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TRIBAL LAW AND ORDER ACT OF 2009

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

ON

H.R. 1924

DECEMBER 10, 2009

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CONTENTS

DECEMBER 10, 2009

Page

TEXT OF THE BILL

H.R. 1924, the "Tribal Law and Order Act of 2009" 3

OPENING STATEMENTS

The Honorable Robert C. "Bobby" Scott, a Representative in Congress from the State of Virginia, and Chairman, Subcommittee on Crime, Terrorism, and Homeland Security 1
The Honorable Daniel E. Lungren, a Representative in Congress from the State of California, and Member, Subcommittee on Crime, Terrorism, and Homeland Security 29

WITNESSES

The Honorable Stephanie Herseth Sandlin, a Representative in Congress from the State of South Dakota
Oral Testimony 31
Prepared Statement 34
The Honorable Thomas J. Perrelli, Associate Attorney General, United States Department of Justice, Washington, DC
Oral Testimony 38
Prepared Statement 40
Mr. Marcus Levings, Great Plains Area Vice-President, National Congress of American Indians, New Town, ND
Oral Testimony 66
Prepared Statement 68
Ms. Tova Indritz, Chair, National Association of Criminal Defense Lawyers, Native American Justice Committee, Albuquerque, NM
Oral Testimony 75
Prepared Statement 78
Mr. Scott Burns, Executive Director, National District Attorneys Association, Alexandria, VA
Oral Testimony 120
Prepared Statement 123
Ms. Barbara L. Creel, Assistant Professor of Law, Southwest Indian Law Clinic, University of New Mexico School of Law, Albuquerque, NM
Oral Testimony 127
Prepared Statement 129

LETTERS, STATEMENTS, ETC., SUBMITTED FOR THE HEARING

Material submitted by the Honorable Tom Rooney, a Representative in Congress from the State of Florida, and Member, Subcommittee on Crime, Terrorism, and Homeland Security 61

APPENDIX

Material Submitted for the Hearing Record 139

Page

OFFICIAL HEARING RECORD

MATERIAL SUBMITTED FOR THE HEARING RECORD BUT NOT REPRINTED

Submission entitled *Maze of Injustice, The failure to protect indigenous women from sexual violence in the USA,* Amnesty International. This document is available at the Subcommittee and can also be accessed at:

http://www.amnestyusa.org/women/maze/report.pdf

TRIBAL LAW AND ORDER ACT OF 2009

THURSDAY, DECEMBER 10, 2009

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIME, TERRORISM,
AND HOMELAND SECURITY
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:02 a.m., in room 2237, Rayburn House Office Building, the Honorable Robert C. "Bobby" Scott (Chairman of the Subcommittee) presiding.

Present: Representatives Scott, Quigley, Gohmert, Goodlatte, Lungren, and Rooney.

Staff present: (Majority) Karen Wilkinson, (Fellow) Federal Public Defender Office Detailee; Veronica Eligan, Professional Staff Member; Sam Sokol, Counsel; Elliott Mincberg, Counsel; (Minority) Caroline Lynch, Counsel; and Kimani Little, Counsel.

Mr. SCOTT. Subcommittee will now come to order. I am pleased to welcome you today to the hearing before the Subcommittee on Crime, Terrorism, and Homeland Security on H.R. 1924, the "Tribal Law and Order Act of 2009," sponsored by the gentlelady from South Dakota, Ms. Herseth Sandlin.

The general issue before us today is how to best prosecute crime in Indian country. I don't believe there is any dispute that violent crime in Indian country is unacceptable. Violent crime on reservations is unfortunately two, three, or four times that of the national average.

Amnesty International tells us that one in three American Indian and Alaskan Native women will be raped in their lifetime. This is a rate two and a half times the national average.

The risk of being murdered is twice as high for an American Indian living on a reservation as for the average American living off a reservation. Amphetamine has made its way to the reservations and, as in other areas, is destroying lives and communities.

In spite of these excessive high crime rates, law enforcement in Indian country remains underfunded, undertrained, and understaffed. Prosecution of crime in Indian country is also below the national average.

The Department of Justice reported earlier this year that the number of cases declined for prosecution on Indian country by the Federal Government, referred to as the declination rate, was 52.2 percent for fiscal year 2007 and 47 percent for fiscal year 2008. The rate for crimes reported off of Indian country is at 20.7 percent for fiscal 2007 and 15.6 percent for fiscal 2008. While these figures are

not directly comparable and do not tell the entire story, there indicate that there is a serious problem with crime control in Indian country and we need to make sure that the problems are addressed.

In addition to inadequate resources in which to investigate and prosecute serious crimes in Indian country there is also a dearth of evidence-based prevention and intervention tools, which we now know are effective in reducing crime before it occurs. And so it is important that we consider evidence-based crime prevention, intervention, substance abuse treatment, and reentry programs.

And great Indian country is vast, covering 56 million acres. In remote, scarcely populated areas such as these where responding to a crime may take hours of travel even under the best of circumstances, crime prevention is especially important.

The unique status of Indian tribes as an independent sovereigns together with the trust and responsibility of the United States to tribes, however, presents issues not normally faced by law enforcement. These issues affect core decisions, such as who is responsible for investigating and prosecuting a crime.

On Indian land a different law enforcement agency—tribal, State, and/or Federal—will have sole, primary, or shared responsibility for investigating a crime depending on tribal membership of the suspect and victim, the location of the crime, and the type of crime. By the time these jurisdictional questions are answered critical evidence may be lost forever.

Similarly, those who prosecute a case—tribal, State, or Federal Government—also depends on whether the suspect and victim are members of a tribe, whether the crime occurred on Indian country, and the type of crime. In most reservations serious felony crimes in Indian country that involve suspects and victims who are tribal members will be prosecuted in Federal courts under the Major Crimes Act.

In six States, however, known as Public Law 280 states, the State is responsible for prosecuting these crimes. Public Law 280 states are California, Alaska, Minnesota, Nebraska, Oregon, and Wisconsin.

H.R. 1924 expands Federal jurisdiction in Public Law 280 states so that tribal, State, and Federal Governments will now share concurrent jurisdiction over the same major crimes in Indian country. Other than this change, the bill does not alter existing jurisdiction over Indian country crime.

The bill also increases tribal sentencing authority from 1 year per offense to 3 years of incarceration for each offense. The intent of this provision is to increase tribal authority to prosecute and incarcerate more serious criminals, but it also raises significant concerns for the individual rights of tribal members because the Federal Constitution does not apply to tribal prosecutions. And this is true even though the tribal defendant is also a U.S. citizen.

One such concern is that there is no guarantee to right to counsel in tribal court. Some tribes may voluntarily offer legal representation to interested defendants, but others do not. Those that provide representation may appoint lawyers while other tribes merely appoint advocates who are neither lawyers nor legally trained.

The bill expands concurrent jurisdiction in PL 280 states and also fails to prioritize these possible investigations and prosecutions. So the question remains as to who should investigate and prosecute the case.

Should the Federal Government defer to the State governments and only intervene when the State asks for assistance or fails to prosecute, as in the hate crimes bill? Should tribal governments also have a say in who investigates the case and whether the case is prosecuted in State or Federal court?

This increased concurrent jurisdiction coupled with no guidance would seem to have the potential to create more confusion, resulting in fewer, not more, prosecutions. So I look forward to hearing from our witnesses about this issue.

I raise these concerns with the hope that our witnesses can help us draft a bill that will reduce the unacceptably high crime rate that currently plagues many Indian reservations while respecting the individual rights of tribal defendants. Tribal Law and Order Act of 2009 is a comprehensive bill that incorporates a number of different approaches to prosecuting crime. As with all crime bills, we need to examine the existing problems of reservation crime to ensure to the best that we can that the bill's provisions address those specific problems and avoid unintended consequences.

So I look forward to hearing from our witnesses on these issues.

And finally, I understand that the Senate Committee on Indian Affairs has proposed amendments to the Senate companion bill to H.R. 1924 that seek to address some of the concerns that have been raised with this bill. So we intend to look closely at these amendments.

[The text of the bill, H.R. 1924, follows:]

I

111TH CONGRESS
1ST SESSION

H. R. 1924

To amend the Indian Law Enforcement Reform Act, the Indian Tribal Justice Act, the Indian Tribal Justice Technical and Legal Assistance Act of 2000, and the Omnibus Crime Control and Safe Streets Act of 1968 to improve the prosecution of, and response to, crimes in Indian country, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

APRIL 2, 2009

Ms. HERSETH SANDLIN (for herself, Mr. KILDEE, and Mr. GRIJALVA) introduced the following bill; which was referred to the Committee on the Judiciary, and in addition to the Committees on Natural Resources, Energy and Commerce, and Education and Labor, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

A BILL

To amend the Indian Law Enforcement Reform Act, the Indian Tribal Justice Act, the Indian Tribal Justice Technical and Legal Assistance Act of 2000, and the

Omnibus Crime Control and Safe Streets Act of 1968 to improve the prosecution of, and response to, crimes in Indian country, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Tribal Law and Order Act of 2009".

(b) TABLE OF CONTENTS.—The table of contents of this Act is as follows:

Sec. 1. Short title; table of contents.
Sec. 2. Findings; purposes.
Sec. 3. Definitions.
Sec. 4. Severability clause.

TITLE I—FEDERAL ACCOUNTABILITY AND COORDINATION

Sec. 101. Office of Justice Services responsibilities.
Sec. 102. Declination reports.
Sec. 103. Prosecution of crimes in Indian country.
Sec. 104. Administration.

TITLE II—STATE ACCOUNTABILITY AND COORDINATION

Sec. 201. State criminal jurisdiction and resources.
Sec. 202. Incentives for State, tribal, and local law enforcement cooperation.

TITLE III—EMPOWERING TRIBAL LAW ENFORCEMENT AGENCIES AND TRIBAL GOVERNMENTS

Sec. 301. Tribal police officers.
Sec. 302. Drug enforcement in Indian country.
Sec. 303. Access to national criminal information databases.
Sec. 304. Tribal court sentencing authority.
Sec. 305. Indian Law and Order Commission.

TITLE IV—TRIBAL JUSTICE SYSTEMS

Sec. 401. Indian alcohol and substance abuse.
Sec. 402. Indian tribal justice; technical and legal assistance.
Sec. 403. Tribal resources grant program.
Sec. 404. Tribal jails program.
Sec. 405. Tribal probation office liaison program.
Sec. 406. Tribal youth program.

TITLE V—INDIAN COUNTRY CRIME DATA COLLECTION AND INFORMATION SHARING

Sec. 501. Tracking of crimes committed in Indian country.
Sec. 502. Grants to improve tribal data collection systems.
Sec. 503. Criminal history record improvement program.

TITLE VI—DOMESTIC VIOLENCE AND SEXUAL ASSAULT PROSECUTION AND PREVENTION

Sec. 601. Prisoner release and reentry.
Sec. 602. Domestic and sexual violent offense training.
Sec. 603. Testimony by Federal employees in cases of rape and sexual assault.
Sec. 604. Coordination of Federal agencies.
Sec. 605. Sexual assault protocol.

SEC. 2. FINDINGS; PURPOSES.

(a) FINDINGS.—Congress finds that—

(1) the United States has distinct legal, treaty, and trust obligations to provide for the public safety of tribal communities;

(2) several States have been delegated or have accepted responsibility to provide for the public safety of tribal communities within the borders of the States;

(3) Congress and the President have acknowledged that—

(A) tribal law enforcement officers are often the first responders to crimes on Indian reservations; and

(B) tribal justice systems are ultimately the most appropriate institutions for maintaining law and order in tribal communities;

(4) less than 3,000 tribal and Federal law enforcement officers patrol more than 56,000,000 acres of Indian country, which reflects less than ½ of the law enforcement presence in comparable rural communities nationwide;

(5) on many Indian reservations, law enforcement officers respond to distress or emergency calls without backup and travel to remote locations without adequate radio communication or access to national crime information database systems;

(6) the majority of tribal detention facilities were constructed decades before the date of enactment of this Act and must be or will soon need to be replaced, creating a multibillion-dollar backlog in facility needs;

(7) a number of Indian country offenders face no consequences for minor crimes, and many such offenders are released due to severe overcrowding in existing detention facilities;

(8) tribal courts—

(A) are the primary arbiters of criminal and civil justice for actions arising in Indian country; but

(B) have been historically underfunded;

(9) tribal courts have no criminal jurisdiction over non-Indian persons, and the sentencing authority of tribal courts is limited to sentences of not more than 1 year of imprisonment for Indian offenders, forcing tribal communities to rely solely on the Federal Government and certain State governments for the prosecution of—

(A) misdemeanors committed by non-Indian persons; and

(B) all felony crimes in Indian country;

(10) a significant percentage of cases referred to Federal agencies for prosecution of crimes allegedly occurring in tribal communities are declined to be prosecuted;

(11) the complicated jurisdictional scheme that exists in Indian country—

(A) has a significant negative impact on the ability to provide public safety to Indian communities; and

(B) has been increasingly exploited by criminals;

(12) the violent crime rate in Indian country is—

(A) nearly twice the national average; and

(B) more than 20 times the national average on some Indian reservations;

(13)(A) domestic and sexual violence against Indian and Alaska Native women has reached epidemic proportions;

(B) 34 percent of Indian and Alaska Native women will be raped in their lifetimes; and

(C) 39 percent of Indian and Alaska Native women will be subject to domestic violence;

(14) the lack of police presence and resources in Indian country has resulted in significant delays in responding to victims' calls for assistance, which adversely affects the collection of evidence needed to prosecute crimes, particularly crimes of domestic and sexual violence;

(15) alcohol and drug abuse plays a role in more than 80 percent of crimes committed in tribal communities;

(16) the rate of methamphetamine addiction in tribal communities is 3 times the national average;

(17) the Department of Justice has reported that drug organizations have increasingly targeted Indian country to produce and distribute methamphetamine, citing the limited law enforcement presence and jurisdictional confusion as reasons for the increased activity;

(18) tribal communities face significant increases in instances of domestic violence, burglary, assault, and child abuse as a direct result of increased methamphetamine use on Indian reservations;

(19)(A) criminal jurisdiction in Indian country is complex, and responsibility for Indian country law enforcement is shared among Federal, tribal, and State authorities; and

(B) that complexity requires a high degree of commitment and cooperation from Federal and State officials that can be difficult to establish;

(20) agreements for cooperation among certified tribal and State law enforcement officers have proven to improve law enforcement in tribal communities;

(21) consistent communication among tribal, Federal, and State law enforcement agencies has proven to increase public safety and justice in tribal and nearby communities; and

(22) crime data is a fundamental tool of law enforcement, but for decades the Bureau of Indian Affairs and the Department of Justice have not been able to coordinate or consistently report crime and prosecution rates in tribal communities.

(b) PURPOSES.—The purposes of this Act are—

(1) to clarify the responsibilities of Federal, State, tribal, and local governments with respect to crimes committed in tribal communities;

(2) to increase coordination and communication among Federal, State, tribal, and local law enforcement agencies;

(3) to empower tribal governments with the authority, resources, and information necessary to safely and effectively provide for the safety of the public in tribal communities;

(4) to reduce the prevalence of violent crime in tribal communities and to combat violence against Indian and Alaska Native women;

(5) to address and prevent drug trafficking and reduce rates of alcohol and drug addiction in Indian country; and

(6) to increase and standardize the collection of criminal data and the sharing of criminal history information among Federal, State, and tribal officials responsible for responding to and investigating crimes in tribal communities.

SEC. 3. DEFINITIONS.

(a) IN GENERAL.—In this Act:

(1) INDIAN COMMUNITY.—The term "Indian community" means a community of a federally recognized Indian tribe.

(2) INDIAN COUNTRY.—The term "Indian country" has the meaning given the term in section 1151 of title 18, United States Code.

(3) INDIAN TRIBE.—The term "Indian tribe" has the meaning given the term in section 102 of the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. 479a).

(4) SECRETARY.—The term "Secretary" means the Secretary of the Interior.

(5) TRIBAL GOVERNMENT.—The term "tribal government" means the governing body of an Indian tribe.

(b) INDIAN LAW ENFORCEMENT REFORM ACT.—Section 2 of the Indian Law Enforcement Reform Act (25 U.S.C. 2801) is amended by adding at the end the following:

"(10) TRIBAL JUSTICE OFFICIAL.—The term 'tribal justice official' means—

"(A) a tribal prosecutor;

"(B) a tribal law enforcement officer; or

"(C) any other person responsible for investigating or prosecuting an alleged criminal offense in tribal court.".

SEC. 4. SEVERABILITY CLAUSE.

If any provision of this Act, an amendment made this Act, or the application of such provision or amendment to any person or circumstance is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of the provisions of such to any person or circumstances shall not be affected thereby.

TITLE I—FEDERAL ACCOUNTABILITY AND COORDINATION

SEC. 101. OFFICE OF JUSTICE SERVICES RESPONSIBILITIES.

(a) DEFINITIONS.—Section 2 of the Indian Law Enforcement Reform Act (25 U.S.C. 2801) is amended—

(1) by striking paragraph (8);

(2) by redesignating paragraphs (1) through (7) as paragraphs (2) through (8), respectively;

(3) by redesignating paragraph (9) as paragraph (1) and moving the paragraphs so as to appear in numerical order; and

(4) in paragraph (1) (as redesignated by paragraph (3)), by striking "Division of Law Enforcement Services" and inserting "Office of Justice Services".

(b) ADDITIONAL RESPONSIBILITIES OF OFFICE.—Section 3 of the Indian Law Enforcement Reform Act (25 U.S.C. 2802) is amended—

(1) in subsection (b), by striking "(b) There is hereby established within the Bureau a Division of Law Enforcement Services which" and inserting the following:

"(b) OFFICE OF JUSTICE SERVICES.—There is established in the Bureau an office, to be known as the 'Office of Justice Services', that";

(2) in subsection (c)—

(A) in the matter preceding paragraph (1), by striking "Division of Law Enforcement Services" and inserting "Office of Justice Services";

(B) in paragraph (2), by inserting "and, with the consent of the Indian tribe, tribal criminal laws, including testifying in tribal court" before the semicolon at the end;

(C) in paragraph (8), by striking "and" at the end;

(D) in paragraph (9), by striking the period at the end and inserting a semicolon; and

(E) by adding at the end the following:

"(10) the development and provision of dispatch and emergency and E–911 services;

"(11) communicating with tribal leaders, tribal community and victims' advocates, tribal justice officials, and residents of Indian land on a regular basis regarding public safety and justice concerns facing tribal communities;

"(12) conducting meaningful and timely consultation with tribal leaders and tribal justice officials in the development of regulatory policies and other actions that affect public safety and justice in Indian country;

"(13) providing technical assistance and training to tribal law enforcement officials to gain access and input authority to utilize the National Criminal Information Center and other national crime information databases pursuant to section 534 of title 28, United States Code;

"(14) in coordination with the Attorney General pursuant to subsection (g) of section 302 of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3732), collecting, analyzing, and reporting data regarding Indian country crimes on an annual basis;

"(15) submitting to the Committee on Indian Affairs of the Senate and the Committee on Natural Resources of the House of Representatives, for each fiscal year, a detailed spending report regarding tribal public safety and justice programs that includes—

"(A)(i) the number of full-time employees of the Bureau and tribal government who serve as—

"(I) criminal investigators;

"(II) uniform police;

"(III) police and emergency dispatchers;

"(IV) detention officers;

"(V) executive personnel, including special agents in charge, and directors and deputies of various offices in the Office of Justice Services; or

"(VI) tribal court judges, prosecutors, public defenders, or related staff; and

"(ii) the amount of appropriations obligated for each category described in clause (i) for each fiscal year;

"(B) a list of amounts dedicated to law enforcement and corrections, vehicles, related transportation costs, equipment, inmate transportation costs, inmate transfer costs, replacement, improvement, and repair of facilities, personnel transfers, detailees and costs related to their details, emergency events, public safety and justice communications and technology costs, and tribal court personnel, facilities, and related program costs;

"(C) a list of the unmet staffing needs of law enforcement, corrections, and court personnel at tribal and Bureau of Indian Affairs justice agencies, the replacement and repair needs of tribal and Bureau corrections facilities, needs for tribal police and court facilities, and public safety and emergency communications and technology needs; and

"(D) the formula, priority list or other methodology used to determine the method of disbursement of funds for the public safety and justice programs administered by the Office of Justice Services;

"(16) submitting to the Committee on Indian Affairs of the Senate and the Committee on Natural Resources of the House of Representatives, for each fiscal year, a report summarizing the technical assistance, training, and other support provided to tribal law enforcement and corrections agencies that operate relevant programs pursuant to self-determination contracts or self-governance compacts with the Bureau of Indian Affairs; and

"(17) promulgating regulations to carry out this Act, and routinely reviewing and updating, as necessary, the regulations contained in subchapter B of title 25, Code of Federal Regulations (or successor regulations).";

(3) in subsection (d)—

(A) in paragraph (1), by striking "Division of Law Enforcement Services" and inserting "Office of Justice Services";

(B) in paragraph (3)—

(i) by striking "regulations which shall establish" and inserting "regulations, which shall—

"(A) establish";

(ii) by striking "reservation." and inserting "reservation; but"; and

(iii) by adding at the end the following:

"(B) support the enforcement of tribal laws and investigation of offenses against tribal criminal laws."; and

(C) in paragraph (4)(i), in the first sentence, by striking "Division" and inserting "Office of Justice Services";

(4) in subsection (e), by striking "Division of Law Enforcement Services" each place it appears and inserting "Office of Justice Services"; and

(5) by adding at the end the following:

"(f) LONG-TERM PLAN FOR TRIBAL DETENTION PROGRAMS.—Not later than 1 year after the date of enactment of this subsection, the Secretary, acting through the Bureau, in coordination with the Department of Justice and in consultation with tribal leaders, tribal law enforcement officers, and tribal corrections officials, shall submit to Congress a long-term plan to address incarceration in Indian country, including a description of—

"(1) proposed activities for the construction of detention facilities (including regional facilities) on Indian land;

"(2) proposed activities for the construction of additional Federal detention facilities on Indian land;

"(3) proposed activities for contracting with State and local detention centers, upon approval of affected tribal governments;

"(4) proposed activities for alternatives to incarceration, developed in cooperation with tribal court systems; and

"(5) other such alternatives to incarceration as the Secretary, in coordination with the Bureau and in consultation with tribal representatives, determines to be necessary.

"(g) LAW ENFORCEMENT PERSONNEL OF BUREAU AND INDIAN TRIBES.—

"(1) REPORT.—Not later than 60 days after the date of enactment of this subsection, the Secretary shall submit to the Committee on Indian Affairs of the Senate and the Committee on Natural Resources of the House of Representatives a report regarding vacancies in law enforcement personnel of Bureau and Indian tribes.

"(2) LONG-TERM PLAN.—Not later than 1 year after the date of enactment of this subsection, the Secretary shall submit to the Committee on Indian Affairs of the Senate and the Committee on Natural Resources of the House of Representatives a long-term plan to address law enforcement personnel needs in Indian country.".

(c) LAW ENFORCEMENT AUTHORITY.—Section 4 of the Indian Law Enforcement Reform Act (25 U.S.C. 2803) is amended—

(1) in paragraph (2)(A), by striking "), or" and inserting "or offenses committed on Federal property processed by the Central Violations Bureau); or"; and

(2) in paragraph (3), by striking subparagraphs (A) through (C) and inserting the following:

"(A) the offense is committed in the presence of the employee; or

"(B) the offense is a Federal crime and the employee has reasonable grounds to believe that the person to be arrested has committed, or is committing, the crime;".

SEC. 102. DECLINATION REPORTS.

Section 10 of the Indian Law Enforcement Reform Act (25 U.S.C. 2809) is amended by striking subsections (a) through (d) and inserting the following:

"(a) REPORTS.—

"(1) LAW ENFORCEMENT OFFICIALS.—Subject to subsection (d), if a law enforcement officer or employee of any Federal department or agency declines to initiate an investigation of an alleged violation of Federal law in Indian country, or terminates such an investigation without referral for prosecution, the officer or employee shall—

"(A) submit to the appropriate tribal justice officials evidence, including related reports, relevant to the case that would advance prosecution of the case in a tribal court; and

"(B) submit to the Office of Indian Country Crime relevant information regarding all declinations of alleged violations of Federal law in Indian country, including—

"(i) the type of crime alleged;

"(ii) the status of the accused as an Indian or non-Indian;

"(iii) the status of the victim as an Indian; and

"(iv) the reason for declining to initiate, open, or terminate the investigation.

"(2) UNITED STATES ATTORNEYS.—Subject to subsection (d), if a United States Attorney declines to prosecute, or acts to terminate prosecution of, an alleged violation of Federal law in Indian country, the United States Attorney shall—

"(A) submit to the appropriate tribal justice official, sufficiently in advance of the tribal statute of limitations, evidence relevant to the case to permit the tribal prosecutor to pursue the case in tribal court; and

"(B) submit to the Office of Indian Country Crime and the appropriate tribal justice official relevant information regarding all declinations of alleged violations of Federal law in Indian country, including—

"(i) the type of crime alleged;

"(ii) the status of the accused as an Indian or non-Indian;

"(iii) the status of the victim as an Indian; and

"(iv) the reason for the determination to decline or terminate the prosecution.

"(b) MAINTENANCE OF RECORDS.—

"(1) IN GENERAL.—The Director of the Office of Indian Country Crime shall establish and maintain a compilation of information received under paragraph (1) or (2) of subsection (a) relating to declinations.

"(2) AVAILABILITY TO CONGRESS.—Each compilation under paragraph (1) shall be made available to Congress on an annual basis.

"(c) INCLUSION OF CASE FILES.—A report submitted to the appropriate tribal justice officials under paragraph (1) or (2) of subsection (a) may include the case file, including evidence collected and statements taken that could support an investigation or prosecution by the appropriate tribal justice officials.

"(d) EFFECT OF SECTION.—

"(1) IN GENERAL.—Nothing in this section requires any Federal agency or official to transfer or disclose any confidential or privileged communication, information, or source to an official of any Indian tribe.

"(2) FEDERAL RULES OF CRIMINAL PROCEDURE.—Rule 6 of the Federal Rules of Criminal Procedure shall apply to this section.

"(3) REGULATIONS.—Each Federal agency required to submit a report pursuant to this section shall adopt, by regulation, standards for the protection of confidential or privileged communications, information, and sources under paragraph (1).".

SEC. 103. PROSECUTION OF CRIMES IN INDIAN COUNTRY.

(a) APPOINTMENT OF SPECIAL PROSECUTORS.—Section 543 of title 28, United States Code, is amended—

(1) in subsection (a), by inserting before the period at the end the following: ", including the appointment of qualified tribal prosecutors and other qualified attorneys to assist in prosecuting Federal offenses committed in Indian country"; and

(2) by adding at the end the following:

"(c) SENSE OF CONGRESS REGARDING CONSULTATION.—It is the sense of Congress that, in appointing attorneys under this section to serve as special prosecutors in Indian country, the Attorney General should consult with tribal justice officials of each Indian tribe that would be affected by the appointment.".

(b) TRIBAL LIAISONS.—The Indian Law Enforcement Reform Act (25 U.S.C. 2801 et seq.) is amended by adding at the end the following:

"SEC. 11. ASSISTANT UNITED STATES ATTORNEY TRIBAL LIAISONS.

"(a) APPOINTMENT.—Each United States Attorney the district of which includes Indian country shall appoint not less than 1 assistant United States Attorney to serve as a tribal liaison for the district.

"(b) DUTIES.—A tribal liaison shall be responsible for the following activities in the district of the tribal liaison:

"(1) Coordinating the prosecution of Federal crimes that occur in Indian country.

"(2) Developing multidisciplinary teams to combat child abuse and domestic and sexual violence offenses against Indians.

"(3) Consulting and coordinating with tribal justice officials and victims' advocates to address any backlog in the prosecution of major crimes in Indian country in the district.

"(4) Developing working relationships and maintaining communication with tribal leaders, tribal community and victims' advocates, and tribal justice officials to gather information from, and share appropriate information with, tribal justice officials.

"(5) Coordinating with tribal prosecutors in cases in which a tribal government has concurrent jurisdiction over an alleged crime, in advance of the expiration of any applicable statute of limitation.

"(6) Providing technical assistance and training regarding evidence gathering techniques to tribal justice officials and other individuals and entities that are instrumental to responding to Indian country crimes.

"(7) Conducting training sessions and seminars to certify special law enforcement commissions to tribal justice officials and other individuals and entities responsible for responding to Indian country crimes.

"(8) Coordinating with the Office of Indian Country Crime, as necessary.

"(9) Conducting such other activities to address and prevent violent crime in Indian country as the applicable United States Attorney determines to be appropriate.

"(c) SENSE OF CONGRESS REGARDING EVALUATIONS OF TRIBAL LIAISONS.—

"(1) FINDINGS.—Congress finds that—

"(A) many tribal communities rely solely on United States Attorneys offices to prosecute felony and misdemeanor crimes occurring on Indian land; and

"(B) tribal liaisons have dual obligations of—

"(i) coordinating prosecutions of Indian country crime; and

"(ii) developing relationships with tribal communities and serving as a link between tribal communities and the Federal justice process.

"(2) SENSE OF CONGRESS.—It is the sense of Congress that the Attorney General should—

"(A) take all appropriate actions to encourage the aggressive prosecution of all crimes committed in Indian country; and

"(B) when appropriate, take into consideration the dual responsibilities of tribal liaisons described in paragraph (1)(B) in evaluating the performance of the tribal liaisons.

"(d) ENHANCED PROSECUTION OF MINOR CRIMES.—

"(1) IN GENERAL.—Each United States Attorney serving a district that includes Indian country is authorized and encouraged—

"(A) to appoint Special Assistant United States Attorneys pursuant to section 543(a) of title 28, United States Code, to prosecute crimes in Indian country as necessary to improve the administration of justice, and particularly when—

"(i) the crime rate exceeds the national average crime rate; or

"(ii) the rate at which criminal offenses are declined to be prosecuted exceeds the national average declination rate;

"(B) to coordinate with applicable United States magistrate and district courts—

"(i) to ensure the provision of docket time for prosecutions of Indian country crimes; and

"(ii) to hold trials and other proceedings in Indian country, as appropriate;

"(C) to provide to appointed Special Assistant United States Attorneys appropriate training, supervision, and staff support; and

"(D) if an agreement is entered into with a Federal court pursuant to paragraph (2), to provide technical and other assistance to tribal governments and tribal court systems to ensure the success of the program under this subsection.

"(2) SENSE OF CONGRESS REGARDING CONSULTATION.—It is the sense of Congress that, in appointing Special Assistant United States Attorneys under this subsection, a United States Attorney should consult with tribal justice officials of each Indian tribe that would be affected by the appointment.".

SEC. 104. ADMINISTRATION.

(a) OFFICE OF TRIBAL JUSTICE.—

(1) DEFINITIONS.—Section 4 of the Indian Tribal Justice Technical and Legal Assistance Act of 2000 (25 U.S.C. 3653) is amended—

(A) by redesignating paragraphs (2) through (7) as paragraphs (3) through (8), respectively; and

(B) by inserting after paragraph (1) the following:

"(2) DIRECTOR.—The term 'Director' means the Director of the Office of Tribal Justice.".

(2) STATUS.—Title I of the Indian Tribal Justice Technical and Legal Assistance Act of 2000 is amended—

(A) by redesignating section 106 (25 U.S.C. 3666) as section 107; and

(B) by inserting after section 105 (25 U.S.C. 3665) the following:

"SEC. 106. OFFICE OF TRIBAL JUSTICE.

"(a) IN GENERAL.—Not later than 90 days after the date of enactment of the Tribal Law and Order Act of 2009, the Attorney General shall modify the status of the Office of Tribal Justice as the Attorney General determines to be necessary to establish the Office of Tribal Justice as a permanent division of the Department.

"(b) PERSONNEL AND FUNDING.—The Attorney General shall provide to the Office of Tribal Justice such personnel and funds as are necessary to establish the Office of Tribal Justice as a division of the Department under subsection (a).

"(c) ADDITIONAL DUTIES.—In addition to the duties of the Office of Tribal Justice in effect on the day before the date of enactment of the Tribal Law and Order Act of 2009, the Office of Tribal Justice shall—

"(1) serve as the program and legal policy advisor to the Attorney General with respect to the treaty and trust relationship between the United States and Indian tribes;

"(2) serve as the point of contact for federally recognized tribal governments and tribal organizations with respect to questions and comments regarding policies and programs of the Department and issues relating to public safety and justice in Indian country; and

"(3) coordinate with other bureaus, agencies, offices, and divisions within the Department of Justice to ensure that each component has an accountable process to ensure meaningful and timely consultation with tribal leaders in the development of regulatory policies and other actions that affect—

"(A) the trust responsibility of the United States to Indian tribes;

"(B) any tribal treaty provision;

"(C) the status of Indian tribes as a sovereign governments; or

"(D) any other tribal interest.".

(b) OFFICE OF INDIAN COUNTRY CRIME.—The Indian Law Enforcement Reform Act (25 U.S.C. 2801 et seq.) (as amended by section 103(b)) is amended by adding at the end the following:

"SEC. 12. OFFICE OF INDIAN COUNTRY CRIME.

"(a) ESTABLISHMENT.—There is established in the criminal division of the Department of Justice an office, to be known as the 'Office of Indian Country Crime'.

"(b) DUTIES.—The Office of Indian Country Crime shall—

"(1) develop, enforce, and administer the application of Federal criminal laws applicable in Indian country;

"(2) coordinate with the United States Attorneys that have authority to prosecute crimes in Indian country;

"(3) coordinate prosecutions of crimes of national significance in Indian country, as determined by the Attorney General;

"(4) develop and implement criminal enforcement policies for United States Attorneys and investigators of Federal crimes regarding cases arising in Indian country; and

"(5) submit to the Committee on Indian Affairs of the Senate and the Committee on Natural Resources of the House of Representatives annual reports describing the prosecution and declination rates of cases involving alleged crimes in Indian country referred to United States Attorneys.

"(c) DEPUTY ASSISTANT ATTORNEY GENERAL.—

"(1) APPOINTMENT.—The Attorney General shall appoint a Deputy Assistant Attorney General for Indian Country Crime.

"(2) DUTIES.—The Deputy Assistant Attorney General for Indian Country Crime shall—

"(A) serve as the head of the Office of Indian Country Crime;

"(B) serve as a point of contact to United State Attorneys serving districts including Indian country, tribal liaisons, tribal governments, and

other Federal, State, and local law enforcement agencies regarding issues affecting the prosecution of crime in Indian country; and

"(C) carry out such other duties as the Attorney General may prescribe.".

TITLE II—STATE ACCOUNTABILITY AND COORDINATION

SEC. 201. STATE CRIMINAL JURISDICTION AND RESOURCES.

(a) CONCURRENT AUTHORITY OF UNITED STATES.—Section 401(a) of Public Law 90–284 (25 U.S.C. 1321(a)) is amended—

(1) by striking the section designation and heading and all that follows through "The consent of the United States" and inserting the following:

"SEC. 401. ASSUMPTION BY STATE OF CRIMINAL JURISDICTION.

"(a) CONSENT OF UNITED STATES.—

"(1) IN GENERAL.—The consent of the United States"; and

(2) by adding at the end the following:

"(2) CONCURRENT JURISDICTION.—At the request of an Indian tribe, and after consultation with the Attorney General, the United States shall maintain concurrent jurisdiction to prosecute violations of sections 1152 and 1153 of title 18, United States Code, within the Indian country of the Indian tribe.".

(b) APPLICABLE LAW.—Section 1162 of title 18, United States Code, is amended by striking subsection (c) and inserting the following:

"(c) APPLICABLE LAW.—At the request of an Indian tribe, and after consultation with the Attorney General—

"(1) sections 1152 and 1153 of this title shall remain in effect in the areas of the Indian country of the Indian tribe; and

"(2) jurisdiction over those areas shall be concurrent among the Federal Government and State and tribal governments.".

SEC. 202. INCENTIVES FOR STATE, TRIBAL, AND LOCAL LAW ENFORCEMENT COOPERATION.

(a) ESTABLISHMENT OF COOPERATIVE ASSISTANCE PROGRAM.—The Attorney General may provide grants, technical assistance, and other assistance to State, tribal, and local governments that enter into cooperative agreements, including agreements relating to mutual aid, hot pursuit of suspects, and cross-deputization for the purposes of—

(1) improving law enforcement effectiveness; and

(2) reducing crime in Indian country and nearby communities.

(b) PROGRAM PLANS.—

(1) IN GENERAL.—To be eligible to receive assistance under this section, a group composed of not less than 1 of each of a tribal government and a State or local government shall jointly develop and submit to the Attorney General a plan for a program to achieve the purpose described in subsection (a).

(2) PLAN REQUIREMENTS.—A joint program plan under paragraph (1) shall include a description of—

(A) the proposed cooperative tribal and State or local law enforcement program for which funding is sought, including information on the population and each geographic area to be served by the program;

(B) the need of the proposed program for funding under this section, the amount of funding requested, and the proposed use of funds, subject to the requirements listed in subsection (c);

(C) the unit of government that will administer any assistance received under this section, and the method by which the assistance will be distributed;

(D) the types of law enforcement services to be performed on each applicable Indian reservation and the individuals and entities that will perform those services;

(E) the individual or group of individuals who will exercise daily supervision and control over law enforcement officers participating in the program;

(F) the method by which local and tribal government input with respect to the planning and implementation of the program will be ensured;

(G) the policies of the program regarding mutual aid, hot pursuit of suspects, deputization, training, and insurance of applicable law enforcement officers;

(H) the recordkeeping procedures and types of data to be collected pursuant to the program; and

(I) other information that the Attorney General determines to be relevant.

(c) PERMISSIBLE USES OF FUNDS.—An eligible entity that receives a grant under this section may use the grant, in accordance with the program plan described in subsection (b)—

(1) to hire and train new career tribal, State, or local law enforcement officers, or to make overtime payments for current law enforcement officers, that are or will be dedicated to—

(A) policing tribal land and nearby lands; and

(B) investigating alleged crimes on those lands;

(2) procure equipment, technology, or support systems to be used to investigate crimes and share information between tribal, State, and local law enforcement agencies; or

(3) for any other uses that the Attorney General determines will meet the purposes described in subsection (a).

(d) FACTORS FOR CONSIDERATION.—In determining whether to approve a joint program plan submitted under subsection (b) and, on approval, the amount of assistance to provide to the program, the Attorney General shall take into consideration the following factors:

(1) The size and population of each Indian reservation and nearby community proposed to be served by the program.

(2) The complexity of the law enforcement problems proposed to be addressed by the program.

(3) The range of services proposed to be provided by the program.

(4) The proposed improvements the program will make regarding law enforcement cooperation beyond existing levels of cooperation.

(5) The crime rates of the tribal and nearby communities.

(6) The available resources of each entity applying for a grant under this section for dedication to public safety in the respective jurisdictions of the entities.

(e) ANNUAL REPORTS.—To be eligible to renew or extend a grant under this section, a group described in subsection (b)(1) shall submit to the Attorney General, together with the joint program plan under subsection (b), a report describing the law enforcement activities carried out pursuant to the program during the preceding fiscal year, including the success of the activities, including any increase in arrests or prosecutions.

(f) REPORTS BY ATTORNEY GENERAL.—Not later than January 15 of each applicable fiscal year, the Attorney General shall submit to the Committee on Indian Affairs of the Senate and the Committee on Natural Resources of the House of Representatives a report describing the law enforcement programs carried out using assistance provided under this section during the preceding fiscal year, including the success of the programs.

(g) TECHNICAL ASSISTANCE.—On receipt of a request from a group composed of not less than 1 tribal government and 1 State or local government, the Attorney General shall provide technical assistance to the group to develop successful cooperative relationships that effectively combat crime in Indian country and nearby communities.

(h) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated such sums as are necessary to carry out this section for each of fiscal years 2010 through 2014.

TITLE III—EMPOWERING TRIBAL LAW ENFORCEMENT AGENCIES AND TRIBAL GOVERNMENTS

SEC. 301. TRIBAL POLICE OFFICERS.

(a) FLEXIBILITY IN TRAINING LAW ENFORCEMENT OFFICERS SERVING INDIAN COUNTRY.—Section 3(e) of the Indian Law Enforcement Reform Act (25 U.S.C. 2802(e)) (as amended by section 101(b)(4)) is amended—

(1) in paragraph (1)—

(A) by striking "(e)(1) The Secretary" and inserting the following:

"(e) STANDARDS OF EDUCATION AND EXPERIENCE AND CLASSIFICATION OF POSITIONS.—

"(1) STANDARDS OF EDUCATION AND EXPERIENCE.—

"(A) IN GENERAL.—The Secretary"; and

(B) by adding at the end the following:

"(B) TRAINING.—The training standards established under subparagraph (A) shall permit law enforcement personnel of the Office of Justice Services or an Indian tribe to obtain training at a State or tribal police academy, a local or tribal community college, or another training academy that meets the relevant Peace Officer Standards and Training.";

(2) in paragraph (3), by striking "Agencies" and inserting "agencies"; and

(3) by adding at the end the following:

"(4) BACKGROUND CHECKS FOR OFFICERS.—The Office of Justice Services shall develop standards and deadlines for the provision of background checks for tribal law enforcement and corrections officials that ensure that a response to a request by an Indian tribe for such a background check shall be provided by not later than 60 days after the date of receipt of the request, unless an adequate reason for failure to respond by that date is provided to the Indian tribe.".

(b) SPECIAL LAW ENFORCEMENT COMMISSIONS.—Section 5(a) of the Indian Law Enforcement Reform Act (25 U.S.C. 2804(a)) is amended—

(1) by striking "(a) The Secretary may enter into an agreement" and inserting the following:

"(a) AGREEMENTS.—

"(1) IN GENERAL.—Not later than 180 days after the date of enactment of the Tribal Law and Order Act of 2009, the Secretary shall establish procedures to enter into memoranda of agreement";

(2) in the second sentence, by striking "The Secretary" and inserting the following:

"(2) CERTAIN ACTIVITIES.—The Secretary"; and

(3) by adding at the end the following:

"(3) PROGRAM ENHANCEMENT.—

"(A) TRAINING SESSIONS IN INDIAN COUNTRY.—

"(i) IN GENERAL.—The procedures described in paragraph (1) shall include the development of a plan to enhance the certification and provision of special law enforcement commissions to tribal law enforcement officials, and, subject to subsection (d), State and local law enforcement officials, pursuant to this section.

"(ii) INCLUSIONS.—The plan under clause (i) shall include the hosting of regional training sessions in Indian country, not less frequently than biannually, to educate and certify candidates for the special law enforcement commissions.

"(B) MEMORANDA OF AGREEMENT.—

"(i) IN GENERAL.—Not later than 180 days after the date of enactment of the Tribal Law and Order Act of 2009, the Secretary, in consultation with Indian tribes and tribal law enforcement agencies, shall develop minimum requirements to be included in special law enforcement commission agreements pursuant to this section.

"(ii) AGREEMENT.—Not later than 60 days after the date on which the Secretary determines that all applicable requirements under clause (i) are met, the Secretary shall offer to enter into a special law enforcement commission agreement with the applicable Indian tribe.".

(c) INDIAN LAW ENFORCEMENT FOUNDATION.—The Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) is amended by adding at the end the following:

"TITLE VII—INDIAN LAW ENFORCEMENT FOUNDATION

"SEC. 701. INDIAN LAW ENFORCEMENT FOUNDATION.

"(a) ESTABLISHMENT.—As soon as practicable after the date of enactment of this title, the Secretary shall establish, under the laws of the District of Columbia and in accordance with this title, a foundation, to be known as the 'Indian Law Enforcement Foundation' (referred to in this section as the 'Foundation').

"(b) DUTIES.—The Foundation shall—

"(1) encourage, accept, and administer, in accordance with the terms of each donation, private gifts of real and personal property, and any income from or interest in such gifts, for the benefit of, or in support of, public safety and justice services in American Indian and Alaska Native communities; and

"(2) assist the Office of Justice Services of the Bureau of Indian Affairs and Indian tribal governments in funding and conducting activities and providing education to advance and support the provision of public safety and justice services in American Indian and Alaska Native communities.".

