

WORKING ACROSS JURISDICTIONS TO PROTECT VICTIMS OF CRIME

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SOME EXAMPLES OF PROBLEMS THAT ARISE

- A non-Indian teacher for a State public school district located on a reservation is observed improperly acting toward young Indian students (providing alcohol to them and making sexual innuendos to females) and this teacher's behaviors are brought to the attention of the Tribe-
What can the Tribe do?

Another situation

- An Indian from the Fort Peck Indian reservation is released from a federal penitentiary where he was serving a sentence for sexual abuse of a child- He moves to the Pine Ridge reservation and starts living with a tribal member and her children. Tribe finds out about this- What can the Tribe do?

Another common one

- Tribal Child Protection program receives a referral from school that a tribal member child is reporting improper touching by stepfather- CPP investigates and files for emergency removal of child. Case is turned over to BIA CI and on to FBI- 8 months later the child is still in foster care and there have been no charges filed against stepfather. What should the Tribe do?

LAST ONE

- A young boy, when 8 years old, is sexually abused by an uncle and uncle goes to prison. Victim receives some counseling but after the uncle is prosecuted counseling stops. When the boy is 14 yrs old he begins perpetrating on younger boys at school and this is reported to law enforcement and the Child Protection program- What should the Tribe do?

TRIBAL COURT JURISDICTION- NON PUBLIC LAW 280

- Tribal Courts have jurisdiction, concurrent with federal courts over Major Crimes under 18 USC §1153 and victimless crimes, and exclusive over other crimes, committed by Tribal members within Indian country-Inherent authority
- Tribal Courts have inherent authority over non-member Indians who commit crimes within Indian country- US v. Lara

CRIMINAL JURISDICTION IN INDIAN COUNTRY

- Overview of general rules of criminal jurisdiction in Indian country both in Public Law 280 and non-Public Law 280 states
- Jurisdiction depends upon place crime committed, race of perpetrator and victim, type of crime, statutes specifying Federal/State/Tribal jurisdiction

INDIAN COUNTRY DEFINED

- 18 U.S.C. §1151 defines Indian country
- All lands that lie within established reservation boundaries
- All allotted lands wherever situated- Especially important for reservations that lack established boundaries
- All rights of way running through allotted or trust lands, wherever situated
- Dependent Indian communities-communities that depend on federal assistance (Indian housing projects, boarding schools etc)

FEDERAL COURT JURISDICTION

- Indian Country Crimes Act (aka General Crimes Act)- 18 USC §1152-gives United States jurisdiction over crimes committed by non-Indians against Indians in Indian country and non-major crimes committed by Indians against non-Indians
- Assimilative Crimes Act- 18 USC §13-applies laws of states to federal enclaves including Indian reservations- applies thru the General Crimes Act-applies to victimless crimes committed by both Indians and non-Indians in Indian country
- Major Crimes Act- 18 USC §1153- applies to Indians who commit certain major crimes against other Indians or non-Indians

STATE COURT JURISDICTION

- State courts have jurisdiction over crimes committed by non-Indian against another non-Indian in Indian country and over victimless crimes committed by non-Indians, although the latter may be concurrent with the federal courts
- See *United States v. McBratney*, 104 U.S. 621(1881)

CRIMINAL JURISDICTION IN PUBLIC LAW 280 STATES

- Tribal Courts have exclusive jurisdiction over criminal regulatory offenses (certain traffic offenses, violations of regulatory laws, trespass on tribal lands) and crimes involving the internal affairs of the Tribe and concurrent with state courts over all other offenses
- State has concurrent criminal jurisdiction over all state prohibitory offenses
- Federal courts retain jurisdiction over federal crimes of general applicability

FEDERAL DECISIONS TO PROSECUTE WHEN TRIBAL PROSECUTION MAY BE PENDING

- United States Attorney Manual- §9-27.240
- Decision is based upon:
 - Strength of other jurisdiction's interest in prosecution;
 - Other jurisdiction's ability and willingness to prosecute;
 - The probable sentence in other jurisdiction
 - Because tribal courts are limited to one year sentence policy militates against deferring to tribal court jurisdiction

UNITED STATES V. LARA

Supreme Court Recognizes
Congressional Authority to Restore
Inherent Tribal Authority

QUESTIONS PRESENTED

- Was the Duro fix a delegation of federal authority or a congressional recognition of inherent tribal authority?
- Court holds 7-2 that Congress can restore inherent tribal authority that the Supreme Court had held Tribes had been implicitly divested of

FACTS

- Billy Jo Lara, a Turtle Mountain Chippewa Indian, is banished from Spirit Lake reservation, comes back, and while being arrested assaults a federal officer
- Tribal Court prosecutes him for violence to policeman and he pleads guilty and does not raise any challenge to tribal court jurisdiction
- After his release from tribal jail he gets prosecuted for same conduct in federal court

