to 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 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 or tribal 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 2005 VAWA amendments require each state, in order to maintain its STOP Violence Against Women Formula Grant Program 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)(42 U.S.C. § 3796gg-4(e)). This requirement may apply to certain tribes that obtain STOP subgrants. (Please refer any questions about the applicability of 18 U.S.C. § 922(g) (8) to the USAO in your district.)

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 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 concerning knowledge on the part of the supplier may be difficult to establish.

Possession of Firearm After Conviction of Misdemeanor Crime of Domestic Violence - 18 U.S.C. § 922(g)(9)

As of 1996, it is illegal to possess a firearm and/or ammunition after conviction 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 law's effective date. A qualifying MCDV 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 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 or set aside, or if civil rights have been restored, unless the pardon or restoration contains a firearm restriction.

The MCDV definition was expanded in 2006 to include tribal court convictions. On August 16, 2006, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) issued an "Open Letter to Tribal Law Enforcement Departments." The memorandum discusses potential difficulties that may arise in the qualification of tribal convictions and states that a person is not considered convicted unless they were represented by counsel in the proceeding for the underlying offense, or knowingly and intelligently waived the right to counsel (18 U.S.C. § 921(a)(33)(B)(i)). The memorandum 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 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."

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.

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.

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.

Penalties

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

Other Relevant Statutes

Full Faith and Credit to Orders of Protection - 18 U.S.C. § 2265

This civil law provides that a civil or criminal domestic protection order issued by a court in one state, 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 have provided 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 (a) the original respondent did not file a cross or counter petition seeking a protective order, or (b) 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 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)).

Bureau of Indian Affairs (BIA) Arrest Authority – 25 U.S.C. § 2803(3)

Section 908(b) of VAWA 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 cohabitating with or has cohabitated 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 officer has probable cause to believe that the person to be arrested has committed, or is committing, a crime.

Amendment to ATF Form 4473

In July 2005, ATF revised Form 4473, 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 or she 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) or 18 U.S.C. § 924(a)(1).

Right of Victim to Speak at Bail Hearing - 18 U.S.C. § 2263

The victim of a VAWA crime has the right—a right that 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 USAO may move for pre-trial detention of the defendant.

Rights of Crime Victims - 18 U.S.C. § 3771(a)

Under the Crime Victims' Rights Act, enacted in 2004, all federal crime victims, including domestic violence victims, 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 proceeding, or any parole proceeding, involving the 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.

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.

Indian Country Legal Basics

Defining Indian Country for Purposes of Federal Jurisdiction

The term "Indian Country" is defined in 18 U.S.C. § 1151 as including "(a) all land within the boundaries of the reservations of federally recognized Indian tribes, including patented land and any rights-of-way running through the reservation; (b) dependent Indian communities; and (c) Indian allotments to which title has not been extinguished, including any rights-of-way running through the allotment." If an Indian Country case is charged in federal court, the prosecutor must be prepared to prove that the crime took place on a reservation or other Indian land.

Determining Who Is an Indian

The term "Indian" is not defined by statute. Court opinions have articulated tests based on the degree of Indian blood and whether tribal or Federal Governments recognize the person as Indian. The tribe must be federally recognized for the person to be considered an Indian subject to federal criminal jurisdiction under the Major Crimes Act. Canadian tribes are not federally recognized for purposes of treating their tribal members as Indian offenders or victims in the United States. Different federal courts have established different standards defining who is an Indian for purposes of federal criminal prosecution. Therefore, it is important to consult with staff in the USAO to learn what the standard is in a particular federal judicial district.

The General Crimes Act

The General Crimes Act was passed by Congress in 1817. The law, 18 U.S.C. § 1152, extended federal criminal jurisdiction over interracial crimes committed in Indian Country. It applies to cases where (1) either the offender is not Indian but the victim is, or the offender is Indian but the victim is not; (2) the crime falls outside of the Major Crimes Act; and (3) the Indian offender has not already been punished by the tribe for that conduct. In Indian Country prosecutions under § 1152, substantive federal criminal statutes that otherwise apply on federal lands may be “borrowed” pursuant to the Federal Enclaves Act, 18 U.S.C. § 7.

The Assimilative Crimes Act

In 1825, Congress passed the Federal Crimes Act, which was a precursor to what is now known as the Assimilative Crimes Act, 18 U.S.C. § 13. This Act provides that where there is no applicable substantive federal crime, the law of the state in which the crime occurred may be incorporated into the federal criminal code in § 1152 prosecutions. State misdemeanor offenses can also be assimilated.