(d) ACCEPTANCE AND ASSISTANCE.—Section 5 of the Indian Law Enforcement Reform Act (25 U.S.C. 2804) is amended by adding at the end the following:

"(g) ACCEPTANCE OF ASSISTANCE.—The Bureau may accept reimbursement, resources, assistance, or funding from—

"(1) a Federal, tribal, State, or other government agency; or

"(2) the Indian Law Enforcement Foundation established under section 701(a) of the Indian Self-Determination and Education Assistance Act.".

SEC. 302. DRUG ENFORCEMENT IN INDIAN COUNTRY.

(a) EDUCATION AND RESEARCH PROGRAMS.—Section 502 of the Controlled Substances Act (21 U.S.C. 872) is amended in subsections (a)(1) and (c), by inserting " tribal," after "State," each place it appears.

(b) PUBLIC-PRIVATE EDUCATION PROGRAM.—Section 503 of the Comprehensive Methamphetamine Control Act of 1996 (21 U.S.C. 872a) is amended—

(1) in subsection (a), by inserting "tribal," after "State,"; and

(2) in subsection (b)(2), by inserting ", tribal," after "State".

(c) COOPERATIVE ARRANGEMENTS.—Section 503 of the Controlled Substances Act (21 U.S.C. 873) is amended—

(1) in subsection (a)—

(A) by inserting "tribal," after "State," each place it appears; and

(B) in paragraphs (6) and (7), by inserting ", tribal," after "State" each place it appears; and

(2) in subsection (d)(1), by inserting ", tribal," after "State".

(d) POWERS OF ENFORCEMENT PERSONNEL.—Section 508(a) of the Controlled Substances Act (21 U.S.C. 878(a)) is amended in the matter preceding paragraph (1) by inserting ", tribal," after "State".

SEC. 303. ACCESS TO NATIONAL CRIMINAL INFORMATION DATABASES.

(a) ACCESS TO NATIONAL CRIMINAL INFORMATION DATABASES.—Section 534 of title 28, United States Code, is amended—

(1) in subsection (a)(4), by inserting "Indian tribes," after "the States,";

(2) by striking subsection (d) and inserting the following:

"(d) INDIAN LAW ENFORCEMENT AGENCIES.—The Attorney General shall permit tribal and Bureau of Indian Affairs law enforcement agencies—

"(1) to directly access and enter information into Federal criminal information databases; and

"(2) to directly obtain information from the databases.";

(3) by redesignating the second subsection (e) as subsection (f); and

(4) in paragraph (2) of subsection (f) (as redesignated by paragraph (3)), in the matter preceding subparagraph (A), by inserting ", tribal," after "Federal".

(b) REQUIREMENT.—

(1) IN GENERAL.—The Attorney General shall ensure that tribal law enforcement officials that meet applicable Federal or State requirements have access to national crime information databases.

(2) SANCTIONS.—For purpose of sanctions for noncompliance with requirements of, or misuse of, national crime information databases and information obtained from those databases, a tribal law enforcement agency or official shall be treated as Federal law enforcement agency or official.

(3) NCIC.—Each tribal justice official serving an Indian tribe with criminal jurisdiction over Indian country shall be considered to be an authorized law enforcement official for purposes of access to the National Crime Information Center of the Federal Bureau of Investigation.

SEC. 304. TRIBAL COURT SENTENCING AUTHORITY.

(a) CONSTITUTIONAL RIGHTS.—Section 202 of Public Law 90–284 (25 U.S.C. 1302) is amended—

(1) in the matter preceding paragraph (1), by striking "No Indian tribe" and inserting the following:

"(a) IN GENERAL.—No Indian tribe";

(2) in paragraph (7) of subsection (a) (as designated by paragraph (1)), by striking "and a fine" and inserting "or a fine"; and

(3) by adding at the end the following:

"(b) TRIBAL COURTS AND PRISONERS.—

"(1) IN GENERAL.—Notwithstanding paragraph (7) of subsection (a) and in addition to the limitations described in the other paragraphs of that subsection,

no Indian tribe, in exercising any power of self-government involving a criminal trial that subjects a defendant to more than 1 year imprisonment for any single offense, may—

"(A) deny any person in such a criminal proceeding the assistance of a defense attorney licensed to practice law in any jurisdiction in the United States;

"(B) require excessive bail, impose an excessive fine, inflict a cruel or unusual punishment, or impose for conviction of a single offense any penalty or punishment greater than imprisonment for a term of 3 years or a fine of $15,000, or both; or

"(C) deny any person in such a criminal proceeding the due process of law.

"(2) AUTHORITY.—An Indian tribe exercising authority pursuant to this subsection shall—

"(A) require that each judge presiding over an applicable criminal case is licensed to practice law in any jurisdiction in the United States; and

"(B) make publicly available the criminal laws (including regulations and interpretive documents) of the Indian tribe.

"(3) SENTENCES.—A tribal court acting pursuant to paragraph (1) may require a convicted offender—

"(A) to serve the sentence—

"(i) in a tribal correctional center that has been approved by the Bureau of Indian Affairs for long-term incarceration, in accordance with guidelines developed by the Bureau of Indian Affairs, in consultation with Indian tribes;

"(ii) in the nearest appropriate Federal facility, at the expense of the United States pursuant to a memorandum of agreement with Bureau of Prisons in accordance with paragraph (4);

"(iii) in a State or local government-approved detention or correctional center pursuant to an agreement between the Indian tribe and the State or local government; or

"(iv) subject to paragraph (1), in an alternative rehabilitation center of an Indian tribe; or

"(B) to serve another alternative form of punishment, as determined by the tribal court judge pursuant to tribal law.

"(4) MEMORANDA OF AGREEMENT.—A memorandum of agreement between an Indian tribe and the Bureau of Prisons under paragraph (2)(A)(ii)—

"(A) shall acknowledge that the United States will incur all costs involved, including the costs of transfer, housing, medical care, rehabilitation, and reentry of transferred prisoners;

"(B) shall limit the transfer of prisoners to prisoners convicted in tribal court of violent crimes, crimes involving sexual abuse, and serious drug offenses, as determined by the Bureau of Prisons, in consultation with tribal governments, by regulation;

"(C) shall not affect the jurisdiction, power of self-government, or any other authority of an Indian tribe over the territory or members of the Indian tribe;

"(D) shall contain such other requirements as the Bureau of Prisons, in consultation with the Bureau of Indian Affairs and tribal governments, may determine, by regulation; and

"(E) shall be executed and carried out not later than 180 days after the date on which the applicable Indian tribe first contacts the Bureau of Prisons to accept a transfer of a tribal court offender pursuant to this subsection.

"(c) EFFECT OF SECTION.—Nothing in this section affects the obligation of the United States, or any State government that has been delegated authority by the United States, to investigate and prosecute any criminal violation in Indian country.".

(b) GRANTS AND CONTRACTS.—Section 1007(b) of the Economic Opportunity Act of 1964 (42 U.S.C. 2996f(b)) is amended by striking paragraph (2) and inserting the following:

"(2) to provide legal assistance with respect to any criminal proceeding, except to provide assistance to a person charged with an offense in an Indian tribal court;".

SEC. 305. INDIAN LAW AND ORDER COMMISSION.

(a) ESTABLISHMENT.—There is established a commission to be known as the Indian Law and Order Commission (referred to in this section as the "Commission").

(b) MEMBERSHIP.—

(1) IN GENERAL.—The Commission shall be composed of 9 members, of whom—

(A) 3 shall be appointed by the President, in consultation with—

(i) the Attorney General; and

(ii) the Secretary of the Interior;

(B) 2 shall be appointed by the majority leader of the Senate, in consultation with the Chairperson of the Committee on Indian Affairs of the Senate;

(C) 1 shall be appointed by the minority leader of the Senate, in consultation with the Vice Chairperson of the Committee on Indian Affairs of the Senate;

(D) 2 shall be appointed by the Speaker of the House of Representatives, in consultation with the Chairperson of the Committee on Natural Resources of the House of Representatives; and

(E) 1 shall be appointed by the minority leader of the House of Representatives, in consultation with the Ranking Member of the Committee on Natural Resources of the House of Representatives.

(2) REQUIREMENTS FOR ELIGIBILITY.—Each member of the Commission shall have significant experience and expertise in—

(A) the Indian country criminal justice system; and

(B) matters to be studied by the Commission.

(3) CONSULTATION REQUIRED.—The President, the Speaker and minority leader of the House of Representatives, and the majority leader and minority leader of the Senate shall consult before the appointment of members of the Commission under paragraph (1) to achieve, to the maximum extent practicable, fair and equitable representation of various points of view with respect to the matters to be studied by the Commission.

(4) TERM.—Each member shall be appointed for the life of the Commission.

(5) TIME FOR INITIAL APPOINTMENTS.—The appointment of the members of the Commission shall be made not later than 60 days after the date of enactment of this Act.

(6) VACANCIES.—A vacancy in the Commission shall be filled—

(A) in the same manner in which the original appointment was made; and

(B) not later than 60 days after the date on which the vacancy occurred.

(c) OPERATION.—

(1) CHAIRPERSON.—Not later than 15 days after the date on which all members of the Commission have been appointed, the Commission shall select 1 member to serve as Chairperson of the Commission.

(2) MEETINGS.—

(A) IN GENERAL.—The Commission shall meet at the call of the Chairperson.

(B) INITIAL MEETING.—The initial meeting shall take place not later than 30 days after the date described in paragraph (1).

(3) QUORUM.—A majority of the members of the Commission shall constitute a quorum, but a lesser number of members may hold hearings.

(4) RULES.—The Commission may establish, by majority vote, any rules for the conduct of Commission business, in accordance with this Act and other applicable law.

(d) COMPREHENSIVE STUDY OF CRIMINAL JUSTICE SYSTEM RELATING TO INDIAN COUNTRY.—The Commission shall conduct a comprehensive study of law enforcement and criminal justice in tribal communities, including—

(1) jurisdiction over crimes committed in Indian country and the impact of that jurisdiction on—

(A) the investigation and prosecution of Indian country crimes; and

(B) residents of Indian land;

(2) the tribal jail and Federal prisons systems and the effect of those systems with respect to—

(A) reducing Indian country crime; and

(B) rehabilitation of offenders;

(3)(A) tribal juvenile justice systems and the Federal juvenile justice system as relating to Indian country; and

(B) the effect of those systems and related programs in preventing juvenile crime, rehabilitating Indian youth in custody, and reducing recidivism among Indian youth;

(4) the impact of the Indian Civil Rights Act of 1968 (25 U.S.C. 1301 et seq.) on—

(A) the authority of Indian tribes; and

(B) the rights of defendants subject to tribal government authority; and

(5) studies of such other subjects as the Commission determines relevant to achieve the purposes of the Tribal Law and Order Act of 2009.

(e) RECOMMENDATIONS.—Taking into consideration the results of the study under paragraph (1), the Commission shall develop recommendations on necessary modifications and improvements to justice systems at the tribal, Federal, and State levels, including consideration of—

(1) simplifying jurisdiction in Indian country;

(2) improving services and programs—

(A) to prevent juvenile crime on Indian land;

(B) to rehabilitate Indian youth in custody; and

(C) to reduce recidivism among Indian youth;

(3) enhancing the penal authority of tribal courts and exploring alternatives to incarceration;

(4) the establishment of satellite United States magistrate or district courts in Indian country;

(5) changes to the tribal jails and Federal prison systems; and

(6) other issues that, as determined by the Commission, would reduce violent crime in Indian country.

(f) REPORT.—Not later than 2 years after the date of enactment of this Act, the Commission shall submit to the President and Congress a report that contains—

(1) a detailed statement of the findings and conclusions of the Commission; and

(2) the recommendations of the Commission for such legislative and administrative actions as the Commission considers to be appropriate.

(g) POWERS.—

(1) HEARINGS.—

(A) IN GENERAL.—The Commission may hold such hearings, meet and act at such times and places, take such testimony, and receive such evidence as the Commission considers to be advisable to carry out the duties of the Commission under this section.

(B) PUBLIC REQUIREMENT.—The hearings of the Commission under this paragraph shall be open to the public.

(2) WITNESS EXPENSES.—

(A) IN GENERAL.—A witness requested to appear before the Commission shall be paid the same fees as are paid to witnesses under section 1821 of title 28, United States Code.

(B) PER DIEM AND MILEAGE.—The per diem and mileage allowance for a witness shall be paid from funds made available to the Commission.

(3) INFORMATION FROM FEDERAL, TRIBAL, AND STATE AGENCIES.—

(A) IN GENERAL.—The Commission may secure directly from a Federal agency such information as the Commission considers to be necessary to carry out this section.

(B) TRIBAL AND STATE AGENCIES.—The Commission may request the head of any tribal or State agency to provide to the Commission such information as the Commission considers to be necessary to carry out this section.

(4) POSTAL SERVICES.—The Commission may use the United States mails in the same manner and under the same conditions as other agencies of the Federal Government.

(5) GIFTS.—The Commission may accept, use, and dispose of gifts or donations of services or property.

(h) COMMISSION PERSONNEL MATTERS.—

(1) TRAVEL EXPENSES.—A member of the Commission shall be allowed travel expenses, including per diem in lieu of subsistence, at rates authorized for an employee of an agency under subchapter I of chapter 57 of title 5, United States Code, while away from the home or regular place of business of the member in the performance of the duties of the Commission.

(2) DETAIL OF FEDERAL EMPLOYEES.—On the affirmative vote of ⅔ of the members of the Commission and the approval of the appropriate Federal agency head, an employee of the Federal Government may be detailed to the Commission without reimbursement, and such detail shall be without interruption or loss of civil service status, benefits, or privileges.

(3) PROCUREMENT OF TEMPORARY AND INTERMITTENT SERVICES.—On request of the Commission, the Attorney General and Secretary shall provide to the

Commission reasonable and appropriate office space, supplies, and administrative assistance.

(i) CONTRACTS FOR RESEARCH.—

(1) RESEARCHERS AND EXPERTS.—

(A) IN GENERAL.—On an affirmative vote of ⅔ of the members of the Commission, the Commission may select nongovernmental researchers and experts to assist the Commission in carrying out the duties of the Commission under this section.

(B) NATIONAL INSTITUTE OF JUSTICE.—The National Institute of Justice may enter into a contract with the researchers and experts selected by the Commission under subparagraph (A) to provide funding in exchange for the services of the researchers and experts.

(2) OTHER ORGANIZATIONS.—Nothing in this subsection limits the ability of the Commission to enter into contracts with any other entity or organization to carry out research necessary to carry out the duties of the Commission under this section.

(j) TRIBAL ADVISORY COMMITTEE.—

(1) ESTABLISHMENT.—The Commission shall establish a committee, to be known as the "Tribal Advisory Committee".

(2) MEMBERSHIP.—

(A) COMPOSITION.—The Tribal Advisory Committee shall consist of 2 representatives of Indian tribes from each region of the Bureau of Indian Affairs.

(B) QUALIFICATIONS.—Each member of the Tribal Advisory Committee shall have experience relating to—

(i) justice systems;

(ii) crime prevention; or

(iii) victim services.

(3) DUTIES.—The Tribal Advisory Committee shall—

(A) serve as an advisory body to the Commission; and

(B) provide to the Commission advice and recommendations, submit materials, documents, testimony, and such other information as the Commission determines to be necessary to carry out the duties of the Commission under this section.

(k) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated such sums as are necessary to carry out this section, to remain available until expended.

(l) TERMINATION OF COMMISSION.—The Commission shall terminate 90 days after the date on which the Commission submits the report of the Commission under subsection (c)(3).

(m) NONAPPLICABILITY OF FACA.—The Federal Advisory Committee Act (5 U.S.C. App.) shall not apply to the Commission.

TITLE IV—TRIBAL JUSTICE SYSTEMS

SEC. 401. INDIAN ALCOHOL AND SUBSTANCE ABUSE.

(a) CORRECTION OF REFERENCES.—

(1) INTER-DEPARTMENTAL MEMORANDUM OF AGREEMENT.—Section 4205 of the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986 (25 U.S.C. 2411) is amended—

(A) in subsection (a)—

(i) in the matter preceding paragraph (1)—

(I) by striking "the date of enactment of this subtitle" and inserting "the date of enactment of the Tribal Law and Order Act of 2009"; and

(II) by inserting ", the Attorney General," after "Secretary of the Interior";

(ii) in paragraph (2)(A), by inserting ", Bureau of Justice Assistance, Substance Abuse and Mental Health Services Administration," after "Bureau of Indian Affairs,";

(iii) in paragraph (4), by inserting ", Department of Justice, Substance Abuse and Mental Health Services Administration," after "Bureau of Indian Affairs";

(iv) in paragraph (5), by inserting ", Department of Justice, Substance Abuse and Mental Health Services Administration," after "Bureau of Indian Affairs";

(v) in paragraph (7), by inserting ", the Attorney General," after "Secretary of the Interior";

(B) in subsection (c), by inserting ", the Attorney General," after "Secretary of the Interior"; and

(C) in subsection (d), by striking "the date of enactment of this subtitle" and inserting "the date of enactment of the Tribal Law and Order Act of 2009".

(2) TRIBAL ACTION PLANS.—Section 4206 of the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986 (25 U.S.C. 2412) is amended—

(A) in subsection (b), in the first sentence, by inserting ", the Bureau of Justice Assistance, the Substance Abuse and Mental Health Services Administration," before "and the Indian Health Service service unit";

(B) in subsection (c)(1)(A)(i), by inserting ", the Bureau of Justice Assistance, the Substance Abuse and Mental Health Services Administration," before "and the Indian Health Service service unit";

(C) in subsection (d)(2), by striking "fiscal year 1993 and such sums as are necessary for each of the fiscal years 1994, 1995, 1996, 1997, 1998, 1999, and 2000" and inserting "the period of fiscal years 2010 through 2014";

(D) in subsection (e), in the first sentence, by inserting ", the Attorney General," after "the Secretary of the Interior"; and

(E) in subsection (f)(3), by striking "fiscal year 1993 and such sums as are necessary for each of the fiscal years 1994, 1995, 1996, 1997, 1998, 1999, and 2000" and inserting "the period of fiscal years 2010 through 2014".

(3) DEPARTMENTAL RESPONSIBILITY.—Section 4207 of the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986 (25 U.S.C. 2413) is amended—

(A) in subsection (a), by inserting ", the Attorney General" after "Bureau of Indian Affairs";

(B) in subsection (b)—

(i) by striking paragraph (1) and inserting the following:

"(1) ESTABLISHMENT.—

"(A) IN GENERAL.—To improve coordination among the Federal agencies and departments carrying out this subtitle, there is established within the Substance Abuse and Mental Health Services Administration an office, to be known as the 'Office of Indian Alcohol and Substance Abuse' (referred to in this section as the 'Office').

"(B) DIRECTOR.—The director of the Office shall be appointed by the Director of the Substance Abuse and Mental Health Services Administration—

"(i) on a permanent basis; and

"(ii) at a grade of not less than GS–15 of the General Schedule.";

(ii) in paragraph (2)—

(I) by striking "(2) In addition" and inserting the following:

"(2) RESPONSIBILITIES OF OFFICE.—In addition";

(II) by striking subparagraph (A) and inserting the following:

"(A) coordinating with other agencies to monitor the performance and compliance of the relevant Federal programs in achieving the goals and purposes of this subtitle and the Memorandum of Agreement entered into under section 4205;";

(III) in subparagraph (B)—

(aa) by striking "within the Bureau of Indian Affairs"; and

(bb) by striking the period at the end and inserting "; and"; and

(IV) by adding at the end the following:

"(C) not later than 1 year after the date of enactment of the Tribal Law and Order Act of 2009, developing, in coordination and consultation with tribal governments, a framework for interagency and tribal coordination that—

"(i) establish the goals and other desired outcomes of this Act;

"(ii) prioritizes outcomes that are aligned with the purposes of affected agencies;

"(iii) provides guidelines for resource and information sharing;

"(iv) provides technical assistance to the affected agencies to establish effective and permanent interagency communication and coordination; and

"(v) determines whether collaboration is feasible, cost-effective, and within agency capability."; and

(iii) by striking paragraph (3) and inserting the following:

"(3) APPOINTMENT OF EMPLOYEES.—The Director of the Substance Abuse and Mental Health Services Administration shall appoint such employees to work in the Office, and shall provide such funding, services, and equipment, as may be necessary to enable the Office to carry out the responsibilities under this subsection."; and

(C) in subsection (c)—

(i) by striking "of Alcohol and Substance Abuse" each place it appears;

(ii) in paragraph (1), in the second sentence, by striking "The Assistant Secretary of the Interior for Indian Affairs" and inserting "The Director of the Substance Abuse and Mental Health Services Administration"; and

(iii) in paragraph (3)—

(I) in the matter preceding subparagraph (A), by striking "Youth" and inserting "youth"; and

(II) by striking "programs of the Bureau of Indian Affairs" and inserting "the applicable Federal programs".

(4) REVIEW OF PROGRAMS.—Section 4208a(a) of the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986 (25 U.S.C. 2414a(a)) is amended in the matter preceding paragraph (1) by inserting ", the Attorney General," after "the Secretary of the Interior".

(5) FEDERAL FACILITIES, PROPERTY, AND EQUIPMENT.—Section 4209 of the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986 (25 U.S.C. 2415) is amended—

(A) in subsection (a), by inserting ", the Attorney General," after "the Secretary of the Interior";

(B) in subsection (b)—

(i) in the first sentence, by inserting ", the Attorney General," after "the Secretary of the Interior";

(ii) in the second sentence, by inserting ", nor the Attorney General," after "the Secretary of the Interior"; and

(iii) in the third sentence, by inserting ", the Department of Justice," after "the Department of the Interior"; and

(C) in subsection (c)(1), by inserting ", the Attorney General," after "the Secretary of the Interior".

(6) NEWSLETTER.—Section 4210 of the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986 (25 U.S.C. 2416) is amended—

(A) in subsection (a), in the first sentence, by inserting ", the Attorney General," after "the Secretary of the Interior"; and

(B) in subsection (b), by striking "fiscal year 1993 and such sums as may be necessary for each of the fiscal years 1994, 1995, 1996, 1997, 1998, 1999, and 2000" and inserting "the period of fiscal years 2010 through 2014".

(7) REVIEW.—Section 4211(a) of the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986 (25 U.S.C. 2431(a)) is amended in the matter preceding paragraph (1) by inserting ", the Attorney General," after "the Secretary of the Interior".

(b) INDIAN EDUCATION PROGRAMS.—Section 4212 of the Indian Alcohol and Substance Abuse Prevention Act of 1986 (25 U.S.C. 2432) is amended by striking subsection (a) and inserting the following:

"(a) SUMMER YOUTH PROGRAMS.—

"(1) IN GENERAL.—The head of the Indian Alcohol and Substance Abuse Program, in coordination with the Assistant Secretary for Indian Affairs, shall develop and implement programs in tribal schools and schools funded by the Bureau of Indian Education (subject to the approval of the local school board or contract school board) to determine the effectiveness of summer youth programs in advancing the purposes and goals of this Act.

"(2) COSTS.—The head of the Indian Alcohol and Substance Abuse Program and the Assistant Secretary shall defray all costs associated with the actual operation and support of the summer youth programs in a school from funds appropriated to carry out this subsection.

"(3) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to carry out the programs under this subsection such sums as are necessary for each of fiscal years 2010 through 2014.".

(c) EMERGENCY SHELTERS.—Section 4213(e) of the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986 (25 U.S.C. 2433(e)) is amended—

(1) in paragraph (1), by striking "as may be necessary" and all that follows through the end of the paragraph and inserting "as are necessary for each of fiscal years 2010 through 2014.";

(2) in paragraph (2), by striking "$7,000,000" and all that follows through the end of the paragraph and inserting "$10,000,000 for each of fiscal years 2010 through 2014."; and

(3) by indenting paragraphs (4) and (5) appropriately.

(d) REVIEW OF PROGRAMS.—Section 4215(a) of the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986 (25 U.S.C. 2441(a)) is amended by inserting ", the Attorney General," after "the Secretary of the Interior".

(e) ILLEGAL NARCOTICS TRAFFICKING; SOURCE ERADICATION.—Section 4216 of the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986 (25 U.S.C. 2442) is amended—

(1) in subsection (a)—

(A) in paragraph (1)—

(i) in subparagraph (A), by striking the comma at the end and inserting a semicolon;

(ii) in subparagraph (B), by striking ", and" at the end and inserting a semicolon;

(iii) in subparagraph (C), by striking the period at the end and inserting "; and"; and

(iv) by adding at the end the following:

"(D) the Blackfeet Nation of Montana for the investigation and control of illegal narcotics traffic on the Blackfeet Indian Reservation along the border with Canada.";

(B) in paragraph (2), by striking "United States Custom Service" and inserting "United States Customs and Border Protection"; and

(C) by striking paragraph (3) and inserting the following:

"(3) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to carry out this subsection such sums as are necessary for each of fiscal years 2010 through 2014."; and

(2) in subsection (b)(2), by striking "as may be necessary" and all that follows through the end of the paragraph and inserting "as are necessary for each of fiscal years 2010 through 2014.".

(f) LAW ENFORCEMENT AND JUDICIAL TRAINING.—Section 4218 of the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986 (25 U.S.C. 2451) is amended—

(1) by striking subsection (a) and inserting the following:

"(a) TRAINING PROGRAMS.—

"(1) IN GENERAL.—The Secretary of the Interior, in coordination with the Attorney General, the Administrator of the Drug Enforcement Administration, and the Director of the Federal Bureau of Investigation, shall ensure, through the establishment of a new training program or by supplementing existing training programs, that all Bureau of Indian Affairs and tribal law enforcement and judicial personnel have access to training regarding—

"(A) the investigation and prosecution of offenses relating to illegal narcotics; and

"(B) alcohol and substance abuse prevention and treatment.

"(2) YOUTH-RELATED TRAINING.—Any training provided to Bureau of Indian Affairs or tribal law enforcement or judicial personnel under paragraph (1) shall include training in issues relating to youth alcohol and substance abuse prevention and treatment."; and

(2) in subsection (b), by striking "as may be necessary" and all that follows through the end of the subsection and inserting "as are necessary for each of fiscal years 2010 through 2014.".

(g) JUVENILE DETENTION CENTERS.—Section 4220 of the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986 (25 U.S.C. 2453) is amended—

(1) in subsection (a)—

(A) by striking "The Secretary" the first place it appears and inserting the following:

"(1) IN GENERAL.—The Secretary";

(B) in the second sentence, by striking "The Secretary shall" and inserting the following:

"(2) CONSTRUCTION AND OPERATION.—The Secretary shall"; and

(C) by adding at the end the following:

"(3) DEVELOPMENT OF PLAN.—

"(A) IN GENERAL.—Not later than 180 days after the date of enactment of this paragraph, the Secretary, the Director of the Substance Abuse and Mental Health Services Administration, the Director of the Indian Health Service, and the Attorney General, in consultation with tribal leaders and tribal justice officials, shall develop a long-term plan for the construction, renovation, and operation of Indian juvenile detention and treatment centers and alternatives to detention for juvenile offenders.

"(B) COORDINATION.—The plan under subparagraph (A) shall require the Bureau of Indian Education and the Indian Health Service to coordinate with tribal and Bureau of Indian Affairs juvenile detention centers to provide services to those centers."; and

(2) in subsection (b)—

(A) by striking "such sums as may be necessary for each of the fiscal years 1994, 1995, 1996, 1997, 1998, 1999, and 2000" each place it appears and inserting "such sums as are necessary for each of fiscal years 2010 through 2014"; and

(B) by indenting paragraph (2) appropriately.

SEC. 402. INDIAN TRIBAL JUSTICE; TECHNICAL AND LEGAL ASSISTANCE.

(a) INDIAN TRIBAL JUSTICE.—

(1) BASE SUPPORT FUNDING.—Section 103(b) of the Indian Tribal Justice Act (25 U.S.C. 3613(b)) is amended by striking paragraph (2) and inserting the following:

"(2) the employment of tribal court personnel, including tribal court judges, prosecutors, public defenders, guardians ad litem, and court-appointed special advocates for children and juveniles;".

(2) TRIBAL JUSTICE SYSTEMS.—Section 201 of the Indian Tribal Justice Act (25 U.S.C. 3621) is amended—

(A) in subsection (a)—

(i) by striking "the provisions of sections 101 and 102 of this Act" and inserting "sections 101 and 102"; and

(ii) by striking "the fiscal years 2000 through 2007" and inserting "fiscal years 2010 through 2014";

(B) in subsection (b)—

(i) by striking "the provisions of section 103 of this Act" and inserting "section 103"; and

(ii) by striking "the fiscal years 2000 through 2007" and inserting "fiscal years 2010 through 2014";

(C) in subsection (c), by striking "the fiscal years 2000 through 2007" and inserting "fiscal years 2010 through 2014"; and

(D) in subsection (d), by striking "the fiscal years 2000 through 2007" and inserting "fiscal years 2010 through 2014".

(b) TECHNICAL AND LEGAL ASSISTANCE.—

(1) TRIBAL CIVIL LEGAL ASSISTANCE GRANTS.—Section 102 of the Indian Tribal Justice Technical and Legal Assistance Act of 2000 (25 U.S.C. 3662) is amended by inserting "(including guardians ad litem and court-appointed special advocates for children and juveniles)" after "civil legal assistance".

(2) TRIBAL CRIMINAL LEGAL ASSISTANCE GRANTS.—Section 103 of the Indian Tribal Justice Technical and Legal Assistance Act of 2000 (25 U.S.C. 3663) is amended by striking "criminal legal assistance to members of Indian tribes and tribal justice systems" and inserting "criminal legal assistance services to all defendants subject to tribal court jurisdiction and judicial services for tribal courts".

(3) FUNDING.—The Indian Tribal Justice Technical and Legal Assistance Act of 2000 is amended—

(A) in section 106 (25 U.S.C. 3666), by striking "2000 through 2004" and inserting "2010 through 2014"; and

(B) in section 201(d) (25 U.S.C. 3681(d)), by striking "2000 through 2004" and inserting "2010 through 2014".

SEC. 403. TRIBAL RESOURCES GRANT PROGRAM.

Section 1701 of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3796dd) is amended—

(1) in subsection (b)—

(A) in each of paragraphs (1) through (4) and (6) through (17), by inserting "to" after the paragraph designation;

(B) in paragraph (1), by striking "State and" and inserting "State, tribal, or";

(C) in paragraphs (9) and (10), by inserting ", tribal," after "State" each place it appears;

(D) in paragraph (15)—

(i) by striking "a State in" and inserting "a State or Indian tribe in";

(ii) by striking "the State which" and inserting "the State or tribal community that"; and

(iii) by striking "a State or" and inserting "a State, tribal, or";

(E) in paragraph (16), by striking "and" at the end

(F) in paragraph (17), by striking the period at the end and inserting "; and";

(G) by redesignating paragraphs (6) through (17) as paragraphs (5) through (16), respectively; and

(H) by adding at the end the following:

"(17) to permit tribal governments receiving direct law enforcement services from the Bureau of Indian Affairs to access the program under this section on behalf of the Bureau for use in accordance with paragraphs (1) through (16).".

(2) in subsection (i), by striking "The authority" and inserting "Except as provided in subsection (j), the authority"; and

(3) by adding at the end the following:

"(j) GRANTS TO INDIAN TRIBES.—

"(1) IN GENERAL.—Notwithstanding subsection (i) and section 1703, and in acknowledgment of the Federal nexus and distinct Federal responsibility to address and prevent crime in Indian country, the Attorney General shall provide grants under this section to Indian tribal governments, for fiscal year 2010 and any fiscal year thereafter, for such period as the Attorney General determines to be appropriate to assist the Indian tribal governments in carrying out the purposes described in subsection (b).

"(2) PRIORITY OF FUNDING.—In providing grants to Indian tribal governments under this subsection, the Attorney General shall take into consideration reservation crime rates and tribal law enforcement staffing needs of each Indian tribal government.

"(3) FEDERAL SHARE.—Because of the Federal nature and responsibility for providing public safety on Indian land, the Federal share of the cost of any activity carried out using a grant under this subsection shall be 100 percent.

"(4) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated such sums as are necessary to carry out this subsection for each of fiscal years 2010 through 2014.

"(k) REPORT.—Not later than 180 days after the date of enactment of this subsection, the Attorney General shall submit to Congress a report describing the extent and effectiveness of the Community Oriented Policing (COPS) initiative as applied in Indian country, including particular references to—

"(1) the problem of intermittent funding;

"(2) the integration of COPS personnel with existing law enforcement authorities; and

"(3) an explanation of how the practice of community policing and the broken windows theory can most effectively be applied in remote tribal locations.".

SEC. 404. TRIBAL JAILS PROGRAM.

(a) IN GENERAL.—Section 20109 of the Violent Crime Control and Law Enforcement Act of 1994 (42 U.S.C. 13709) is amended by striking subsection (a) and inserting the following:

"(a) RESERVATION OF FUNDS.—Notwithstanding any other provision of this part, of amounts made available to the Attorney General to carry out programs relating to offender incarceration, the Attorney General shall reserve $35,000,000 for each of fiscal years 2010 through 2014 to carry out this section.".

(b) REGIONAL DETENTION CENTERS.—

(1) IN GENERAL.—Section 20109 of the Violent Crime Control and Law Enforcement Act of 1994 (42 U.S.C. 13709) is amended by striking subsection (b) and inserting the following:

"(b) GRANTS TO INDIAN TRIBES.—

"(1) IN GENERAL.—From the amounts reserved under subsection (a), the Attorney General shall provide grants—

"(A) to Indian tribes for purposes of—

"(i) construction and maintenance of jails on Indian land for the incarceration of offenders subject to tribal jurisdiction;

"(ii) entering into contracts with private entities to increase the efficiency of the construction of tribal jails; and

"(iii) developing and implementing alternatives to incarceration in tribal jails;

"(B) to Indian tribes for the construction of tribal justice centers that combine tribal police, courts, and corrections services to address violations of tribal civil and criminal laws;

"(C) to consortia of Indian tribes for purposes of constructing and operating regional detention centers on Indian land for long-term incarceration of offenders subject to tribal jurisdiction, as the applicable consortium determines to be appropriate.

"(2) PRIORITY OF FUNDING.—in providing grants under this subsection, the Attorney General shall take into consideration applicable—

"(A) reservation crime rates;

"(B) annual tribal court convictions; and

"(C) bed space needs.

"(3) FEDERAL SHARE.—Because of the Federal nature and responsibility for providing public safety on Indian land, the Federal share of the cost of any activity carried out using a grant under this subsection shall be 100 percent.".

(2) CONFORMING AMENDMENT.—Section 20109(c) of the Violent Crime Control and Law Enforcement Act of 1994 (42 U.S.C. 13709(c)) is amended by inserting "or consortium of Indian tribes, as applicable," after "Indian tribe".

(3) LONG-TERM PLAN.—Section 20109 of the Violent Crime Control and Law Enforcement Act of 1994 (42 U.S.C. 13709) is amended by adding at the end the following:

"(d) LONG-TERM PLAN.—Not later than 1 year after the date of enactment of this subsection, the Attorney General, in coordination with the Bureau of Indian Affairs and in consultation with tribal leaders, tribal law enforcement officers, and tribal corrections officials, shall submit to Congress a long-term plan to address incarceration in Indian country, including a description of—

"(1) proposed activities for construction of detention facilities (including regional facilities) on Indian land;

"(2) proposed activities for construction of additional Federal detention facilities on Indian land;

"(3) proposed activities for contracting with State and local detention centers, with tribal government approval;

"(4) proposed alternatives to incarceration, developed in cooperation with tribal court systems; and

"(5) such other alternatives as the Attorney General, in coordination with the Bureau of Indian Affairs and in consultation with Indian tribes, determines to be necessary.".

SEC. 405. TRIBAL PROBATION OFFICE LIAISON PROGRAM.

Title II of the Indian Tribal Justice Technical and Legal Assistance Act of 2000 (25 U.S.C. 3681 et seq.) is amended by adding at the end the following:

"SEC. 203. ASSISTANT PAROLE AND PROBATION OFFICERS.

"To the maximum extent practicable, the Director of the Administrative Office of the United States Courts, in coordination with the Office of Tribal Justice and the Director of the Office of Justice Services, shall—

"(1) appoint individuals residing in Indian country to serve as assistant parole or probation officers for purposes of monitoring and providing service to Federal prisoners residing in Indian country; and

"(2) provide substance abuse, mental health, and other related treatment services to offenders residing on Indian land.".

SEC. 406. TRIBAL YOUTH PROGRAM.

(a) INCENTIVE GRANTS FOR LOCAL DELINQUENCY PREVENTION PROGRAMS.—

(1) IN GENERAL.—Section 504 of the Juvenile Justice and Delinquency Prevention Act of 1974 (42 U.S.C. 5783) is amended—

(A) in subsection (a), by inserting ", or to Indian tribes under subsection (d)" after "subsection (b)"; and

(B) by adding at the end the following:

"(d) GRANTS FOR TRIBAL DELINQUENCY PREVENTION AND RESPONSE PROGRAMS.—

"(1) IN GENERAL.—The Administrator shall make grants under this section, on a competitive basis, to eligible Indian tribes or consortia of Indian tribes, as described in paragraph (2)—

"(A) to support and enhance—

"(i) tribal juvenile delinquency prevention services; and

"(ii) the ability of Indian tribes to respond to, and care for, juvenile offenders; and

"(B) to encourage accountability of Indian tribal governments with respect to preventing juvenile delinquency and responding to, and caring for, juvenile offenders.

"(2) ELIGIBLE INDIAN TRIBES.—To be eligible to receive a grant under this subsection, an Indian tribe or consortium of Indian tribes shall submit to the Administrator an application in such form and containing such information as the Administrator may require.

"(3) PRIORITY OF FUNDING.—In providing grants under this subsection, the Administrator shall take into consideration, with respect to the reservation communities to be served—

"(A) juvenile crime rates;

"(B) dropout rates; and

"(C) percentage of at-risk youth.".

(2) AUTHORIZATION OF APPROPRIATIONS.—Section 505 of the Juvenile Justice and Delinquency Prevention Act of 1974 (42 U.S.C. 5784) is amended by striking "fiscal years 2004, 2005, 2006, 2007, and 2008" and inserting "each of fiscal years 2010 through 2014".

(b) COORDINATING COUNCIL ON JUVENILE JUSTICE AND DELINQUENCY PREVENTION.—Section 206(a)(2) of the Juvenile Justice and Delinquency Prevention Act of 1974 (42 U.S.C. 5616(a)(2)) is amended—

(1) in subparagraph (A), by striking "Nine" and inserting "Ten"; and

(2) in subparagraph (B), by adding at the end the following:

"(iv) One member shall be appointed by the Chairman of the Committee on Indian Affairs of the Senate, in consultation with the Vice Chairman of that Committee.".

TITLE V—INDIAN COUNTRY CRIME DATA COLLECTION AND INFORMATION SHARING

SEC. 501. TRACKING OF CRIMES COMMITTED IN INDIAN COUNTRY.

(a) GANG VIOLENCE.—Section 1107 of the Violence Against Women and Department of Justice Reauthorization Act of 2005 (28 U.S.C. 534 note; Public Law 109–162) is amended—

(1) in subsection (a)—

(A) by redesignating paragraphs (8) through (12) as paragraphs (9) through (13), respectively;

(B) by inserting after paragraph (7) the following:

"(8) the Office of Justice Services of the Bureau of Indian Affairs;";

(C) in paragraph (9) (as redesignated by subparagraph (A)), by striking "State" and inserting "tribal, State,"; and

(D) in paragraphs (10) through (12) (as redesignated by subparagraph (A)), by inserting "tribal," before "State," each place it appears; and

(2) in subsection (b), by inserting "tribal," before "State," each place it appears.

(b) BUREAU OF JUSTICE STATISTICS.—Section 302 of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3732) is amended—

(1) in subsection (c)—

(A) in paragraph (1), by inserting ", Indian tribes," after "contracts with";

(B) in each of paragraphs (3) through (6), by inserting "tribal," after "State," each place it appears;

(C) in paragraph (7), by inserting "and in Indian country" after "States";

(D) in paragraph (9), by striking "Federal and State Governments" and inserting "Federal Government and State and tribal governments";

(E) in each of paragraphs (10) and (11), by inserting ", tribal," after "State" each place it appears;

(F) in paragraph (13), by inserting ", Indian tribes," after "States";

(G) in paragraph (17)—

(i) by striking "State and local" and inserting "State, tribal, and local"; and

(ii) by striking "State, and local" and inserting "State, tribal, and local";

(H) in paragraph (18), by striking "State and local" and inserting "State, tribal, and local";

(I) in paragraph (19), by inserting "and tribal" after "State" each place it appears;

(J) in paragraph (20), by inserting ", tribal," after "State"; and

(K) in paragraph (22), by inserting ", tribal," after "Federal";

(2) in subsection (d)—

(A) by redesignating paragraphs (1) through (6) as subparagraphs (A) through (F), respectively, and indenting the subparagraphs appropriately;

(B) by striking "To insure" and inserting the following:

"(1) IN GENERAL.—To ensure"; and

(C) by adding at the end the following:

"(2) CONSULTATION WITH INDIAN TRIBES.—The Director, acting jointly with the Assistant Secretary for Indian Affairs (acting through the Director of the Office of Law Enforcement Services) and the Director of the Federal Bureau of Investigation, shall work with Indian tribes and tribal law enforcement agencies to establish and implement such tribal data collection systems as the Director determines to be necessary to achieve the purposes of this section.";

(3) in subsection (e), by striking "subsection (d)(3)" and inserting "subsection (d)(1)(C)";

(4) in subsection (f)—

(A) in the subsection heading, by inserting ", Tribal," after "State"; and

(B) by inserting ", tribal," after "State"; and

(5) by adding at the end the following:

"(g) REPORT TO CONGRESS ON CRIMES IN INDIAN COUNTRY.—Not later than 1 year after the date of enactment of this subsection, and annually thereafter, the Director shall submit to Congress a report describing the data collected and analyzed under this section relating to crimes in Indian country.".

SEC. 502. GRANTS TO IMPROVE TRIBAL DATA COLLECTION SYSTEMS.

Section 3 of the Indian Law Enforcement Reform Act (25 U.S.C. 2802) is amended by adding at the end the following:

"(f) GRANTS TO IMPROVE TRIBAL DATA COLLECTION SYSTEMS.—

"(1) GRANT PROGRAM.—The Secretary, acting through the Director of the Office of Justice Services of the Bureau and in coordination with the Attorney General, shall establish a program under which the Secretary shall provide grants to Indian tribes for activities to ensure uniformity in the collection and analysis of data relating to crime in Indian country.

"(2) REGULATIONS.—The Secretary, acting through the Director of the Office of Justice Services of the Bureau, in consultation with tribal governments and tribal justice officials, shall promulgate such regulations as are necessary to carry out the grant program under this subsection.".

SEC. 503. CRIMINAL HISTORY RECORD IMPROVEMENT PROGRAM.

Section 1301(a) of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3796h(a)) is amended by inserting ", tribal," after "State".

TITLE VI—DOMESTIC VIOLENCE AND SEXUAL ASSAULT PROSECUTION AND PREVENTION

SEC. 601. PRISONER RELEASE AND REENTRY.