BREYER ISSUES OPINION FOR REHNQUIST, STEVENS, OCONNOR AND GINSBURG

- Opinion first holds that Congress clearly intended that Tribes be able to prosecute nonmember Indians under their “inherent sovereignty” and not as a delegation of federal authority
- Opinion holds that the restriction on inherent authority recognized in *Duro* was a “political”, not constitutional restriction, and the Congress has the ability to ease this political restriction
- Court reiterates that Congress acts toward Indian tribes with plenary authority and it can grant jurisdiction to Indian tribes without running afoul of the Constitution but warns that such grants of jurisdiction cannot interfere with State rights (look out Indian Child Welfare Act and this may also be a warning to Congress not to extend jurisdiction to non-Indians)

WHAT ABOUT LARA'S CONSTITUTIONAL ARGUMENTS?

- Court holds that Lara's due process argument (that Congress has given an entity the power to prosecute him without giving him legal counsel) and his equal protection argument should have been raised in tribal court
- Court never reaches the due process and equal protection arguments those leaving these issues to be resolved after a challenge to a tribal court prosecution

STEVENS CONCURS

- Tribal sovereignty was superior to state sovereignty and if Congress can grant states powers they did not inherently possess they can certainly restore a power Tribes historically had (Give that man a cigar)

KENNEDY CONCURS

- Holds that Court should not even address whether Congress has the authority to relax political restrictions on tribal inherent authority because the issue should have been raised in the tribal court thus Lara had not standing to raise it

THOMAS CONCURS

- Indian law is schizophrenic- how can one government restore inherent sovereignty to another- Time to revisit the basic principles of federal Indian law
- States the Congress can only give authority to prosecute to an entity under control of the Executive (president) and Tribes are certainly not under his control
- Thomas would overturn Wheeler and find that Tribes have no vestiges of inherent sovereignty and are completely dependent upon Congress to define their rights

SOUTER AND SCALIA DISSENT (Strange bedfellows huh)

- Dissent says that Duro and Oliphant hold that Tribes can get authority that they have been divested of only by a delegation from Congress

TRIBAL-FEDERAL COORDINATION ISSUES IN CHILD SEXUAL ABUSE CASES

- Which jurisdiction should prosecute? Tribes can prosecute child sexual abuse crime even if federal or state prosecution
- Watch for the jurisdiction over Indian from other reservation issue- US v. Lara, 294 F.3d 1004 (8thCir) and United States v. Enas, 255 F.3d 662 (9th Cir.)
- Release conditions
- Civil Child Protection Issues
- Reporting Requirements After Release

SPECIFIC FEDERAL STATUTES

§ 2241. Aggravated sexual abuse

- (a) By force or threat. Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly causes another person to engage in a sexual act--
 - (1) by using force against that other person; or
 - (2) by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping;or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.
- (b) By other means. Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly--
 - (1) renders another person unconscious and thereby engages in a sexual act with that other person; or
 - (2) administers to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance and thereby--
 - (A) substantially impairs the ability of that other person to appraise or control conduct; and
 - (B) engages in a sexual act with that other person;or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.
- (c) With children. Whoever crosses a State line with intent to engage in a sexual act with a person who has not attained the age of 12 years, or in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in a sexual act with another person who has not attained the age of 12 years, or knowingly engages in a sexual act under the circumstances described in subsections (a) and (b) with another person who has attained the age of 12 years but has not attained the age of 16 years (and is at least 4 years younger than the person so engaging), or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both. If the defendant has previously been convicted of another Federal offense under this subsection, or of a State offense that would have been an offense under either such provision had the offense occurred in a Federal prison, unless the death penalty is imposed, the defendant shall be sentenced to life in prison.
- (d) State of mind proof requirement. In a prosecution under subsection (c) of this section, the Government need not prove that the defendant knew that the other person engaging in the sexual act had not attained the age of 12 years.

18 U.S.C. 2242- Sexual Abuse

§ 2242. Sexual abuse

- Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly--
 - (1) causes another person to engage in a sexual act by threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping);
 - or
 - (2) engages in a sexual act with another person if that other person is--
 - (A) incapable of appraising the nature of the conduct; or
 - (B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act;or attempts to do so, shall be fined under this title, imprisoned not more than 20 years, or both.

SEXUAL ABUSE OF MINOR OR WARD

§ 2243. Sexual abuse of a minor or ward

(a) Of a minor. Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in a sexual act with another person who--

- (1) has attained the age of 12 years but has not attained the age of 16 years; and
- (2) is at least four years younger than the person so engaging;

or attempts to do so, shall be fined under this title, imprisoned not more than 15 years, or both.

(b) Of a ward. Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in a sexual act with another person who is--

- (1) in official detention; and
- (2) under the custodial, supervisory, or disciplinary authority of the person so engaging;

or attempts to do so, shall be fined under this title, imprisoned not more than one year, or both.