Non-Indian Versus Non-Indian Crimes in Indian Country

The U.S. Supreme Court in *United States v. McBratney*, 104 U.S. 621 (1882), held that states have exclusive jurisdiction over crimes in Indian Country involving only non-Indians.

Victimless Crimes

In addition, states also have been deemed to have exclusive jurisdiction over “victimless crimes” committed by a non-Indian. Victimless crimes typically include such offenses as traffic violations and disorderly conduct.

Victimless Crime With a Particularized Threat

Some crimes that are commonly thought of as being “victimless” may pose a particularized threat to individual persons or their property, or to specific tribal interests. Examples include crimes such as bribery calculated to obstruct or corrupt the functioning of tribal government, speeding in the vicinity of an Indian school, or a breach of peace that borders on an assault. In such cases, the statutory analysis focusing on the tribal affiliation of the offender and the “victim” is used.

The Major Crimes Act

Passed in 1885, the Major Crimes Act, 18 U.S.C. § 1153, provides federal criminal jurisdiction over certain specified crimes if the offender is Indian. The crimes specified in § 1153 are commonly called the “major crimes” and are as follows: murder, manslaughter, kidnapping, maiming, a felony under Chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within Indian Country. The Major Crimes Act is the main source of federal jurisdiction for crimes in which both the offender and the victim are Indians and the crime occurred in Indian Country. Tribes retain jurisdiction to prosecute Indians for conduct that might constitute a § 1153 felony. Therefore, an Indian defendant may be prosecuted “concurrently” in two jurisdictions for the same crime. The Constitutional prohibition against double jeopardy does not apply since the United States and Indian tribes are separate sovereigns. See *United States v. Wheeler*, 435 U.S. 313 (1978).

General Federal Crimes of Nationwide Applicability

These types of offenses are federal crimes regardless of who commits the crime (Indian or non-Indian), and where the crime occurs. For example, federal crimes concerning firearms, controlled substances, and VAWA apply to all persons, Indian and non-Indian, even if the crimes are committed in Indian Country. These federal statutes apply to Indian Country independent of the Major, General, or Assimilative Crimes Acts.

Public Law 280

In 1953, Congress passed Public Law (PL) 280, providing that criminal jurisdiction and limited civil jurisdiction over Indian Country was delegated from the Federal Government to six states: Alaska (with the exception of the Metlakatla Indian Tribe), California, Minnesota (with the exception of the Red Lake Reservation), Nebraska, Oregon (with the exception of the Warm Springs Reservation), and Wisconsin. These states are commonly referred to as the “mandatory” PL 280 states. The law also permitted non-mandatory states to opt in; these states are now commonly referred to as “optional” PL 280 states. Amendments to Public Law 280 contained in the Indian Civil Rights Act allowed states to retrocede jurisdiction back to the Federal Government. Section 221 of TLOA, passed in 2010, provides that tribes can ask the Attorney General to reassume concurrent jurisdiction.

Tribal Court Sentencing Authority

Originally passed in 1968, the Indian Civil Rights Act (ICRA) (25 U.S.C. § 1302) extended certain federal rights to Indians in Indian Country, similar to federal constitutional rights. When originally passed, ICRA limited tribal courts' sentencing authority to 6 months in jail and \$5,000 for any offense. A 1986 amendment to ICRA increased the tribal court sentencing limit to a maximum of 1 year in jail and a \$5,000 fine for any one crime. TLOA restored limited felony sentencing authority to tribes, and allows for sentencing up to 3 years and \$15,000 per offense, for a combined maximum sentence of 9 years per criminal proceeding. Tribes using this enhanced sentencing authority are required to guarantee certain rights to defendants, including the right to indigent defense counsel. To qualify as a felony, a tribal offense must either be a repeat offense or an offense considered to be a felony by any state or the Federal Government. Pursuant to 25 U.S.C. § 1303, a writ of habeas corpus shall be available to any person to test the legality of their detention by order of an Indian tribe.

Tribal Court Authority Over Non-Indians

The U.S. Supreme Court ruled in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), that tribal courts do not have criminal jurisdiction over non-Indian offenders. If the victim is Indian, the Federal Government has exclusive jurisdiction pursuant to the General Crimes Act. If the victim is non-Indian, the state has exclusive jurisdiction under *United States v. McBratney*, 104 U.S. 621 (1882).



Using Federal Law To Prosecute Domestic Violence Crimes in Indian Country

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