Section 4042 of title 18, United States Code, is amended—

(1) in subsection (a)(4), by inserting ", tribal," after "State";

(2) in subsection (b)(1), in the first sentence, by striking "officer of the State and of the local jurisdiction" and inserting "officers of each State, tribal, and local jurisdiction"; and

(3) in subsection (c)—

(A) in paragraph (1)—

(i) in subparagraph (A), by striking "officer of the State and of the local jurisdiction" and inserting "officers of each State, tribal, and local jurisdiction"; and

(ii) in subparagraph (B), by inserting ", tribal," after "State" each place it appears; and

(B) in paragraph (2)—

(i) by striking "(2) Notice" and inserting the following:

"(2) REQUIREMENTS.—

"(A) IN GENERAL.—A notice";

(ii) in the second sentence, by striking "For a person who is released" and inserting the following:

"(B) RELEASED PERSONS.—For a person who is released";

(iii) in the third sentence, by striking "For a person who is sentenced" and inserting the following:

"(C) PERSONS ON PROBATION.—For a person who is sentenced";

(iv) in the fourth sentence, by striking "Notice concerning" and inserting the following:

"(D) RELEASED PERSONS REQUIRED TO REGISTER.—

"(i) IN GENERAL.—A notice concerning"; and

(v) in subparagraph (D) (as designated by clause (iv)), by adding at the end the following:

"(ii) PERSONS RESIDING IN INDIAN COUNTRY.—For a person described in paragraph (3) the expected place of residence of whom is potentially located in Indian country, the Director of the Bureau of Prisons or the Director of the Administrative Office of the United States Courts, as appropriate, shall—

"(I) make all reasonable and necessary efforts to determine whether the residence of the person is located in Indian country; and

"(II) ensure that the person is registered with the law enforcement office of each appropriate jurisdiction before release from Federal custody.".

SEC. 602. DOMESTIC AND SEXUAL VIOLENT OFFENSE TRAINING.

Section 3(c)(9) of the Indian Law Enforcement Reform Act (25 U.S.C. 2802(c)(9)) (as amended by section 101(a)(2)) is amended by inserting before the semicolon at the end the following: ", including training to properly interview victims of domestic and sexual violence and to collect, preserve, and present evidence to Federal and tribal prosecutors to increase the conviction rate for domestic and sexual violence offenses for purposes of addressing and preventing domestic and sexual violent offenses".

SEC. 603. TESTIMONY BY FEDERAL EMPLOYEES IN CASES OF RAPE AND SEXUAL ASSAULT.

The Indian Law Enforcement Reform Act (25 U.S.C. 2801 et seq.) is amended by adding at the end the following:

"SEC. 11. TESTIMONY BY FEDERAL EMPLOYEES IN CASES OF RAPE AND SEXUAL ASSAULT.

"(a) APPROVAL OF EMPLOYEE TESTIMONY.—The Director of the Office of Justice Services or the Director of the Indian Health Service, as appropriate (referred to in this section as the 'Director concerned'), shall approve or disapprove, in writing, any request or subpoena for a law enforcement officer, sexual assault nurse examiner, or other employee under the supervision of the Director concerned to provide testimony in a deposition, trial, or other similar proceeding regarding information obtained in carrying out the official duties of the employee.

"(b) REQUIREMENT.—The Director concerned shall approve a request or subpoena under subsection (a) if the request or subpoena does not violate the policy of the Department of the Interior to maintain strict impartiality with respect to private causes of action.

"(c) TREATMENT.—If the Director concerned fails to approve or disapprove a request or subpoena by the date that is 30 days after the date of receipt of the request or subpoena, the request or subpoena shall be considered to be approved for purposes of this section.".

SEC. 604. COORDINATION OF FEDERAL AGENCIES.

The Indian Law Enforcement Reform Act (25 U.S.C. 2801 et seq.) (as amended by section 603) is amended by adding at the end the following:

"SEC. 12. COORDINATION OF FEDERAL AGENCIES.

"(a) IN GENERAL.—The Secretary, in coordination with the Attorney General, Federal and tribal law enforcement agencies, the Indian Health Service, and domestic violence or sexual assault victim organizations, shall develop appropriate victim services and victim advocate training programs—

"(1) to improve domestic violence or sexual abuse responses;

"(2) to improve forensic examinations and collection;

"(3) to identify problems or obstacles in the prosecution of domestic violence or sexual abuse; and

"(4) to meet other needs or carry out other activities required to prevent, treat, and improve prosecutions of domestic violence and sexual abuse.

"(b) REPORT.—Not later than 2 years after the date of enactment of this section, the Secretary shall submit to the Committee on Indian Affairs of the Senate and the Committee on Natural Resources of the House of Representatives a report that describes, with respect to the matters described in subsection (a), the improvements made and needed, problems or obstacles identified, and costs necessary to address the problems or obstacles, and any other recommendations that the Secretary determines to be appropriate.".

SEC. 605. SEXUAL ASSAULT PROTOCOL.

Title VIII of the Indian Health Care Improvement Act is amended by inserting after section 802 (25 U.S.C. 1672) the following:

"SEC. 803. POLICIES AND PROTOCOL.

"The Director of Service, in coordination with the Director of the Office on Violence Against Women of the Department of Justice, in consultation with Indian Tribes and Tribal Organizations, and in conference with Urban Indian Organizations, shall develop standardized sexual assault policies and protocol for the facilities of the Service, based on similar protocol that has been established by the Department of Justice.".

○

Mr. SCOTT. It is now my pleasure to recognize the acting Ranking Member of the Subcommittee, gentleman from California, Mr. Lungren.

Mr. LUNGREN. Thank you very much, Mr. Chairman. I am sitting here in the stead of Mr. Gohmert, who will be here shortly. Unfortunately I am a Member of the Task Force on Impeachment and we are considering the impeachment of a Federal judge from Louisiana, and we have another hearing that I must attend a little bit later.

But I thank you for having this hearing examining H.R. 1924, the "Tribal Law and Order Act of 2009." As I recall, this, I believe, is the first hearing the Subcommittee has held on the issue of criminal law enforcement in Indian country in some time. I don't recall a hearing this year or last year.

And so I am very pleased that we are doing this. It is a matter this Subcommittee needs to spend time on as the rising crime rate and apparent inadequate law enforcement on Indian reservations have been a serious concern for many years.

As the former attorney general of California and a Member whose district contains Indian country I have some familiarity with tribal issues. There are 564 federally-recognized tribes in the United States comprised of 1.9 million American Indians and Alaska Natives, with tribal lands covering about 56 million acres in the continental United States.

But Indian country is disparate country. What I mean by that is there are very many differences. In California we have—I believe it is now over 110 maybe approaching 120 different recognized tribes and bands, most of which live on small parcels of land—rancherias—very different than what you find in some other States that have large expanses.

We are a PL 280 State, as the gentleman suggested, with general criminal supervision law enforcement by State law. And there may be gaps there but I think that that is not a bad model and I am very interested in how this—the changes intended in this law might impact our State.

Concurrent jurisdiction sometimes is an additional protection. I would not want to see it, though, advanced in a certain way that would interfere with prompt and timely investigation and prosecution of crimes by local jurisdiction under State law, as is currently the case, if there is no problem there.

As you stated, the jurisdiction over criminal matters in Indian country is a responsibility shared by tribal, State, and Federal law enforcement officials in a very complex manner. In fact, the reservation that is in one of my counties crosses over State lines.

A good part of the land is in Nevada; some of the land is in California. I believe more of the members of that tribe actually live in Nevada than in California.

I have worked in the past on how we deal with cross-jurisdictional matters and how we try and work with the tribal law enforcement in conjunction with local law enforcement. It is not an easy question and I believe it is important for us to have these kinds of hearings to understand what is done.

Sometimes you have peculiar circumstances. I recall at one point in time in California when the Federal Government was not enforcing the laws dealing with gambling, and the interesting thing was that local law enforcement could go in and do general prosecution on Indian lands but they could not do anything with respect to illegal gambling on the Indian lands.

And so you had the anomalous situation where a local sheriff would go in if there were an act of violence at a gambling establishment on the lands but could do nothing about illegal gambling that was going on there. I mean, those things have been sorted out better, but it just shows you the confusion that can arise when you have concurrent jurisdiction. And in some cases the result was an inability or a failure to enforce laws at all.

And so this is a very interesting, very important thing for us to talk about. And one of the things that we need to do is to make sure our colleagues when we deal with this issue understand the unique status that tribes have. They hold a unique status of a dependent, domestic, sovereign nation within the United States. Nobody else has that.

As a result, many Members don't understand why we have these kinds of conflicts of law and why our examination is necessary. So I thank the Chairman for bringing us to this point and I am very interested in looking at the material. And I promise that while I might have to leave for a good portion of this for the impeachment proceedings I will examine this information and follow this, and hopefully work with you and others so that we can come to completion on this.

Mr. SCOTT. Thank you.

Our first panel consists of the sponsor of H.R. 1924, the gentlelady from South Dakota, Ms. Stephanie Herseth Sandlin. She is the at-large Member from South Dakota and is serving her fourth term.

She serves on the Committees on Agriculture, Veterans' Affairs, and Natural Resources, and chairs the Veterans' Affairs Subcommittee on Economic Opportunity. She also serves on the Select Committee on Energy Independence and Global Warming.

Ms. Herseth Sandlin, it is good to see you. You know the drill.

TESTIMONY OF THE HONORABLE STEPHANIE HERSETH SANDLIN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF SOUTH DAKOTA

Ms. HERSETH SANDLIN. Thank you very much, Chairman Scott, for holding today's hearing and for your interest in the Tribal Law and Order Act and for allowing me to testify in support of this legislation.

I want to thank Mr. Lungren for his comments and his understanding and perspective as it relates to the impact of law enforcement across the country and the different tribes that we represent.

As South Dakota's lone Member of the U.S. House of Representatives, I have the privilege of representing nine sovereign Sioux tribes. The Tribal Law and Order Act is a bipartisan and bicameral initiative to improve coordination among tribal, State, and Federal law enforcement agencies and increase accountability standards.

Senator Byron Dorgan, who is Chairman of the Senate Committee on Indian Affairs, has introduced nearly identical legislation in the Senate that has been approved by the Committee, and President Obama announced at the Tribal Nations Conference held in Washington, D.C., here last month that, "I support the Tribal Law and Order Act and look forward to Congress passing it so I can sign it into law."

I would especially like to thank the U.S. Department of Justice and Attorney General Holder for the priority the Department has given to tribal justice issues. The department held a tribal nations listening session on public safety and law enforcement in Minneapolis in October on other places across the country, which, together with the Tribal Nations Summit in Washington, DC, and DOJ's ongoing efforts to work with Congress to fashion the very best tribal law and order bill, that demonstrates the President and his Administration's commitment to working with tribes on law enforcement priorities that we share in common.

I am very glad to see that Associate Attorney General Tom Perrelli is here today to testify, and I thank him for all of the initiative and attention that he himself has given and devoted to these issues throughout his career, including speaking at the listening session in Minneapolis and the Tribal Nations Summit. I am particularly pleased at his candor that the Federal Government must do better and that he is experienced working with large, land-based tribes, like the Oglala Sioux tribes in South Dakota.

As you know, the Federal Government has a unique relationship with the 562 federally-recognized American Indian and Alaska Native tribes. This government-to-government relationship is established by our founders in the U.S. Constitution, recognized by hundreds of treaties, and reaffirmed through executive orders, judicial decisions, and congressional action. Fundamentally, this relationship establishes the responsibilities to be carried out by one sovereign to the other.

Native American family, like all families in our country, deserve a basic sense of safety and security in their community. Law enforcement is one of the Federal Government's trust obligations to federally-recognized tribes. Yet, as the tribes across the country know all too well, on many counts we are failing to meet that obligation and have done so for too many years.

For instance, as the Chairman noted in his opening remarks, Amnesty International has reported that American Indian and Alaska Native women are more than two and a half times more likely to be raped or sexually assaulted than women in the United States in general. Yet, the majority of those crimes go unpunished.

Moreover, fewer than 3,000 law enforcement officers patrol more than 56 million acres of Indian country. That reflects less than one half of the law enforcement presence in comparable rural communities.

The situation is particularly challenging—I think Mr. Lungren noted—for large, land-based reservations in South Dakota and elsewhere. The kinds of problems that arise include the case of a young woman living on the Pine Ridge reservation who had received a restraining order for an ex-boyfriend who had battered her. One night she was home alone and woke up as he attempted to break into her home with a crow bar.

She immediately called the police, but due to a lack of landlines for telephones and spotty cell phone coverage the call was cut off three times before she could report the situation to the dispatcher. The nearest officer was over 40 miles away.

Even though the police officer who took the call started driving to her home at 80 miles an hour on roads that the quality of which—well, if you traveled those roads you would understand why traveling over 60 miles an hour is a hazard and the high incidence of traffic accidents that we have and deaths that result. But even with his efforts, by the time he arrived the woman was severely bloodied and beaten and the perpetrator had escaped.

In addition to the situations faced by victims of violent crime these officers frequently have no backup. And again, just to put the expansive nature of this territory into perspective, just the Cheyenne River Sioux tribe that I represent their reservation is comparable to the size of the State of Connecticut.

The Tribal Law and Order Act would improve law enforcement efforts in Indian country by clarifying the responsibilities of Federal, State, tribal, and local governments with respect to crimes committed on tribal—in tribal communities. It would increase coordination and communication among Federal, State, tribal, and local law enforcement agencies.

It would empower tribal governments with the authority, resources, and information necessary to effectively provide for the public safety in tribal communities, reduce the prevalence of violent crime in tribal communities, and combat violence against Indian and Alaska Native women.

It would target youth prevention by authorizing funding for summer education programs and at-risk youth treatment centers, address and prevent drug trafficking and reduce rates of alcohol and drug addiction in Indian country, and increase and standardize the collection of criminal data and the sharing of criminal history information among State, Federal, and tribal officials responsible for responding to and investigating crimes in tribal communities.

One example of an improvement the bill would make is the provision for special law enforcement commissions. Currently only Federal agents, such as the FBI, can make arrests for rapes on reservations in cases in which the perpetrator is non-Indian. In many

cases those FBI officers can be hundreds of miles from a reservation.

A provision in this bill would expand a training program to give special law enforcement commissions to tribal law enforcement officers. With this special commission a tribal law enforcement officer can be federally deputized to arrest any person on tribal land who commits a Federal crime such as rape, murder, or drug trafficking.

The bill also streamlines the process for IHS officials to testify in criminal cases, such as rape or sexual assault cases, before a tribal court. In order for an IHS official or BIA officer to answer a subpoena to testify in court approval must be given by someone in Washington, D.C.

The result is that some tribal court criminal cases are dropped because the person who conducted the rape examination or the officer who answered the distress call doesn't show up in tribal court. That would be changed so that if approval isn't given within 30 days the request to testify will be considered approved.

By expanding training programs to grant tribal law enforcement officers authority to arrest all suspects of crime on tribal land and making it easier for IHS experts to testify in court we can slow the flood of crimes that go unpunished.

While there will be no simple or quick fix, this comprehensive legislation is a step in the right direction. By passing this legislation we will make important strides in improving law enforcement in Indian country during this Congress.

I thank you again, Chairman Scott, for this opportunity to testify on behalf of the Tribal Law and Order Act of 2009 and for helping to advance this important bill on behalf of the tribal communities across Indian country that are in desperate need of improved law enforcement.

[The prepared statement of Ms. Herseth Sandlin follows:]

PREPARED STATEMENT OF THE HONORABLE STEPHANIE HERSETH SANDLIN

Written Testimony of Representative Stephanie Herseth Sandlin
H.R. 1924, Tribal Law and Order Act of 2009
House Judiciary Subcommittee on Crime, Terrorism & Homeland Security
December 10, 2009

Thank you, Chairman Scott and Ranking Member Gohmert for holding today's hearing on the Tribal Law and Order Act and for allowing me to testify in support of this important legislation.

As South Dakota's lone member of the U.S. House of Representatives, I have the privilege of representing nine Sioux tribes. The Tribal Law and Order Act is a bipartisan and bicameral initiative to improve coordination between tribal, state and federal law enforcement agencies and increase accountability standards.

Senator Byron Dorgan, chairman of the Senate Committee on Indian Affairs, has introduced nearly identical legislation in the Senate that has been approved by that committee. And President Obama announced at the Tribal Nations Conference in Washington last month that: "I … support the Tribal Law and Order Act, and … look forward to Congress passing it so I can sign it into law."

The federal government has a unique relationship with the 562 federally-recognized American Indian and Alaska Native tribes. This government-to-government relationship is established by our founders in the U.S. Constitution, recognized through hundreds of treaties, and reaffirmed through executive orders, judicial decisions, and congressional action. Fundamentally, this relationship establishes the responsibilities to be carried out by one sovereign to the other.

Native American families, like all families, deserve a basic sense of safety and security in their communities. Law enforcement is one of the federal government's trust obligations to federally-recognized tribes. Yet, as the tribes across the country know all too well, on many counts, we are failing to meet that obligation and have done so for too many years.

Tragically, there is a pervasive sense of lawlessness in too many areas of Indian Country. Public safety has reached a crisis level for many tribal communities in South Dakota and across the nation and tribal communities face many law enforcement challenges.

Amnesty International has reported that American Indian and Alaska Native women are more than two and a half times more likely to be raped or sexually assaulted than women in the Untied States in general. Yet, the majority of these crimes go unpunished. In addition, the use of methamphetamine in tribal communities is three times the national average.

Moreover, fewer than 3,000 law enforcement officers patrol more than 56 million acres of Indian Country. That reflects less than one-half of the law enforcement presence in comparable rural communities. On many Indian reservations, officers respond to emergency calls without backup and travel to remote locations without adequate radio communication. The situation is particularly challenging for large, land-based reservations in South Dakota and elsewhere.

In South Dakota, officers can cover hundreds of miles each shift. During a typical eight hour shift on the Oglala Sioux Tribe's Pine Ridge Reservation, there are only five tribal law enforcement officers on duty to patrol an area larger than the state of Delaware.

In April, Oglala Sioux Tribe President Theresa Two Bulls testified at a House Interior Appropriations oversight hearing. She described the case of a young woman living on the Pine Ridge reservation who had received a restraining order for an ex-boyfriend who battered her. One night, she was home alone and woke up as he attempted to break into her home with a crow bar. She immediately called the police, but due to the lack of land lines for telephones and the spotty cell coverage, the call was cut off three times before she reported her situation to the dispatcher. The nearest officer was about 40 miles away. Even though the young police officer who took the call started driving to her home at 80 miles an hour, by the time he arrived, the woman was severely bloodied and beaten. The perpetrator had escaped.

As I meet with tribal leaders in South Dakota and throughout Indian Country, stories like this are common. At a 2007 Natural Resources Field hearing in South Dakota on tribal law enforcement,

the Cheyenne River Sioux tribal chairman testified that his tribe had only three officers per shift to cover 19 communities and 15,000 people spread across an area almost the size of the state of Connecticut. The sheer size of these reservations, coupled with understaffed departments, outdated equipment, and high gas prices, strain tribal law enforcement efforts.

As crime rates increase, the state of jails and other facilities fail to keep pace. Many Indian detention facilities, police stations, and tribal court buildings are in disrepair, and some in South Dakota have been condemned. These facilities often have broken furnaces, no running water, or asbestos in the air. However, the tribes are forced to keep them open because the Federal government has no plan to replace them. One tribal detention facility in South Dakota was forced to remove its prisoners four times in one year because of a lack of heat and air conditioning.

For families who take a basic sense of safety and security for granted, these stories should serve as a wake-up call. Clearly, these problems will continue to worsen until the federal government dedicates the resources necessary to address these problems, and just as importantly, address the complex and broken system of law and order in Indian Country.

The Tribal Law and Order Act would improve law enforcement efforts in Indian Country by clarifying the responsibilities of Federal, State, tribal, and local governments with respect to crimes committed in tribal communities; it would increase coordination and communication among Federal, State, tribal, and local law enforcement agencies; empower tribal governments with the authority, resources, and information necessary to effectively provide for the public's safety in tribal communities; reduce the prevalence of violent crime in tribal communities and combat violence against Indian and Alaska Native women; targets youth prevention by authorizing funding for summer education programs and at-risk youth treatment centers; reduce at-risk youth and lower drop out rates; address and prevent drug trafficking and reduce rates of alcohol and drug addiction in Indian country; and increase and standardize the collection of criminal data and the sharing of criminal history information among Federal, State, and Tribal officials responsible for responding to and investigating crimes in tribal communities.

Here are some examples of improvements the bill would make. Currently, only federal agents such as the FBI can make arrests for sexual assaults on reservations in cases in which the perpetrator is non-Indian. In many cases, including my home state, those FBI offices can be hundreds of miles from a reservation. A provision in this bill will expand a training program to give Special Law Enforcement Commissions to tribal law enforcement officers. With an SLEC, a tribal law enforcement officer can be federally deputized to arrest any person on tribal land who commits a federal crime such as rape, murder, and drug trafficking.

The bill also streamlines the process for IHS officials to testify in rape or sexual assault cases. In order for an IHS official to testify in court, approval must be given by the director of IHS in Washington, DC. That would be changed so that if approval is not given within 30 days, the request to testify will be considered approved.

By expanding training programs to grant tribal law enforcement officers arresting authority of non-Natives on tribal land and making it easier for IHS experts to testify in court, we can slow the flood of crimes that go unpunished.

While there will be no simple or quick fix, this comprehensive legislation is a step in the right direction. Native American families, like all families, deserve to live in safe communities with the critical law enforcement protection and services that are standard in nearly every town and city across the country. By passing this legislation, we'll make important strides in improving law enforcement in Indian Country during this Congress.

Mr. SCOTT. Thank you very much. Thank you.

Are there any questions?

Thank you. And we will be proceeding with the next panel. Thank you for your sponsorship of this, Ms. Herseth Sandlin.

And we will next call our next witness. The next panel consists of the Associate Attorney General in the United States Department of Justice, Tom Perrelli.

As the third ranking official in the department he oversees what is traditionally described as the Department's civil litigations component. He also receives much of the Department's work supporting State, local, and tribal law enforcement efforts. He graduated from Harvard Law School magna cum laude and is serving his sixth tour in the Department of Justice.

Mr. Perrelli?

TESTIMONY OF THE HONORABLE THOMAS J. PERRELLI, ASSOCIATE ATTORNEY GENERAL, UNITED STATES DEPARTMENT OF JUSTICE, WASHINGTON, DC

Mr. PERRELLI. Good morning, Chairman Scott, Acting Ranking Member Lungren, and Members of the Subcommittee. Thank you for having me here today to testify about the Tribal Law and Order Act of 2009.

It is an important area and I would like to thank Representative Herseth Sandlin for her leadership in this area.

And I also want to thank the Committee for taking on this issue.

By any standard we have an enormous public safety problem in Indian country. As those who have worked in Indian country know and as Congressman Lungren said, enforcing the law is complicated, due to jurisdictional complexities, lack of resources, and the basic challenge—in many locations—that comes from distance. And the challenges of enforcing the law in California are different from those in South Dakota, and different again from those in Alaska.

But I want to make something clear: We need to make Indian country safer, and I think we can do so. The problems today are severe.

American Indians and Alaska Natives suffer from violent crime at far greater rates than other Americans. Some tribes have experienced crime rates of two, three, four, even ten 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 and clinic research show that there are high rates of intimate partner violence, and those levels of violence have continued for years.

The leadership of the Justice Department is absolutely committed to doing better. The Federal Government has a trust responsibility to Native Americans, and the reality is that in many Indian communities, the Federal Government has the primary law enforcement role. But in that role we are also partners with tribal prosecutors, law enforcement, courts, victim services providers, and with State and local authorities.

All of us need to work together more effectively to improve the lives of Native Americans and make those communities safer. The Tribal Law and Order bill is key to this effort because it focuses on a number of critical areas, including building tribal capacity to play an increasing role in public safety, encouraging partnership and communication among tribal, State, and Federal actors, addressing the violence against native women that has devastated many communities, and reauthorizing important programs that address public safety and improve the lives of tribal youth.

Now as I have said, the Department of Justice, at its highest levels, is committed to this effort. As part of that the Attorney General convened a listening session, as Congresswoman Herseth Sandlin explained, to discuss public safety and law enforcement. Leaders of all the federally-recognized tribes were invited.

And what we heard there is simply unacceptable. We were told by a veteran South Dakota prosecutor that in one neighborhood, nearly every other house had been a crime scene in the last 10 years. We heard from American Indian women about reservations in which women who had not been sexually assaulted were the exception.

We heard from tribal law enforcement officials who were so strapped on a reservation the size of Delaware that they can have only two officers on duty at any given time, putting those officers hours away from likely crime scenes. And we have heard from a tribal judge about the frustration of learning that a domestic violence perpetrator who had been given no jail time had more than 20 prior arrests for domestic violence, but the judge simply was not able to access a database that would have told him that.

These issues are real priorities for the Department of Justice. Both the Deputy Attorney General and I have extensive personal experience in Indian country, having been involved in efforts to improve public safety there over the years. I personally consider the efforts of the CIRCLE Project, which was a project that attempted to bring comprehensive approaches to problems in Indian country with as many partners as possible in Northern Cheyenne, Oglala Sioux, and Zuni Pueblo areas, to be one of the most fulfilling aspects of my career.

With a new focus, we at the Justice Department are hard at work to develop sustainable, effective, and efficient strategies, and I would by happy to talk about the things that we are already doing. We believe the Tribal Law and Order Act would make important changes, and we strongly support S. 797, the Senate version of this legislation, which is sponsored by Senator Dorgan, and we look forward with this Subcommittee to further develop H.R. 1924. I urge the Subcommittee to do all that it can to move the measure forward so that it can be signed into law as soon as possible.

Thank you very much, and I look forward to questions.

[The prepared statement of Mr. Perrelli follows:]

PREPARED STATEMENT OF THE HONORABLE THOMAS J. PERRELLI

Department of Justice

STATEMENT OF

THOMAS J. PERRELLI
ASSOCIATE ATTORNEY GENERAL

BEFORE THE

SUBCOMMITTEE OF CRIME, TERRORISM AND HOMELAND SECURITY
UNITED STATES HOUSE OF REPRESENTATIVES

ENTITLED

"H.R. 1924, THE TRIBAL LAW AND ORDER ACT OF 2009"

PRESENTED

DECEMBER 10, 2009

Good morning, Chairman Scott, Ranking Member Gohmert, and Members of the Subcommittee. Thank you for the opportunity to testify today on the Tribal Law and Order Act of 2009, which marks a key step forward in the federal government's effort to improve public safety in tribal communities. The Administration strongly supports S. 797, the Senate version of this legislation which is sponsored by the Senate Committee on Indian Affairs Chairman, Byron Dorgan, and we look forward to working with the Subcommittee to further develop H.R. 1924. I want to acknowledge Representative Herseth-Sandlin's leadership on this issue. I appreciate the opportunity to discuss the Department's law enforcement role in Indian Country.[1]

We believe that passage of the Tribal Law and Order Act is critical because violent crime in American Indian and Alaska Native communities is at unacceptable levels. The federal government has a distinct legal, trust, and treaty obligation to provide for public safety in tribal communities, and we welcome this measure as an important step in fulfilling this basic duty. Although no legislation can solve all the problems facing Indian Country, the Tribal Law and Order Act would put in place important changes that will help both the Executive Branch and the Congress better address the public safety challenges that confront tribal communities.

It is difficult to overstate the severity of the problem. Available statistics make clear that American Indians and Alaska Natives suffer violent crime at far greater rates than other Americans. According to data from the Bureau of Indian Affairs, some tribes have experienced rates of violent crime twice, four times, and in some cases over 10 times the national average. Violence against Native women and children is a particular problem, with some counties facing

[1] "Indian Country" is defined by 18 U.S.C. § 1151 as follows: . . . "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including the rights-of-way through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the titles to which have not been extinguished, including rights-of-way running through the same."

murder rates against Native women well over 10 times the national average.[2] Reservation- and clinic-based research shows very high rates of intimate-partner violence against American Indian and Alaska Native women.[3]

In October, the Attorney General convened a listening session, to which the leaders of all federally recognized tribes were invited, to discuss public safety and law enforcement in tribal communities. In addition, the Justice Department recently convened its annual tribal consultation on violence against women, as required by the Violence Against Women Act. The experiences that tribal leaders and tribal law enforcement officials shared with us at these events make clear the devastating effect crime has on the quality of life for those living in American Indian and Alaska Native communities. Tribal leaders and tribal law enforcement officials — as well as the Department's Assistant U.S. Attorneys, Federal Bureau of Investigation (FBI) special agents, and victim specialists in the field — have described many brutal offenses against women and children. Perhaps most tragically, they find that many survivors of such crimes have been abused repeatedly during their lifetimes.

A challenge associated with policing Indian Country is the geographic isolation of many reservations. In some instances, law enforcement officials — whether tribal police, BIA police, or the FBI — may need to travel hundreds of miles to reach a crime scene. Additionally, many tribal nations lack the resources necessary to address these challenges, and the problems associated with attracting and retaining qualified law enforcement officers in Indian Country

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[2] Zaykowski, Kallmyer, Poteyeva, & Lanier (Aug. 2008), *Violence Against American Indian and Alaska Native Women and the Criminal Justice Response: What Is Known*, Bachman (NCJ # 223691), at 5, http://www.ncjrs.gov/pdffiles1/nij/grants/223691.pdf.

[3] Malcoe & Duran (2004), *Intimate partner violence and injury in the lives of low-income Native American women*, in B. Fisher (Ed.) Violence against women and family violence: Developments in research, practice, and policy, at I-2-5 (NCJ 199703), http://www.ncjrs.gov/pdffiles1/nij/199701.pdf.

cannot be solved in isolation. The federal government, and the Justice Department, have a duty to help tribes confront the dire public safety challenges in tribal communities.

I. The Department of Justice's Unique Law Enforcement Role in Indian Country

A. The Legal Framework

In Indian Country, law enforcement is a shared responsibility, subject to partially overlapping jurisdiction of Federal, state, and tribal authorities. Under current law, whether a particular crime is investigated or prosecuted by Federal, state, or tribal authorities depends on the severity of the crime, where it occurred, and whether the perpetrator and/or victim are Indian.

Although the details of this jurisdictional patchwork are complex, one essential point is clear: the Department of Justice has primary responsibility for prosecuting major crimes, including violent felonies, in most of Indian Country, and sole responsibility for prosecuting crimes committed by non-Indians against Native Americans.[4] In these areas, with respect to the most serious offenses and certain perpetrators, it is only the Justice Department that has authority to prosecute offenders and bring them to justice.[5]

If the Justice Department fails to enforce the law in these cases, no one else can or will. Even with respect to offenses in Indian Country over which tribal governments have concurrent

[4] One significant exception is that in the six states that have been covered by Public Law 280 since its enactment in 1953 – Alaska, Minnesota, California, Nebraska, Oregon, and Wisconsin – state jurisdiction over criminal offenses occurring in Indian Country is exclusive of the federal government; there is no federal jurisdiction.

[5] The two main federal statutes governing federal criminal jurisdiction in Indian country are 18 U.S.C. § 1152 and § 1153. Section 1153, known as the Major Crimes Act, gives the Federal Government jurisdiction to prosecute certain enumerated serious offenses, such as murder, manslaughter, rape, aggravated assault, and child sexual abuse, when they are committed by Indians in Indian country. Section 1152, known as the Indian Country Crimes Act, gives the Federal Government exclusive jurisdiction to prosecute all crimes committed by non-Indians against Indian victims. Section 1152 also grants the Federal Government jurisdiction to prosecute minor crimes by Indians against non-Indians, although that jurisdiction is shared with tribes, and section 1152 provides that the Federal Government may not prosecute an Indian for a minor offense who has been punished by the local tribe. To protect tribal self-government, section 1152 also specifically excludes minor crimes between Indians, which fall under exclusive tribal jurisdiction. The Federal Government also has jurisdiction to prosecute federal crimes of general application, such as drug and financial crimes, when they occur in Indian country, absent a specific treaty or statutory exemption. Finally, the Federal Government prosecutes certain specific offenses designed to protect tribal communities, such as bootlegging in Indian country, theft from a tribal organization or casino, unlawful hunting on tribal lands, and entering or leaving Indian country with the intent to stalk or commit domestic abuse. 18 U.S.C. §§ 2261, 2261A.

jurisdiction, often only federal courts can impose a sentence that is commensurate to the crime. This is because tribal courts currently are limited to imposing only relatively minor sentences, regardless of the nature of the offense.[6]

Thus, the Department of Justice has a legal and moral obligation to ensure public safety in tribal communities. The Department intends to vigorously enforce the law in Indian Country where we have authority.

B. Role of Department of Justice Law Enforcement Agencies in Investigating Crime in Tribal Communities

A number of Department of Justice components have roles in investigating crimes in Indian Country and bringing perpetrators to justice. The FBI is the Department's primary investigative arm in Indian Country. In 1994, the FBI established its Safe Trails Task Force initiative to focus exclusively on Indian Country crime. Through the Safe Trails Task Forces, the FBI joins with other Federal agencies within the Department of Justice and the Department of the Interior's Bureau of Indian Affairs (BIA), as well as with state, local, and tribal law enforcement officials to address regional problems of violent crime. The FBI currently operates 18 Safe Trails Task Forces. In addition, the FBI works with the BIA to provide training to tribal, state, and local investigators.

The FBI's Office for Victim Assistance dedicates 31 victim specialists to Indian Country. These professionals are a critical part of the investigation team, particularly in sensitive cases involving sexual assault and child abuse. Equally important, they provide critical support services to victims in Indian Country that otherwise would be entirely absent in many tribal communities.

[6] Currently, tribes' sentencing authority is limited to one year in prison and a $5,000 fine under the Indian Civil Rights Act, 25 U.S.C. § 1302.

In recent years, the Drug Enforcement Administration (DEA) has worked with the Native American law enforcement community to address smuggling, distribution, and abuse of controlled substances. In addition to participating in the FBI's Safe Trails Task Forces, the DEA has created its own initiatives to investigate significant drug trafficking organizations that operate on or near tribal lands. The DEA also works with the Bureau of Indian Affairs to provide core training for local, tribal, and federal investigators working with Indian Country crime.

Finally, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) works to reduce violence in Indian Country by helping tribal governments combat gang violence and other firearms-related crimes. ATF also provides training and instruction on firearms and other issues, including information about domestic violence.

C. The Role of the United States Attorney's Offices in Prosecuting Crime in Indian Country

The U.S. Attorney's Offices are responsible for prosecuting federal criminal cases arising in Indian Country. There are more than three dozen U.S. Attorney's Offices that have Indian Country within their boundaries, and approximately 25 percent of all violent crime cases opened by U.S. Attorneys nationwide each year arise in Indian Country.

The Executive Office of U.S. Attorneys coordinates among the U.S. Attorney's Offices and between these offices and other Department of Justice components. The Executive Office of U.S. Attorneys supports the Attorney General's Advisory Committee (AGAC) of United States Attorneys, including the AGAC's Native American Issues Subcommittee (NAIS), which focuses exclusively on Indian Country issues. The NAIS is comprised of U.S. Attorneys from districts having the vast majority of Native American and Alaska Native communities, and provides

important policy recommendations to the Attorney General regarding public safety and legal issues related to Indian Country.

The Department also recently created a permanent Attorney Advisor position titled Native American Issues Coordinator within the Executive Office of U.S. Attorneys' Legal Initiatives Staff. The Native American Issues Coordinator is the Executive Office of U.S. Attorneys' principal legal advisor on Native American issues, among other law enforcement program areas; and provides management support to the United States Attorney's Offices.

An important component of the United States Attorneys' Offices' efforts in Indian Country is the Tribal Liaison program, established in 1995. Tribal Liaisons have a critical role in the Department's work in Indian Country, serving as a contact between the Department and those living in tribal communities. They often provide significant training for law enforcement agents investigating violent crime and sexual abuse cases in Indian Country, and for Bureau of Indian Affairs (BIA) criminal investigators and tribal police presenting cases in federal court. Many Tribal Liaisons also serve in a role similar to a district attorney or community prosecutor in a non-Indian Country jurisdiction, and are accessible to the community in a way not generally required of other Assistant U.S. Attorneys.[7] Tribal Liaisons typically have personal relationships with tribal governments and state and local law enforcement officials from jurisdictions bordering Indian country. These relationships enhance information sharing and assist the coordination of criminal prosecution, whether federal, state, or tribal.

D. The Role of the Department's Grant-Making Components in Supporting Tribal Justice and Tribal Law Enforcement

[7] Although the Tribal Liaisons are collectively the most experienced prosecutors of crimes in Indian Country, they are not the only Assistant U.S. Attorneys doing these prosecutions. The sheer volume of cases from Indian Country requires these prosecutions in most U.S. Attorney's Offices to be distributed among numerous Assistant U.S. Attorneys.

In addition to active law enforcement on the ground, the Department of Justice also provides substantial support for tribal law enforcement and tribal justice systems through its grant programs. The Department's Office of Community Oriented Policing Services (COPS) helps put police on the beat, and provides the equipment and resources they need to protect public safety. The Office of Justice Programs and Office on Violence Against Women also administer important grant programs for tribal nations, support research and evaluation projects, and provide training and statistical and technical assistance for Indian tribes. These programs are designed to enhance and support Indian tribes' ability to address crime, violence, and victimization in Indian Country and in Alaska Native villages.

E. The Office of Tribal Justice

The Office of Tribal Justice is the primary point of contact for the Department of Justice with federally recognized Native American tribes, and advises the Department on legal and policy matters pertaining to Native Americans. The responsibilities of the Office of Tribal Justice include providing a single point of contact within the Department for meeting the broad and complex federal responsibilities owed to federally recognized Indian tribes; promoting internal uniformity of Department policies and litigation positions relating to Indian country; ensuring that the Department clearly communicates policies and positions to tribal leaders; and serving generally as a liaison with federally recognized tribes.

II. The Department of Justice's Initiative on Law Enforcement and Public Safety in Tribal Communities

We support the Tribal Law and Order Act of 2009 pending in the Senate. But we also are not waiting for the bill to become law to improve our response to Indian Country crime. The Attorney General has created a Department-wide initiative to improve our efforts to make tribal

communities safer. The Department's dialogue with tribal leaders at the Attorney General's Tribal Nations Listening Session in October was an important early step in that process.

Tribal leaders at the listening session made clear the need for immediate action in response to the extreme levels of violent crime in Indian Country, which severely undermine the quality of life for our first Americans. The gravest concerns of the tribal leaders and law enforcement experts with whom we met focused on these overarching topics: (i) violence against women and children in tribal communities, including the obligation to bring perpetrators of sexual assault and domestic violence in Indian Country to justice; (ii) the need for better coordination of federal law enforcement resources – most pressingly, FBI agents, federal prosecutors, and victim specialists – in Indian Country; (iii) the obligation to improve communication and coordination with tribal law enforcement agencies; (iv) considerations of alternative, flexible funding mechanisms for tribal justice systems, including tribal courts, police departments, prevention programs, victims' services, and juvenile justice services and infrastructure; (v) the responsibility of the federal government to support the capacity-building of tribal justice systems; (vi) the obligation of federal, state, local, and tribal law enforcement to develop collaborative strategies for fighting crime in tribal communities, including through increased opportunities for cross-deputization; and (vii) the need to develop culturally sensitive prevention and intervention programs for juveniles in tribal communities. Above all, tribal leaders emphasized that interactions between the Justice Department and tribes must reflect the government-to-government relationship between the United States and the tribes; that tribal sovereignty and self-determination should be central to federal law enforcement policies in tribal communities; and that solutions developed by the tribes themselves will best effect change in tribal communities.

What we learned from tribal leaders and law enforcement experts during our listening session will inform the efforts we undertake, in close partnership with tribes, to improve public safety in tribal communities. The Justice Department is committed to take immediate action, and to implement long-term strategies to more effectively fulfill our moral and legal obligations to help tribal governments fight crime in their communities.

With new focus, therefore, we at the Justice Department are hard at work to develop sustainable, effective, and efficient strategies to improve our law enforcement efforts in Indian Country. The Deputy Attorney General, who has been a leader on these issues for a decade, and I are working closely with the Native American Issues Subcommittee of the Attorney General's Advisory Committee, the Executive Office of U.S. Attorneys, the FBI, and others to develop policies that will augment our prosecutorial efforts in Indian Country, particularly with respect to the problem of violence against women; improve communication and coordination between tribes and our Department leaders in the field; and engage federal, state, local, and tribal law enforcement in more effective and efficient collaboration. We expect to set forth new policies in each of these areas soon.

To identify just a few additional steps we are already taking:

At the suggestion of tribal leaders during the listening session, we will create a task force to focus particularly on the issue of violence against women in tribal communities. This task force will be made up of federal, tribal, and state and local prosecutors and law enforcement, and will develop strategies to combat violence against women in tribal communities. We will identify the membership and scope of the task force after additional input from tribes.

We are establishing a National Training Coordinator for Indian Country. Having a training official dedicated to Indian Country issues will help ensure that Department of Justice

prosecutors and agents have the training and cultural knowledge needed to successfully investigate and prosecute crimes occurring in Indian Country.

We are re-examining the Department's grant-making procedures and priorities to ensure that they best serve tribal communities.

We are exploring an expansion of the multi-disciplinary team approach used in child sexual assault cases to adult sexual assault cases. Multi-disciplinary teams generally include law enforcement, victim advocates, medical providers, and prosecutors. In Indian Country, these representatives would be from both the tribal and federal systems. Members of multi-disciplinary teams work together to coordinate interviews, discuss case strategy, potentially share evidence, and ensure that victims receive necessary support and services. In the child sexual abuse context, this model has served as an important prosecution tool and enabled federal and tribal law enforcement to improve communication and jointly track such cases and investigations.

Because the root causes of crime in tribal communities are related to substance abuse, poverty, and lack of educational and employment opportunities, we are working with other federal agencies to address these issues collectively. In particular, we are engaged in ongoing discussions on these issues with the Department of the Interior, and also with many others.

Finally, to ensure ongoing input from tribal governments as we develop strategies to better address the public safety challenges in tribal communities, the Attorney General will establish a Tribal Nations Leadership Council, beginning next year.

III. Benefits of the Tribal Law and Order Act

The goals of the Justice Department's public safety in tribal communities initiative – improved communication and coordination between the federal and tribal governments; renewed

focus on violence against women in tribal communities; institutionalized commitment to tribal justice across the federal government that will provide security and public safety over the long term; and enhanced accountability – are all advanced by the Tribal Law and Order Act currently before the Senate. The legislation provides a number of important tools that will help both the Congress and the Executive Branch fulfill the federal government's responsibility to provide for public safety in Indian Country, and will also help to strengthen tribal nations' own law enforcement systems. Moreover, it does so in a manner that is appropriately respectful of tribal sovereignty and self-determination. As a result, the bill enjoys strong support not only from the Administration, but more importantly, from the tribes it seeks to assist. As stated at the outset, the Administration supports the Senate version of this legislation. We look forward to working with the Subcommittee to discuss changes to H.R. 1924 that are consistent with the goals of S. 797.

One important provision in both versions is a clarification authorizing the Attorney General to appoint tribal prosecutors to serve as Special Assistant U.S. Attorneys (SAUSAs). For decades, the Department has relied on assistance from experienced SAUSAs from other federal agencies and state and local governments in enforcing criminal law. Many tribal prosecutors have the dedication, experience, and expertise required to assist the Department in prosecuting Indian Country crime, and we welcome the bill's clarification of the Attorney General's authority in this area.

The Tribal Law and Order Act would also increase the prominence of the Office of Tribal Justice as a permanent Department component. We share that goal, but for administrative reasons urge the Subcommittee to adopt minor changes to this provision, so that the Office of Tribal Justice is accorded the appropriate status within the organizational structure of the

Department. For instance, we believe that it most appropriately would remain an "Office" rather than a "Division," as is currently the case under H.R. 1924. Divisions are large litigating components within the Department — such as the Criminal Division — and thus the role of a Division is substantially different than the specific role assigned to the Office of Tribal Justice under the bill.

Under the Act, the Department also would be required to coordinate with tribes when decisions are made to decline to prosecute crimes arising in Indian Country, so that where concurrent tribal jurisdiction exists, tribes have a fair opportunity to exercise it. The Department believes that close communication with our tribal law enforcement partners is critical to our efforts to improve public safety in tribal communities. Indeed, this is our intention regardless of whether this provision is included in the Tribal Law and Order Act.