(c) Defenses.

- (1) In a prosecution under subsection (a) of this section, it is a defense, which the defendant must establish by a preponderance of the evidence, that the defendant reasonably believed that the other person had attained the age of 16 years.
- (2) In a prosecution under this section, it is a defense, which the defendant must establish by a preponderance of the evidence, that the persons engaging in the sexual act were at that time married to each other.

(d) State of mind proof requirement. In a prosecution under subsection (a) of this section, the Government need not prove that the defendant knew--

- (1) the age of the other person engaging in the sexual act; or
- (2) that the requisite age difference existed between the persons so engaging.

INVESTIGATING AND REPORTING OF CHILD SEXUAL ABUSE

- Congress has specifically found in the Indian Child Protection and Family Violence Prevention Act, Pub L. 101-630, codified as amended at 25 USC §§3201-3211 that reporting of child sexual abuse in Indian country was problematic and needed to be mandated

PURPOSE OF FEDERAL LAW

- Indian Child Protection and Family Violence Prevention Act, Pub L. 101-630, codified as amended at 25 USC §§3201-3211
 - (2) declares that two major goals of the United States are to--
 - (A) identify the scope of incidents of abuse of children and family violence in Indian country and to reduce such incidents; and
 - (B) provide funds for mental health treatment for Indian victims of child abuse and family violence on Indian reservations.

REPORTING METHOD

- b) Notification of child abuse reports.
 - (1) When a local law enforcement agency or local child protective services agency receives an initial report from any person of--
 - (A) the abuse of a child in Indian country, or
 - (B) actions which would reasonably be expected to result in abuse of a child in Indian country, the receiving agency shall immediately notify appropriate officials of the other agency of such report and shall also submit, when prepared, a copy of the written report required under subsection (c) to such agency.
 - (2) Where a report of abuse involves an Indian child or where the alleged abuser is an Indian and where a preliminary inquiry indicates a criminal violation has occurred, the local law enforcement agency, if other than the Federal Bureau of Investigation, shall immediately report such occurrence to the Federal Bureau of Investigation.
- (c) Written report of child abuse.
 - (1) Within 36 hours after receiving an initial report described in subsection (b), the receiving agency shall prepare a written report which shall include, if available--
 - (A) the name, address, age, and sex of the child that is the subject of the report;
 - (B) the grade and the school in which the child is currently enrolled;
 - (C) the name and address of the child's parents or other person responsible for the child's care;
 - (D) the name and address of the alleged offender;
 - (E) the name and address of the person who made the report to the agency;
 - (F) a brief narrative as to the nature and extent of the child's injuries, including any previously known or suspected abuse of the child or the child's siblings and the suspected date of the abuse; and
 - (G) any other information the agency or the person who made the report to the agency believes to be important to the investigation and disposition of the alleged abuse.
 - (2) (A) Any local law enforcement agency or local child protective services agency that receives a report alleging abuse described in section 505(3) shall immediately initiate an investigation of such allegation and shall take immediate, appropriate steps to secure the safety and well-being of the child or children involved.
 - (B) Upon completion of the investigation of any report of alleged abuse that is made to a local law enforcement agency or local child protective services agency, such agency shall prepare a final written report on such allegation.
- (d) Confidentiality of informant. The identity of any person making a report described in subsection (b)(1) shall not be disclosed, without the consent of the individual, to any person other than a court of competent jurisdiction or an employee of an Indian tribe, a State or the Federal Government who needs to know the information in the performance of such employee's duties.

SHARING REPORTS

- § 3205. Confidentiality
- Pursuant to section 552a of title 5, United States Code, the Family Educational Rights and Privacy Act of 1974 (20 U.S.C. 1232g), or any other provision of law, agencies of any Indian tribe, of any State, or of the Federal Government that investigate and treat incidents of abuse of children may provide information and records to those agencies of any Indian tribe, any State, or the Federal Government that need to know the information in performance of their duties. For purposes of this section, Indian tribal governments shall be treated the same as other Federal Government entities.

ISSUES ARISING AT TRIAL

- **18 USC §3509(b) allows child to testify in federal court via closed circuit television when:**
 - (i) The child is unable to testify because of fear.
 - (ii) There is a substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying.
 - (iii) The child suffers a mental or other infirmity.
 - (iv) Conduct by defendant or defense counsel causes the child to be unable to continue testifying

INVESTIGATING AND REPORTING ISSUES IN INDIAN COUNTRY

- Eliminating multiple interviews of child victim
- Assuring that reports get from tribal police to federal criminal investigators to FBI and to US Attorney's office
- Assuring that communication between federal law enforcement and tribal prosecutor assures protection of child during the investigative and prosecution process
- Assuring that Defendant does not have access to child during pre-trial process