We likewise support the concept of creating a permanent position at Main Justice to coordinate federal prosecution efforts in Indian Country and, as noted above, the Department has already established a permanent Native American Issues Coordinator within the Executive Office of U.S. Attorneys here in Washington. We believe this position will be most effective within this Office, as provided in the Senate version, because U.S. Attorneys are on the front lines of responding to law enforcement challenges in Indian Country. We therefore recommend that H.R. 1924 be amended to locate this position and responsibility within the Executive Office of U.S. Attorneys rather than in the Criminal Division.

The bill also includes annual reporting requirements concerning decisions by the U.S. Attorney's Offices to decline to prosecute alleged crimes and by the FBI to administratively close matters arising in Indian Country. This is important data for both the Department and the

Congress, and we support the increased accountability that will come with more specific information in this area.

Finally, the Act will institutionalize improved coordination between the Department of Justice and other federal partners, such as the Department of the Interior. Although we are already collaborating with fellow agencies, we agree that these statutory provisions will provide a useful framework to ensure such collaboration continues on a predictable basis into the future.

IV. Conclusion

The challenges facing law enforcement in tribal communities are enormous. The basic level of police protection that most Americans take for granted simply does not exist in many parts of Indian Country. We have a duty to change that. Although no single piece of legislation can address all of the needs in this area, the Tribal Law and Order Act makes important improvements that will continue to benefit tribes in this and future Administrations.

I urge the Subcommittee to do all it can to move this measure forward, so that it can be signed into law as soon as possible.

Thank you, and I look forward to your questions.

Mr. SCOTT. Thank you.

And I now recognize myself for 5 minutes of questions.

You indicated your support of the Senate bill. Do you not support the House bill?

Mr. PERRELLI. I think we have been working with the Senate to make improvements on the bill. There are a number of areas where I think we have been able to do that.

That includes areas such as ensuring a right to counsel. That includes trying to create the right set of incentives in the area of declination reports and reporting on decision-making by the Federal Government. And those are just a couple of the areas.

So we think that S. 797 is—represents the next stage of development and we look forward to working with this Committee.

Mr. SCOTT. What is the status of 797?

Mr. PERRELLI. It is my understanding that they are looking at a manager's amendment to that, but I don't think I have seen a copy of that.

Mr. SCOTT. In Committee?

Mr. PERRELLI. I think it is out of Committee, but—it is out of Committee——

Mr. SCOTT. But the changes have been made in Committee?

Mr. PERRELLI. Correct.

Mr. SCOTT. Okay.

Are there challenges in the prosecution involving evidence—the arrest process, and evidence, and chain of custody of evidence—are there challenges in prosecution in that area?

Mr. PERRELLI. There are significant challenges in Indian country. Some of them are presented by sheer distance—the amount of time it takes to get to a crime scene when evidence may have spoiled.

And there is simply the challenge of the lack of resources, whether insufficient number of police officers or insufficient resources for forensics. So those are serious challenges and they certainly affect the ability to prosecute cases in Indian country.

Mr. SCOTT. What about number of prosecutors and indigent defense—attorneys for defendants?

Mr. PERRELLI. I think both of those—there are challenges in both of those areas. While some tribes do provide counsel to criminal defendants, we certainly think that particularly if the Congress enacts the Tribal Law and Order Act and increases potential sentences to 3 years that it will be important to ensure counsel to indigent defendants.

On the prosecution side I think we are actively engaged in trying to determine what additional resources need to be put put in Indian country. A major initiative for the Department is to move law enforcement and prosecutorial resources closer to the reservations where they are needed so that some of the problems of distance we could cut down.

Mr. SCOTT. In tribal trials are there trials by jury?

Mr. PERRELLI. Not every trial is trial by jury, but there are trials by jury in many tribal courts. And the juries—different tribes have different practices and procedures but some have all Native American jurors, others have a mix of native and non-native jurors.

Mr. SCOTT. And who are the judges and what are their qualifications?

Mr. PERRELLI. They are tribal court judges. They are selected, again, in different ways by different communities.

My experience over the last decade is that there has been an enormous improvement in the quality of tribal court judges. We

spent the last several months working with a number of them on developing the right approach for the Justice Department to take in Indian country.

Mr. SCOTT. A judge is legally—to have formal legal training?

Mr. PERRELLI. Many are, but some are not.

Mr. SCOTT. What about services after conviction—services like drug courts, alcohol safety courts? Are those available in tribal courts and are they available in Federal courts?

Mr. PERRELLI. In many tribal communities there are wellness courts or drug courts that have been, I think, proven very effective, and we have seen some terrific, promising practices. And I know that when I meet with tribal leaders, those who don't have such courts very much want to develop them in their jurisdiction.

Mr. SCOTT. Have you proposed a budget for prevention law enforcement, criminal defense and prosecution? Have you presented a budget to solve some of these problems?

Mr. PERRELLI. We are engaged in the 2011 budget process and are very focused on these issues. And I agree with, I think, the premise of your question, which is we need to look at this comprehensively.

It can't just be about putting police officers on the street and prosecutors. One has to fund the indigent defense; one also has to fund prevention and reentry strategies. Without putting all of those pieces together, we won't do the best job possible.

Mr. SCOTT. And are you developing a budget?

Mr. PERRELLI. We are engaged in the 2011 budget process, where we are looking at what additional resources are needed in Indian country across the entire spectrum.

Mr. SCOTT. And will that budget include costs of incarceration?

Mr. PERRELLI. Well, certainly we will factor that in. In this year, under the Recovery Act, there is $225 million dedicated to the construction of tribal prisons.

One of the things that the Tribal Law and Order Act would do and that we think is important is allow those funds to be used in a broader way. Currently it really only allows the construction of traditional prisons. Tribal communities have come to us and said, "We would like to use them for broader purposes, whether it is justice centers, rehabilitation, other purposes." So that, we think, is an important aspect of this act.

Mr. SCOTT. And we can count on the budget on being a comprehensive response to this problem?

Mr. PERRELLI. I can't guarantee what OMB will do but I can guarantee that we are looking at this problem in a comprehensive——

Mr. SCOTT. You are asking.

Mr. PERRELLI. We are asking.

Mr. SCOTT. Thank you.

Gentleman from California?

Mr. LUNGREN. Obviously responses by representatives of Administrations do not change with their understanding of the power of OMB.

Mr. Perrelli, I would like to ask you this, both what the position of the Administration is, and as you understand this bill how would it affect the PL 280 States and would it be a situation of concurrent

jurisdiction or would this remove jurisdiction of general criminal enforcement by State law enforcement in PL 280 States?

Mr. PERRELLI. My understanding is that upon a request of a particular tribe and in the House version of the bill, consultation with the Attorney General, I know that on the Senate version of the bill it requires the consent of the Attorney General, which we support, and I can explain why—that it would move from mandatory PL 280 to a concurrent jurisdiction, and there are a number of concurrent PL280 jurisdictions across the country.

Mr. LUNGREN. So it would not remove, as you understand it, jurisdiction with State authorities?

Mr. PERRELLI. That is my understanding of the current version of the bill.

Mr. LUNGREN. Because if it did I would have to oppose it because I would be afraid we would be losing the very thing the purpose of this bill is to achieve, which is to ensure those who are part of Indian country the same right to protection from crime, including violent crime, that every other American has the right to not only deserve but to expect.

Let me ask you this: Under current law, with respect to criminal violations on tribal land, what is the appellate process?

Mr. PERRELLI. Under current law if the case is taken into the Federal system it follows the normal Federal appeal structure. Depending on the type of jurisdiction in place, whether it is PL 280 or something else may well go into the State system and go through the State process. If the tribal prosecutor takes the case and pursues it in tribal court there is the limit of the 1-year sentence and then there are whatever appellate options may be available through that tribal court system.

There are a number of courts that have intertribal appellate courts so that there will be several tribes together that will have an appellate system. That is not at all uncommon—some in California, the Pacific Northwest, as well as the Southwest. But not every tribe has an appellate system currently.

Mr. LUNGREN. And under this legislation, if granted, jurisdiction in a particular—well, in tribal areas, would the Federal law enforcement have the ability to make the decision as to whether they would take a case or would that have to be with the acquiescence of the tribe or tribal court? How would that work?

Mr. PERRELLI. I think it would work similar to how it does in the many concurrent jurisdiction States now, where the Federal law enforcement makes the decision. They have the ultimate authority whether they want to pursue Federal charges. There is no question that we work in close partnership with tribal authorities as well as State and local authorities in making decisions.

And I would say that I think it is extraordinarily important for all of those entities to work together to address public safety, because it may well be that while pursuing one case on the State level is a better idea, pursuing another case at the Federal level may be a better idea. That is really the theme behind what are called our Safe Trail Task Forces. There are 18 of them that the FBI manages that are focused on Indian country, and they bring together tribal, State, local, and Federal law enforcement to work together on cases that may ultimately be pursued in different

ways. But certainly this does not give up any of the discretion of Federal law enforcement to pursue cases federally.

Mr. LUNGREN. Now, a number of cases were mentioned by the author of the bill, and I think you made reference to it too, with respect to the unbelievably high level of sexual assaults that apparently do not go prosecuted. Is this because of a failure of resources?

Is this a failure of tribal law? Is this a failure of Federal prosecutors? Is it a uniquely serious problem in PL 280 States?

I am trying to get a sense of what the—if the facts are—and I believe them to be true—but if the facts are as vivid and as offensive as they appear to be, how can this continue? Why has it continued?

Mr. PERRELLI. I would first of all say it is not a problem specific to PL 280 States, although I would certainly note that Alaska presents perhaps the biggest challenges. There certainly are challenges, I think, on several levels. First, there is obviously the need to dedicate sufficient resources. I think the challenges of distance in many areas make it difficult to gather evidence and to be able to pursue crime appropriately.

I do think that we in the Federal Government, working with State, local, and tribal partners need to develop some new strategies. One of the things we have seen in child sexual assault cases is the use of child advocacy centers and multidisciplinary teams bringing everyone together has been extremely effective, in both protecting children as well as in bringing perpetrators to justice.

I think we are looking right now at a similar model in the domestic violence and sexual assault area, where we would bring everyone together, because I think there is no question that anybody can look at the statistics and say we are not doing as good a job as we need to.

Mr. SCOTT. Gentleman from Illinois, Mr. Quigley?

Mr. QUIGLEY. Thank you, Mr. Chairman. Sorry about that.

I guess as a former criminal defense attorney I witnessed the problems that sometimes could take place just between the State and the Federal deciding who was going to go forward in a criminal investigation or charges. This is only compounded in this kind of situation.

Could you address some of those issues of jurisdiction and how it could complicate life for a defendant, but also, as is addressed elsewhere, the issues that could come out in a disparity in sentencing as a result of this, given the limits the tribes face and so forth?

Mr. PERRELLI. Certainly. First, on the complexity: The situation that would arise if a tribe were to seek retrocession and if it actually occurred, is not dissimilar from what you see in, you know, maybe a dozen States today, which is concurrent jurisdiction, where there really are tribal, State, and Federal law enforcement who all could have potential involvement in the matter.

And it is absolutely incumbent on them to work together and to ensure that a defendant's rights are not violated. But it is correct that as separate sovereigns they each have their own authority to potentially prosecute.

I don't think we have seen a huge number of situations where there have been multiple prosecutions in an effort, but it certainly

does occur, just as it occurs at the State and Federal level. So I think the cornerstone of this bill, and I think going forward, is the need to work together to prosecute crime in a smart way and not prosecute the same crime over and over again.

Mr. QUIGLEY. But is it detailed in the legislation or are you suggesting that a defendant needs to hope that these entities work together?

Mr. PERRELLI. I think there is a great deal in the legislation that tries to facilitate that kind of cooperation and coordination, but I think that the defendant is in no different position than defendants in Connecticut, Idaho, Florida, Massachusetts, and other States that have the exact same situation currently. But it would be putting the defendant in a situation no different than the situation currently in California and other states that are mandatory PL 280.

Let me get to the disparate sentencing which you asked—this is an area of real concern to us. The study was done in 2003 identifying disparate sentencing, I think. You know, roughly 25 percent of the violent crime prosecuted in the Federal system is actually Indian country crime, and so that as violent crime sentences increase it has a disproportionate effect on Native American defendants.

This has been an issue that we have been concerned about, and the Department is engaged in a broad review of sentencing policy now. I think it will require a longer and deeper examination of sentencing policy related to Native Americans, and this is something on which certainly tribal leaders who have been concerned about this issue have sought our engagement, both at the Department of Justice in terms of thinking about charging decisions, but also in trying to engage the Sentencing Commission.

Mr. QUIGLEY. Is there anything else we can do within this legislation to try to address that, or——

Mr. PERRELLI. Perhaps slightly off the topic, but I think getting in the same direction, certainly one of the things that we have supported as an amendment to the Senate in the bill and would support here is ensuring a right to counsel whenever a tribal court seeks to impose a sentence of more than 1 year. So that is something that we are very supportive of and think would be helpful.

Mr. QUIGLEY. Thank you.

Mr. SCOTT. Gentleman from Florida, Mr. Rooney?

Mr. ROONEY. Thank you, Mr. Chairman.

And I come from the 16th district of Florida. We have the Brighton Seminole Indian Reservation in my district, and so these issues are of utmost importance to me and I think a lot of the people in central Florida and south Florida.

So with that, I want to thank you for your testimony. I just have a few brief questions and appreciate your response.

Can you provide for me examples of statutes requiring the reporting of all declinations by either Federal law enforcement or Federal prosecutors to either an office within the Department or another jurisdiction for prosecution, and is the referral of cases to States for prosecution governed by the statute?

Mr. PERRELLI. I think in terms of reporting on declinations, the one bill that I can think of is the Emmett Till bill, the cold case bill. So that does have a reporting requirement.

What we have supported is a requirement that we cooperate and coordinate with tribal partners, rather than a mandatory requirement of providing specific evidence or specific information, because I think our view is that you want to make sure that a prosecutor has the discretion in a particular case to say, "No, I don't want to hand over this evidence because it might be relevant to another investigation," or, "I don't want to provide this evidence because of privacy or other issues."

But the one bill that I can think of that has that kind of reporting requirement is the Emmett Till bill.

Mr. ROONEY. Okay. Is the referral of cases to States for prosecution governed by a statute?

Mr. PERRELLI. It is not governed by a statute that I can think of. We are authorized to cooperate with them, but I don't think there is a specific statute that lays out what prosecutors have to do.

Mr. ROONEY. Okay. Thank you.

Does the Department support the provision in Section 101(c) of the bill, which appears to grant warrantless arrest authority to tribal authorities for all Federal crimes?

Mr. PERRELLI. Our view is that we think that section would best allow warrantless arrests only upon probable cause, which would be a change, as well as really for felonies or certain misdemeanors where there is a threat to public safety. But for misdemeanors where there is no threat to public safety, we have generally been of the view that there is not a need to authorize a warrantless arrest.

Mr. ROONEY. Section 201 addresses the issue of retrocession of criminal jurisdiction to the United States. Does the Department have any objections or concerns to how Section 201 is currently drafted?

Mr. PERRELLI. We have taken the view—and this has been adopted in the Senate—that retrocession shouldn't occur unless the Attorney General is not just consulted but actually concurs. I think we want to ensure that jurisdiction isn't retroceded in Federal law enforcement authority absent a determination by the Attorney General that the resources are available and the Federal Government is prepared to take on those additional efforts.

Mr. ROONEY. Okay. Does the Department support Section 304 of the bill, which would allow a tribal court to direct the incarceration of those convicted by tribal court in a Bureau of Prisons facility?

Mr. PERRELLI. We have had concerns about doing that wholesale across the board. I think our view is that the best medium-and long-term approach here is construction of appropriate facilities, including alternatives to incarceration, in tribal communities or on a regional basis for a number of tribes.

But we have been willing to take on a pilot project that involves placing up to 100 prisoners into the Bureau of Prisons system, recognizing that there are capacity constraints in tribal facilities and believing that, at least in the short term, this may relieve some of those problems in the hope that we will be able to build capacity in tribal facilities over time.

Mr. ROONEY. Okay.

If I might take the liberty—and this might not be an appropriate question for you—but as somebody who has sort of watched the reservation in our district change over the years, specifically with the introduction of a very large hotel-casino, and reading the background of the—your testimony here today and the issue—and it deals with a lot of things that deal with funding, obviously, manpower and unemployment and things like that—has that phenomenon had any effect in the bigger picture? And again, if you don't know the answer to this that is—I completely understand. I am just curious as—what has that—what impact, if any, has that had on what we are talking about here today?

Mr. PERRELLI. Sure. I think you do see larger differences among tribal communities, whether it is economic development, housing, health care, and criminal justice systems. Certainly there are certain advantages that gaming tribes have that live near larger communities and are able to earn significant revenue.

They certainly have advantages that others do not, and so you see that. I particularly focus on some of the tribes in the reservations in the Great Plains particularly, where Congresswoman Herseth Sandlin's jurisdiction is, where they may have casinos but they don't have the same kind of revenue, and there are obviously less funds available to spend on justice systems and other things. So I think you do see some tremendous development of justice systems, health care, and other things in some communities, and other communities that are still struggling.

Mr. ROONEY. Thank you, sir.

And, Mr. Chairman, just—I would like to submit a letter from our Ranking Member into the record, if I could.

Mr. SCOTT. Without objection, so ordered.

[The information referred to follows:]

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

November 10, 2009

Honorable Lamar Smith
Ranking Member
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Dear Representative Smith:

I write to express views of the Judicial Conference of the United States relating to matters addressed by the *Tribal Law and Order Act of 2009*, H.R. 1924. The views in this letter are based on existing Judicial Conference positions, rather than a specific deliberation by the Conference with respect to this particular bill.

If signed into law, this Act would effect sweeping changes in tribal, state, and federal criminal justice systems. The sponsors' overarching objective of improving justice on tribal lands is important and laudable. Nonetheless, we have comments and concerns about a number of the specific provisions contained within the bill.

As a general matter, noting a lack of adequate funding for tribal court systems in the past, the Judicial Conference has expressed its support for expanding federal funding to tribal courts to prosecute and try cases that might otherwise come into the federal courts. The Conference has also indicated that in considering measures that would shift jurisdiction away from the federal courts or establish concurrent jurisdiction, the Congress should provide federal financial and other assistance to the local justice systems to permit them to handle the increased workload; similar principles would seem to apply to tribal justice systems.

Section 103(b) of the Act would authorize and encourage "United States magistrate and district courts" to coordinate with the U.S. attorney for the district to "ensure the provision of docket time for prosecutions of Indian country crimes." If we may assume that this language is intended to ensure that the federal courts are available for the prosecution of crimes occurring in Indian country, we have no comments on it. The Speedy Trial Act already imposes limits that require U.S. attorneys and courts to carefully manage the priority of criminal proceedings. If the drafters' intent, however, is to require the federal courts to expedite cases arising in Indian country versus other criminal cases, we would need to examine closely any revisions to this language. With respect to civil cases, the Judicial Conference has consistently opposed statutory provisions imposing litigation priority, expediting, or time-limitation rules on specified cases

brought in the federal courts beyond those currently specified in 28 U.S.C. § 1657 (related to habeas petitions and recalcitrant witnesses). The basic reasons for this policy are: (1) proliferation of statutory priorities means there will be no priorities; (2) individual cases within a class of cases inevitably have different priority treatment needs; (3) priorities are best set on a case-by-case basis as dictated by the exigent circumstances of the case and the status of the court docket; and (4) mandatory priorities, expedition, and time limits for specific types of cases are inimical to effective case management. Changes to the current bill language could potentially implicate analogous considerations in criminal cases.

Section 103(b) of the Act would encourage the U.S. attorney for the district to coordinate with magistrate and district courts to "hold trials and other proceedings in Indian country, as appropriate." We presume this provision is intended to address venue and not change jurisdictional law or choice of law. In principle, the Conference does not object to a provision that would encourage, but not require, U.S. attorneys' offices and tribes to reach agreements that would allow magistrate judges to hold court on tribal land with proper support. If there is a need for more magistrate judges to handle offenses on Indian reservations, the Federal Magistrates Act provides authority for the Judicial Conference to establish more positions at any location justifying the need. Limited tribal law enforcement resources and lack of agreement on jurisdictional issues have posed great challenges, however, to such arrangements in the past. Such arrangements may also present practical limitations and impact the security of judicial officers and other participants (*e.g.*, attorneys, jurors) who would be required to attend these proceedings. Addressing courthouse and courtroom security continues to be a high priority for the Judicial Conference. For example, Conference policy requires a deputy U.S. marshal in the courtroom during all criminal proceedings in which a defendant is present, including criminal proceedings before magistrate judges, unless the presiding judge determines one is not required. Removing deputy marshals from the courthouses to attend proceedings in Indian country may pose additional constraints on the resources currently available for courtroom security. In addition, federal courthouses have been carefully designed to ensure the safety of all visitors and participants, including the defendants and witnesses who may be held in custody. We would prefer the same level of security be available for proceedings held in Indian country. While we do not necessarily object to this provision of the bill, Congress should be aware of these obstacles to its implementation.

A final comment concerning Section 103(b) relates to the use of the phrase "United States magistrate and district courts." Because the United States district courts include United States magistrate judges and there are no separate magistrate courts, the use of the phrase "United States district courts" is sufficient and appropriate. The same language also appears in Section 305 and should be likewise revised.

Section 304 provides for the appointment of defense counsel if the defendant is being tried before a tribal court and is facing imprisonment of more than one (1) year for any single offense. The Conference has the view that federal courts should have the discretion to appoint counsel in certain serious petty offense cases, even if the court does not intend to impose a jail term. The principles underlying that view may apply to tribal courts, as well (even though the Sixth Amendment has not been held to bind tribal courts). Cases involving drugs or sex-related charges, for example, may have serious collateral consequences for a defendant in connection with his or her education, employment or other activities, which appointed counsel could address

with defendants before tribal courts. Appointed counsel, paid for by the tribal government, would also be consistent with the professional standards of several organizations that have considered the issue. *See* Standard 5-5.1, *ABA Standards for Criminal Justice: Providing Defense Services* (3d ed. 1992); Guideline 1.2, *NLADA Guidelines for Legal Defense Systems in the United States* (1976).

Section 305 authorizes the creation of the Indian Law and Order Commission, which would study and make recommendations on necessary modifications and improvements to the justice system at the tribal, federal, and state levels. Among the specific issues on which the Commission would be charged with making recommendations is the "establishment of satellite United States magistrate or district courts in Indian country." The Judicial Conference has opposed the creation of any separate systems of special magistrates having limited jurisdiction concurrent with that of United States magistrate judges on Indian reservations. If, as we would hope, the intent of the directive is merely to explore additional places of holding court within existing federal judicial districts, the bill language should be clarified accordingly. Moreover, as we have noted previously, when a need exists for United States magistrate judges to handle offenses committed on Indian reservations, the Federal Magistrates Act provides authority for the Judicial Conference to establish additional magistrate judge positions at appropriate locations to handle whatever cases are actually prosecuted.

Section 405 of the Act would require that:

> ...to the maximum extent practicable, the Director of the Administrative Office of the United States Courts, in coordination with the Office of Tribal Justice and the Director of the Office of Justice Services, (1) shall appoint individuals residing in Indian country to serve as assistant parole or probation officers for purposes of monitoring and providing service to Federal prisoners residing in Indian country; and (2) provide substance abuse, mental health, and other related treatment services to offenders residing on Indian land.

It is not clear if section 405 is intended to address a perceived problem of a lack of Native American officers or officer assistants, but it appears that the courts have been doing a commendable job in recruiting qualified personnel with Native American heritage. The Judicial Conference is committed to a diverse, qualified workforce. Personnel records reviewed on September 25, 2009, reflect that there were 30 officers or officer assistants of Native American heritage working in probation or pretrial services offices. The overwhelming majority of these positions were in districts within Indian country.

There are also two technical concerns with this section. First, it is more appropriate to reference "probation and pretrial services officers or officer assistants" in this section, as federal parole was abolished prospectively by the *Sentencing Reform Act of 1984*, Pub. L. No. 98-473 (1984). Federal probation officers still supervise the handful of active federal parole cases, as authorized by 18 U.S.C. § 3655. Also, this bill text should refer not to the Director of the Administrative Office of the United States Courts, but to the chief judge or the chief probation or pretrial services officer of each judicial district, to be consistent with other statutory appointment provisions for probation and pretrial services staff. *See e.g.*, 18 U.S.C. § 3153(a)(1) (concerning

Honorable Lamar Smith
Page 4

the appointment of pretrial services staff) and 18 U.S.C. § 3602 (concerning the appointment of probation officers).

Section 405 also addresses the issue of providing treatment services to offenders residing on Indian land. The Judicial Conference has consistently supported legislation designed to improve the reentry of federal offenders. With the recent enactments of the *Second Chance Act of 2007*, Pub. L. No. 110-199, and the *Judicial Administration and Technical Amendments Act of 2008*, Pub. L. No. 110-406, the courts have sufficient statutory authority to contract and expend for treatment and reentry services for offenders, including those residing in Indian country. The delivery of these services in Indian country, however, continues to present problems. In an attempt to attract more vendors willing to deliver treatment services in Indian country, the Administrative Office of the U.S. Courts (AO) added language to its standard contracts that would allow treatment providers who contract with the probation or pretrial services offices to be reimbursed for their travel expenses. In fiscal year 2008, the Judiciary spent approximately $183,000 on vendor travel, of which more than $150,000 was spent by four districts with Indian lands within their jurisdictions (Arizona, South Dakota, North Dakota, and Montana). The AO will continue to monitor these expenditures and can make additional adjustments to the contracts if necessary to attract more treatment providers to deliver services in Indian country.

There are several provisions of the bill on which the Judicial Conference has no established positions, but that require further study by the Conference. For example, Section 304 increases tribal court sentencing authority from one to three years, thus in effect giving tribal courts jurisdiction over some felonies. There are, however, substantial differences between tribal courts and federal courts with respect to constitutional protections, laws, procedures, and sentencing options. These differences may result in widely disparate treatment for the same criminal conduct depending on whether a defendant is tried in tribal court or in federal court. The Conference and its committees are continuing to study this and other aspects of the bill and intend to advise Congress promptly if the Conference adopts any additional positions applicable to the legislation.

Thank you for the opportunity to provide comments on this legislation. If we may be of any additional assistance to you, please do not hesitate to contact our Office of Legislative Affairs at 202-502-1700.

Sincerely,

James C. Duff
Secretary

cc: Honorable Louie Gohmert
Honorable Joe Barton
Honorable John Kline

Identical letter sent to: Honorable John Conyers, Jr.
Honorable Nick J. Rahall
Honorable Doc Hastings

Mr. ROONEY. Thank you, sir.

Mr. PERRELLI. Thank you.

Mr. SCOTT. Mr. Perrelli, you—in response to the gentleman from Illinois you indicated you support a right to counsel if they are getting more than 1 year. You do not support a right to counsel under a year?

Mr. PERRELLI. We support for more than 1 year; we have not taken a position on less than a year. But I think we have been fo-

cused on the situation, similar to the situation in the Federal system, where you have got potential felony time of more than a year.

Mr. SCOTT. It was my understanding if you are looking at any time you have a right to counsel.

Mr. PERRELLI. With respect to——

Mr. SCOTT. Is that not right?

Mr. PERRELLI. Well, in Indian country it is not—it has not been correct——

Mr. SCOTT. But in Federal court if you are looking at any time you have a right to counsel.

Mr. PERRELLI. I guess my recollection was if it was less than 6 months that——

Mr. SCOTT. Well, if you could get back to us on that, and also what does counsel mean?

Mr. PERRELLI. We think a counsel have to mean effective representation. And so we have been supportive of amendments that make clear that there is a requirement of effective representation and that—effective representation by someone who is a member of a bar of a jurisdiction in the United States.

Mr. SCOTT. A lawyer?

Mr. PERRELLI. Well, someone who is barred. I know that there are some tribal communities where they do authorize to practice non-lawyers in certain circumstances.

Mr. SCOTT. Okay, so when you say right to counsel you were talking about a lawyer and not an advocate?

Mr. PERRELLI. We are talking about—what we have said is effective representation, and that is some——

Mr. SCOTT. Is that an issue we need to look at as the bill goes forward?

Mr. PERRELLI. We certainly think that the current version of the House bill needs to be amended to ensure counsel to—counsel who is authorized to practice law in a jurisdiction in the United States and that that representation should be effective.

Mr. SCOTT. Okay.

Other questions, Mr. Rooney, Mr. Quigley?

Thank you very much, Mr. Perrelli.

If our next witnesses will come forward—next panel of witnesses?

As they come forward I will begin my introductions. We have four witnesses coming forward.

The first panelist is Marcus Levings, who serves as the Great Plains area vice president of the National Congress of American Indians. He also serves as a Tribal Business Council chairman of the Three Affiliated Tribes in western North Dakota. Graduated from Dickinson State University with a Bachelor's degree in business administration and finance and holds a Master's degree from the University of Maryland.

Our next witness is Tova Indritz. She is the chair of the Native American Justice Committee of the National Association of Criminal Defense Lawyers.

For 13 years she headed the Federal Public Defender Office in New Mexico. She has been in private practice since 1995, where she represents defendants in Federal, State, and Indian tribal courts. She graduated from Yale Law School.

Next panelist will be Scott Burns, who is the executive director for the National District Attorneys Association. Between 2000 and February 2009 he was deputy drug czar with the executive office of the president, Office of National Drug Control Policy. In that position he was chair of several White House intergovernmental committees, including the Native American Initiative. He graduated from California Western School of Law.

And our final panelist is Barbara Creel. She is a member of the Pueblo Jemez and a law professor at the University of New Mexico School of Law, where she teaches in the Southwest Indian Law Clinic. She also teaches a course designed—she designed called Criminal Law in Indian country.

Prior to teaching she served as the tribal liaison to the United States Army Corps of Engineers and as assistant Federal public defender in Portland, Oregon. She is a graduate of University of New Mexico School of Law.

We begin with Chairman Levings.

Mr. LEVINGS. Morning.

Mr. SCOTT. Just before you start, there is a timing device that will help you keep within the 5 minutes that you have been allotted. It will start green and when there is 1 minute left the device will turn to yellow, and red when your 5 minutes have expired.

Chairman Levings?

TESTIMONY OF MARCUS LEVINGS, GREAT PLAINS AREA VICE-PRESIDENT, NATIONAL CONGRESS OF AMERICAN INDIANS, NEW TOWN, ND

Mr. LEVINGS. Morning. My name is Marcus Dominick Levings. My Hidatsa name is Upapagish, White-Headed Eagle. I am the chairman of the Three Affiliated Tribes of Mandan, Hidatsa, and Arikara of the Fort Berthold Reservation. It is an honor to be here in front of you and—very important issue.

Honorable Chairman and distinguished Members of the Committee, thank you for the opportunity to testify today. We would also like to thank Congressman Herseth Sandlin for her efforts to move the Tribal Law and Order Act forward.

We have a public safety crisis on Indian reservations across the country and we urge Congress to move swiftly to pass the legislation in 2009. On some reservations violent crime is more than 20 times the national average. One in three Native American women will be raped in their lifetimes.

Many reservations are viewed as places with weak law enforcement and that perception breeds crime and violence. As President Obama said in his speech to tribal leaders last month, these facts are an assault on our national conscience that we can no longer ignore.

For 2½ years NCAI has worked with the Senate Committee on Indian Affairs and the Senate Judiciary Committee. The legislation has been well-vetted and we have achieved a strong bipartisan consensus.

We ask that the Judiciary Committee allow the Senate bill to move to the House floor to be considered under suspension. Our goal is to make 2010 a safer year for American Indian communities.

I would like to mention only two areas that are addressed by the bill: Federal accountability and empowerment of tribal law enforcement. Under the Major Crimes Act the Federal Government has the role—sole authority for felonies committed on Indian reservations. Despite the Federal responsibility, crime rates have been doubling and tripling in Indian country while crime rates have been falling throughout the rest of the United States.

Something is seriously wrong with the Federal law enforcement response. Funding for U.S. attorneys' offices has nearly doubled since 1998, yet the number of Federal prosecutions of Indian country crimes has fallen 26 percent since 2003.

These concerns are not confined to any one Administration. In November 2007 the Denver Post reported that over the past 10 years U.S. attorneys have declined to prosecute nearly two-thirds of felony Indian country cases nationally.

The reforms in the Tribal Law and Order Court would ensure that Indian country crime is subject to consistent and focused attention. In particular, Section 102 would require the Department to compile data on declinations of Indian country cases and submit annual reports to Congress.

Tribal leaders and Members of Congress have sought this data for decades. This will provide an important tool for measuring responsiveness and guiding law enforcement policy in the future.

Empowering tribal law enforcement is also critical. Criminal jurisdiction in Indian country is divided among Federal, tribal, and State governments. Tribal law enforcement officers are usually the first responders to crime scenes on Indian land but their limited authority often prevents them from arresting the perpetrators.

Section 301 would go a long way toward eliminating barriers to law enforcement in Indian country. Special law enforcement commissions have long been available to tribal police, but the BIA has withheld the training and granting of commissions for bureaucratic reasons.

This section expands the special law enforcement commissions program and clarifies the standards required of tribal officers. Section 301 also addresses a severe problem that tribes face in recruiting and training police officers.

Another significant concern for tribal governments is their inability to impose appropriate sentences. When U.S. attorneys and States attorneys in PL 280 jurisdictions decline to prosecute felonies in Indian country that responsibility falls to the tribes despite their limited sentencing power.

The reality on the ground is that tribal courts are often responsible for prosecuting felony crimes. There is a large gap between the maximum sentencing authority of tribes and the average sentence for the least serious felonies that are prosecuted by the Federal Government. Section 304 would help remedy this problem by increasing tribal sentencing authority to a term of 3 years in prison and ensures protection of civil rights by requiring the tribe to provide indigent defense counsel.

NCAI supports a swift passage of the Tribal Law and Order Act to address the critical shortcomings in Federal support for tribal criminal justice. NCAI urges the Committee to acknowledge the urgency of the public safety situation on Indian lands and advance

the bill as quickly as possible. Native communities cannot afford another year of the status quo.

I would like to thank the Committee for inviting us to testify today. Ajugidaj. Thank you.

[The prepared statement of Mr. Levings follows:]

PREPARED STATEMENT OF MARCUS LEVINGS

HOUSE OF REPRESENTATIVES COMMITTEE ON THE JUDICIARY
Oversight Hearing on H.R. 1924, The Tribal Law & Order Act of 2009
December 10, 2009

Testimony of Marcus Levings
Great Plains Regional Vice President
National Congress of American Indians
and
Chairman, Mandan, Arikara & Hidatsa Nation

Honorable Chairman and distinguished members of the Committee, thank you for the opportunity to testify today. During the previous two years, NCAI has provided testimony multiple times on an array of public safety issues relevant to tribal communities. We are pleased with the legislative progress that has been made in that time and, particularly, we would like to thank Congresswoman Herseth Sandlin for her steadfast efforts to move the Tribal Law & Order Act forward. However, we are acutely aware that all of her efforts—and the hard work of so many others—may be lost if Congress does not act swiftly to pass the legislation.

Native Americans are victims of violent crime at rates more than double those of any other demographic in the United States.[1] One-third of our women will be raped in their lifetimes.[2] Crime rates have been increasing in Indian country while they have been falling in similarly low-income communities throughout the United States. Nearly 10 years ago, in October 1997, the Executive Committee for Indian Country Law Enforcement Improvements issued its final report to the Attorney General and the Secretary of the Interior. The report concluded that "there is a public safety crisis in Indian Country"[3]

These public safety problems have existed for many decades, continue today and are the result of decades of gross underfunding for tribal criminal justice systems, a painfully complex jurisdictional scheme, and a centuries-old failure by the federal government to fulfill its public safety obligations on Indian lands. Although there have been many federal reports and studies of these problems, Congress has rarely been able to address them. Too often, the policy community has taken an ideological approach to the federal criminal laws affecting Indian people and has been unable to find common ground.

With this legislation, Indian tribes and the legislative sponsors have taken a different approach. All agree that the crime statistics from Indian communities are shocking and unacceptable. Lives are at stake, and we have a duty to find solutions and move swiftly to implement those solutions. For two and a half years, NCAI has worked in a bi-partisan fashion with the Senate

[1] Bureau of Crime Statistics, U.S. Dept. of Justice, Violent Victimization and Race, 1993-98, at 1 (NCJ 176354, 2001).
[2] Tjaden, Patricia, and Nancy Thoennes, Full Report of the Prevalence, Incidents, and Consequences of Violence Against Women, Findings from the Violence Against Women Survey, Washington, DC; National Institute of Justice, November 2000, NCJ 183781, p.22.
[3] REPORT OF THE EXECUTIVE COMMITTEE FOR INDIAN COUNTRY LAW ENFORCEMENT IMPROVEMENTS (1997), *availabl at* http://www.usdoj.gov/otj/icredact.htm.

Committee on Indian Affairs and the Senate Judiciary Committee. This legislation has been well-vetted and we have achieved a remarkable degree of consensus on solutions that will go a long way toward addressing these problems. Congress has a unique opportunity to reverse the regrettable public safety trends that have existed on Indian lands for far too long.

NCAI and tribal leaders ask that the House Judiciary Committee take the same pragmatic approach. This is good legislation that will strengthen our law enforcement efforts, and it comes at a great time with an Administration that is fully committed to improving justice on Indian lands. We ask that the Judiciary Committee give full consideration to S. 797, the Senate version of the bill that has been marked up and modified after extensive dialogue with the Administration, tribes, prosecutors, public defenders and many Congressional offices representing a broad range of interests. A manager's amendment is under development that addresses a number of outstanding concerns, and we hope that the Senate will pass the bill by next week. We ask that the Judiciary Committee consider allowing the Senate bill to move to the House floor to be considered under suspension this year. We have discussed this matter with Speaker Pelosi, and she has committed to moving the legislation as soon as you have completed your work. Our goal is to make 2010 a safer and happier year for American Indian communities.

NCAI would like to highlight the following four areas addressed by the bill and explain their significance to native communities: 1) federal accountability; 2) amendments to P.L. 280; 3) empowerment of tribal law enforcement; and 4) reauthorization of critical tribal justice programs.

Federal Accountability

Under the Major Crimes Act and other federal laws, the Federal Government has the sole authority for investigation and prosecution of violent crimes and other felonies committed on Indian reservations. Despite these laws and the federal trust obligation to protect Indian communities, the violent crime rate on Indian reservations is two and a half times the national average, Indian women are victims of rape and sexual assault at three times the national average, and tribal lands are increasingly the target of drug trafficking and gang-related activity. These crime rates have been doubling and tripling in Indian country while crime rates have been falling in similarly low-income communities throughout the United States. Something is seriously wrong with the federal law enforcement response.

In the past, there has been a serious concern that the Department of Justice places no priority on addressing crime in tribal communities, and is subject to no oversight or accountability on its performance in this area. Those concerns are not unfounded. In December of 2006, the Bush Administration fired seven U.S. Attorneys, five of whom served on the Attorney General's Native American Issues Subcommittee and were viewed favorably by the tribes their respective jurisdictions. One of those individuals, former U.S. Attorney for the Western District of Michigan Margaret Chiara, openly admitted that employees within the Justice Department frowned upon her attentiveness to Indian Country crime.[4] She recounted that "[p]eople thought it was too much of my time and that it was too small of a population."[5]

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[4] Michael Riley, *Principles, Politics Collide*, THE DENVER POST, Nov. 13, 2007, *available at*: http://www.denverpost.com/new/ci_7446439.
[5] *Id.*

In addition, what little hard data is available supports the theory that crime on Indian lands has not been a priority for the Department of Justice. Funding for U.S. Attorneys' offices has nearly doubled since 1998, yet the number of federal prosecutions of Indian Country crimes has actually fallen 26 percent since 2003.[6] These are not partisan concerns and are not confined to any one Administration. In November, 2007, *The Denver Post* reported that "over the past 10 years, U.S. attorneys have declined to prosecute nearly two-thirds of felony Indian Country cases nationally."[7]

This lack of accountability would not present a problem if tribes had some other form of recourse. However, when it comes to non-Indian offenders, tribal governments have no authority to prosecute, and they have only limited misdemeanor penal authority over Indians. In short, Indian tribes do not wish to "federalize" more crimes and put more Indians in federal prison. However, dangerous criminals that commit felonies on Indian lands—whether Indian or non-Indian—are under the sole jurisdiction of the Department of Justice and the Department must not ignore its responsibility to bring them to justice. The proposed reforms in H.R. 1924 would help ensure that Indian country crime is subject to consistent and focused attention. In particular:

- Section 102 would require the Department to maintain and compile data on declinations of referred Indian country cases and submit annual reports of such information to Congress. Tribal leaders and Members of Congress have sought this data for decades, but have been rebuffed by a Department of Justice that hides behind broad claims of prosecutorial discretion and a steady unwillingness to release any internal data. This will provide an important tool for measuring responsiveness to referred cases and guiding law enforcement policy in the future.

- Section 103 would authorize the Department to appoint special tribal prosecutors to assist in prosecuting Indian country crimes. Federal law (28 U.S.C. §543) authorizes the Attorney General to "appoint attorneys to assist United States attorneys when the public interest so requires." Tribal prosecutors appointed to handle Indian country crimes would fall within this category. With knowledge of federal Indian law and a familiarity with tribal justice systems, tribal prosecutors will be prepared and more adept at handling Indian country cases.

- Section 103 would also require each U.S. Attorney that serves a district which includes Indian country to appoint a tribal liaison to aid in the prosecution of Indian country crimes. Tribal liaisons would not only help coordinate the prosecution of these crimes, but they would play a significant role in developing relations and maintaining dialogue with tribal leaders and justice officials to help repair strained tribal/federal relations and more effectively prosecute.

NCAI believes that these proposals would help change the culture of federal neglect and give public safety in Indian country the attention it warrants.

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[6] *Id.*
[7] *Id.*

Amendments to P.L. 280

Under Public Law 280, the law enforcement of certain states has displaced federal enforcement and assumed full or partial jurisdiction over crimes committed in Indian Country within state borders. The law has contributed to mistrust and hostility between state and tribal officials on many reservations. Tribal opposition to P.L. 280 has focused on the law's failure to recognize tribal sovereignty and the lack of consent of the affected tribes. States have focused on the failure of the Act to provide federal funding. Even though tribes retain concurrent jurisdiction over P.L. 280 lands, the federal government has viewed P.L. 280 as an excuse to cut off the tribal financial and technical assistance for law enforcement which is mandated by its trust relationship with tribes.

As a result, tribes have no choice but to rely on state prosecution of crimes that occur on their lands. Yet, similar to the situation with the Federal Government, State police in P.L. 280 jurisdictions are often unresponsive to calls for criminal investigations and the public safety needs of tribal communities, and there is no mechanism to hold State governments accountable for their P.L. 280 obligations. This creates a serious dilemma for tribes. If the suspect is non-Indian, the tribe lacks the jurisdiction to prosecute. If the suspect is Indian, the tribe has jurisdiction to prosecute but very few law enforcement resources and minimal sentencing power. What tribes are left with is a system under which dangerous perpetrators often go unprosecuted. Victims, their families, and the tribal communities in which such heinous crimes occur should not be forced to accept such a weak system of justice.

H.R. 1924 proposes a modest reform to P.L. 280 that would help address these issues.

- Section 201 clarifies that the Federal Government retains concurrent authority over all P.L. 280 jurisdictions. P.L. 280 distinguishes between the six "mandatory" states and the other "optional" states that elected to assert P.L. 280 jurisdiction before 1968. In the mandatory states, the federal government has been divested of Indian country jurisdiction. This legislation would allow the tribe to request that the U.S. Attorney exercise concurrent jurisdiction over Indian country crimes and major crimes within a certain area.

Contrary to the criticism of H.R. 1924's opponents, this provision will not cause more confusion; rather, it will provide an alternative solution where states lack the resources to prosecute Indian country crimes. In other words, if states are adequately fulfilling their responsibilities in P.L. 280 jurisdictions, tribes will not request federal action. NCAI supports this reform because it would increase tribal control and create another means to address unmet law enforcement needs.

Empowerment of Tribal Law Enforcement

Criminal jurisdiction in Indian country is divided among federal, tribal, and state governments, depending on the location of the crime, the type of crime, the race of the perpetrator, and the race of the victim. This "jurisdictional maze" is the result of over 200 years of federal legislation and Supreme Court precedent, and it creates significant impediments to law enforcement in Indian country.[8] Each criminal investigation involves a cumbersome procedure to establish who has

[8] See Robert N. Clinton, Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze, 18 Ariz. L. Rev. 503, 508-13 (1976)

jurisdiction over the case based on: the nature of the offense committed, the identity of the offender, the identity of the victim, and the legal status of the land where the crime took place—none of which are consistently easy to determine.

Tribal law enforcement officers are usually the first responders to crime scenes on Indian lands, but their limited jurisdictional authority often prevents them from arresting the alleged perpetrators. Instead, their only option is to hold individuals until local, state, or federal law enforcement officers arrive, which is a difficult task—and not always successful—given the remoteness of Indian reservations and the poor coordination between government bodies.

- Section 301 would go a long way toward eliminating barriers to law enforcement in Indian country. Special law enforcement commissions have long been available to tribal police, but the BIA has withheld the training and granting of commissions for bureaucratic reasons. This section expands the special law enforcement commissions program, clarifies the standards required of tribal officers, and permits flexibility in reaching MOUs between the BIA and tribal governments that seek special commissions. Section 301 also addresses a severe problem that tribes face in recruiting and training police officers. Instead of insisting all BIA police officers receive training from the lone Indian Police Academy in Artesia, New Mexico, it allows tribal law enforcement personnel to obtain training at various state or local facilities, so long as the selected facility meets the appropriate Peace Officer Standards of Training.

Another significant concern for tribal governments is their inability to impose sentences proportionate to the crimes committed. When U.S. Attorneys (and States' Attorneys in P.L. 280 jurisdictions) decline to prosecute felonies in Indian Country, that responsibility falls to the tribes, despite their limited sentencing power. In an oversight hearing on tribal courts and the administration of justice in Indian country held by the Senate Committee on Indian Affairs on July 24, 2008, the Honorable Teresa Pouley, Tulalip Tribal Court Judge and President of the Northwest Tribal Court Judges Association testified that, "The reality on the ground is that Tribal Courts are often responsible for prosecuting felony crimes." She is a prime example—during her tenure as a tribal judge, she has presided over "cases involving charges of rape, child sexual assault, drug trafficking, aggravated assault and serious domestic violence." Judge Pouley went on to express her concern that tribal courts' lack of sentencing authority was placing the tribal community at risk.[9] Those views are echoed by tribal leaders across the United States.

- Section 304 would extend tribal sentencing limitations under the Indian Civil Rights Act to provide for appropriate sentences for more serious offenders. Current law restricts tribal sentencing authority to 1 year imprisonment, a $5000 fine, or both. Yet, a 2003 report of the Native American Advisory Group to the U.S. Sentencing Guidelines Commission points out the disparity between tribal sentencing authority and the sentences that are imposed by the federal government for crimes committed under the Major Crimes Act. Assaults comprise the greatest percentage of crimes prosecuted under the Major Crimes Act, and the average federal sentence for Indians prosecuted for assault

[9] The Testimony of Honorable Theresa M. Pouley, pg. 12, *Oversight Hearing on Tribal Courts & the Administration of Justice in Indian Country*, UNITED STATES SENATE COMMITTEE ON INDIAN AFFAIRS (July 24, 2008), *available at*: http://indian.senate.gov/public/_files/TeresaPouleytestimony.pdf.

is 3.3 years. As such, there is a large gap between the maximum sentencing authority of tribes and the average sentence for the least serious crime that is prosecuted by the federal government. Section 304 would help remedy this problem by increasingly tribal sentencing authority to a term of 3 years in prison, a fine of $15,000, or both. Note, however, that if a tribe subjects a defendant to a crime that is punishable by more than one year in prison, H.R. 1924 ensures protection of defendants' civil rights by requiring the tribe to provide licensed defense counsel.[10]

The effectiveness of tribal law enforcement is further hindered by tribes' lack of access to criminal history information, including national databases such as the National Crime Information Center (NCIC), which provides criminal history data that is critical to effective law enforcement in tribal communities. NCIC is a centralized database of criminal information that interfaces with various local, state, tribal, federal, and international criminal justice systems,[11] and has been labeled by Congress as "the single most important avenue of cooperation among law enforcement agencies."[12]

But the problem doesn't stop there: most tribal law enforcement authorities lack access to the entire array of criminal justice data systems that are necessary to accomplish traditional policing activities. For example, access to the NCIC requires access to the National Law Enforcement Telecommunication System (NLETS), which is the platform by which all criminal justice data files are entered, transmitted, and accessed. NLETS not only facilitates access to NCIC, but to other criminal databases that are, likewise, critical to effective law enforcement, including the Integrated Automated Fingerprint Identification System (IAFIS) and the National Instant Criminal Background Check System (NICS). Denial of full access to these basic information sharing networks prevents tribal officers from fulfilling the most routine duties, like accessing stolen property information or running fingerprint scans, placing them and the communities they serve in grave danger.

- For the above reasons, section 303 of H.R. 1924 is critically important. This section grants tribes direct access to Federal criminal information databases. It allows tribal authorities to obtain data from, as well as enter data into these information systems, so long as they meet the applicable Federal or State requirements.

NCAI strongly supports these proposals that will help empower tribal law enforcement officers.

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[10] The licensing requirements are up for a proposed modification in the Senate bill to specifically require that tribal public defenders meet the Constitutional standards for "effective assistance of counsel," which include licensing and many other norms of legal practice. As sovereign nations, tribes have the inherent right to set their own licensing standards, though these standards would need to equal or exceed the standards set by federal courts. Although tribes may *choose* to adopt state licensing standards, it would be a gross infringement on tribal sovereignty, as well as antithetical to the federal policy that supports tribal self-governance, to *force* tribes to submit to state standards. These same principles apply to licensing of tribal judges.

[11] *Applying Security Practices to Justice Information Sharing*, Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice, at 3-21 (2004) *available at*: http://it.ojp.gov/documents/asp/ApplyingSecurityPractices.pdf.

[12] National Crime Information Center (NCIC) – FBI Information Systems, *available at* http://www.fas.org/irp/agency/doj/fbi/is/ncic.htm; National Law Enforcement Cooperation Act of 1990, Pub. L. No. 101-647 §612, 104 Stat. 4823 (1990) (codified at 28 U.S.C. §534 note).

Reauthorization of Critical Tribal Justice Programs
In theory, the federal policy of tribal self-determination has made it legally possible for tribes to carry out their inherent rights as sovereign nations to develop and manage their own comprehensive justice systems for themselves. But in practice, the federal government has repeatedly failed to provide tribes the resources necessary to create a strong law enforcement infrastructure in tribal communities. Increasing law enforcement funding is a top priority. As such, NCAI supports the efforts of H.R. 1924 to reauthorize important tribal justice programs. Title IV of the bill is central to this effort.

- Section 401 reauthorizes the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986 (25 U.S.C. 2411), taking heed of the fact that more than 80% of reservation crime is drug or alcohol related. This act provides treatment for juveniles and adults alike but emphasizes the importance of juvenile programs through the creation of summer programs for tribal youth and the funding of emergency shelters, halfway homes, and juvenile detention centers.
- Section 403 reauthorizes and amends the tribal Community Oriented Policing (COPS) program (42 U.S.C. §3796dd) to provide a long-term, flexible grant program for tribal governments.
- Section 404 reauthorizes the Tribal Jails Program (42 U.S.C. §13709) and provides for use of funds to construct tribal justice centers, including tribal jails and court buildings. It also permits funds to be used for proposed alternatives to incarceration, which is crucial, especially for those tribal justice systems whose sentencing and rehabilitation methods may not align with traditional notions of American justice.
- Section 406 is particularly important to support the development of the Juvenile Justice programs in Indian Country. It reauthorizes and strengthens the DOJ's Tribal Youth Program and moves it to Title V of the Juvenile Justice and Delinquency Prevention Act.

In order to address the profound public safety needs in tribal communities, the additional law enforcement and criminal justice resources provided for by these provisions are badly needed.

Conclusion
NCAI supports swift passage of the Tribal Law and Order Act in the 111th Congress to address the critical shortcomings in federal support for tribal criminal justice. This is not some ill-conceived bill, thrown together at the last second to address the law enforcement needs of tribal communities. Rather, it is the product of more than two years of background hearings and careful crafting by congressional staff. The bill has been extremely well vetted and has received broad bi-partisan support in the Senate. NCAI urges the Committee to acknowledge the exigency of the public safety situation on Indian lands and advance H.R. 1924 as quickly as possible. Specifically, we ask that the House Committees of jurisdiction consider releasing the bill and support placement of the Senate version on the suspension calendar for passage before the year's end. Native communities cannot afford another year of the status quo when it comes to the federal response to their public safety needs.

Once again, on behalf of NCAI, I would like to thank the Committee for inviting us to testify today. I would be happy to try to answer any questions you may have.

Mr. SCOTT. Thank you.
Ms. Indritz?

TESTIMONY OF TOVA INDRITZ, CHAIR, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NATIVE AMERICAN JUSTICE COMMITTEE, ALBUQUERQUE, NM

Ms. INDRITZ. Mr. Chairman, Mr. Gohmert, Members of the Committee, Tova Indritz on behalf of the National Association of Criminal Defense Lawyers, and my testimony here today is also endorsed by the New Mexico Criminal Defense Lawyers Association and the National Association of Federal Defenders.

Most Americans would be completely shocked to know that their fellow American citizens are not entitled to the appointment of counsel when they are looking at going to prison for any length of time. And it is our position that Native Americans charged in tribal court who can be sentenced to any time in prison should have the right to counsel, and if they can't afford it, the right to appointed counsel. And we would also ask that this Committee include in the bill some funding for that, because in this bill there is $35 million per year of funding for tribal jails and not one penny for the provision of defense counsel.

Now, I believe that most Americans do understand that all societies, including tribes, have a right to law, and the rule of law, and social order, but that still has to be balanced, as it is in the Federal and State systems, with respect for the rights of individuals. And here we are 46 years after *Gideon v. Wainwright* and 37 years after *Argersinger v. Hamlin,* which, Mr. Scott, you had asked the gentleman from Department of Justice if people are not entitled to counsel in misdemeanor cases, and the answer is under *Argersinger* the Supreme Court says when someone is facing any period of incarceration they have a right to counsel.

But as we know, that doesn't apply in tribal court, which now is restricted to a year. And so we would ask Congress to authorize funds for some kinds of public defender systems.

I can tell you, I live in New Mexico and all 19 pueblos in New Mexico do not have any kind of public defender system. One of the two Apache tribes does and the Navajo tribe has a public defender that represents well less than 10 percent of the people who go to court with a staff of only two professional lawyers and four paralegals.

So while we respect and recognize the importance of tribal sovereignty and the rights of tribes to follow traditional methods of dispute resolution, our position is this: If a tribe utilizes its court system for restorative justice and restitution and making parties whole then maybe lawyers aren't required, but once a person faces any time in prison or jail—any loss of liberty—then they, as U.S. citizens, should have the same rights as other U.S. citizens to counsel, to appointed counsel if they are too poor to afford counsel.

And we believe that tribes can provide that and provide due process and there should be funding to do that. So we would ask the court to—this Committee to amend the law to guarantee right to counsel for any time in jail and that to be provided at the expense of the tribe, as is in the Senate version, and then to provide funding.

It should be effective assistance of counsel, but it should also be real lawyers, and that is people who have graduated from law school and are a member of the bar of any State or the District of

Columbia. I know that some tribal bars allow people to be a member of the bar who have not graduated from law school and maybe not even graduated from high school.

And so we oppose increasing tribal sentences to 3 years absent full right to counsel, right to appointed counsel and funding, and full due process. And I would point out that some tribes currently stack sentences, so someone gets 1 year plus 1 year plus 1 year for a series of misdemeanors. You would have to be a kind of unimaginative prosecutor not to see how one event could be more than one count, and that is done without counsel. I attached one court opinion that says that to my testimony and cited some others.

So we also think that the limitation of 1 year should be—or 3 years—should be per course of conduct rather than per count, as some tribes currently interpret. And we also think that there should be real due process.

And I want to just give some examples of my own experience with problems in some tribal courts. I have seen charges that are not supported by any tribal ordinance or statute. I have seen a proposed jury where all the juror—people who are eligible to be on the jury—are all men—in that case my client was a woman—because in that tribe that was their system. I have seen a lack of access to actually a statute that the client was charged with—moreover a lack of procedure. I would call the counsel on the other side and say, "So if we have a jury trial does the jury have to be unanimous?" And the other lawyer would say, "Well, good question. Let me figure it out and call you back."

So things happen—go along. No rules of evidence, no appeal because the tribe chose not to participate in any kind of appellate process, situations where the judge was not a lawyer, situations where the judge had a real conflict of interest. In one case I did in a tribal court the judge who was first appointed was the person who had fired my client for the same conduct that the client was then charged with. Or in another case there was a family relationship between the victim and the judge.

But the worst—there was a case I did in a tribal court where after I won, the tribe retaliated against a witness—not my client, but a witness who was a relative of my client. That witness had been the former head of the tribe and the tribe was mad that he had come and testified for the defendant, and so they banished him, which meant he lost his job, he lost his place to live and his community connections. He was a full-blood member of the community.

And I don't know what that did to that witness, but in the future anybody else who is called to be a defense witness at trial has to think three times and say, "Do I want to risk my home, my livelihood, my job, my family and community connections and all I hold dear just because someone is asking me to be a witness?" because of this retaliation that happened in this particular case that I was a defense lawyer in.

So I would just say, we also oppose having tribes send prisoners at no cost to the Federal Bureau of Prisons. Tribes would have to pay for treatment and counseling options but they could send people away for free to the Bureau of Prisons, which is ill-equipped. And in my written testimony, which is much more extensive, I list

some of the problems with this Bureau of Prisons approach having to do with good time, and habeas, and all kinds of other things, not to mention that the BOP is very overcrowded.

So we would also ask for some guidance so that people are not prosecuted three times by the Federal, State, and tribal governments.

And I just want to make one last comment in closing, and that is about jury pools in the Federal court system. The Federal courts, by their own statistics, admit that Native Americans are underrepresented in Federal jury pools.

And if we are thinking of having more jurisdiction or trials on Indian land there has to be a way to require Federal courts to use supplemental source lists, such as driver's license lists, so that the number of Native Americans in the jury pools are proportionate in percentage to the Native Americans in the over-18 population—over age 18 population—so that Native Americans are not so underrepresented in Federal jury pools as is the case now.

I have other concerns and I have addressed them in my fairly extensive written testimony. And I really appreciate the opportunity for the defense bar to come forward and talk about individual rights with respect to this bill affecting Native Americans. Thank you very much.

[The prepared statement of Ms. Indritz follows:]

PREPARED STATEMENT OF TOVA INDRITZ

Written Statement of
Tova Indritz
2040 Fourth Street, NW
Albuquerque, NM 87102
Chair, Native American Justice Committee
of the National Association of Criminal Defense Lawyers

on behalf of the
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

before the
House Committee on the Judiciary
Subcommittee on Crime, Terrorism, and Homeland Security

Hearing on H.R. 1924
The "Tribal Law and Order Act of 2009"

December 10, 2009

Mr. Chairman, Mr. Gohmert, and distinguished Members of the Committee:

Thank you for inviting me to testify on behalf of the National Association of Criminal Defense Lawyers on the important and often neglected issue of tribal justice. My name is Tova Indritz. I am a criminal defense lawyer in Albuquerque, New Mexico. I graduated from Yale Law School in 1975, and after one year of clerking for a judge here in Washington, DC, I have been a criminal defense lawyer my entire legal career. I was in the office of the Federal Public Defender for New Mexico for 18 years, 13 of which I headed the office. Since 1995 I have been in private practice, where I represent persons accused of crime in trials, appeals, and post-conviction petitions. I practice in federal, state, and Indian tribal courts. I am the chair of NACDL's Native American Justice Committee.

NACDL is the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. A professional bar association founded in 1958, NACDL's over 11,000 direct members – and 80 state, local and international affiliate organizations with a total of 35,000 members — include private criminal defense lawyers, public defenders, active-duty U.S. military defense counsel, law professors, and judges committed to preserving fairness within America's criminal justice system.

My testimony is also endorsed by the National Association of Federal Defenders and by the New Mexico Criminal Defense Lawyers Association.

I. NATIVE AMERICANS FACING IMPRISONMENT IN THE UNITED STATES SHOULD BE ENTITLED TO THE RIGHT TO COUNSEL, THE RIGHT TO APPOINTED COUNSEL IF THE ACCUSED CANNOT AFFORD TO HIRE A LAWYER, AND DUE PROCESS.

The Sixth Amendment to the U.S. Constitution guarantees a criminal defendant the right to counsel, Johnson v. Zerbst, 304 U.S. 458 (1938), and applies that right to state court trials. Gideon v. Wainwright, 372 U.S. 335 (1963). This is a right guaranteed to all U.S. citizens, including Native Americans, who are, after all, U.S. citizens, and also to non- U.S. citizens who are charged with crimes and face the loss of their liberty. It equally applies in the misdemeanor context, if a person faces the possibility of imprisonment. Argersinger v. Hamlin, 407 U.S. 25 (1972).

Yet the Indian Civil Rights Act does not extend to Indians in tribal courts the protections of the Sixth Amendment, nor of the 1963 Supreme Court decision in Gideon v. Wainwright, which guarantees the right to a lawyer to persons unable to afford counsel. Rather, that Act of Congress provides that "No Indian tribe in exercising powers of self-government shall ... deny to any person in a criminal proceeding the right ... at his own expense to have the assistance of counsel for his defense." 25 U.S.C. §1302(6). Tribal courts are not required to provide public defenders or appointed counsel to those defendants who cannot afford to hire a lawyer.

As you know, currently the Indian Civil Rights Act limits tribes to imposing sentences of up to one year and a fine of up to $5,000, 25 U.S.C. §1302(7). This bill contemplates raising that allowable penalty to three years imprisonment and a fine of up to $15,000, section 304 of HR 1924.

We oppose that increase to three years, unless and until persons prosecuted in tribal courts have the same rights to counsel, appointed counsel, and all aspects of due process as are afforded to other persons in the United States. The Sixth Amendment to the Constitution should not stop at the reservation's edge.

As documented in NACDL's recent report "Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts," due to lack of funding, unethical caseloads, lack of training and standards, and the outright denial of appointed counsel, "misdemeanor courts across the country are incapable of providing accused individuals with the due process guaranteed them by the Constitution." All of these problems are greatly magnified within the tribal court systems.

The House version of H.R. 1924 provides that if the criminal trial subjects a defendant to more than one year imprisonment for any single offense, the tribe may not deny the assistance of a defense attorney. That is a good start, but there are several problems that NACDL asks you to address:

A. <u>H.R. 1924 does not clearly set out a right to appointed counsel; it should do so.</u>

The Senate version of this bill states that "if the defendant is not able to afford defense counsel, the tribal government shall provide one at the tribal government's expense". We urge you to adopt that language also, and to make clear that a person facing imprisonment, indeed, any length of loss of liberty, has the right to appointed counsel if he or she cannot afford counsel.

While we recognize and respect the importance of tribal sovereignty, and the right of tribes to follow traditional methods of dispute resolution, our position is this: If a tribe utilizes its court system for restorative justice, to mediate between parties, to accomplish making the parties whole such as through reconciliation, restoration of harmony among neighbors, and restitution, as is done in a Peacemaker court, then counsel may not be necessary. But when a tribe chooses the path of incarceration, or potential incarceration, then the Sixth Amendment must apply to all persons. Federal and State courts have long been able to balance the need for social order and the rule of law to protect society with the rights of individuals to counsel and due process, and we believe that Indian tribes can also do that.

As the U.S. Supreme Court held over 37 years ago, "In our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair

trial unless counsel is provided for him. This seems to us to be an obvious truth." Argersinger v. Hamlin, 407 U.S. 25, 32 (1972).

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.

Id. at 31, quoting Powell v. Alabama, 287 U.S. 45, at 68-69 (1932).

NACDL urges Congress to guarantee Native Americans charged in tribal court who face any term of imprisonment the right to counsel, and the right to appointed counsel at the expense of the tribe if the person cannot afford counsel, and to include that language in this bill.

B. H.R. 1924 includes no funds earmarked for tribes to provide appointed counsel; the bill should specifically authorize funds for appointed counsel in tribal prosecutions.

According to the U.S. Census Bureau, 24.3 percent of our 2.1 million Native Americans live at or below the federal poverty level. For the 400,000 or so Indians who live on reservations, where opportunities are few and unemployment high, the percentage of persons living in poverty is much higher. The majority of Native American defendants charged in tribal court cannot afford to hire an attorney. As one tribal court judge complained to the Wall Street Journal, "99.9 percent" of the defendants in his court cannot afford a lawyer. These individuals must defend themselves against a trained prosecutor with a better education, more resources, and far more courtroom experience, and more importantly, they face a real loss of liberty through incarceration.

While Congress provides some money for tribal judges and prosecutors, year after year, poor defendants often face the judge and the prosecutor, and potential jail sentences, completely alone, with no champion to defend them.

Some tribes have used their own funds to establish full-time, part-time, or contract public defenders. A lone public defender can only represent one defendant in a case with multiple defendants, and sometimes there is no provision for counsel for the other accused people. Some tribes require lawyers wanting to appear in tribal court on civil cases to accept criminal defense appointments, usually without compensation. Other tribes use non-lawyer advocates or law school clinic students to represent the accused. But the majority of tribes with criminal courts have no funds and no provision at all for counsel for the accused.

In New Mexico, where I live, none of the 19 Pueblo tribes has a public defender; one formerly had a public defender who was a young lawyer, but that Pueblo fired both their lawyer-prosecutor and their lawyer-public defender at the same time several years ago. One of the two Apache tribes has a public defender. The Navajo Nation, the largest tribe in the US, has a small public defender office with only two lawyers and four paraprofessional tribal advocates; together they represent less than 10% of the Navajos charged in eleven tribal courts scattered across a reservation that spans three States and is the size of West Virginia.

Congress can remedy this injustice by balancing distribution of resources among the judges, the prosecutors, and defender services. Funding only two prongs imbalances the system – a stool cannot stand on two legs. Congress should provide in this bill funding specifically for the defense of Native Americans facing incarceration in Indian tribal court prosecutions when those defendants cannot afford to hire counsel on their own.

Congress has codified its past formal findings that "the provision of adequate ... legal assistance to both individuals and tribal courts is an essential element in the development of strong tribal court systems" and that "Congress and the Federal courts have repeatedly recognized tribal justice systems as the most appropriate forums for the adjudication of disputes affecting personal and property rights on Native lands." Yet Congress has never allocated funds specifically for representation of defendants in tribal criminal cases.

As recently as November 16, 2009, Attorney General Holder described in a speech to the Brennan Center that deficiencies in indigent defense are to him "an issue of personal importance and national conscience". He stated ,"Ours is an adversarial system of justice -- it requires lawyers on both sides who effectively represent their client's interests, whether it's the government or the accused. When defense counsel are handicapped by lack of training, time, and resources -- or when they're just not there when they should be -- we rightfully begin to doubt the process and we start to question the results. We start to wonder: Is justice being done? Is justice being served?" NACDL agrees with Attorney General Holder on that. He referred to "the right to have truly effective defense counsel" as the "most basic constitutional protection ", and again, we agree with him on that as well.

Attorney General Holder also said "I want to emphasize education, because I believe that if more Americans knew more about how some of their fellow citizens experience the criminal justice system, they would be shocked and angered." NACDL believes that if more Americans knew that First Americans could be imprisoned without ever having the right to appointed counsel, they would also be shocked and angered.

Although this bill provides for $35 million per year for each of fiscal years 2010 through 2014 for prisons (see page 79, section 404), and although money might be usable for defense counsel (page 74, 76), there is not one cent dedicated for the purpose of defense counsel.

We urge this committee to add into this bill funding earmarked for the provision of defense services. This could be set up similar to the Criminal Justice Act, 18 U.S.C. §3006A, which allows for either the establishment of public defender offices, or a legal aid agency with its own board of directors, or a method to appoint individual lawyers who would be paid hourly, at each tribe chooses. Enactment of the requirement for defense counsel should carry with it funding explicitly earmarked for not only defense counsel but also such defense services as investigators, paralegals, office staff, expert witnesses, training, and support. Providing federal funds so that tribes can hire public defenders or contract counsel to defend the accused who cannot afford to hire their own, along with necessary ancillary defense services, will, as in federal and state courts, protect individual liberties, while still allowing the tribes to shape their own laws and judicial processes and protect public safety on tribal land.

Funding for defense counsel is a matter of basic fairness and equality. Native Americans charged with crime and facing incarceration are deserving of no less protection under the U.S. Constitution than are other persons in the United States.

C. The qualifications for appointed counsel must require lawyers who have graduated from law school and are licenced to practice law in a State or the District of Columbia.

The right to counsel requires the effective representation by counsel. Strickland v. Washington, 466 U.S. 668, 686 (1984).

> The right to counsel is a fundamental right of criminal defendants; it assures the fairness, and thus the legitimacy, of our adversarial process. The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.

Kimmelman v. Morrison, 477 U.S. 365, 374 (1986).

Some tribes allow persons who have not graduated from law school, or even from college, and sometimes who have not even graduated from high school, who are in effect paralegals, to be members of the tribal bar. While we do not express any view as to whether this is appropriate in the civil or mediation context, NACDL urges that the bill require defense lawyers to have graduated from law school and become a member of the bar of any State or the District of Columbia.

The use of non-lawyer paralegal tribal advocates leads to a question of what happens, for example, when a defendant has a non-lawyer tribal advocate rather than a "real" lawyer for counsel. See for example, United States v. Tools, 2008 U.S. Dist. LEXIS 49490, 15-16 (D.S.D. June 27, 2008), discussing whether a statement made by a defendant should be suppressed in this context, and noting:

> . . . several courts have determined that representation by an individual who is not a licensed attorney is a per se violation of the Sixth Amendment right to effective counsel. See United States v. O'Neil, 118 F.3d 65, 70-71 (2d Cir. 1997) (stating that it is a per se violation of the Sixth Amendment "where the attorney was not licensed to practice law because he failed to satisfy the substantive requirements of admission to the bar"); United States v. Mouzin, 785 F.2d 682, 697 (9th Cir. 1986) (stating that an individual who had never been admitted to practice law and thus "who never acquired the threshold qualification to represent a client in court cannot be allowed to do so, and no matter how spectacular a performance may ensue, it will not constitute 'effective representation of counsel' for purposes of the Sixth Amendment"); Solina v. United States, 709 F.2d 160, 168-69 (2d Cir. 1983) (finding the graduate of an accredited law school who had failed the New York bar examination twice and had not been admitted to any other bar provided ineffective counsel under the Sixth Amendment); United States v. Myles, 10 F. Supp. 2d 31, 35 (D.D.C. 1998) (noting the "per se rule [under the Sixth Amendment] applies where the defendant is represented by an individual who has never been admitted to any court's bar"); and United States v. Dumas, 796 F. Supp. 42, 46 (D. Mass. 1992) (determining that "if a defendant is convicted while represented by someone who has never been admitted to any court's bar, that defendant is deemed to have been denied counsel as a matter of law"). Thus, if this court found the appointment of lay counsel to trigger the protections afforded by the appointment of "counsel" within the meaning of the Sixth Amendment, it would be fundamentally inconsistent with the general rule that an individual must be a licensed professional attorney before he can be considered effective counsel under the Sixth Amendment.
>
> Id., footnote 1 at 16-18.

> There is a clear distinction between licensed legal counsel and lay representation under the Sixth Amendment. See Wheat v. United States, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988) (stating "[t]he Sixth Amendment right to choose one's own counsel is circumscribed in several important respects . . . [r]egardless of his persuasive powers, an advocate who is not a member of the bar may not represent clients . . . in court."). The United States Supreme Court did not extend the Sixth Amendment to encompass the right to be represented in court by a layman. Id. Additionally, every circuit which has considered the question, including the Eighth Circuit, has held there is no right to representation by persons who are not qualified attorneys. See Pilla v. American Bar Ass'n, 542 F.2d 56, 58-59 (8th Cir. 1976) (affirming the district court opinion which determined that individuals in civil and criminal cases do not have a constitutional right to be represented by lay counsel). See also United States v. Anderson, 577 F.2d 258, 261 (5th Cir. 1978) (stating "[t]here is no sixth amendment right to be represented by a non-attorney"); United States v. Scott, 521 F.2d 1188, 1191-92 (9th Cir. 1975) (determining that the word "counsel" in the Sixth Amendment guaranteeing an accused the right to have the assistance of counsel for his defense does not include friends or advisors of an accused who declines an attorney and represents himself); United States v. Grismore, 546 F.2d 844, 847 (10th Cir. 1976) (stating " '[c]ounsel' as referred to in the Sixth Amendment does not include a lay person, rather 'counsel' refers to a person authorized to the practice of law"); and United States v. Jordan, 508 F.2d 750, 753 (7th Cir. 1975) (stating "[t]he district court is not obligated to appoint counsel of defendant's choice where the chosen attorney is not admitted to practice"). 1

Id. at 15-16. See also United States v. Dupris, 422 F. Supp. 2d 1061 (D. S.D. 2006).

Even in those tribal courts where the tribal prosecutor is not a law school graduate, the individual who faces loss of liberty and consequent inability to support his or her family needs a law-trained defender.

We urge this committee to amend H.R. 1924 to provide that "a defense lawyer is defined as an attorney licensed to practice law by any State of the United States or the District of Columbia."

D. Due process must be provided in tribal courts.

Currently, the Indian Civil Rights Act requires that no tribe "deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law", 25 U.S.C. §1302 (8). Yet without defense lawyers, and the

right to appointed counsel at the expense of the tribe, and with non-lawyer judges, and non-lawyer tribal advocates, tribes are now sentencing Native Americans to terms of imprisonment without due process.

I represented in a tribal court a young Native American woman who had been employed by an Indian tribe and was alleged to have taken tribal funds by taking checks that should have gone to other people or companies and depositing those funds into her own bank account or making "direct deposit" transfers of tribal money to her own account. In fact, before I became her lawyer she had plead guilty in tribal court to a charge that was broad and general and covered "direct deposit" and also "checks", with no allegation of any specific check on any specific date; the tribe sent her to serve six months in jail. She paid restitution in full. The plea agreement included language that "if other discrepancies are found via audit, those will be treated separately from this case". While she was in jail serving that sentence, she voluntarily advised the tribe of a specific taking that had not been previously presented to her and was not found by audit. After her release from the six month sentence, the tribe then charged her with three counts regarding that specific additional taking on a date which preceded her previous plea and was encompassed within it, and she hired me to represent her.

One of the charges against her was supported by a tribal ordinance. The other two charges were not defined or described by any tribal law, ordinance, or regulation, but were being prosecuted nonetheless.

If the case were to be tried to a jury, that jury would consist of the tribal council. The tribal council included only men; no women are allowed to be on the tribal council. Once appointed to the tribal council, a man serves for the rest of his life. There were at that time at least 40 members of the tribal council. I called the opposing counsel to ask whether, if we had a jury trial, the jury would have to be unanimous. He replied, "That's a good question. Let me find out and call you back." In other words, there were no rules of procedure; the rules were being made up as we went along.

The man initially appointed to be the judge was the previous year's tribal governor, who was the person who had fired my client for this same conduct. He was not a lawyer, and in fact, had minimal education. This was a fairly small tribe, which over the years had evolved into two political "factions"; my client's family came from one "faction" and this appointed judge from the other "faction".

After I filed a number of written motions, the tribal council voted to hire an outside person, a law school graduate, to be the judge for this case only.

At the hearing on my motions, there were times when I would object to testimony, and the Judge would rule "sustained" or "overruled"; since there were no rules of evidence that applied, the legal basis for either my objections or his rulings was unclear.

During the course of negotiations, the prosecutor reminded me that, as this particular tribe had elected not to participate in a multi-tribal appeal process, there was no appeal from the judge's ruling, for either side.

However, what bothered me most about this case was that a few months after the judge had dismissed the charges, the tribe chose to retaliate against one of my witnesses. This witness was a former Governor of the tribe, a full-blooded member of the tribe who had lived on tribal land all of his life. The tribe was upset that he testified for the defendant, who was a relative of his, and they punished him by banning him from tribal land. This meant that he lost his job on tribal land, and had to leave his home and family. What kind of court system will this create, when others who might be witnesses in the future know that if they testify for the accused, they risk their home, livelihood, and all the connections they hold dear? If this retaliation had occurred in a federal or state court, I could have immediately gone to the judge to rectify it, but there was no remedy in the tribal context.

In another case, I represented a Native American man in a different tribal court. Originally the FBI had investigated the case, but after a detailed and lengthy consideration, the U.S. Attorney determined that there was not sufficient evidence to prosecute my client. A few weeks later, my client called me and said he had to appear in tribal court to face charges. These tribal charges arose out of the same event, on the same night, as the events that the federal government had investigated and declined to prosecute. I told my client that I did not want to meet him at the tribal courthouse, but somewhere else, and we settled on meeting at a gas station. From there we went together to the tribal court. The FBI agent was quite well aware that I was this man's lawyer, as the FBI agent had come to my office to execute the federal search warrant for my client's head hair. But when we got to the tribal court, literally standing on the courthouse steps were two FBI agents and a Bureau of Indian Affairs police officer. They were quite disappointed to see me, since they had planned to interview my client when he appeared for the tribal court arraignment. Their pretext that this was a "different" case was an effort to end-run my client's right to counsel. And then they had the temerity to argue that they should not have to turn over the results of their investigation into the incident, because it was a "different" case from the federal investigation.

In small tribes, the Judge knows or is related to everyone who will come before him or her. I recall when I was a young and inexperienced lawyer asking a Native American client if he was related to a particular witness in our case. He looked at me as if that was the silliest question anyone ever asked him, and said, "Yes, of course; I'm related to everyone in the Pueblo." In one case I had in a tribal court, the alleged victim was the abusive ex-boyfriend of the Judge's sister; the Judge declined to find he had any conflict of interest.

E. The provision of counsel, or failure to provide counsel, and the provision of due process, or the failure to provide due process in tribal court often impacts the rights of Native Americans later charged with serious felonies in federal or state court.

Cases that start out in tribal court are sometimes then referred to federal court or state court. Deprivations of counsel, of qualified counsel, and of due process that occur in the tribal court process then spill over into the federal or state case. Frequently in the case of a serious crime in Indian Country, especially where the tribal lands are isolated or geographically distant from a large city, the tribal police are the first to respond and the FBI doesn't arrive until days, weeks, or months later. When the tribal police encounter a serious situation, such as a dead body, an allegation of rape or child abuse, they need to take immediate action but they already know that the case will become a felony charge in state or federal court. Yet they still must adhere to tribal processes, and give their modified Miranda warning that "you have a right to counsel if you can afford a lawyer", or they simply do not provide counsel at all.

Thus, for example, a Native American who is arrested by tribal police on a tribal charge of "assault", when there was a mutual fight that resulted in a death, will be initially charged in tribal court with assault, but later charged with a murder or manslaughter in federal or state court. How matters are handled at the initial steps can permanently impact the defendant's rights in terms of interviews without counsel, failure to promptly present the defendant to a judge, searches, collection and preservation of evidence, and every aspect of the case with the more serious penalty. See, for example, the cases of United States v. Tools, 2008 U.S. Dist. LEXIS 49490, 15-16 (D.S.D. June 27, 2008), discussed above, and United States v. Dupris, 422 F. Supp. 2d 1061 (D. S.D. 2006).

But a far more egregious case of this problem of denial of Sixth Amendment rights in a tribal context where the case is then to be transferred to federal court is United States v. Mitchell, 502 F.3d 931 (9th Cir. 2007), cert. den. Mitchell v. United States, 128 S. Ct. 2902 (2008). The FBI manipulated the tribal court system's lack of counsel to question a defendant detained for 25 days without any counsel or any arraignment to secure multiple confessions that led to a federal death sentence. In Mitchell, the Ninth Circuit affirmed, 2 to 1, the federal death sentence on a Navajo who was convicted of murder of two Navajos on Navajo land. Despite the tribe having not opted-in to the federal death penalty for murders of Indians on Indian land, and the Navajo Nation's stated opposition to the death penalty on religious and cultural grounds, the federal prosecutors chose to prosecute a 20-year old Navajo with no prior criminal record under a law of general jurisdiction (carjacking resulting in death) to obtain the death penalty.

Mr. Mitchell remained in tribal custody from November 4 to November 29, 2001, fully 25 days, with no counsel appointed and no arraignment in any court (tribal or federal). Indeed, the Assistant US Attorney consulted by the FBI thought there was insufficient evidence for an arrest warrant, but suggested getting the tribe to arrest, based on the AUSA's

supposition that the Navajo Nation would have a lesser standard for an arrest. And then the FBI took advantage of the tribal custody and lack of counsel to interview Mitchell multiple times, and take a polygraph, over those 25 days before taking him into federal custody (and again interviewed him on the way to the federal courthouse). The problem of failing to appoint counsel, in a circumstance when everyone involved knew there was a homicide and therefore a federal prosecution forthcoming, and no real likelihood of tribal prosecution, illustrates yet another reason why defendants in tribal court need appointed counsel. For Lezmond Mitchell the lack of appointed counsel in tribal court is a matter with life or death consequence.

F. Consecutive sentences for multiple offense counts for a single course of conduct currently result in sentences longer than one year, without counsel; this should be prohibited by Congress.

Some tribes "stack" multiple uncounseled misdemeanor sentences to impose multi-year sentences without counsel. See, for example, a case from the Pascua Yaqui Court of Appeals, Pascua Yaqui Tribe v. Beatrice Miranda, No. CA 08-015, at 21-26, decided March 29, 2009, attached hereto, and Fort Peck Assiniboine and Sioux Tribes v. Marvin Bull Chief, Sr., Appeal No. 062, May 31, 1989, www.tribal-institute.org/opinions/1989.NAFP.0000006.htm. For example, it is not uncommon for indigent Indians in Arizona tribal courts to be sentenced to four or five years of imprisonment, all without having had appointed counsel, even where the individuals have requested the appointment of an attorney.

A single event, such as an assault, can result in prosecution for multiple offense counts. Thus, a person charged with multiple offenses arising out of a single course of conduct can now face multiple one-year consecutive sentences without having any counsel at all. To correct this problem, NACDL recommends changing the language "any single offense" in Section 304(b)(1) to "a single course of conduct". This would, in effect, codify the interpretation of the phrase "any one offense" in 25 U.S.C. §1302(7) adopted by the District Court for the District of Minnesota in Spears v. Red Lake Band of Chippewa Indians, 363 F. Supp. 2d 1176 (D. Minn. 2005).

G. Tribal judges who can impose expanded sentences should also be required to be lawyers who are members of a bar of any State or the District of Columbia.

The bill requires tribal judges to be "licenced to practice law in any jurisdiction". For the same reasons that counsel should be a "real lawyer", discussed above, when the penalties are as high as are contemplated in this bill, judges who have the capacity to imprison people should be required to be a member of a bar of "any State of the United States or the District of Columbia", not just a member of a tribal bar that does not require graduation from law school.

II. NACDL OPPOSES INCREASING THE TRIBAL COURT PENALTY TO IMPRISONMENT OF UP TO THREE YEARS.

For reasons detailed in Point I above, because most tribes do not provide qualified appointed counsel to indigent defendants and due process, NACDL urges that Congress
1) not expand tribal jurisdiction beyond the current one year, and
2) limit the one year maximum to one year per a single course of conduct.

As discussed above, some tribes interpret the one year limitation as one year per count and therefore impose multiple-year sentences for a single event without the appointment of counsel. We also know of tribes that charge multiple counts for a related series of events, and without the indigent defendant having appointed counsel, impose a sentence of, at least in one case, nine years.

III. SENDING INDIANS CONVICTED IN TRIBAL COURT TO THE FEDERAL BUREAU OF PRISONS, WITHOUT ANY COST TO THE TRIBES, CREATES MULTIPLE PROBLEMS.

The Department of Justice, in Principal Deputy Assistant Attorney General Keith B. Nelson's letter of September 17, 2008, to Senator Byron Dorgan, at page 7, "strongly opposes creating authority to transfer prisoners convicted in tribal court to Federal facilities." We agree.

There are several reasons that allowing tribal courts to send convicted defendants to the Federal Bureau of Prisons without cost to the tribe is problematic:

1. The federal BOP is currently about 136% over capacity.

2. As the DoJ letter expresses, Indians would be incarcerated far from their homes, and unable to have family visits. They also would be unable to benefit from re-entry programs in their communities.

3. Tribes would have a financial disincentive to offer reasonable treatment alternatives to incarceration or treatment options that are more likely to help the community in the long run; under this bill the tribe would have to pay for education, drug treatment, counseling, or supervision near the tribe, but could send prisoners at no cost to the BOP.

4. Would tribal prisoners serving time in federal prison be entitled to good time under varying plans set forth by each individual tribe, or would they accrue good time in the same way, governed by federal statute, as their fellow federal prisoners? Would tribal prisoners be eligible, for example, as federal prisoners for time off their sentences for participating in drug treatment or other programs?

5. If a tribal prisoner wanted to challenge conditions of confinement, who is the respondent: the warden or the tribe? And, if the tribe, where does venue and jurisdiction lie? Would the Native American tribal prisoner be able to file a habeas corpus petition against the warden of the prison where he was being held in federal court in the district of confinement, as do other federal prisoners? Or would he have to file against the tribe that ordered the sentence, and if so, under Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), which holds that violations of the Indian Civil Rights Act can only be litigated in tribal court, would that have to be in the tribal court which sentenced him but has no control over the functioning of the Federal Bureau of Prisons? If that is the case, an Indian raising conditions of confinement claims would have no remedy whereas his/her cellmate who was sentenced in federal court has at least a forum for filing suit.

IV. THE "FINDINGS" SECTION OF THIS BILL SHOULD ALSO CONSIDER THE RIGHTS OF THE ACCUSED.

Both in the findings section (Section 2, starting at page 3) and in the "purpose" section (Section 2, starting at page 7), there should be added considerations concerning the rights of the accused. NACDL suggests adding a finding that indigent Indians (who are, after all, U.S. citizens) who are facing incarceration are currently not entitled to appointed counsel and most are not represented by a lawyer. (Note that the commission is to study "the rights of defendants subject to tribal government authority", page 53.) And in the purpose section, we suggest adding a purpose "to protect the rights of the accused in tribal courts".

V. REQUIRING THE FBI/OTHER LAW ENFORCEMENT AGENCIES AND THE U.S. ATTORNEY TO SEND DECLINATION REPORTS TO THE TRIBE RAISES A VARIETY OF CONCERNS.

This is particularly so where the investigation showed that the target was not involved in any crime, where tribal officials have familial relationships with the accused or the victim, and under other circumstances.

VI. REQUIRING TRIALS IN TO BE HELD IN INDIAN COUNTRY REQUIRES MORE THOUGHT ABOUT THE JURY POOL.

We know that, even by the Courts' own statistics, Native Americans are currently underrepresented in federal jury pools, especially in those districts where the courts have chosen to use only the voter lists and refused to use supplemental source lists (primarily drivers' license lists). Congress should take this opportunity to make federal jury pools more representative of the population, including correcting the underrepresentation of Hispanics, Native Americans, and other minorities, rural residents, and other underrepresented populations. If the courts are to hold jury trials on Indian land, there should be a requirement that if the representation of Native Americans on the district's jury pool is less than the

percentage of Native Americans over age 18 in that district, the court should be required to use a supplemental source list so as to bring the representation of Native Americans to at least the same percentage of Native Americans within the over-age 18 population of the district.

VII. CONCURRENT FEDERAL, STATE, AND TRIBAL JURISDICTION WILL ALLOW FOR TRIPLE PROSECUTION OF THE SAME CONDUCT WITHOUT DOUBLE/TRIPLE JEOPARDY.

Under United States v. Wheeler, 435 U.S. 313 (1978), prosecution in tribal and federal court for the same conduct is not double jeopardy because prosecution is by two sovereigns who do not derive sovereignty from each other. If all three jurisdictions can prosecute, we believe there should be some limitation on multiple prosecutions for the same conduct.

VIII. THE INDIAN LAW AND ORDER COMMISSION ESTABLISHED BY SECTION 305 OF THE BILL SHOULD INCLUDE MEMBERSHIP FROM THE DEFENSE BAR AND THE FEDERAL SENTENCING COMMISSION.

Section 305 of the bill establishes an Indian Law and Order Commission with various appointees by the Administration, House, and Senate, tasked to "conduct a comprehensive study of law enforcement and criminal justice in tribal communites" including issues of jurisdiction over Indian Country crimes, jails and prisons, prevention, rehabilitation and "the rights of defendants subject to tribal government authority", and other important issues, and to make recommendations.

We suggest adding representation from the defense bar or persons or organizations who represent Native Americans charged with crime, such as for example, a Federal Public Defender whose office represents Indians charged in federal courts or a lawyer public defender in a tribal court setting, and at least a liaison to the Federal Sentencing Commission, as that organization still controls the Sentencing Guidelines that apply to Indian Country crimes prosecuted in federal court.

NACDL much appreciates the opportunity to be heard before this Subcommittee. We thank you for considering our views.

Tova Indritz, Chair
Native American Justice Committee
National Association of Criminal
Defense Lawyers

ATTACHMENT

No. CA-08-015

Pascua Yaqui Tribe Court of Appeals

Pascua Yaqui Tribe, Plaintiff/Appellee

v.

Miranda, Beatrice, Defendant/Appellant

OPINION

Appeal of a decision of the Pascua Yaqui Tribal Court in Case No. CR-08-119, the Honorable Cornelia Cruz presiding.

AFFIRMED

Alfred K. Urbina, Esq., Pascua Yaqui Tribe Office of Prosecutor, Tucson, AZ, for the Plaintiff/Appellee.

Nicholas Fontana, Esq., Tucson, AZ, for the Defendant/Appellant.

I. STATEMENT OF THE FACTS

On the evening of January 25, 2008, Beatrice Miranda, by all accounts wandering around, drunk, came across Monica Valenzuela, a minor Yaqui teenager. (Transcript D at 5-7, 24-27). Miranda seems to have thought someone was laughing at her; she pulled a knife, screaming obscenities, and began chasing the girl across the reservation. (Transcript D at 24-27). Monica made it home, just ahead of this woman, and ran inside, where she was able to alert

her sister, Bridget, that Miranda was in their yard, yelling and waving a knife around. (Transcript D at 26). Bridget went outside to investigate. (Transcript D at 13). Miranda threated to kill the girls, brandishing the weapon. (Appellant's Opening Brief at 54). They called the police, and she ran off. (Transcript D at 14-21, 25-29).

Miranda was picked up, based on their description, near the Valenzuela home. (Transcript D at 4). With some difficulty, they were able to restrain and arrest her. (Transcript D at 4-6). She was searched, pursuant to this arrest; the police found a folding knife on her person, later confirmed to be the weapon used in the assault. (Transcript D at 7-10, 22-23, 30-32).

On January 26, 2008, the Tribe filed a criminal complaint against Miranda, charging her with two counts of endangerment, two counts of threatening and intimidating, two counts of aggravated assault, and two counts of disorderly conduct, one count each for each victim. (*PYT v. Miranda*, Pascua Yaqui Trial Court Record, document 38, hereinafter "R.38")

At her initial appearance, Miranda, without counsel, was advised of her rights, and declared that she was waiving them:

> The Court: The Pascua Yaqui Tribal Court is now in session in the matter of Pascua Yaqui Tribe versus Beatrice Miranda. Docket number CR-08-119.... Let me see, I now will advise you of your rights. You have the right to remain silent. Anything you say may be used against you. You have the right to counsel at your own expense, and you have the right to (inaudible) probable cause in this phase of the proceedings. Do you understand your rights?
>
> Miranda: Yes.

(Transcript A at 2). The court found probable cause and set bail at $1500.00. (R.36).

On February 4, 2008, Miranda appeared at her arraignment, without counsel. She was again advised of her rights, and again waived them:

> The Court: I will advise you of your rights. You have the right to remain silent. Anything you say will be used against you. You have the right to legal counsel at your own expense. You have the right to (inaudible). Miss Miranda, you have the right to cross-examine witnesses and evidence presented by the Tribe, and the right present witnesses and evidence in your behalf. You have the right to know the charges against you, and you have the right to appeal to the Pascua Yaqui Court of Appeals. Do you understand your rights?
>
> Miranda: Yes.

(Transcript B at 2-3). She then attempted to plead guilty to all charges. The court intervened, finding an insufficient factual basis, at that time, to substantiate her pleas, (Transcript B at 4-7), entered not guilty pleas on her behalf, and set a pre-trial hearing date, March 12, 2008. (R.34).

At pre-trial hearing Miranda appeared, was again advised of her rights, and again waived them:

> The Court: I will advise you of your rights. You have the right to remain silent. Anything you say may be used against you. You have the right to legal counsel at your own expense. You have the right to a hearing and to a jury hearing. You have the right to cross examine the witnesses, and (inaudible) about the Tribe, and the right to examine witnesses in advantage on your behalf. You have the right to know the allegations against you, and you have the right to appeal to the Pascua Yaqui Court of Appeals. Do you understand your rights?
>
> Miranda: Yes.

(Transcript C at 2). No motions were made by either party, the case was set for trial on April 12, 2008. (R.12).

March 12, 2008, the parties submitted a negotiated plea agreement, signed by Miranda. (R.25). The agreement detailed her rights explicitly, and explicitly waived them:

> I have read and understand the above. I understand I have the right to discuss this case and my civil rights with a lawyer at my expense. I understand that by pleading guilty I will be giving up my right to a trial by jury, to confront, cross-examine, and compel the attendance of witnesses, and my privilege against self-incrimination. I agree to enter this plea as indicated above on the terms and conditions indicated herein. I fully understand that if I am placed on probation as part of this plea agreement, the terms and conditions of probation are subject to modification at any time during the period of probation in the event that I violate any written condition of my probation.

(Appellee's Response Brief, Appendix A)

It was accepted by the court; change of plea hearing set for April 12, 2008. (R.25).

March 14, 2008, Miranda sent the court a written request to withdraw from the plea agreement. (R. 22). The court vacated the change of plea hearing, set the matter for trial, April 12, 2008. (R.21).

April 12, 2008, Miranda appeared *pro se*. (R.12). She was advised of her rights, again, and apparently declared that she was waiving them:

> The Court: I will advise you of your rights. You have the right to remain silent. Anything you say may be used against you. You have the right to you own counsel at your own expense. You have the right to a hearing. You have the right to cross examine witnesses and evidence presented by the Tribe, and the right to present witnesses and evidence in your behalf. You have the right to know the charges against you, and you have the right to appeal to the Pascua Yaqui Court of Appeals. Do you understand your rights?
>
> Miranda: (No audible response).

(Transcript D at 1-2).

The tribe presented testimony from arresting Officer Jose Montano (Transcript D at 2-12), Bridget Valenzuela (Transcript D at 12- 23) and Monica Valenzuela (Transcript D at 23-32) as well as entering the knife recovered from Miranda on arrest into evidence (Tribe's Exhibit 2). Miranda presented no evidence or witnesses, did not testify, and did not cross-examine any witnesses offered by the prosecution.

The court found her guilty on all counts. (R.12, Transcript D at 35-36)

While Miranda requested immediate sentencing, the Tribe asked for a pre-sentence investigative report (to be filed by the Office of Probation and Parole), and the court granted this request. (Transcript D at 36). Sentencing was scheduled for May 19, 2008. (Transcript D at 37).

At sentencing, Miranda was again advised of her rights:

> The Court: I will advise you of your rights. You have the right to remain silent. Anything you say may be used against you. You have the right to legal counsel at your own expense. You have the right to a hearing. You have the right to cross examine witnesses and evidence presented by the Tribe, and the right to present witnesses and evidence in your behalf. You have the right to know the charges against you, and in the sentencing matter, you have the right to appeal to the Pascua Yaqui Court of Appeals. And the consequences, uh, in the revocation matter may include you being found in violation of you conditions of probation, your probation term being revoked or extended, and any suspended days being imposed. Do you understand your rights?
>
> Miranda: Yes.

(Transcript E at 1-2)

The pre-sentence investigative report filed by the Office of Probation and Parole revealed that Miranda was on probation (for conviction in CR-07-064) when she perpetrated her assault against the Valenzuela sisters. (Transcript E at 1-9).

Miranda stated, contrary to her assertions in Appellant's Opening Brief, (Appellant's Opening Brief at 16), that she received a copy of the pre-sentence investigation report:

> The Court: And we will first proceed with the sentencing hearing, uh, CR-08-119. And in that matter the pre-sentence investigation report has been filed by The Court. or with The Court rather by the Probation Office. And did you receive a copy of that, Ms. Miranda?
>
> Ms. Miranda: Yes.

Her probation was revoked. (Transcript E at 9). After hearing the recommendations of the Probation officer, Miranda requested that all of the sentences "run concurrent." (Transcript E at 5). Sentence was imposed, with some of the terms running concurrent:

> The Court: At this time, the Court will enforce sentence as follows, after hearing from the probation officer and the Tribe regarding the history of the Defendant. And the Court does find that the Defendant does have a history of failures to comply, failures to appear, uhm, and failure to comply with the conditions of probation and other orders set by the court. The Court will set sentencing as follow: Count One, three-hundred and sixty-five days in jail; Count Two, three-hundred and sixty-five days in jail; Count three, Endangerment, Count Four, uh, sixty days in jail; Count Four, sixty days in jail; Count five, ninety days in jail; Count Six, ninety days in jail; Count Seven, Seven, I'm sorry, thirty days in jail; Count Eight, thirty days in jail. Counts One and Two are to be served immediately for a total of seven-hundred and thirty days in jail; counts Five and Six will be served consecutive to Counts One and two for a total of one-hundred and thirty days in jail; Counts Five and Six will be

> served consecutive to Counts One and Two for a total of on-hundred and eighty days; Sentencing, Counts Three, Four, Seven and Eight are concurrent with One, Two, Five and Six for a total of nine-hundred and ten days in jail. The Defendant is restrained for a period of two years from the victims, and Defendant will not possess any type of weapons, for a period of two years.

(Transcript E at 7-8) Miranda requested credit for time served and her request was granted, reducing the sentence going forward by one hundred and fourteen days. (Transcript E at 9-10).

Miranda's criminal history (referred to in Appellant's Opening Brief as her "alleged criminal history," Appellant's Opening Brief at 17) informed the sentencing recommendations made the court by the Probation Office and the final sentence imposed (Appellee's Response Brief, Appendix B clarifies this history, including prior criminal charges brought against Miranda in CR-05-036, (in which she was represented by Chief Public Defender Nicolas Fontana), CR-05-278 (in which she was represented by Deputy Public Defender M. June Harris), and CR-07-064, (in which she was represented by Chief Public Defender Nicolas Fontana); she was on probation for her conviction in CR-07-064 when the incidents in the current case took place (Transcript E at 8-10)).

It is unclear in the record why Miranda chose not to retain the services of the Public Defender's Office in this case; she had ample familiarity with them from past experience, as attested to above.

The Pascua Yaqui Public Defender entered its notice of appearance on behalf of Miranda on June 10, 2008. (R.3) Miranda's Notice of Appeal was filed on June 26, 2008. (R.1).

Oral argument was heard on this appeal on March 17, 2009.

II. STATEMENT OF THE ISSUES

1. Did the court fail to properly advise the Appellant of her rights as guaranteed by the Constitution of the Pascua Yaqui Tribe and the Indian Civil Rights Act, and was she thereby deprived of due process of law?
2. Was inadmissible evidence wrongly admitted, and did admission of such evidence deprive the Appellant of her rights to confront her accusers and be given a fair trial as guaranteed by the Constitution of the Pascua Yaqui Tribe and the Indian Civil Rights Act?
3. Did the Court make a negative inference to the Appellant's invocation of her right to remain silent, and did any such inference deprive her of her right to be free from self-incrimination as guaranteed by the Constitution of the Pascua Yaqui Tribe and the Indian Civil Rights Act?
4. Did the court err in exercising jurisdiction over the Appellant?
5. Was the court's conviction of Appellant on counts five and six of the complaint improper?
6. Did the sentence imposed by the court violate the Indian Civil Rights Act?

III. OPINION

1. The trial court properly advised the Appellant of her rights as guaranteed by the Constitution of the Pascua Yaqui Tribe and the Indian Civil Rights Act, and she was not deprived of due process of law.

Appellant has submitted a lengthy narrative (Appellant's Opening Brief at 26-36) detailing her experiences at every stage of the pretrial and trial process, attempting to make the claim that she was, at no point, properly advised of her rights. This attempt fails, as her recitation of events only demonstrates that she was amply advised of those rights, and waived them, repeatedly. She contends that her waiver of the right to retain counsel at her own expense (or to solicit the services of the Public Defender's office) was improper, or defective, because the court did not

recount her rights in sufficiently exhaustive detail for a waiver to have been effective. I find that the waiver was effective, both generally, based on the advisories repeatedly provided her by the court, and specifically, given her particular levels of knowledge and experience. *North Carolina v. Butler* 441 U.S. 369, 373 (1979).

While Appellant put forth an elaborate collection of arguments predicated upon her unfamiliarity with the Pascua Yaqui criminal justice system, going so far as to refer to herself as an "alleged" Indian (Appellant's Opening Brief at 46) and challenge the Tribe's demonstration of subject matter jurisdiction over her, (Appellant's Opening Brief at 42-47) she is in fact intimately familiar with the workings of the system, and her familiarity is born of direct personal experience. Appendix B of Appellee's Response Brief testifies to this experience: Appellant appeared before the Pascua Yaqui criminal court on three separate occasions prior to being charged with the offenses under examination (CR-05-036, CR-05-278, and CR-07-064), and was in fact on probation for conviction in CR-07-064 the night the incidents in this case took place. (Transcript E at 8-10). On all three of these occasions she availed herself of the services of the Public Defender's Office, (Appellee's Response Brief, Appendix B) and indeed was personally represented in two by the Chief Public Defender, her counsel on this appeal (who presumably would have raised various issues, such as the question of subject matter jurisdiction, on those other occasions, CR-05-036 and CR-07-064, had they had merit). Appellant simply cannot sustain the argument that she was unaware of her rights, or that she only waived representation by counsel in this case because some defect in the court's instructions prevented her from either learning of the existence of the Public Defender or acquiring the means to contact him. Within this context, the instructions offered by the court to Appellant, at every stage of the process, regarding her rights were more than sufficient to meet the constitutional requirements of due process, and her waiver of those rights was more than adequate to have been effective.

Any possible defect in the court's repeated admonishments to Appellant not cured by her extensive personal knowledge of the Pascua Yaqui criminal justice system would have been corrected through her voluntary adoption, by signature, of the plea bargain agreement she entered into with the Tribe. This agreement detailed her rights exhaustively. (Appellee's Response Brief Appendix A).

Appellant's entire argument, that her successive, consistent, waivers of the right to counsel were ineffective for purposes of due process, is based upon upon this Court's decision in *Pascua Yaqui Tribe v. Ramirez*, CA-02-003 (2006). *Ramirez*, however, was a different case and does not apply, as it was "limited to those circumstances where a criminal defendant is required by the trial judge to proceed involuntarily, *pro se*, without legal counsel or an advocate in his or her defense in a criminal trial" (*Ramirez* at 7). Appellant was not required to proceed without counsel, she chose to proceed without counsel. She was informed at each step of her right to retain counsel (Initial Appearance, Appellant's Opening Brief at 26 citing Transcript A at 2; Arraignment, Appellant's Opening Brief at 28 citing Transcript B at 2; Pre-Trial Hearing, Appellant's Opening Brief at 30 citing Transcript C at 2; Trial, Appellant's Opening Brief at 34 citing Transcript D at 2; at Sentencing, Appellant's Opening Brief at 35 citing Transcript E at 2-3, the right to counsel did not apply); at each step she affirmed that she understood that right and had decided to waive it. Her contrary decision on three prior occasions to retain the services of the Public Defender's Office conclusively demonstrates that she was fully aware of this option, knew how to exercise it, and made a voluntary, informed choice, in this case, not to do so.

Further, under the the Pascua Yaqui Constitution, the Indian Civil Rights Act, and the United States Constitution, criminal defendants before the Pascua Yaqui court have the right to retain counsel at their own expense, not the power to demand counsel be provided at public expense. Art.I § 1(f), Const. Pascua Yaqui Tribe; 25 U.S.C. § 1302(6)(2001); *United States v. Bird*, 287 F.3d 709, 713 (8th Cir. 2002). The Pascua Yaqui Tribe has chosen to fund an Office

of the Public Defender to defend indigents; nothing in federal law or the Yaqui Constitution compels it to do so. Within the separate, sovereign, Constitutional structure of the Yaqui Tribe, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978), it is sufficient that defendants be told they may retain counsel at their own expense, and be allowed to do so, should they choose. In Appellant's current case, she chose not to, repeatedly. I will respect that choice and hold her waiver of the right to counsel to have been knowing, intelligent, and effective.

Given Appellant's peculiar familiarity with the Yaqui criminal justice system, and the effectiveness of her repeated waivers of her right to counsel, she has failed to demonstrate actual harm from any alleged defect in the various recitations made to her by the court of her rights. Not having demonstrated such harm, she has shown no reversible error, and I affirm the trial courts convictions on all counts.

2. The trial judge did not exceed the bounds of her discretionary authority to admit the evidence entered against Appellant, and Appellant was not deprived of her rights to confront her accusers or be given a fair trial as guaranteed by the Constitution of the Pascua Yaqui Tribe and the Indian Civil Rights Act.

Appellant's extended discourse on this topic (Appellant's Opening Brief at 36-41) may be reduced to three claims: that the trial court erred by admitting into evidence various statements that were, purportedly, hearsay; that the court further erred by allowing the prosecution to use leading questions on direct examination; and that the court wrongly allowed into evidence "irrelevant and prejudicial statements."

A. **Hearsay**

While the general rule, of course, is that hearsay (a statement made by an out of court declarant offered to establish the truth of the matter asserted) is inadmissible, 3 PYT R.Evid. 37, ("Hearsay is not admissible except as provided by these rules."), most evidence having the appearance of being inadmissible hearsay is either admissible non-hearsay (e.g. party admissions

3. PYT R. Evid. Rule 38(b); FRE 801(d)(2), and out of court statements offered for some purpose other than establishing the truth of the matter asserted 3 PYT R.Evid. 36(c); FRE 801(c)), or hearsay admissible under an exception. 3 PYT R.Evid. 39, 40; FRE 803, 804. Further, even hearsay that is not admissible under a exception may be admitted, with certain qualifications, in the discretion of the court if necessary in the interests of justice (judges make that determination after examining the probative value, credibility, and possible prejudicial effect of such evidence; this is reflected in the residual exception to the hearsay rule, FRE 807, under the Federal Rules of Evidence, which the court was free to adopt, according to 3 PYT R.Crim.Proc. Rule 43(c) "whenever due process or the court require[d]") *see also Idaho v. Wright*, 497 U.S. 805, 816, 110 S.Ct. 3139, 3147, 111 L.Ed.2d 638 (1990), "[t]he Confrontation Clause is not violated if the hearsay statement falls within a firmly rooted hearsay exception; and [second] even if it does not fall within such an exception, hearsay testimony is not violative of the Confrontation Clause if it is supported by a showing of particularized guarantees of trustworthiness."

Appellant misstates the rule by treating "hearsay" as simply or "generally" inadmissible, (Appellant's Opening Brief at 36) and ignoring the wide list of exceptions to the basic rule, acting as though the mere claim that hearsay evidence was admitted would suffice to establish that it was wrongly admitted, or even that, absent any showing of prejudice, acceptance of such evidence would necessarily rise to the level of constitutional impermissibility.

Appellant makes the further, broad claim that "a substantial portion" of the evidence against her at trial was inadmissible hearsay, asserting that "rather than being the exception" the "admission of hearsay was the norm." (Appellant's Opening Brief at 37) Unfortunately, while she gives these vague remarks the appearance of specificity by assigning a number, eleven, to the supposed items of hearsay wrongly admitted, she offers no further substantiation of either the remarks or that number. Nowhere does she actually cite the eleven supposed instances of

improper hearsay, the number is merely thrown out, perhaps, in part, because it exceeds another number, ten, found to have been objectionable in the authority she cites, *Waters v. Colville Confederated Tribes*, 3 CCAR 35 (1996) (Appellant's Opening Brief at 38). Laying aside the number eleven, I find only two concrete examples of supposed hearsay in her brief: the arresting officer's testimony that when he presented the knife recovered from Appellant to the two victim witnesses, minutes after their assault, they "immediately recognized" it as the weapon brandished by the assailant, (Appellant's Opening Brief at 37 citing Transcript D at 8) and the further testimony of that officer,

> I made contact with the victims, they said that, uh, the female subject with the long blue sleeved shirt, uh, was chasing them with the knife, pointed the knife at them, uh called her names, uh, something about I'm going to kill you fucking bitches and, uh, uh, you're laughing at me and something like that.

(Appellant's Opening Brief at 37 citing Transcript D at 8)

Both instances of "hearsay" were obviously highly relevant, 3 PYT R.Evid 6(a), (they regarded statements by victims to the police, immediately after a crime, made for purposes of apprehending the assailant).

Further, nowhere in Appellant's elaborate discussion does she mention the fact that the declarants whose out of court testimony she now finds objectionable offered substantially similar testimony in court, at her trial, subject to cross examination. (Transcript D at 12-23, 23-32).

Even were the out of court statements of the victim witnesses to have been excluded entirely, those statements were cumulative, mere repetitions of the testimony these victim witness offered in court.

Nothing in the record or in Appellant's argument demonstrates that admission of these arguably superfluous statements had the slightest effect upon her ultimate conviction.

Finally, Appellant did not object to the introduction of this evidence at trial. Thus, according to 3 PYT R.Evid. Rule 3(a):

> Effect of Erroneous Ruling. Error may not be predicated on a ruling which admits or excludes evidence unless a substantial right of the party is affected, and (1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike is made and appears on the record, stating the specific ground for the objection, if such is not obvious from the context;

Even if Appellant were to establish that the evidence was wrongly admitted by the court, she would have to further demonstrate, now, that the wrongful admission at trial was plain error. 3 PYT R.Evid. Rule 3(d); *United States v. Rich*, 580 F.2d 929, 936 (9th Cir.), *cert. denied,* 439 U.S. 935, 99 S.Ct. 330 (1978). Plain error by the trial court would had to have affected a substantial right and materially affected the verdict; here, the evidence objected to was cumulative, Appellant has made no showing that it affected the verdict at all, let alone that it affected the verdict materially.

As Appellant has not shown that the trial court committed plain error by admitting the supposed items of hearsay into evidence, I find that the court did not abuse its discretion in doing so, any error it made was "harmless beyond a reasonable doubt" *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967), resulted in no "actual prejudice" *Brecht v. Abrahamson,* 507 U.S. 619 at 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993), and I will not reverse her convictions in response.

B. Leading questions

3 PYRT R.Evid. 31 (c) concerns leading questions, the relevant portion:

> Leading Questions: Leading questions shall not be used on the direct examination of a witness *except as may be necessary to develop the witness' testimony*. (emphasis added)

Appellant's assertion that "leading questions are prohibited during the direct examination of a witness" is a misstatement of law. The relevant rule of evidence 3 PYT R.Evid. 31(c); FRE 611(c) allows leading questions to be used, explicitly, whenever "necessary to develop the witness' testimony."

Furthermore, trial courts have always been given broad discretion to allow such questions under the necessity exception, *Ellis v. Chicago*, 667 F.2d 606, 613 (7th Cir. 1981); *Rodriguez v. Banco Cent. Corp.*, 990 F.2d 7, 12 (1st Cir. 1993) ("In this realm the widest possible latitude is given to the judge on the scene."); *St. Clair v. United States*, 154 U.S. 134, 150 (1894) ("much must be left to the sound discretion of the trial judge, who sees the witness, and can therefore determine, in the interest of truth and justice, whether the circumstances justify leading questions to be propounded to a witness by the party producing him") they may even go so far as to instruct that these questions be used, in the "interest of justice," without abusing that discretion. *United States v. Brown*, 603 F.2d 1022, 1026 (1st Cir. 1979). Court discretion is particularly broad when, as in this case, the finder of fact is a judge, steeped in the law and charged with the responsibility to see that defendant's rights are protected, due process accorded her at trial.

Appellant simply leaves the necessity exception out of her argument. Nowhere does she even attempt to demonstrate that the court's decision to allow leading questions was an abuse of discretion, that finding such questions necessary to develop witness testimony was error. She just baldly, wrongly, asserts that these questions may never be used.

Further, contrary to Appellant's confused rendition of the law, while courts not only have broad general discretion to allow leading questions whenever they deem them necessary to develop witnesses testimony, they have been found to have particularly strong justification for doing so when, as here, a witness is young, timid, ignorant, unresponsive or infirm. (Transcript D at 23-32, *see* the federal ruling on the FRE 611(c), substantially similar to 3 PYT R.Evid. 31(c), in *U.S.v. Nabors*, 762 F.2d 642, 651 (8th cir. 1985) which would grant the court very broad

discretion to allow such questions in this case.) Appellant has not demonstrated that this discretion was abused, or shown clearly that allowing such questions prejudiced the verdict against her. Absent such a showing, which would require a very high burden given the nature of the witnesses, the magnitude of other evidence demonstrating Appellant's guilt, and the fact that Appellant was given a bench, not a jury trial, I find that the court did not commit reversible error.

C. Irrelevant and prejudicial statements

While evidence tending to demonstrate that Appellant was a narcotics user would have been irrelevant and prejudicial if admitted into evidence at trial in this case (in which she was charged with aggravated assault, endangerment, threatening and intimidating, and disorderly conduct), (Appellant's Opening Brief at 40 citing Transcript D at 11), the record does not support Appellant's contention that such evidence was admitted, or that any brief reference to it at trial actually prejudiced her defense (made it more likely that she would have been convicted of the charges at issue than if the reference had not been made).

The exchange referenced by Appellant in her brief (Appellant's Opening Brief at 40) regarded one question by the prosecutor to the arresting officer. The record demonstrates that Appellant failed to object to this question at trial, and that further, however improper and prejudicial the question may have been, the line of inquiry was immediately abandoned. (Appellant's Opening Brief at 40 citing Transcript D at 11).

Given Appellant's failure to object at trial, the standard for review by this Court, as discussed above, is plain error. *State vs. Owens*, 112 Ariz. 223 at 228, 540 P.2d 695 at 700 (1975) "We need not consider, however, whether the comments were so prejudicial that they constituted reversible error because the defendant's failure to object during or just after the closing arguments constituted a waiver of any right to review on appeal." *citing State v. Holmes*,110 Ariz. 494, 520 P.2d 1118 (1974); *State v. Kelley*, 110 Ariz. 196, 516 P.2d 569 (1973). "A party's failure to object will be overlooked only where we find fundamental error."

citing State v. Shing, 109 Ariz. 361, 509 P.2d 698 (1973). Having failed to demonstrate such error, or that the ultimate result in this case was different from the result that would have occurred had the question not been asked, Appellant has not shown that the court committed plain error. The convictions will not be reversed in response.

Furthermore, the burden for demonstrating such error would have been particularly high on Appellant as she was given a bench, not a jury trial, and the standards for evidence heard at bench trials are considerably broader than those at jury trials (given the significantly reduced likelihood that judges will be prejudiced as triers of fact by the admission of otherwise impermissible evidence than juries). *Harris v. Rivera*, 454 U.S. 339, 346-347 (1981) (per curiam).

3. Nothing in the record establishes that the Court made a negative inference to the Appellant's invocation of her right to remain silent, thus she was not thereby deprived of her right to be free from self-incrimination as guaranteed by the Constitution of the Pascua Yaqui Tribe and the Indian Civil Rights Act.

While it would have been impermissible for the judge to have commented on Appellant's refusal to testify at trial in a way that impugned her exercise of the constitutionally protected right to remain silent, *Griffin v. California*, 380 U.S. 609, 615 (1965), Appellant has failed to establish that a comment making such an impermissible inference took place. Further, she has not demonstrated that such a comment had a prejudicial effect, that her conviction on the eight counts under examination was made any more likely by this type of judicial remark than it would have been had the judge said nothing.

Again, given that the finder of fact was the judge, not a jury, and the record attests to overwhelming evidence of Appellant's guilt on all charges, it is difficult to imagine how such a showing of prejudice could have been made.

Appellant bases the claim that her right to remain silent was violated on a single statement by the judge at trial, a comment that must be interpreted to be understood (given the flawed recording) and whose interpretation is far from clear: "And the Court will also inform you that your refusal to testify is highly (inaudible) on the Court by uh, (inaudible). " (Appellant's Opening Brief at 41-42 citing Transcript D at 33) The remark was ambiguous, at best, and is not in itself sufficient to demonstrate Appellant's contention that her silence at trial was impugned by the court.

Even were the remark to be given the interpretation provided by Appellant in her brief (Appellant's Opening Brief at 41-42), which is to say the most negative interpretation possible, she would still have to establish that it had a prejudicial effect. She has not done so, and there is little reason to believe that it did, as discussed above. The statement upon which Appellant attempts to rest this claim, however construed, is too thin a reed to sustain her assertion of reversible, constitutional harm. I find, further, that, however read, it was "harmless beyond a reasonable doubt," *Chapman v. California* 386 U.S. 18 at 24, 87 S.Ct. 824 at 828 (1967), as Appellant has failed to demonstrate the existence of any possibility, let alone a reasonable possibility, that it contributed to her conviction. *Fahy v. Connecticut*, 375 U.S. 86-87, 84 S.Ct. 229, 230, 231, 11 L. Ed. 2D 171 (1963).

4. The trial court properly exercised jurisdiction over the Appellant.

The Pascua Yaqui Tribal Court has subject matter jurisdiction to hear criminal charges brought against Indians (member and non-member) for violating Pascua Yaqui criminal law on the Yaqui Reservation. 3 PYTC § 1-1-20(a); *Oliphant v. Suquamish Indian Tribe*, 453 U.S. 191, 208 (1978); 25 U.S.C. § 1301(2); *U.S. v. Lara,* 124 S.Ct. 1628 (2004). Indian status of a defendant must be determined to establish the Tribal Court's criminal jurisdiction. *In re Certified Question,* No. 98AC00004 (Hopi 2001).

Contrary to Appellant's lengthy, speculative contentions, (Appellant's Opening Brief at 44-45) it is not difficult to establish that a defendant is an Indian; this may be done simply, quickly, and conclusively, generally by the submission of a Certificate of Indian Blood to the court. *United States v. Lawrence*, 52 F.3d 150, 152 (8th Cir. 1995) *citing St. Cloud v. United States*, 702 F.Supp.1456 (D.S.D. 1988) ("Recognition" analysis: "Those factors, which the Court considered in declining order of importance, are: 1) tribal enrollment; 2) government recognition formally and informally through receipt of assistance reserved only to Indians; 3) enjoyment of the benefits of tribal affiliation; and 4) social recognition as an Indian through residence on a reservation and participation in Indian social life."). Tribe's Exhibit 1 (Index listing #13 Certificate of Indian Blood for Beatrice Miranda. Enrollment #2694U04548.) is a Certificate of Indian Blood for Beatrice Miranda, containing Appellant's name, birth date, and tribal enrollment number. Eligibility for enrollment requires at least ¼ degree Pascua Yaqui Blood. Art III § 1(b) PYT Const.; *see United States v. Torres*, 733 F.2d 449, 455 (7th Cir. 1984) *citing Alvarado v. United States,* 429 U.S. 1099, 97 S.Ct. 1119, 51 L.Ed.2d 547 (1977) (tribal enrollment and one-fourth Indian blood is sufficient proof that one is an Indian); *United States v. Broncheau*, 597 F.2d 1260, 1263 (9th Cir.), cert. denied, 444 U.S. 859 (1979). Appellant contends that this Certificate was either never submitted to the court, or that, in the alternative, Appellee produced insufficient foundation to authenticate it. (Appellant's Opening Brief at 46-47).

Appellant seizes upon an inaudible portion of the trial transcript (Appellant's Opening Brief at 46 citing Transcript D at 3-33) to make the claim that this Certificate was never "offered, or admitted into evidence," and that the Tribe thus "failed to introduce any evidence whatsoever regarding Miranda's alleged status as an Indian." (Appellant's Opening Brief at 46) Appellant may think it "curious" that the Certificate of Indian Blood was included in the record on appeal, as "Tribe's Exhibit 1," but the Certificate was included in the record on appeal because it was part of the record at trial, and it was part of the record at trial because it was submitted to the

Court and entered into evidence. Appellant's claim that the Certificate was not submitted to the Court can not be reconciled with the fact that it was in the record. It is not necessary to have an audible recording of the Certificate' submission to the Court for it to have been properly submitted, the document's presence in the trial record amply demonstrates that it was admitted into evidence.

Further, pursuant to Rule 53, PYT Rules of Evidence,

> The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 48(D) or testified to be correct by a witness who has compared it with the original.

the Certificate of Indian Blood was a self authenticating Public Record, and thus need only to have been submitted to have been properly admitted as evidence. Appellant's claim that further foundation was required to authenticate the document is false.

As a Certificate of Indian Blood demonstrating Appellant's Indian status was submitted to the court, the Tribe met its burden at trial to establish that Appellant was in fact an Indian and that the Pascua Yaqui Tribal Court had subject matter jurisdiction to hear the charges filed against her.

5. The trial court's conviction of Appellant on counts five and six of the complaint was proper.

Appellant compounds her faulty claim that the Tribe failed to demonstrate subject matter jurisdiction by making the strange, wholly erroneous, argument that the Tribe further failed to prove, beyond a reasonable doubt, that she was an "Indian," and that therefore she was wrongly convicted on counts five and six of the charges brought against her. (Appellant's Opening Brief at 47-48).

Counts five and six concerned "threatening or intimidating", 4 P.Y.T.C. 1-260:

> Any Indian who, with the intent to scare or terrify, threatens or intimidates another person by word or conduct so as to cause physical injury to another person or serious damage to property of another person, or causes another person to reasonably believe that he/she is in danger of receiving physical injury or damage to property, shall be guilty of an offense.

Contrary to Appellant's fanciful interpretation of this statute, use of the word "Indian" in the crime's definition did not make being an Indian into an element of the crime, any more than use of the more usual word "person" would have made being a "person" an element of the crime. As the Tribe has no jurisdiction to hear claims against non-Indians, it may not prosecute a person under Tribal Law unless that person is an Indian. The words Indian and person are thus wholly interchangeable for purposes of Indian criminal statutes.

Having established Appellant's Indian status for purposes of jurisdiction, the Tribe had no further burden to demonstrate that she was an Indian. Appellant does not contend that the Tribe failed to prove beyond a reasonable doubt that she was guilty of any actual element of the crime of threatening and intimidating, so her conviction for that crime, on Counts Five and Six, was proper and is affirmed.

6. The sentence imposed by the court of nine hundred and ten (910) days did not violate the Indian Civil Rights Act.

Under the Indian Civil Rights Act, 25 U.S.C. § 1302(7) , and the Constitution of the Pascua Yaqui Tribe, Art. 1, § 1(g) PYT Const., the court may not impose a sentence exceeding one year's imprisonment for conviction of any one offense. Appellant contends that these statutory limitations act to bar any sentence exceeding one year's imprisonment, period, even if a defendant is convicted of multiple offenses, provided those offense are part of "the same criminal transaction" or "course of conduct." (Appellant's Opening Brief at 51-54, "It is clear

that Congress intended to adopt the concept that separate crimes arising from a single criminal episode should normally be treated as a single offense for sentencing purposes.")

Appellant's contention is a misstatement of law and flies in the faces not only of the plain language of the statute in question (which restricts the sentences for "any one offense" not the sentencing of "all offenses" cumulatively) but also the law as it has been construed and applied in Indian Country universally since the passage of the Indian Civil Rights Act in 1968.

Contrary to Appellant's assertion, the phrase "any one offense" is not ambiguous and the purported standard she offers to interpret it is neither controlling on this court nor a correct statement of law as applied within the United States at either the Federal or State level.

Appellant puts forth a "same transaction" test to make the claim that the language "any one offense" must be read to mean that no more than one offense may be charged against a defendant, however many crimes she commits, if those crimes are part of a "single criminal episode" (Appellant's Opening Brief at 54-55) She cites *Spears v. Red Lake,* 363 F.Supp. 2D 1176, 1178 (D. Minn. 2005), which is not binding on this court, and a concurrence, *Ashe v. Swenson,* 397 U.S. 436, 449-54 (1970) (Brennan, J., concurring), which is not binding on any court, to support this theory.

What Appellant does not cite is the law that is binding in Arizona, and the United States generally, as articulated by the Arizona Supreme Court , *State v. Barber*, 133 Ariz. 572, 576, 653 P.2d 29, 33 (App. 1982), *State v. Eagle*, 196 Ariz. 188, 190, 994 P. 2d 395, 397 (2007), and the United States Supreme Court, *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 182 (1932). While decisions of the Arizona and United States Supreme Courts are not controlling authority in this court, they are highly persuasive, particularly when they reflect the majority, or unanimous, legal opinion regarding construction of a disputed term or phrase substantially similar to the term or phrase under examination. Indeed, the authority of the United States Supreme court is particularly instructive here, as Appellant purports to base her argument

upon a construction of the Indian Civil Rights Act, a statute enacted by the United States Congress. The presumption that language in such a statute was intended to have the meaning accorded similar language by the Supreme Court is difficult to overcome, and was not overcome by Appellant in her attempt to impose an alternate, unique, construction.

Under *Blockburger*, as restated in *State v. Barber*, *State v. Eagle*, and drawn from a venerable understanding of the meaning of the phrase "same offense" given expression in *Morey v. Commonwealth*, 108 Mass. 433, 434 (1871),

> A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.

The construction of the phrase "same offense" given in *Blockburger* is the construction that is nearly universally controlling now and the construction that controls interpretation of that phrase within the Indian Civil Rights Act, namely, that so long as conviction of one statutory crime requires proof of at least one additional element not required to be convicted of a different crime, the two crimes are separate offenses. *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 182 (1932) As separate offenses, a defendant may be properly charged with both, convicted of both, and sentenced separately for both. While Appellant could not have been sentenced to a term of more than one year for any one offense, she was not convicted of one offense, but eight, and sentenced separately for each.

Appellant attempts to circumvent this construction through a purported recitation of the statutory history of the Indian Civil Rights Act, (Appellant's Opening Brief at 51-52), the balance it supposedly struck between federal and Indian jurisdiction over crimes, (Appellant's Opening Brief at 52-54), and the "absurd result" that would, in her claim, be the product of using the *Blockburger* test to interpret its language, offering her own "single criminal transaction" test as

the "clear" expression of Congressional intent, (Appellant's Opening Brief at 54), even though that test never appeared anywhere in the legislative history of the Indian Civil Rights Act, was not the meaning accorded the phrase "same offense" under federal law when the statute was enacted, and has only been applied by one court, in *Spears*, since that statute went into effect. *See United States v Dixon*, 509 US 688, 704, 113 S Ct 2849, rejecting this interpretation of "same offense", "That test inquires whether each offense contains an element not contained in the other;", further "but there is no authority, except *Grady*[overturned], for the proposition that it has different meanings in the two contexts. That is perhaps because it is embarrassing to assert that the single term 'same offense' (the words of the Fifth Amendment at issue here) has two different meanings-that what is the same offense is yet not the same offense."; 125 L Ed 2d 556(1993) and *Carter v McClaughry*, 183 US 367, 394-395; 22 S Ct 181; 46 L Ed 236 (1901) further "Having found the relator to be guilty of two offenses, the Court was empowered by the statute to punish him as to one by fine and as to the other by imprisonment. The sentence was not in excess of its authority. Cumulative sentences are not cumulative punishments, and a single sentence for several offenses, in excess of that prescribed for one offense, may be authorized by statute. *citing In re De Bara*, 179 U. S. 316; *In re Henry*, 123 U. S. 372. Finally, *Ramos v. Pyramid Lake Tribal Ct.*, 621 F. Supp. 967, 970 (D. Nev. 1985), examining consecutive sentences under the ICRA,

> "This Court could find no cases holding that the imposition of consecutive sentences constitutes cruel and unusual punishment. Indeed, the imposition of consecutive sentences for numerous offenses is a common and frequently exercised power of judges. Ramos was found guilty by the Pyramid Lake Tribal Court and sentenced accordingly to those findings of guilt. He may be unhappy with the sentence he received, but there was no violation of his right against cruel and unusual punishment and, thus, no habeas relief lies."

Appellant cites *Griffin v. Oceanic Contractors,* 458 U.S. 5644, 575 (1982)

> Interpretation of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative history are available.

No interpretation would be more absurd in this case than one that reversed the meaning the law had for four decades and straightjacketed Indian courts, reducing them to one year, maximum, sentences of imprisonment, however many crimes an Indian offender has committed against Indians on Indian land, whenever, as is usually the case, those crimes were part of a "course of conduct" "criminal episode" or "criminal transaction." Such a ruling would reduce Indians to life on reservations where their own courts cannot maintain order and federal courts will not. I reject that interpretation, and choose instead to follow the essential principles of the *Blockburger* test.

Furthermore, I recognize that Indian courts have wider discretion to apply this test then federal or state courts, discretion derived both from their status as separate sovereigns (whose sovereignty antedates the existence of the United States) and from compelling, particular interests they have in maintaining order and the rule of law in Indian country. The reality, as long recognized by federal courts, is that Indian courts have primary responsibility to dispense justice to Indian victims of crimes perpetrated by Indians on Indian land. While the Federal Government of the United States curtailed much of the sovereign authority of Indian courts through the Major Crimes Act, 18 U.S.C. § 1153, and the Indian Civil Rights Act, it did not destroy that authority, or abrogate the fundamental responsibilities of those courts. *United States v. Montana,* 450 U.S. 544, 564 101 S. Ct. 1245 (1981) *citing United States v. Wheeler,* 435 U.S. 313, 323-326 (1978). Indeed, the federal government has manifested a general unwillingness to take jurisdiction over crimes committed by Indians in Indian country, which leaves Indian courts as the sole effective guarantors of safety, order and justice for Indians living on Indian land. To fulfill that crucial role, Indian courts are, and must be, accorded greater discretion to charge

criminals and mete out sentences than federal or state courts operating more simply within the confines of the *Blockburger* test.

Accordingly, I find that the court acted properly, under *Blockburger*, and within the wide latitude Indian courts have to charge and sentence criminal defendants, by hearing the charges filed against Appellant, convicting her, and imposing the sentence she received. Each charge heard against Appellant required that sufficient additional facts be proven to satisfy the expansive form of the *Blockburger* test I am applying. Further, Appellant was not convicted of eight separate charges against one victim, as her Brief implies, but of four sets of charges against two separate victims, making the sentences actually handed down particularly appropriate. When making this sentence, the court took notice of her prior criminal record, (Transcript E at 7-8, Appellee's Response Brief Appendix B, CR-05-036, CR-05-278, CR-07-064), the fact that she was on probation when the crimes occurred, (for conviction in CR-07-064), and the possible future threat she might pose to the continued safety of the victims in this case (Transcript E at 5-6); it then gave her credit for time served, reducing the actual sentence imposed considerably (subtracting one hundred and fourteen days from the sentence to be served, Transcript E at 9-10) and ran several of the sentences concurrently, further moderating their impact (Counts Three, Four, Seven and Eight, Transript E at 7-8, subtracting 240 days from the actual sentence).

The trial courts judgment on all counts is affirmed.

Temporary Stay

On this portion of my decision I am issuing a temporary stay effective until April 30th, 2009, as questions regarding the breadth of discretion given to the Pascua Yaqui Courts to hear multiple charges and confer sentence are fundamentally political in nature. The legislative drafters of the Constitution of the Pascua Yaqui Tribe made a deliberate effort to harmonize Art. 1, § 1(g) PYT with its counterpart in the Indian Civil Rights Act, 25 U.S.C. § 1302(7). Both inform the reader that the court may not impose a sentence

exceeding one year's imprisonment for conviction of any one offense. And yet, the Appellant's interpretation leads one to conclude that these statutory limitations act to bar any sentence exceeding one year's imprisonment, period, even if a defendant is convicted of multiple offenses, provided those offenses are part of "the same criminal transaction" or "course of conduct."

Questions regarding the interpretation and breadth of discretion conferred upon the Pascua Yaqui Courts by the Constitution to hear multiple charges and confer sentence are fundamentally political and reside within the domain of the Legislative branch. Moreover, the culture, traditions, and separate sovereign structure of the Pascua Yaqui Tribe make it appropriate that questions of significant policy be decided by the legislative than the judicial branch of our government. Accordingly, I am submitting to the Attorney-General the question as to (1) whether or not Art 1, 1(g) of the Pascua Yaqui Constitution is to be interpreted in harmony with the Indian Civil Rights Act; and (b) whether the two must be interpreted – and thus applied - by the Pascua Yaqui Courts pursuant to the Appellant's more formalistic construction.

Given Appellant's declaration at oral argument (March 17, 2009) that she intends to use this Court's disposition to perfect her filing of a habeas corpus petition in federal district court, I consider it of paramount importance that the legislative branch of the Yaqui government make a concrete determination of these disputed points of policy before our order concerning them is given full effect. The impact of the delay resulting from the stay will be minimal as counsel for the Appellant, Mr. Fontana, has made it abundantly clear that he intends to file a writ of habeas corpus in federal district court. And yet, during the March 17 hearing it was apparent that the decision sought by the Appellant will have far reaching public policy implications for offenders convicted in the Pascua Yaqui Courts. Thus, before the Appellant moves to pierce the veil of

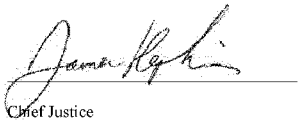
tribal sovereignty at federal district court, the Pascua Yaqui Court of Appeals will continue to hold jurisdiction over this matter until the stay expires in light of the constitutional issue.

At first blush, this may not appear to be a conventional remedy in the Pascua Yaqui Tribal Courts – despite being employed by Appellate Courts in other jurisdictions. And yet, by close analogy matters before the Tribal Courts where the Tribe is not a party and tribal sovereignty is at issue the Constitution prescribes clear notice requirements pursuant to Section 20, 3 PYTC § 2-5-20. In sum, I consider it to be of paramount importance that the legislative branch of the Yaqui government make a determination of the disputed points of policy before my order concerning them is given full effect.

IV. CONCLUSION

The Tribal Court's decision is affirmed on all counts. A temporary stay with respect to the foregoing issue will be in effect until April 30th, 2009. As I have already ruled on every issue, absent a response by the legislative branch removing the stay will simply affirm my decision that has already made - not reverse it.

Filed this 29th day of March, 2009.



Chief Justice

Pascua Yaqui Court of Appeals

28

Mr. SCOTT. Thank you.
Mr. Burns?

TESTIMONY OF SCOTT BURNS, EXECUTIVE DIRECTOR, NATIONAL DISTRICT ATTORNEYS ASSOCIATION, ALEXANDRIA, VA

Mr. BURNS. Chairman Scott, Ranking Member Gohmert, and Members of the Subcommittee, thank you for inviting me to testify today on behalf of America's National District Attorneys Association. We represent and are the voice of some 39,000 prosecutors

across the country and responsible for prosecuting 95 percent—95 percent—of all criminal cases in this country.

As a State and local attorney in a small town in the Southwest for 16 years I became familiar with the unique challenges that face Indian country that you, Chairman Scott, and Congressman Lungren articulately set forth in your—forward in your opening remark. I also had the honor and privilege to serve initially as the deputy director for State and local affairs in the White House Office of National Drug Control Policy—the drug czar's office—and because acutely aware early that there was something missing from the title. And I would like to say that it was me, but it was a lot of pressure from the National Congress of American Indians and others—and it sounds small but it wasn't—that we changed the office to Office of State, Local, and Tribal Affairs and began to try and look at, in a comprehensive way, some of the issues that we were facing in Indian country, and it was staggering.

Traveling to the Akwesasne Mohawk Reservation in upstate New York, to Crow, to Wind River, to Net Lake, to—and Salt River, to Navajo, and Hopi, and Yakima, and across the country, the jurisdictional problems that, again, were addressed in the opening remarks became clear. It also became clear that the lack of training and the lack of penal resources and facilities was staggering. It also became clear that the lack of coordination between Federal, State, and local, and tribal, on the issue that I was then addressing, the drug issue, was almost depressing.

We got some initial money to try and bring to Indian country something that had worked in non-Indian country—the HIDTA program, High Intensity Drug Trafficking Area. First went to five test areas and asked them—went to Indian country and said, "Would you be willing to look at this? Would you be willing to waive sovereignty if we could leverage all of the assets that each bring from their individual agencies and entities and governments?" and all five of them did. And the money was so small—$500,000 for five different tribes—it is hard to say whether that worked or not. But what did work was, in my mind, a sense of commitment and the willingness to try and work together.

I was going to talk about the staggering numbers, Chairman Scott, that you talked about. I won't repeat it, but the domestic violence, the sexual assaults, the crime, methamphetamine, gangs now in Indian country is obvious and is evident.

NDAA applauds Congresswoman Herseth Sandlin for introducing H.R. 1924, the 11Tribal Law and Order Act of 2009" and for each of you for appreciating the importance of this bill. As you know, during recent years all of the criminal justice system, especially on a State and local, have been pinched by States' budgets that are diminishing.

One of the things that we at the National District Attorneys Association have prided ourselves in over the years is providing the best training in the country for prosecutors—for State and local prosecutors that do 95 percent of the criminal cases at the National Advocacy Center in South Carolina. And while the United States attorneys need it and their cases are so important, their funding at the NAC has gone to about $15 million. The funding for State and local prosecutors from the authorized amount of $4.5 million,

to less than $2 million, to—in fiscal year 2010 I think it is $1.175 million, which extremely hampers our ability to give State and local prosecutors appropriate training.

I guess to wrap up, and prior to, again, thanking you for your insight into these complicated issues, I tell you that I can speak for 39,000 prosecutors in saying that we stand ready to assist, to help, that we get it, that we appreciate the issues are complicated. But good women and men who call themselves prosecutors look forward to your leadership and we stand ready to assist.

Thank you.

[The prepared statement of Mr. Burns follows:]

PREPARED STATEMENT OF SCOTT BURNS

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Written Testimony of

Mr. Scott Burns, Esq.
Executive Director, National District Attorneys Association

Hearing on H.R. 1924, the "Tribal Law and Order Act of 2009"

House Judiciary Committee
Subcommittee on Crime, Terrorism, and Homeland Security
United States House of Representatives

December 10, 2009

Chairman Scott, Ranking Member Gohmert, members of the Subcommittee, thank you for inviting me to testify today on behalf of the National District Attorneys Association (NDAA), the oldest and largest organization representing over 39,000 district attorneys, state's attorneys, attorneys general and county and city prosecutors with responsibility for prosecuting 95% of criminal violations in every state and territory of the United States.

As a state and local prosecutor for sixteen years in rural Utah, I became very familiar with the unique criminal justice issues in Indian country; moreover, I was honored to serve as the Deputy Director for State and Local Affairs at the White House Office of National Drug Control Policy and, in an effort to address serious issues relating to Indian country, the title of the position was changed to "Deputy Director for State, Local and Tribal Affairs". During my seven years at the

White House, I visited with tribal leaders and tribal law enforcement and treatment officials across the country - New York, South Dakota, Wyoming, Montana, Washington, Utah, Arizona, New Mexico, California and Oregon - and gained insight with respect to conflict of jurisdiction issues, lack of resources, lack of training, inadequate jail facilities and a number of other critical areas that need to be addressed. It is because of my experience in working with the National Congress of American Indians and caring and insightful tribal leaders, that I applaud and thank you for appreciating the need for better coordination and more federal, state and local support for Indian country.

The lack of coordination and cooperation between federal, state, local and tribal law enforcement has led to disturbing crime trends in tribal communities across the United States. Because of the shortage of resources for law enforcement in tribal communities and the complicated jurisdictional scheme that exists in Indian country, criminals and organized criminal networks have thrived, causing a violent crime rate that is nearly twice the national average.[1] Limited law enforcement presence and tribal courts having little criminal jurisdiction over non-Indian persons has led to significantly increased gang activity and methamphetamine production, allowing drug traffickers to cause astronomically-high addiction rates in tribal communities. This lack of criminal justice presence on tribal lands has also led to sickening trends of domestic and sexual violence against women in tribal communities, with one out of every three Indian and Alaska Native woman suffering a rape in their lifetime and nearly two out of every five being subjected to domestic violence.[2]

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[1] H.R. 1924 - http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.1924:

[2] H.R. 1924 - http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.1924:

NDAA applauds Congresswoman Herseth-Sandlin for introducing H.R. 1924, the Tribal Law and Order Act of 2009, for addressing these significant problems on tribal lands. Because of the complicated jurisdictional issues in Indian country, H.R. 1924 would encourage and provide incentives for increased coordination and communication among Federal, State, local and tribal governments while clarifying jurisdictional responsibilities between them, which are desperately needed in order to administer fair and impartial justice in tribal communities. Also, H.R. 1924 empowers tribal governments with the authority, resources and information necessary to safely and effectively provide for the safety of their communities; it should be the role and responsibility of every government entity - Federal, State, local and tribal – to provide safe neighborhoods for its citizens.

Additionally, NDAA fully supports the formation of an Indian Law and Order Commission – a group composed of nine members charged with conducting a comprehensive study over a two-year period of the criminal justice system relating to Indian country to analyze the problems within tribal communities, and make recommendations to Congress based on its findings to simplify jurisdiction in Indian country, improve criminal justice services and programs, enhance the penal authority of tribal courts and other issues that would reduce overall crime on tribal lands. Because all aspects of the criminal justice system have not been comprehensively analyzed since the Commission on Law Enforcement and the Administration of Justice spearheaded by President Lyndon Johnson in the 1960's, we would encourage tribal issues be a key component of any comprehensive criminal justice commission mandated by Congress.

During recent years, all aspects of America's criminal justice system have felt the pinch of dwindling budget dollars – especially for training. This couldn't be more relevant for Indian country, where complicated and confusing jurisdictional schemes and differences in penal authority for Indians versus non-Indians are coupled with 21st century problems like methamphetamine production, prescription drug abuse, drug trafficking and organized criminal gangs.

Training programs like NDAA's National Advocacy Center (NAC) equip thousands of state and local prosecutors with the advocacy skills to effectively represent their communities and constituents in the courtroom in order to ensure community safety. The NAC offers several training programs for prosecutors, both new and old, which focus on all aspects related to the problems currently facing tribal prosecutors – from the prosecution of drug crimes, gangs and violent crime, domestic violence and violence against women and children to jurisdictional issues related to crimes committed in Indian country. NDAA strongly encourages Congress to increase its commitment to adequately train Federal, State, local and tribal criminal justice personnel.

Chairman Scott, Ranking Member Gohmert, members of the Subcommittee, I appreciate the opportunity to testify before you on this important legislation and will answer any questions that you may have.

Mr. SCOTT. Thank you.
Ms. Creel?

TESTIMONY OF BARBARA L. CREEL, ASSISTANT PROFESSOR OF LAW, SOUTHWEST INDIAN LAW CLINIC, UNIVERSITY OF NEW MEXICO SCHOOL OF LAW, ALBUQUERQUE, NM

Ms. CREEL. Good morning. Mr. Chairman, Ranking Member Gohmert, distinguished Members of the Committee, my name is Barbara Creel. I am a member of the federally-recognized tribe Pueblo of Jemez, Walatowa, in New Mexico, one of 22 federally-recognized tribes in New Mexico and one of the 19 pueblos.

I am a former Federal public defender, but I come to you today not as a person speaking on behalf of my employer or my tribe, but as someone who has seen crime and punishment on the ground in Indian country and doesn't look at this from an academic point of view but as someone who is a part of a community and families who have been devastated by both crime and punishment.

I commend the Committee for addressing the issue and Congress for all of the efforts in trying to make Indian country safer for Native Americans. It is part of the Federal trust responsibility, as we know.

I cannot agree with the framing of the issue, though, as one of simply addressing the Indian problem by locking up more Indians, especially without the right to counsel. I am happy to hear Mr. Perrelli say that this must be addressed comprehensively and must include drug court, treatment program for substance abuse, and reentry programs.

And there are effective drug treatment and reentry programs today on the ground run by the tribes under their tribal sovereign rights that are culturally sensitive and, again, effective. The Muscogee Creek Nation has a drug treatment now currently and a reentry program that reduces the ordinary rate for recidivism from 68 percent to about 29 percent and it is culturally sensitive.

The bill should be—the act should be amended to address an Indian defendant's right to counsel in tribal court. They should be afforded the right to counsel even if they are going to be imprisoned for just 1 day.

I understand that the Committee and Congress is sensitive to tribal sovereignty and the sovereign right to determine the kind of justice system that is present for policing and enforcing laws on the—in tribes and pueblos. However, I don't know of any tribe that made a sovereign decision to no right to counsel.

I know that tribes have a particular idea about what—maybe that they want to counsel, as in no attorneys, but once they have decided that—to set up a Western-style court system usually the decision not to have a public defender office is based solely on funds. The severe lack of resources and the fact that tribes are dealing with many issues all at the same time—poverty, unemployment, education, health issues—the funds that they have to address these issues, which all funnel into crime, are severely limited and they are severely fractionated.

There is piecemeal—was mentioned the Indian Health Service, Department of Education, as well as the Department of Justice all have separate tribal offices which aren't always coordinated with

each other. I think the act itself, in coordinating those different programs that are piecemeal together is really important for investigation purposes, but also for treatment purposes.

Fundamental fairness and due process requires parity in tribal court justice systems, so once the tribe has decided to enact their sovereign right to create a tribal court that has a law-trained prosecutor I believe that the right to counsel for those Indian defendants who are facing any imprisonment is imperative. And I believe that the United States government, who has held that the right to counsel is a human right and is a bedrock principle for fundamental fairness in courts, should apply to native people as U.S. citizens.

I say this because many times Indian defendants are facing prosecution both in their tribal court and in Federal court. Because of the Major Crimes Act they—tribal jurisdiction has been preempted and displaced.

Tribes don't know whether a case is going to go Federal or not, so the fact that they may not have a public defender system in place severely impacts the individual's civil rights if that case then does become a successive prosecution. Also, there are instances where there is an overlapping investigation between the Federal and the tribal case and prosecution, and there are some egregious lapses in protecting the individual Indian's rights when he does not have defense counsel from the moment he is being investigated. And those, then, can impact his ability to create a fair defense in Federal court where he is entitled to the right to counsel.

Thank you very much for the opportunity to comment on the act and provide testimony, and I look forward to any questions that you may have.

[The prepared statement of Ms. Creel follows:]

PREPARED STATEMENT OF BARBARA L. CREEL

BARBARA L. CREEL
ASSISTANT PROFESSOR OF LAW
UNIVERSITY OF NEW MEXICO SCHOOL OF LAW

Good Morning, Mr. Chairman, Mr. Gohmert, and Distinguished Members of the Subcommittee,

I am grateful for the opportunity to provide testimony on the Tribal Law and Order Act of 2009. My name is Barbara Creel. I am an enrolled member of the Pueblo of Jemez, one of the 22 Federally Recognized Tribes with land holdings in New Mexico. I am a law professor at the University of New Mexico School of Law, where, in addition to teaching in the Southwest Indian Law Clinic, I teach Evidence and a course I designed entitled, Criminal Law in Indian Country. Prior to teaching, I served as the Tribal Liaison to the United States Army Corps of Engineers, and from 1999 to 2006 I was an Assistant Federal Public Defender in Portland, Oregon. The latter position is one of the most important in my career as an advocate for Native peoples.

I am here today in my capacity as a Native American woman, a former federal criminal defense attorney, and an advocate for Native American individuals and Tribes. My words are not spoken on behalf of my employer or my Tribe. I speak for those caught in the 'strange tangle of laws' that make up criminal jurisdiction in Indian country; for those individuals who may be accused of a crime in the future who are subject to Tribal and federal criminal justice systems simultaneously; and those who may be subject to incarceration by order of the Tribal government in a local, state or federal facility without adequate representation.

I applaud the federal government's efforts in protecting Indians in Indian Country. Before proceeding to the analysis of the Act, I must observe that goals of the Act seem deceptively simple by the manner in which it defines the problem.

Despite record poverty, unemployment, suicide, violence and incarceration rates suffered by Natives across Indian Country, the issue is defined as one of lawlessness on the part of Native American Indians. Defining the problem as one of violence and lawlessness on the part of the individual Indians in Indian country suggests the only and best answer is to capture, detain and incarcerate more Native Americans. With Natives disproportionately represented among the prison population in county, state and federal facilities – this cannot be the answer. So, I must insist on a different approach to and frame for the problem.

I. THE ACT SHOULD ALSO INCLUDE FUNDING FOR EFFECTIVE SUBSTANCE ABUSE TREATMENT PROGRAMS, EDUCATION AND JOB TRAINING, AND CULTURALLY-BASED RE-ENTRY PROGRAMS TO PREVENT CRIME AND VIOLENCE AND PREVENT RECIDIVISIM

I acknowledge the need for and support Congressional efforts to address the gaps in criminal jurisdiction in Indian Country, to require the Department of Justice to coordinate law enforcement and investigation with Tribal governments, and to fix the serious lack of funding for law enforcement, Tribal courts, and Tribal sovereignty efforts to provide culturally-based justice systems. The failure to protect these needs is a failure of the federal government's unique role in criminal justice and a failure of the Trust Responsibility.

While I cannot disagree with the need to make the protection of Native American women, children, families and communities from rampant crime and violence a priority, I cannot agree that incarceration alone will address the problem. There needs to be funding and access to effective treatment programs, education programs, job training, and re-entry programs for Native Americans, as well.

Incarceration as a way of life

Most Native people from reservation communities have been touched by violence and incarceration and the collateral effects of both in some way. In my own family and experience, incarceration has never been more than one degree of separation from poverty, substance abuse, unemployment or depression. I have had a cousin die from a gunshot wound, and another die from unnatural causes while in jail for drunkenness. I can tell you that one loss was not easier to take than the other, but one was easier to punish.

II. INDIAN DEFENDANTS FACING IMPRISONMENT IN TRIBAL COURT SHOULD BE AFFORDED THE RIGHT TO COUNSEL, INCLUDING THE RIGHT TO COURT APPOINTED COUNSEL, AND DUE PROCESS OF LAW

Tribes, as political entities predating the U. S. Constitution and the United States itself, are not bound by the Fifth Amendment due process guarantees nor by the Sixth Amendment right to counsel. Rather, Tribes are subject to the procedural protections established by Congress under the Indian Civil Rights Act of 1968 (ICRA). Under ICRA, Indian defendants have the right to counsel, at their own expense. In other words they are entitled to a defense, if they can afford one.

There must be a right to appointed counsel for Native defendants facing criminal charges in Tribal court, just as in federal court. If the indigent defendant is facing potential jail time, even if it is just one day, the court should appoint counsel in his or her defense.

Although the argument against a Tribal right to counsel has been couched in terms of Tribal sovereignty, this has not been the case since the late 1800's. In 1883, the Supreme Court decided *Ex Parte Kan-gi-shu-ca, (Crow Dog)*, 109 U.S. 556. In *Crow Dog*, the Supreme Court determined that the United States federal courts did not have criminal jurisdiction over a Native American who murders another on reservation lands. Instead, the Court held that Tribes had exclusive jurisdiction over their own internal affairs, including murder cases. The Court's decision prompted a swift and violent act of its own. In 1885, in response to *Crow Dog*, Congress passed the Major Crimes Act, 18 U.S.C. §1153, authorizing the federal courts to punish Natives for major crimes committed in Indian Country. Since that time, Congress has exercised plenary power over Tribal jurisdiction. Exercise of this federal power has led to the displacement of Tribal traditional justice systems. In addition, the creation of CFR courts or Courts of Indian Offenses denigrated the preexisting Tribal traditional justice systems that had previously been thought of as sovereign acts of Tribal self-government.

III. FUNDAMENTAL FAIRNESS AND DUE PROCESS REQUIRES PARITY IN TRIBAL COURT SYSTEMS ADOPTING THE ADVERSARY SYSTEM IN WHICH THE TRIBE IS REPRESENTED BY A LAW-TRAINED AND FEDERALLY-FUNDED ATTORNEY

There must be an advocate for the defenseless

Many Tribes have advocated for the defenseless by excluding certain crimes from their jurisdictional authority. Over time and through federal funding, Tribes have expanded their justice systems to embrace the adversarial system. But because no two Tribes are alike, and no Tribe is required to have a particular justice system, there is not a consistent standard for criminal law, procedure or defense. Congressional wisdom opted to apply most of the U.S. Bill of Rights to Tribes and Tribal courts, but declined to apply the right to counsel in the name of Tribal sovereignty.

While Tribal sovereignty and the inherent right to self government may be a reason not to impose the right to counsel on Tribes of vastly different history, geography, language or tradition, it is not implicated in the same way among Tribes that have chosen a Western-style form of retributive justice, and adopted an American-style adversary court system. A Tribe is free to choose its justice system based on its own practices, Tribal values, customs, tradition, language and beliefs, which then shape its notions of justice, fairness, process, and how to control unwanted behavior and unwarranted danger, risks and harm. The sovereign nation can choose restorative justice, peacemaking, sentencing circle, even banishment. However, if the choice is punishment and deterrence in the form of imprisonment in a county, state or federal jail – the order to imprison must be Constitutional.

IV. INDIANS AS DUAL CITIZENS ARE ENTITLED TO PROTECTIONS OF THE UNITED STATES CONSTITUTION, WHEN BEING INVESTIGATED FOR CRIMES THAT OCCUR WITHIN THE TRIBE'S JURISDICTION BUT ARE SUBJECT TO FEDERAL COURT JURISDICTION

This is not simply a matter of Tribal sovereignty, as the individual Indian defendant is also a dual citizen subject to separate sovereigns. Under the dual sovereignty doctrine, the Native defendant can be prosecuted for the same offense or course of conduct in both Tribal and federal courts without running afoul of the Double Jeopardy Clause. Questions remain as to what triggers the Indian defendant's right to counsel in a successive prosecution and what happens when the Tribal and federal investigations overlap. Without a Tribal right to counsel, there is a potential for serious constitutional and civil rights violations in cases where an Indian defendant is being investigated for a Tribal prosecution in conjunction with a federal prosecution. Such a scenario should be intolerable under U.S. standards of justice and fundamental right to counsel.

Thank you again for the opportunity to comment on the Act and provide testimony on this important but under-served and overlooked area of Indian law.

/s/ Barbara Creel

Barbara L. Creel
Assistant Professor of Law
Southwest Indian Law Clinic
UNM Clinical Law Programs

Mr. SCOTT. Thank you very much.

Ms. Creel, you indicated a number of things that needed to be done. Who should pay for the court-appointed attorneys and the training for judges, prosecutors, and other things associated with the tribal courts?

Ms. CREEL. I think tribes have chosen to have tribal courts and prosecutors through funds allocated by Congress, so the bill should include funding for the indigent defense counsel as well. If there

is any funds that are going to the tribe it should be part of the trust responsibility to ensure that tribes are fully funded to make the sovereign decisions that they would like to with regard to what kind of justice system they want, and that should include the right to counsel.

Mr. SCOTT. Mr. Burns, what should the qualifications be for judges, prosecutors, and defense attorneys in tribal courts?

Mr. BURNS. Well, on behalf of State and local prosecutors I have to preface any response that we always have great respect and deference for sovereign nations and the decisions that they make within that nation. But I think prosecutors want law-trained judges; prosecutors want law-trained and competent defense counsel; and prosecutors want a system where you don't call on the phone the night before and say, "Hey, do we need a unanimous jury or not?" And we support a good system.

Mr. SCOTT. What about rules of evidence?

Mr. BURNS. Same thing. I mean, if somebody's liberty is at stake, if we are going to lock people up in the United States, it should not be, "Hey, what do you think?" It should be based upon——

Mr. SCOTT. Should the Federal rules be totally effective in tribal courts?

Mr. BURNS. Again, I think it depends on the system that is in place and the individual portion of Indian country, as we have talked about. It is so complicated, from PL 280 to non-, to those that have concurrent and exclusive—it would depend upon that particular are, in my opinion.

Mr. SCOTT. Ms. Indritz, you mentioned jury pools. What is used for the jury pools today in tribal courts and in Federal courts in tribal areas?

Ms. INDRITZ. Let me start by answering your question with respect to Federal courts——

Mr. SCOTT. Is your mic on? I am sorry.

Ms. INDRITZ. I don't know.

Mr. SCOTT. Okay.

Ms. INDRITZ. Hello?

Mr. SCOTT. Okay.

Ms. INDRITZ. So in Federal court, under Federal law the Federal court is required to make a jury plan that would be approved by the circuit and they are required to use the voter list. Then they may choose to use supplemental source lists, and the supplemental source lists usually are a driver's license list, but they can be other things, like tax rolls or whatever.

In the State of—in the Federal courts in New Mexico I can tell you that the courts have confronted this issue and chosen, because they want what they see as a more sophisticated jury pool, to only use the voter list, whereas in State court in New Mexico we use the driver's license—the voter list supplemented by the driver's list supplemented by the tax rolls. The State does the computer work of combining those, eliminating the people under 18, and eliminating the duplicates.

So the Federal court could get that list for free—I mean, they have to get the voter list from the State anyway—but they choose not to. And as a result, the underrepresented groups are Hispanics, Native Americans, young people in the 18 to 30 age range, men,

and rural people, but particularly Native Americans and Hispanics are underrepresented compared to their percentage of the population.

So about a third of the Federal court districts have chosen to use supplemental source lists and other have not. And I know that this is also true for Arizona as well—Native Americans are just underrepresented in the jury pool.

With respect to tribal courts, right now there are no Federal regulations about that and tribes can make their own choices about how they constitute jury pools, or if they have juries or not. So there is no requirements with respect to tribal courts that I am aware of.

Mr. SCOTT. You mentioned people were ostracized for testimony.

Ms. INDRITZ. I mentioned an instance I am personally aware of, your——

Mr. SCOTT. What is the difference between that and what goes on in Federal court?

Ms. INDRITZ. If that had happened in Federal court I would have immediately gone back to court and——

Mr. SCOTT. You are aware of the campaigns against "snitching"?

Ms. INDRITZ. I am aware that I would have gone back to a Federal judge immediately and gotten this resolved, but there was no way for me to do anything about it in tribal court. And my concern is not only for that individual who got banished, which was a very sad situation—there was sort of a small tribe that had kind of two factions, and one faction was mad at the other faction, but it was clearly retaliation for coming in and testifying and there was no question about—this witness had clearly told the truth. That wasn't the issue. It was that he had testified, as they saw it, against the tribe. But my concern is also for future people who are——

Mr. SCOTT. Does that problem—has that problem been unique to tribal courts? Because you have people who are ostracized for "snitching" and are discouraged in any number of ways from testifying——

Ms. INDRITZ. There is a remedy in Federal court, and there is a remedy in State court, and there is no remedy in tribal court.

Mr. SCOTT. Okay.

Chairman Levings, can you say what about what you would—what is available in tribal areas in terms of crime prevention activities and whether or not more is needed in that area?

Mr. LEVINGS. Well, the Three Affiliated Tribes, the Mandan, Hidatsa, and Arikara, we work with all of the counties—the sheriffs and the State highway patrol and our policing.

We have a unique circumstance up in North Dakota: The western North Dakota, as you know, is very much thriving on oil and gas development. We are going gangbusters 24/7 oil and gas development and the Williston Bakken Formation. Our problem, Mr. Chairman, is that we have a shortage of FBI agents. We have one agent for half of the State of North Dakota, and right now we are working with the associate——

Mr. SCOTT. Does the tribe have law enforcement officials?

Mr. LEVINGS. We entered a 638 contract with the Bureau of Indian Affairs for law enforcement on December 7, 2007. It has made

a tremendous se improvement. So we are unique, as I say, as we are going through this issue today.

We have technical assistance that is working out the best it has ever been. Maybe it was the key 10 years ago; we wish we would have did it then because now we have got the attention of the Washington, D.C. office. Pat Ragsdale just moved on, I know, to Fort Snelling, Minnesota, but before that 638 contract our law enforcement was poor, next to none.

There was one evening our COPS FAST grant officer—she had the whole reservation—1 million acres on her own behalf, and she was trying to police six segment sets separated by Lake Sakakawea that inundated Elbowoods, North Dakota, which was our homeland—90 percent of our people live there. Now we are 2, 3 hours apart segment to segment.

Our hub is New Town. They flooded Elbowoods so they come up with this new town sign and it said this is where the new town is going to be located, and that is where we are at today. And then Four Bears is where our tribal complex is at, and that is where our tribal chambers is and our council quarters.

So we are distance—just to get around the reservation, I think, would probably take you 4½ hours to make a round trip. That is how far it is apart.

So when we contracted in December 7, 2007 we made a unique circumstance work, and District 1 Commander Alma Fordance, I have got to commend him. The technical assistance he has given us since that contract—I guess going on maybe nine, 10 months now—has been second to none. And his coordination and collaboration with the tribe on a criminal investigation made it a better working relationship.

So our tribe is experiencing different attention. I feel for the rest of Indian country, but it just takes time and you need to work through those things.

We still have crime though, Mr. Chairman. It is ironic I sit here in front of you; less than 3 weeks ago my daughter was sexually assaulted on November 19 and she was in the hospital for 15 days. And she is home now and she has got a colostomy bag, and she is going to be home for 3 months recovering.

And it is heart-to-heart for me because the perpetrator got away the first time. But this time the FBI agents and the DOJ attorneys are doing it by the book and our thoughts and our mindsets is that if the chairman's daughter isn't safe on Fort Berthold who is?

So this is the time for me to be here to tell you how important it is. These perpetrators and these breaking of Federal crimes on Indian reservations is not discriminatory because this is the second time for me. My daughter was put in this circumstance in May of 2008 and it never got to any type of prosecution.

In October 2001 my wife was in a drive-by shooting at the high school. That never did go to any type of prosecution. And we know who the individual is; the camera caught the incident on live feed because as a school board former president of New Town School Public District One—I was the president, and we put in cameras outdoors and indoors. And they had the car, they had it speeding away, they retrieved a bullet out of the door—it was a nine millimeter bullet.

So these things happen. And that time I was the Four Bears Segment Council representative. Now I am the chairman of the tribes.

So this is paramount to me. Perpetrators need to be tried, and we need to have a coordinated effort and it needs to be funded to the point where we have enough agents to cover the western North Dakota to maybe three instead of one.

So this is really important to me. I know there is a lot of pros and cons to a lot of the issues, and we are the tribe that is the most friendly as far as we know.

Mandan, Hidatsa, and Arikara, we are the tribe that saved Lewis and Clark when they were coming through in 77 below windchill factors back in the day they were coming out toward exploration. And we saved them, got them fattened, got them ready for the trek back out to Portland, and they moved right along.

But we have not changed. So our tribe is made up of a lot of members, not just from the Three Affiliated Tribes—the Mandan, Hidatsa, and Arikara, but from other tribes.

I just told you about the Williston Bakken Formation. There is more license plates of employees from other States than there is from our own. So we have 4 percent unemployment, so we have different circumstances, yes. But we still have Federal crimes that need to be prosecuted, Mr. Chairman.

Mr. SCOTT. Thank you very much.

Mr. Rooney?

Mr. ROONEY. Thank you, Mr. Chairman.

Mr. Levings, that was a very heartfelt testimony, and my sympathies go out to you and your family. One of the things that is sort of striking me with the testimony Ms. Creel mentioned before about how we would fund criminal defense attorneys—do you believe that the tribes are in a position to pay for counsel for indigent defendants? And I guess where I am going with this, if Ms. Creel's wish was granted is it a matter of custom that we are faced up against here or is it a matter of funding?

In other words, the way the court system works is it—are the obstacles merely a matter of funding or are they a matter of that is just the way that it is done and those things have to be overcome too when you talk about the drive-by shooting and nothing ever happened? Was that a matter of just people purposely, you know, turning a blind eye, or because the resources weren't there? Are there more obstacles than just money here, I guess is the question.

Mr. LEVINGS. I believe when we had first initial meeting as the board president at that time, and as being a council member I had dual roles, I met with the chief of police for the city, I met with the chief of police for the Bureau of Indian Affairs, and I thought I was in the best circumstance but it just didn't happen. Maybe it was a shortage of agents. I am not sure.

There were actually confessions, you know, there was different things going on. But the tribe—we have a committee as well. The Mandan, Hidatsa, and Arikara, we have a judicial committee.

The judicial committee hears everything. They hear the plaintiff's, the defendant's sides, and we actually kind of give an opportunity for our members to vent. They come in and, of course, the defendants are all, you know, in their own mindset not guilty, and then the court is doing things that they have to and the police de-

partment is doing things they have to to incarcerate. But we hear everyone.

So we hear a lot of the issues. One of the main ones was they wanted a public defender, so our tribe has been funding one for several fiscal years now. There was a grant or two they applied for; sometimes they are fortunate to get a few thousands of dollars, maybe a grant $25,000.

But in the end the council have made it a paramount issue to have a public defender. So we fund it out of our general funds from our casino revenue, our lease income, or any other of our other means that we generate out of our profits, in this case oil and gas probably. But we keep that as a law-trained public defender.

Our judge is elected. He is elected just as we are as council members, and then we appoint him for 2 years term, and he has got to make his performance, or in the even years, as this year coming up 2010, he has got to run for reelection. So it is a kind of a fair process today in Fort Berthold.

The problem we have is we are getting probably more work than there is so we have few and far between people applying for these jobs because there is work to be had. So we do the best we can with the limited applications.

Mr. ROONEY. Does anybody else want to weigh in on that question?

Ms. CREEL. Thank you, Mr. Rooney.

When Chairman Levings was talking about 638 contracting for law enforcement, that is Public Law 638, which allows the tribes to apply to the Federal Government for funding and then contract and determine how to use those funds in a on-the-ground, culturally sensitive way. So funding a public defender system is no different than any of the other services that flow through the Federal trust responsibility through the Bureau of Indian Affairs and on down.

Traditional justice systems would not be affected by the right to counsel. The right to counsel obviously implies a tribal court system in which you have a law-trained judge and a prosecutor. That would—and the chance of imprisonment or incarceration. That would trigger, then, the right to counsel.

If tribes are choosing a traditional form of justice—in my home there are no advocates or attorneys allowed in the court system at all. There is a traditional and then a contemporary.

If the contemporary court is going to imprison someone, though, there should be a right to counsel, which would be separate form the traditional court which is held in traditional language and only those members who speak the language and are subject to our tribal spiritual leaders attend. So that wouldn't be impacted at all.

Ms. INDRITZ. Mr. Rooney, the vast majority of Native American defendants who appear in tribal courts are indigent and are unable to afford counsel. There are some Federal funds now that could be used for public defenders but the problem is they are not earmarked solely for public defenders.

And so many tribes have so many needs in their court system, whether it is for computers, or judges, or whatever, that there are funds that the Department of Justice has sometimes awarded if the tribe wants to use—to ask for public defenders—that is not pre-

cluded—but there are no funds earmarked now solely for public defenders. And so we would ask that there be that, that there be funds which are available to tribes for public defense.

And it could work something like the Criminal Justice Act, where there are a variety of ways of providing that, whether it is a public defender office such as Chairman Levings spoke of, or appointing counsel on an individual basis paid on an hourly rate, or a private legal aid organization that also takes on these kind of cases. So there are different ways to do it but there is no earmarked funding just for this public defender function.

Mr. ROONEY. Mr. Chairman, I see my time is expired. If I could take the liberty of just one more—just a follow up to that with a simple yes or no.

So H.R. 1924—does it or does it not have the requirement for the tribe—for counsel for these defendants?

No.

Ms. INDRITZ. No.

Mr. ROONEY. Okay.

Ms. INDRITZ. The Senate version has better language on that. Neither bill has funding.

Mr. ROONEY. Okay.

Thank you, Mr. Chairman. I yield back.

Mr. SCOTT. Thank you.

And I would like to thank all of our witnesses for their testimony today. Without objection written testimony submitted by Amnesty International USA and the Judicial Conference of the United States will be placed in the record.

Members will have—may have additional questions for the witnesses, and if so we will forward those questions to you and ask that the answers be available as promptly as possible so that the answers will be part of the record.

Each witness's written statement will be entered into the record in its entirety. Without objection the hearing record will remain open for 1 week for submission of additional materials.

And there is one other piece of business we would like to do at this time, and that is to congratulate our counsel, Karen Wilkinson, who has been with us for almost 2 years. She is on leave from the public defender's office in Arizona and will—unfortunately they need her back.

We want to thank you for almost 2 years of excellent contribution to the Committee work.

[Applause.]

Without objection the Subcommittee stands adjourned.

[Whereupon, at 11:39 a.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

March 19, 2010

The Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representative
Washington, D.C. 20515

Dear Mr. Chairman:

Enclosed is a response for the record from Thomas J. Perrelli, Associate Attorney General, to a written question received following the December 10, 2009, hearing held by the Subcommittee entitled, "H.R. 1924, the Tribal Law and Order Act of 2009."

We hope this information is helpful to you. If we can be of further assistance, please do not hesitate to contact this office.

Sincerely,

Ronald Weich
Assistant Attorney General

Enclosure

cc: The Honorable Lamar Smith
Ranking Member

Q: In your response to a question from Chairman Scott, you stated the right to counsel for a person charged in federal court and unable to afford counsel applies only to persons facing six months or more incarceration. Does the Department of Justice still hold this position? If not, under what circumstance is an indigent defendant entitled under the U.S. Constitution to the appointment of counsel?

A: Thank you for the opportunity to answer your question more completely. For more than a century, the U.S. Supreme Court has recognized that the Bill of Rights and the Fourteenth Amendment do not of their own force apply to proceedings in tribal court. Talton v. Mayes, 163 U.S. 376, 382-85 (1896). Although the Indian Civil Rights Act of 1968, 82 Stat. 77, 25 U.S.C. §§ 1301-1303, provides specific statutory guarantees of fair procedure, these guarantees are not identical to their constitutional counterparts. *See* Duro v. Reina, 495 U.S. 676, 693 (1990). While ICRA does not expressly require tribal governments to provide counsel to indigent defendants, many tribal governments have opted to provide appointed counsel to indigent defendants under tribal law.

With respect to charges in federal, rather than tribal, court, however, an indigent defendant may have both a statutory and a constitutional right to appointed counsel. An indigent defendant has a statutory right to the appointment of counsel whenever he or she is charged with a felony or with a misdemeanor that carries a possible sentence of six months or more incarceration. *See* 18 U.S.C. § 3006A(a)(1)(A) (provision for appointment of counsel to indigent defendants "charged with a felony or class A misdemeanor" under federal law); *id.* § 3559(a) (felony under federal law carries a sentence of at least one year; class A misdemeanor carries a sentence of sentence of six months to one year). For misdemeanors that carry a possible sentence of less than six months of incarceration, an indigent defendant does not have a per se statutory right to appointed counsel, but may be appointed counsel under a variety of circumstances, including when the interests of justice so require. *Id.* § 3006(a)(2)(A). In addition, the statute incorporates by reference any Sixth Amendment right to the appointment of counsel as a statutory right as well. The Sixth Amendment right provides an indigent defendant with appointed counsel whenever charged with a felony offense. Alabama v. Shelton, 535 U.S. 654, 664 (2002); Nichols v. United States, 511 U.S. 738, 743 n.9 (1994). Where misdemeanor and petty offenses are concerned, the Sixth Amendment rule is that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense . . . unless he was represented by counsel at his trial." Argersinger v. Hamlin, 407 U.S. 25, 37 (1972).

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January 21, 2010

The Honorable John Conyers
Chairman, House Judiciary Committee
2138 Rayburn House Office Building
Washington, DC 20515-6216

Attention: Veronica Eligan
B-370B Rayburn House Office Building
Washington, DC. 20515

and by fax (202) 225-3672

Dear Chairman Conyers:

Thank you very much for the opportunity to testify on December 10, 2009, before the House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security, concerning H.R. 1924, the Tribal Law and Order Act of 2009.

I have reviewed the transcript and offer edits on the attached page.

Your letter of January 7 asked me two questions and my responses to those two questions are as follows:

QUESTION 1. Is a federal writ of habeas corpus, as provided in 25 U.S.C. §1303, sufficient to prevent and remedy civil rights and due process violation relating to the prosecution, conviction or detention by an Indian Tribe of Indian defendants? Please explain your position.

ANSWER: NO

The writ of habeas corpus, while vitally important, is primarily a retrospective remedy, designed to fix violations <u>after</u> they have occurred.

In order to seek to litigate a federal post-conviction petition, a potential petitioner has to (1) know that this remedy exists, and (2) have enough legal acumen and education to draft such a petition with the appropriate issues. If a person is indigent and unable to afford counsel

to prepare such a petition, then he or she will have to draft it pro se and hope that all the right issues are included and that they correctly state the legal problem, and that the federal court will be willing to appoint counsel who might then amend the petition and pursue it. Many persons convicted in tribal court have little information about this potential course of action or how to file a habeas corpus petition; if they never had a lawyer, there is no one to explain this to the defendant. In addition to lack of legal education, many tribal defendants have little sophistication and sometimes a poor command of English. To expect them to spot the right legal issues, preserve the record at the tribal court level, know about the remedy, and prepare a timely petition is unrealistic.

Post-conviction relief will benefit only a tiny, tiny percentage of those who are tried in tribal court and have a real grievance, such as denial of the appointment of counsel or lack of due process. A post-conviction remedy for the few who know to seek it is no substitute for providing counsel and due process and fundamental fairness to all Indians charged in tribal court in the first place.

Also, the realistic time frame for federal courts to consider post-conviction petitions make them almost moot when the sentence is relatively short. To the extent that a prisoner has to administratively exhaust tribal remedies, that only adds to the time frame problem. "A litigant must first exhaust tribal remedies before properly bringing a petition for writ of habeas corpus. Even when a federal court has jurisdiction over a claim, if the claim arises in Indian country, the court is required to "stay its hand" until the party has exhausted all available tribal remedies." Jeffredo v. Macarro, 2009 U.S. App. LEXIS 28180 (9th Cir. Cal. Dec. 22, 2009). See also Selam v. Warm Springs Tribal Corr. Facility, 134 F.3d 948, 951 and 953-54 (9th Cir. 1998),[1] and Felix S. Cohen, Handbook of Federal Indian Law § 9.09 (2005). Cohen, Handbook of Federal Indian Law § 7.04 (citing Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 16 (1987); Nat'l Farmers Union Ins. Cos. v. Crow Tribe , 471 U.S. 845, 857 (1985)).

Habeas corpus petitions from persons convicted in tribal court are generally filed pro se, requiring an initial extra stage where a court staff attorney reviews the petition before a federal judge sees it and this can add extra time to the process of consideration. Almost always, the petitioner remains incarcerated while a court entertains the petition, receives responsive pleadings, and conducts any necessary hearings.

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[1] "The Supreme Court's policy of nurturing tribal self-government strongly discourages federal courts from assuming jurisdiction over unexhausted claims." Selam, 134 F.3d at 953. There is authority for relaxing the exhaustion requirement where the party can show that exhaustion would be futile or that tribal courts offer no adequate remedy. See id. at 954.

With my testimony before the committee, I attached the decision of the Pascua Yaqui Tribe's appellate court in the case of Beatrice Miranda, in which, without counsel, Ms. Miranda was sentenced by the Pascua Yaqui Tribal Court on May 19, 2008, to 910 days (two and a half years) in jail for various charges arising out of a single evening's events. At that time she had already served 114 days in tribal custody, see Pascua Yaqui appellate decision attached to my testimony, at page 7. After losing the tribal court appeal, she did file a federal habeas corpus petition. The tribe did not dispute the facts, only legal issues, so the case proceeded more rapidly than usual. The petition was granted on January 12, 2010, a year and eight months after her tribal court sentencing, and almost two years after she was incarcerated on these charges, for which it was ultimately determined that she could receive only a one-year sentence. That petition was initially filed on April 17, 2009, so the total time from filing to judgment was about 9 months, even where the federal court acted expeditiously. Assuming her release on January 13, 2010, per the federal court's Judgment, that will be six months before her scheduled release date of July 24, 2010, and one year after she completed the Congressionally-authorized sentence on January 25, 2009. I attach here as Exhibits 1, 2, and 3 the the Magistrate's Report and Recommendation, the decision of the U.S. District Court for the District of Arizona, and the Judgment in Ms. Miranda's case ordering her immediate release.

Also, habeas corpus review generally requires a final adjudication, so is unavailable to review pre-trial detention abuses.

Whether the tribe which is a defendant in a habeas corpus petition, or other tribes not a party to the litigation but who face the same legal issues, choose to find precedential value in a federal habeas corpus decision will determine whether that decision affects only the single individual who litigated or has broader impact.

QUESTION 2. Current law limits a Tribe's sentencing authority to a maximum of one year incarceration. In spite of this law, are there circumstances today where a defendant could be convicted in tribal court without representation of counsel and receive a prison sentence of more than one year for a single course of conduct? Please explain.

ANSWER: YES.

As I set forth in both my written and oral testimony, consecutive sentences for multiple counts for a single course of conduct currently result in sentences longer than one year, without counsel; this should be prohibited by Congress. I am aware of a number of cases where Indian tribal courts sentenced Indian defendants not represented by counsel to several consecutive sentences arising out of a single criminal transaction or a single course of conduct and the total sentence was several years.

At least two tribal appellate courts have specifically held that multiple sentences aggregating more than one year are consistent with the "any one offense" language in 25 U.S.C. §1302(7) and therefore permissible. One is the Pascua Yaqui opinion in the Beatrice Miranda case attached to my written testimony, the reversal of which by the U.S. District Court for the District of Arizona is discussed in my answer to question #1 above. Another is the Fort Peck Assiniboine and Sioux Tribes v. Marvin Bull Chief, Sr., Appeal No. 062, May 31, 1989, www.tribal-institute.org/opinions/1989.NAFP.0000006.htm.

At least two federal courts have considered the same question, namely whether multiple sentences for a single course of conduct or single criminal transaction aggregating more than one year are consistent with the "any one offense" language of 25 U.S.C. § 1302(7) and held that sentences exceeding a total of one year are not permitted.[2] One is the Beatrice Miranda case discussed in question #1 above, from the U.S. District Court for the District of Arizona. I attach the Magistrate's recommendation, the District Court Order, and the Judgment as exhibits here; they hold that the violations committed during a single criminal transaction constitute "any one offense" and therefore the sentence maximum is one year.

Another federal court opinion on this topic, which explores in depth the history of Congress' original "any one offense" language is the U.S. District Court for the District of Minnesota in Spears v. Red Lake Band of Chippewa Indians, 363 F. Supp. 2d 1176 (D. Minn. 2005), which found that a 30 month sentence for tribal charges of driving under the influence, failure to take a sobriety test, failure to stop, and negligent homicide, all arising out of a single criminal episode violated 25 U.S.C. §1302(7). That court found that Congress intended to adopt the concept that separate crimes arising from a single criminal episode should normally be treated as a single offense for sentencing purposes under the Indian Civil Rights Act, 25 U.S.C. §1302(7).

Here are some examples of Indians receiving sentences over one year from a tribal court:

Fortino Alvarez, an enrolled member of the Gila River Indian Community, while not represented by counsel, pled guilty to several charges in tribal court. The prosecutors were lawyers. Mr. Alvarez made no objections, no opening or closing statements, and raised no defense. Recordings of the court proceedings indicate that Mr. Alvarez was unclear as to how many cases were pending against him, did not understand the nature of the proceedings, and

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[2] In Ramos v. Pyramid Tribal Court, 621 F. Supp. 967, 968-971 (D. Nev. 1985), the federal district court in Nevada held that sentences totaling over two years for seven charges arising out of a single episode (at a time when 25 U.S.C. §1302(7) allowed only sentences of six months) did not constitute cruel and unusual punishment.

at one point told the judge that he didn't "know about court that much." He was sentenced to a total of nine years imprisonment. He has been in custody since July 2, 2003, remains in custody, and is currently challenging his sentences by federal habeas corpus petition, case number No. 2:08-cv-02226-DGC-DKD in the U.S. District Court for the District of Arizona.

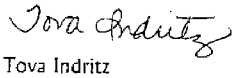
Ramiro Bustamante, an enrolled member of the Pascua Yaqui tribe, was the subject of a single criminal complaint filed against him in the Tribal Court, alleging that he had stolen household items from a camper in his mother's backyard. The complaint alleged four counts (domestic violence burglary, domestic violence theft, domestic violence criminal trespass, and violation of a court order). Mr. Bustamante was not represented by counsel until after he had pleaded guilty to three of the counts at his arraignment. Over Mr. Bustamante's objection that this 'stacking' of sentences for a single event was unlawful, the tribal court imposed consecutive sentences totaling 18 months' incarceration. The Tribal Court of Appeals rejected his appeal, filed with the assistance of a tribal defender, in which he argued that 'stacking' was unlawful. The Court cited its decision in *Miranda* and labeled Mr. Bustamante's appeal "frivolous." Mr. Bustamante is currently seeking relief under 25 U.S.C. § 1303 in the U.S. District Court for the District of Arizona, case number 3:09-cv-08192-ROS-MHB (D. Ariz.)

Derrick Chavez was convicted in Santo Domingo Pueblo court in New Mexico of a probation violation, intoxication, disorderly conduct, tampering with evidence, aggravated battery, and aiding or abetting a party to a crime, all arising out of a single event on October 22, 2009. He was not represented by counsel, pled guilty, and was sentenced to six years of incarceration and banishment from the tribe. As of this date, he has not filed any federal habeas corpus petition and apparently has no counsel.

These cases illustrate how some tribes are in fact "stacking" sentences consecutively to impose a total sentence of over one year, in what we believe is a violation of the one year limitation of 25 U.S.C. §1302(7), often without having any counsel at all. The National Association of Criminal Defense Lawyers recommends changing the language "any single offense" in Section 304(b) (1) of this bill to "a single course of conduct."

Thank you again for the opportunity to share our views on these important issues.

Sincerely,



Tova Indritz
Attorney at Law

Exhibits:
1: Miranda v. Nielson, Magistrate's Report and Recommendation
2: Miranda v. Nielson, District Court's Order Granting Writ of Habeas Corpus
3: Miranda v. Nielson, District Court's Judgment
4: Pueblo of Santo Domingo v. Derrick Chavez, criminal complaint and Judgement {sic}

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Beatrice Miranda, Petitioner, vs. Tracy Nielson, et al., Respondents.	CV 09-8065-PHX-PGR (ECV) **REPORT AND RECOMMENDATION**

TO THE HONORABLE PAUL G. ROSENBLATT, UNITED STATES DISTRICT JUDGE:

BACKGROUND

Petitioner Beatrice Miranda has filed an Amended Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241. Doc. #18. Petitioner initially filed a *pro se* petition on April 17, 2009. Doc. #1. On June 25, 2009, Judge Rosenblatt granted Petitioner's request to appoint the Office of the Federal Public Defender to represent her. Doc. #8.

On January 26, 2008, the Pascua Yaqui Tribe filed an eight count complaint against Petitioner alleging aggravated assault, endangerment, threatening or intimidating and disorderly conduct against two separate victims. Doc. #18 at 3, 6. The convictions arose from an incident in which Petitioner, while holding a knife, chased one of the victims down the street. Doc. #18 at 5-8. After the victim ran to her home, her sister went outside and confronted Petitioner. Id. Petitioner, who was extremely intoxicated, continued to brandish

the knife and she made threats to the victims. Id. One of the victims then threw a basketball at Petitioner and struck her in the face, causing Petitioner to leave. Id.

A trial before a tribal court judge was held on April 21, 2008. Doc. #18 at 3. Petitioner, who was unrepresented by counsel, was found guilty on all counts. Id. On May 19, 2008, the tribal court sentenced Petitioner to a total of 910 days of incarceration with credit for 114 days of time served. Id. Petitioner received consecutive sentences of one year each for the aggravated assault counts. Doc. #18 at 8. Shorter terms were imposed for each of the remaining six counts, some of which were order to run consecutively and some concurrently. Id. The sentence is set to terminate on July 24, 2010. Id. at 3.

An attorney with the office of the Pascua Yaqui Public Defender represented Petitioner on direct appeal. Id. at 9. On March 29, 2009, the Pascua Yaqui Court of Appeals ("PYCA") denied Petitioner's claims on the merits and affirmed her convictions and sentences. Id. at 5.

As explained above, Petitioner filed a *pro se* Petition for Writ of Habeas Corpus in this court on April 17, 2009. Doc. #1. Through appointed counsel, she filed an Amended Petition for Writ of Habeas Corpus on July 29, 2009. Doc. #18. Petitioner raises one claim in her amended petition. Petitioner alleges that her sentence of two and a half years in prison exceeded the maximum sentence permitted under the Indian Civil Rights Act at 25 U.S.C. § 1302(7). Doc. #18 at 10. She contends that the tribal court was without authority to impose a sentence of more than one year in prison. Id.

Respondent Tracy Nielsen ("Respondent") filed an Answer to Petition for Writ of Habeas Corpus on September 23, 2009. Doc. #32.[1] On October 1, 2009, Petitioner filed a Motion for Summary Judgment and a supporting Statement of Facts. Doc. #33, #34. Respondent then filed a Cross Motion for Summary Judgment and a Response in Opposition to Petitioner's Motion for Summary Judgment, along with a supporting Memorandum and

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[1] The other respondents also filed answers. Doc. #22, #25. They essentially contend, however, that they are not proper respondents, and Respondent Nielsen does not assert otherwise.

Statement of Facts. Doc. #36, #37, #38, #39. On November 13, 2009, Petitioner filed a Reply in Support of Motion for Summary Judgment and Response to Cross Motion for Summary Judgment, along with a Controverting Statement of Facts. Doc. #42, #43. On November 30, 2009, Respondent filed a Reply in Support of Cross Motion for Summary Judgment. Doc. #44.

DISCUSSION

The parties agree that there are no genuine issues of material fact in dispute here and that this case is properly resolved on a motion for summary judgment. The legal issues before the court are whether Petitioner exhausted her tribal court remedies before filing a federal habeas petition, and whether the sentence imposed against Petitioner in the tribal court is lawful under the Indian Civil Rights Act ("ICRA") at 25 U.S.C. § 1302(7).

I. Exhaustion

Respondent first contends that the petition should be denied because Petitioner failed to exhaust her tribal court remedies. Respondent claims that Petitioner was required to seek a writ of habeas corpus before the PYCA to satisfy the exhaustion requirement. Petitioner argues that she already presented the same claim at issue here to the PYCA in her direct appeal. She contends that presenting the same claim to the PYCA a second time would be futile and is not required to demonstrate exhaustion.

Neither party has cited, and the court is not aware of, a statutory exhaustion requirement in this context. The Supreme Court, however, has determined that exhaustion of tribal court remedies is important to the "federal policy of promoting tribal self-government." Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 16-17 (1987). Further, the Court has recognized that development of a full record in a tribal court will promote the orderly administration of justice in the federal court. National Farmers Union Ins. Companies v. Crow Tribe of Indians, 471 U.S. 845, 856 (1985). The federal court should therefore "stay[] its hand until after the Tribal Court has had a full opportunity ... to rectify any errors it may have made." Id. at 857. "At a minimum, exhaustion of tribal remedies means that tribal

appellate courts must have the opportunity to review the determinations of the lower tribal courts." Iowa Mut. Ins. Co., 480 U.S. at 17.

Exhaustion of tribal court claims, however, is not an inflexible requirement. Selam v. Warm Springs Tribal Correctional Facility, 134 F.3d 948, 953 (9th Cir. 1998) (citing United States ex rel. Cobell v. Cobell, 503 F.2d 790 (9th Cir. 1974)). As the Cobell court explained:

> A balancing process is evident; that is weighing the need to preserve the cultural identity of the tribe by strengthening the authority of the tribal courts, against the need to immediately adjudicate alleged deprivations of individual rights. Thus, this Court must determine whether exhaustion is appropriate in the case at bar.

Cobell, 503 F.3d at 793 (quoting O'Neal v. Cheyenne River Sioux Tribe, 482 F.2d 1140, 1146 (8th Cir. 1973)).

Applying these balancing principles here, the court finds that Petitioner has satisfied the exhaustion requirement. Petitioner presented her ICRA claim to the PYCA, the tribe's highest court, and the court rejected it. As Petitioner points out in her reply, the PYCA has rejected as "frivolous" the same ICRA claim raised by another member of the tribe. Doc. #42 at 2. Because the PYCA has already rejected this claim more than once, presenting it again in a tribal habeas petition would be an exercise in futility. Such is not required to exhaust tribal court remedies. Moreover, as Petitioner argues, even the strict exhaustion requirements for habeas petitions under 28 U.S.C. § 2254 do not require a petitioner to present on collateral review to a state court the same claims already raised on direct review. The court will not impose such a requirement here. For these reasons, the court finds that Petitioner has satisfied the exhaustion requirement. The court will, therefore, consider the merits of Petitioner's claim.

2. Merits Analysis

Petitioner contends that because all eight of the criminal counts against her arise from the same transaction, the total sentence for those counts could not exceed one year in prison. Respondent claims that Petitioner's two and a half year sentence was lawful because the

statute authorizes up to one year in prison for each offense, and Petitioner was convicted of eight offenses.

Under the ICRA, "[n]o Indian tribe in exercising powers of self-government shall ... impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year...." 25 U.S.C. § 1302(7). The interpretation of a federal statute is a matter of federal law. McInnes v. California, 943 F.2d 1088, 1094 (9th Cir. 1991).

Based on the parties' filings and the court's research, it appears that only two district courts, and no circuit courts, have addressed the precise issue before the court. In Ramos v. Pyramid Tribal Court, 621 F.Supp. 967 (D. Nev. 1985), the petitioner was convicted of several violations arising from the same incident and sentenced to consecutive sentences that totaled more than two years. The petitioner filed a habeas petition in federal court and raised, among other things, a claim that his sentence violated the cruel and unusual punishment provision of the ICRA. Id. at 970. In deciding the cruel and unusual punishment question, the court considered whether the sentence exceeded the one year maximum allowed by § 1302(7). Id. With limited analysis, the court determined that the tribal court's imposition of consecutive sentences did not constitute cruel and unusual punishment. Id. The court indicated that it could find no cases holding as such and it noted that imposing consecutive sentences is a commonly exercised power of judges. Id. The court did not analyze the question of whether the petitioner's several violations constituted "one offense" for sentencing purposes under § 1302(7).

In Spears v. Red Lake Band of Chippewa Indians, 363 F.Supp.2d 1176 (D. Minn. 2005), the petitioner pleaded guilty to six criminal charges in tribal court, including negligent homicide, driving under the influence of alcohol, failing to take a blood, breath or urine test, failing to stop at the scene of an accident, and two minor violations.[2] All the charges arose from an incident in which the petitioner was driving while intoxicated and struck and killed

[2] The petitioner was also charged with involuntary manslaughter in federal court, where he pleaded guilty and received a sentence of 14 months in prison. Spears, 363 F.Supp.2d at 1176-77.

a person lying on the road. Spears, 363 F.Supp.2d at 1176. The tribal court sentenced the petitioner to consecutive sentences on the four more serious violations that totaled 30 months. Id. at 1177. After seeking review in the tribal courts, the petitioner filed a habeas petition in federal court claiming that his sentence violated the ICRA provision that limits tribal court prison sentences to 12 months for "conviction of any one offense." Id.

The court first looked at the language of the statute and found that the phrase "any one offense" is ambiguous. Spears, 363 F.Supp.2d at 1178. It explained how similar language in other contexts has caused disagreement. The court looked at Supreme Court cases in the Fifth and Sixth Amendment arenas to illustrate how the phrase could mean either "any discrete violation of the Tribal Code" or "any prosecution arising from a single criminal transaction or episode." Id. at 1178-79. By determining that the phrase is subject to more than one interpretation, the court examined congressional intent in an effort to construe the statute "to effectuate the underlying purposes of the law." Id. at 1179 (quoting United States v. McAllister, 225 F.3d 982, 986 (8th Cir. 2000)).

In determining congressional intent, the court considered the ICRA history and its underlying purposes. Id. at 1179. Addressing the history, the court explained that because many tribes were not prepared to extend the full range of federal constitutional rights to their members, the ICRA affords only a limited set of rights. Id. Among the rights not afforded under the ICRA is publicly funded counsel for criminal defendants in tribal court. Id. Thus, the original version of the ICRA in 1968 limited the maximum sentence in tribal court to six months, with no guarantee of an appointed lawyer. Id. A subsequent amendment in 1986 increased the maximum sentence to one year. Id.

In discussing the purpose of the ICRA, the court explained that in 1968 Congress knew that under the Major Crimes Act, Indians facing prosecution for serious charges in federal court received the full range of constitutional rights. Id. at 1180. As the court stated:

> Taken together, the ICRA and the Major Crimes Act created a balanced and logical regime: Indians accused of minor crimes faced minor penalties in tribal court where some constitutional rights were withheld; Indians accused of serious crimes faced serious penalties in federal court where all constitutional rights were available.

Id. The court found, however, that this balance could be maintained only if "any one offense" is interpreted to mean "a single criminal transaction." Id. To do otherwise would expose tribal court defendants to serious sentences without the guarantee of all their constitutional rights. Id. For these reasons, the court found "that Congress intended to adopt the concept that separate crimes arising from a single criminal episode should normally be treated as a single offense for sentencing purposes." Id. at 1181. The court therefore interpreted the phrase "any one offense" to mean "a single criminal transaction." Id.

The court then applied its analysis to determine if the petitioner's violations were part of " a single criminal transaction." Id. The court determined that the petitioner's charges arose from a "common nucleus of operative fact surrounding his ill-fated drive on April, 1, 2000" and were therefore factually intertwined. Id. The court further found that the charges were legally intertwined. Id. As a result, the court concluded that "the violations underlying petitioner's tribal court sentence are facets of a single criminal event." Id. at 1182. It therefore held that the 30 month sentence imposed by the tribal court exceeded the maximum sentence permitted for "one offense." Id. The court granted the habeas petition and remanded the matter to the tribal court. Id.

Although the court is bound by neither of these two decisions, the court finds the reasoning of the Spears case persuasive and adopts it here. In light of the history and purpose behind the passage of the ICRA in 1968, the court is convinced that Congress did not intend to allow tribal courts to impose multiple consecutive sentences for criminal violations arising from a single transaction. To hold otherwise would expose a tribal court defendant to a lengthy prison term without the protection of representation by counsel and other critical constitutional rights. The circumstances surrounding the passage of the ICRA clearly demonstrate that in return for alleviating the tribes of the burden of extending every federal constitutional right to its members, Congress intended to significantly limit the sentence that a tribal court can impose. Therefore, like the Spears court, the court here finds that the phrase "any one offense" in § 1302(7) of the ICRA means "a single criminal transaction."

Moreover, the court has no difficulty finding that Petitioner's actions in this case constitute a single criminal transaction. Like the charges in Spear, the charges here arose from a common nucleus of operative fact beginning with Petitioner chasing the first victim with a knife. Petitioner followed the victim to her home where Petitioner encountered the second victim. The incident was relatively brief and it was confined to a small area. There is no question that the charges that arose from this incident are factually and legally intertwined. By finding that Petioner's charges arose from "a single criminal transaction," the court concludes that Petitioner's sentence of 910 days exceeded the 12 month maximum permitted by the ICRA.[3] The court will therefore recommend that the petition be granted and that this matter be remanded to the Pascua Yaqui Tribal Court for re-sentencing.

IT IS THEREFORE RECOMMENDED:

That Petitioner's Motion for Summary Judgment (Doc. #33) be **GRANTED**;

That Respondent's Cross Motion for Summary Judgment (Doc. #36) be **DENIED**;

That Petitioner's Amended Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241 (Doc. #18) be **GRANTED**; and

That this matter be remanded to the Pascua Yaqui Tribal Court for re-sentencing.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment. The parties shall have ten days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. See, 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(b) and 72. Thereafter, the parties have ten days within which to file a response to the objections. Failure to timely file objections to the Magistrate Judge's Report and Recommendation may result in the acceptance of the Report and Recommendation by the district court without further review. See United States v. Reyna-Tapia, 328 F.3d 1114,

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[3] Nothing in this Report and Recommendation should be construed to mean that a tribal court is prohibited from imposing consecutive sentences that exceed a total of one year in prison when the defendant is involved in more than one criminal transaction.

1121 (9th Cir. 2003). Failure to timely file objections to any factual determinations of the Magistrate Judge will be considered a waiver of a party's right to appellate review of the findings of fact in an order of judgement entered pursuant to the Magistrate Judge's recommendation. See Fed. R. Civ. P. 72.

DATED this 14th day of December, 2009.

Edward C. Voss
United States Magistrate Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Beatrice Miranda, Petitioner, vs. Tracy Nielsen, et al., Respondents.	No. CV-09-8065-PCT-PGR (ECV) ORDER GRANTING WRIT OF HABEAS CORPUS

Having reviewed *de novo* the Report and Recommendation of Magistrate Judge Voss in light of the petitioner's [Partial] Objection to Magistrate Judge's Report and Recommendation (doc. #48), the Court finds that the petitioner's Amended Petition for Writ of Habeas Corpus, filed pursuant to 25 U.S.C. § 1303 and 28 U.S.C. § 2241(c)(3), should be granted.[1]

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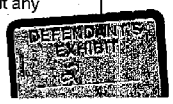
[1] In resolving the motion for extension of time to file objections filed by respondent Nielsen, in which respondent Anchando joined, the Court entered an order (doc. #54) on December 30, 2009 that granted the motion "to the extent that all objections to the Report and Recommendation shall be filed no later than noon on 1/11/10."

Respondent Nielsen filed his Objections to the Report and Recommendation of Magistrate Judge Voss (doc. #56) on 4:05 p.m. on January 11th and respondents Anchando and Harvey filed their Objections to Report and Recommendation of Magistrate Voss and Joinder in Respondent Nielsen's Objections (doc. #57) at 4:58 p.m. on January 11th. None of these respondents have offered any explanation for their late filings, nor have they sought any



The Court agrees with the Magistrate Judge that the Court has jurisdiction to hear the petitioner's habeas claim because the petitioner has sufficiently satisfied the requirement that she exhaust her tribal remedies.

The Court also agrees with the Magistrate Judge that the "any one offense" language of 25 U.S.C. § 1302(7) is properly interpreted to include all tribal code violations committed during a single criminal transaction.

The Court further agrees with the Magistrate Judge that the Pascua Yaqui Tribal Court should be ordered to re-sentence the petitioner to a term of one year inasmuch as the petitioner's tribal court sentence of 910 days exceeded the 12-month maximum sentence permitted by the Indian Civil Rights Act given that the petitioner's charges arose from a single criminal transaction.

Furthermore, the Court agrees with the petitioner that since she has now served more than one year of her sentence, she is entitled to be immediately released from custody. Therefore,

IT IS ORDERED that the Magistrate Judge's Report and Recommendation (doc. #46) is accepted and adopted by the Court.

IT IS FURTHER ORDERED that Petitioner's Motion for Summary Judgment (doc. #33) is granted.

IT IS FURTHER ORDERED that Respondent Nielsen's Motion (Cross-Motion) for Summary Judgment (doc. #36) is denied.

IT IS FURTHER ORDERED that petitioner Beatrice Miranda's Amended Petition for Writ of Habeas Corpus (doc. #18) is granted.

IT IS FURTHER ORDERED that the Clerk of the Court shall immediately

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additional extension of time. The Court concludes that the respondents' objections are untimely. The Court notes that it is in any case unpersuaded by the respondents' objections.

enter a judgment that (1) grants petitioner Beatrice Miranda's Amended Petition for Writ of Habeas Corpus, (2) orders the Pascua Yaqui Tribal Court to reduce petitioner Beatrice Miranda's sentence to one year, and (3) orders the respondents to release the petitioner from custody no later than 5:00 p.m. on Wednesday, January 13, 2010.

IT IS FURTHER ORDERED that the respondents shall file a report no later than 1:00 p.m. on January 15, 2010 setting forth the status of their compliance with this order regarding petitioner Beatrice Miranda's release from custody.

DATED this 12th day of January, 2010, at 9:55 a.m.

Paul G. Rosenblatt
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Beatrice Miranda,	)	**JUDGMENT IN A CIVIL CASE**
	)	
Petitioner,	)	CV-09-8065-PCT-PGR (ECV)
	)	
v.	)	
	)	
Tracy Nielsen, et al.,	)	
	)	
Respondents.	)	

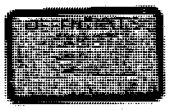
Pursuant to the Court's Order filed this date, Petitioner's Amended Petition is granted. The Pascua Yaqui Tribal Court is ordered to reduce Petitioner Beatrice Miranda's sentence to one year. Respondents are to release Petitioner from custody no later than 5:00 p.m. on Wednesday, January 13, 2010.

JUDGMENT ENTERED this day of 12 January 2010.

RICHARD H. WEARE
District Court Executive/Clerk

s/L. Dixon
By: Deputy Clerk

cc: (all counsel)



PUEBLO OF SANTO DOMINGO

-VS-

ARTICLE 2
INITIATION OF PROCEEDINGS
STATE OF NEW MEXICO
COUNTY OF SANDOVAL
IN SANTO DOMINGO TRIBAL COURT

Name: Derrick Chavez
Address: Jemez Street
Santo Domingo, NM 870
D.O.B. 03/09/87 S.S.N.: 585-87-3597
Charge: Probation Violation, Intoxication
Disorderly Conduct, Tampering with evidence
Aggravated Battery, Parties to a crime

Arrest Date: 10/22/09
Drivers Lic. #:
Citation #:
Arrest #: 00
Case #: SDPMR-1009-17 16
Date Filed: 10/22/2009

Complainant or Officer: James Jojola Unit 1209
(Print Name)

CRIMINAL COMPLAINT

The undersigned, under penalty of perjury, complains and says that on or about 22 day of October, 2009 in the County of SANDOVAL State of New Mexico, the above-named defendant(s) did (here the essential facts):

THE ABOVE NAMED DEFENDANT WHO IS A TRIBAL MEMBER OF THE SANTO DOMINGO TRIBE, SUBJECT TO THIS COURTS JURISDICTION DID COMMIT THE FOLLOWING ACT WITHIN THE EXTERIOR BOUNDARIES OF THE PUEBLO:
Count 1: Defendant did knowingly violate his conditions of probation set by the Santo Domingo Tribal Court.
Defendant did consume alcohol and associate with person that may tempt to indulge in illegal activities.

Count 2: Defendant was under the influence of alcohol which is not allowed within the Santo Domingo Pueblo boundaries.
Defendant was found to be under the influence of an alcoholic beverage. Defendant did admit to consuming alcohol earlier in the day to investigators while in custody of police.

Count 3: Defendant did engage in violent, abusive, profane,or other conduct which tends to disturb the peace.
Defendant was involved in a physical altercation with Nevin Garcia in the Sile community of Santo Domingo.

Count 4: Defendant did destroy, change, hide or place physical evidence with intent to prevent the apprehension, prosecution, or conviction or any person or throw suspicion of the commission of a crime upon another.
Defendant did assist other persons in undressing Nevin Garcia and moving his body to another location and burying his body as to cover up evidence of a crime.

Count 5: Defendant did unlawfully touch or apply force to the person of another with intent to injure that person.
Defendant did inflict great body harm to Nevin Garcia by being involved in a physical altercation with two other persons.

Count 6: Defendant did conspire to commit or aids or abets in the commission of a crime in connection with one or more other persons.
Defendant did assist in the covering up of a crime by knowingly moving the victim, Nevin Garcia, to another location from the original scene of a battery.

Contrary to this pueblo's X Tribal Customs or Common Law, Tribal Ordinance Section(s) NMSA 1978.

I SWEAR OR AFFIRM UNDER PENALTY OF PERJURY THAT THE FACTS SET FORTH ABOVE ARE TRUE TO THE BEST OF MY INFORMATION AND BELIEF. I UNDERSTAND THAT IT IS A CRIMINAL OFFENSE SUBJECT TO THE PENALTY OF IMPRISONMENT TO MAKE A FALSE STATEMENT IN A CRIMINAL COMPLAINT.

Approved [signature]
Governor or Tribal Judge

Complaint James Jojola [signature]
Title (if any) Federal Police Officer # 815
(man #)

CF001

WHITE - Court YELLOW - Defendant PINK - Attorney

AMENDED

TRIBAL COURT FOR THE PUEBLO OF SANTO DOMINGO

CASE Number: SDPM12-1009-17

PUEBLO OF SANTO DOMINGO
-vs-
Chavez Dacuf Ramos
Name of Defendant

(3/8/82)
(D.O.B.)

Date 10/22/2009

CRIME: 1. Probation Violation 2. Intoxication x3 3. Disorderly Conduct
4. Tampering with Evidence 5. Aggravated Battery 6. Parties to a Crime

[Offense(s) as stated on attached Criminal Complaint.]

ARRAIGNMENT

I, the above named defendant, understand that I am charged with the above listed criminal offense(s). I hereby acknowledge that I was read the attached Complaint and received a copy of the Complaint. I further acknowledge that the Court advised me of my rights as afforded to all defendants appearing before this court.

I further understand the nature of the crime(s) charged and I hereby knowingly and voluntarily enter a Plea of:

☒ Guilty ☐ Not Guilty to the listed offense(s).

Defendant's Signature

10-24-09
Date

JUDGEMENT

The accused appeared before the Court on 10/24, 2009, was read and given a copy of the Complaint, was advised of his/her rights and freely entered a Plea of:

☒ Guilty ☐ Not Guilty to the listed charge(s).

After a Trial held on 10/24, 2009, the Defendant was sentenced as follows:

☒ Fine(s): 1) $ 50 2) $ 75 3) $ 75
4) $ 100 5) $ 100 6) $ 25

☐ Jail Term: ☒ Court Costs: $ 5 ☒ Total: $ 430 + 345 = 775 PAST TRIAL

☒ Other Disposition: Due to the Malicousness and Severity of Crime Defendant is Sentenced to 6 years of Incarceration to be Served Consecutively, and is further banned from the tribe here forth

☐ Defendant found not guilty after trial, charges dismissed by the Court for the following reasons:

10/24/09
Date

Gov. Arthur Cate
Governor or Tribal Court Judge

WHITE - Tribal Court YELLOW - Defendant

November 16, 2010

Via Electronic and United States Mail

The Honorable John Conyers, Jr.
House of Representatives
Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515-6216

RE: Subcommittee on Crime Terrorism, and Homeland Security, Committee on the Judiciary
December 10, 2009 Hearing on H.R. 1924 "Tribal Law and Order Act of 2009"
Written Answers to Questions Submitted

Dear Chairman Conyers:

Greetings! I would like to thank you for the earlier opportunity to testify at the hearing concerning H.R. 1924, the Tribal Law and Order Act. I appreciate your initiative and efforts in this important and under-served area of criminal law, Indian law and individual rights. Following the hearing, you asked for written answers to two questions to supplement my testimony. The questions presented and my answers are as follows:

Question:

1) **Is a federal writ of habeas corpus, as provided in 25 U.S.C. § 1303, sufficient to prevent and remedy civil rights and due process violations relating to the prosecution, conviction or detention by an Indian Tribe of Indian defendants? Please explain your position.**

Answer: No.

Explanation: The writ, made applicable to tribes in 1968, does nothing to prevent and very little to remedy civil rights and due process violations in tribal courts. The writ is seldom used by Indian defendants to test the legality an order of detention by an Indian Tribe. After Supreme Court decision in *Santa Clara v. Martinez*, 436 U.S. 49 (1978), limited the federal review to only tribal court orders of detention, there have been very few petitions filed in federal court. The paucity of petitions filed masks the severity and extent of civil rights and due process violations in tribal courts, and is itself the result of inadequate protections.

The under-use and inaccessibility of the federal writ is related to several practical and theoretical factors: 1) lack of defense counsel in tribal court; 2) lack of knowledge, and; 3) lack of a sufficient record or process for tribal post-conviction. Because there is no right to appointed

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Location / Ship To: The University of New Mexico • 1117 Stanford N.E. • Albuquerque, NM 87131-0001 • http://lawschool.unm.edu

counsel in tribal courts, 25 U.S.C. §1303(6), there is no person preserving a record in the tribal court below and no one to advise of the right to seek federal court review for violations.

In each of three recent habeas cases filed pursuant to 25 U.S.C. §1303, a federal public defender represented the Indian individual in the dual prosecution in federal court under the Major Crimes Act, 18 U.S.C. § 1153, and was responsible for filing the petition to challenge the illegal tribal court order in federal court. See, *Spears v. Red Lake Band of Chippewa Indians*, 363 F. Supp. 2d 1176 (D. Minn. 2005); *Miranda v. Nielson*, No. CV 09-8065 PCT PGR, WL 148218 (D. Ariz. 2010); *Bustamante v. Valenzuela*, et al., 715 F. Supp. 2d 960 (D. Ariz. 2010). Without an attorney, the Indian defendant is left defenseless and without any knowledge of or access to federal court review of an illegal conviction or sentence. Unfortunately, under the Criminal Justice Act, federal public defenders are not permitted to appear or practice in tribal courts, and there is no system of appointment for tribal defendants seeking the civil remedy of habeas corpus in absence of a federal prosecution. 18 U.S.C. 3006A.

The federal writ habeas corpus is an imported post-conviction remedy made applicable to tribes under the Indian Civil Rights Act of 1968. The writ is not known in either theory or in practice among tribal people. Nor is it consistent with tribal sovereignty to seek outside review. In 1978, the Bureau of Indian Affairs engaged the National American Indian Court Judges Association (NAICJA) to undertake a yearlong project to assess tribal courts and develop systems for improvement. At that time, ten years after imposition of the ICRA, the assessment found that "[m]ost people on the reservations surveyed do not perceive recourse to federal courts as a means of reviewing Indian court judgments."[1] This was true among the tribal judiciary as well as tribal members. The report indicated, "[j]udges interviewed said the concept of federal review is too new and too complicated for most tribal members who are only starting to understand the avenues of relief available to them under the Indian Civil Rights Act."[2] This is no less true today than it was thirty-two years ago.

Federal habeas is rarely used because there are no known rules or process to access the federal courts. There has been no training or system to promote federal review of a tribal court order of detention. In addition, tribal community members are taught within their own culture not to argue, complain or question authority. When they do, they are met with a lack of support. Indian individuals will have to return home to their reservation community, and do not want to rock the boat or create problems for themselves or their family by a federal challenge to tribal court authority.

Additionally, even among those trained in federal habeas law and procedure, the process for access federal court is daunting. There is no standard practice or procedure that allows for access to federal courts under 25 U.S.C. §1303. There are statutory provisions and rules governing collateral review of state and federal court actions under 28 U.S.C §§ 2241, 2254 and 2255. There are no such rules to govern or guide actions under 25 U.S.C. §1303, and the former (2241, 2254 and 2255) do not apply on their face to Indian tribal orders of detention.[3]

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[1] Indian Courts and the Future, Report of the NAICJA Long Range Planning Project, (1978), Page 76.
[2] *Id.*
[3] Nor should these rules governing review of state and federal orders apply to actions seeking post-conviction review of tribal court orders in federal court.

Although post-conviction or civil remedies provided under §§2241, 2254 and 2255, are complex and esoteric, lawyers and law trained personnel, such as civil rights, criminal defense attorneys, and private practice attorneys, are available to assist in the representation of individuals seeking review of state and federal actions. In addition, there are private entities and public offices, such as the American Civil Liberties Union, and the Office of Civil Rights to provide advice, consultation, investigation and even representation for individuals to address constitutional violations. There is no such resource for the Native American Indian imprisoned by his own tribe. And none of the above named persons nor entities is qualified to assist in a post-conviction tribal or federal remedy without the requisite knowledge of the tribal process, Indian law, tribal sovereignty and federal habeas corpus law.

Even if the Indian tribe provides a right to counsel or approves the retention of outside counsel to represent an Indian defendant in tribal court, that defense counsel may not have the requisite knowledge to access federal court review; or even identify is a due process violation. Competent defense counsel in Indian country requires specialized knowledge.

If access to federal courts as a specialized practice is difficult and complicated for the law-trained person, it is even more so for the tribal person convicted in Indian country under a local tribal practice and incarcerated in a remote tribal or county jail. Tribal jails on the reservation have no access to information on federal remedies to address a violation of tribal law or the Indian Civil Rights Act (ICRA). 25 U.S.C. §§ 1301-1303. County facilities used to house Indian prisoners from those reservations without a tribal jail, will not have any information on how to challenge a tribal sentence. The Bureau of Indian Affairs (BIA) and Department of Justice (DOJ), pursuant to the trust responsibility, are tasked with the responsibility and authority to provide training and assistance to tribal courts. However, until recently there has been no training for tribal defense and currently there exists no known training or guidance for individual rights, especially the right to seek federal review. The BIA and DOJ may actually have a conflict of interest in this responsibility to the individual Indian. Without defense counsel, there is no one to protect an individual's rights under tribal law or ICRA. In the process of funding and training the tribal court system and personnel, the BIA and DOJ provide no oversight of the tribal justice system and no ability to counsel or direct the Indian individual regarding abuses or violations of that system.

In addition, there is no standard of due process among the 565 federally recognized tribes.[4] This means there is no standard for prosecution, trial, plea-bargaining or sentencing. To fill the void, tribal courts have routinely have engaged in a hybrid process of informal hearings that vary widely or fail completely in the protection of the individual rights guaranteed under the Indian Civil Rights Act.

Without written codes or procedures, there is no notice of the law under which the individual Indian is being prosecuted. There is no written notice of the charges and the elements of the crime to counter or defend against. There is no law trained person to challenge the charges or mitigate the tribal sentence.

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4 See 74 Fed. Reg. 40,218 (August 11, 2009); 75 Fed. Reg. 34,760 (June 18, 2010).

Tribal Courts are not required to provide Indian defendants with a list of qualified counsel; they do not have any way of finding out who would be willing and qualified to defend them. Although the Office of tribal justice provides trainings for judges and prosecutors, there is no parity for defense. In summary, without qualified defense counsel in tribal courts, and without the knowledge of and training in the right to federal review of tribal court orders of detention, civil rights and due process violations will occur and continue unchecked.

Question:

2) **Current law limits a Tribe's sentencing authority to a maximum of one-year incarceration. In spite of this law, are circumstances today where a defendant could be convicted in a tribal court without representation of counsel and receive a prison sentence of more than one year for a single course of conduct? Please explain.**

Answer: Yes.
Explanation: Despite the statutory maximum, tribal court judges routinely impose prison sentences greater than one year for a single course of conduct of by way consecutive sentences or 'stacking.'

Imposition of lengthy sentences to address crime and recidivism on Indian reservations is routine. Tribes take the position that because the federal government has failed to prosecute cases in federal court, the tribal court is left to impose greater sentences to deter crime.

In an amicus curiae brief submitted to the Ninth Circuit Court of Appeals, one tribe described the reasoning and ability to circumvent the one-year limit:

> When the federal government [ ] declines to prosecute serious crimes, the burden falls to the Indian tribes to prosecute violent offenders in tribal courts. Knowing this, many tribes have adopted criminal codes designed to allow the charging of multiple offenses. The Gila River Indian Community's Criminal Code was adopted, in part, to 'define the act or omission which constitutes each offense.' And it did so because federal law enforcement agencies often decline prosecution of cases.
>
> Given the inherent jurisdictional limitations and the ICRA limitation of one year for each offense, consecutive sentencing is one tool available to Indian tribes to handle violent criminals.[5]

The 'stacking' of multiple one-year sentences in connection with a single course of conduct was struck down in a federal court decision in 2005, as inconsistent with Congressional intent in ICRA. *Spears*, 363 F. Supp. 2d at 1180-81. Tribes, however, continue to employ the practice of imposing consecutive sentences.[6]

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[5] See *amicus curiae* brief submitted by the Gila River Indian Community in *Miranda v. Nielson*, No. CV 09-8065 PCT PGR, WL 148218 (D. Ariz. 2010) at Page 15.

[6] A habeas decision has no precedential value and is only binding on the parties. See Clinton, Robert N., *There is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L. J. 113, n. 443 (2002) (Habeas jurisdiction

Once a tribal court judge imposes a sentence, that sentence will stand unless and until the Indian individual challenges it internally through a tribal appellate process or externally through the federal writ. The sentence may or may not comport with tribal law or the Indian Civil Rights Act, but there is no way to track or review the imposition of sentences in general to find which are illegal or improper. The BIA conducts a review or audit of tribal courts, but that work only reports on needs assessed by the review. There is no mechanism to track and remedy illegal or improper sentences that may come to light in an audit. The only way to bring the issue to attention is to file a petition for a writ of federal habeas corpus. Tribal due process varies widely, and the Indian individual may not even be informed of any appeal process.

To incarcerate a person subject to tribal court jurisdiction, the process has been made simplified by the BIA. A tribal court or simply fills out a pre-printed form identifying the Indian individual and the sentence imposed, and submit it through the process to hold the person in a Bureau of Indian Affairs approved jail or a tribally operated jail.

In 2009, the Southwest Indian Law Clinic filed a Federal Petition for a Writ of Habeas Corpus pursuant to 25 U.S.C. §1303 on behalf of Native American Indian to challenge his conviction and eight-year sentence imposed by a tribal court in New Mexico after a bench trial. The defendant was not represented by counsel. The tribal court judge that imposed the eight-year sentence was not law trained, not a member of the tribe and a non-Indian. Although the Indian tribe wholly adopted the New Mexico Criminal Manual that included the New Mexico State Constitution and the United States Constitution as tribal law, the hearing was not conducted in accordance with state and federal protections. The tribal judge did not appoint counsel, and the defendant was unable to obtain contact anyone to retain counsel while in jail. On, March 9, 2010, the Magistrate Judge issues proposed findings and a recommended disposition to grant the Petition, and vacate and set aside the sentences. See *Romero v. Goodrich, Romero v. Goodrich,* No. 1:09-cv-232 RB/DJS (D.N.M.2010).[7]

In a separate case, an Indian individual was prosecuted in both tribal court and in federal court under the Major Crimes Act, 18 U.S.C. 1153, for the same course of conduct. This case was a serious crime of arson resulting in homicide. Before the case was prosecuted in federal court, and thus before the Indian man was appointed counsel under the Sixth Amendment, the defendant was prosecuted in tribal court. He pleaded guilty without the benefit of counsel. The tribal court failed to adhere to the fundamental requirements of its own tribal code or ICRA, and ultimately imposed a sentence of four consecutive one-year terms (1460 days). The court also imposed a $20,000, and then converted the fine to additional jail time in violation of tribal law and the ICRA, for a total sentence of 3460 days in jail, nearly nine and one-half years. After a

created by § 1303 provides limited means by which tribal orders limiting liberty can be reviewed in federal court, and such actions do not constitute appeals. Petitions for writs of habeas corpus constitute independent civil actions. *Oneal v. McAninch*, 513 U.S. 432, 440, 449 (1995). Thus, tribes are no more bound as a matter of stare decisis by the outcome of such cases than the highest court of a state is by a federal district court grant of a writ of habeas corpus under 28 U.S.C. § 2254. While of no value as precedent, such cases clearly are binding on the parties as a matter of res judicata so long as the issuing court had lawful jurisdiction.)

[7] The Tribe issued an order to commute the sentence and release the prisoner prior to the writ issuing. The case is pending federal review on the issue of mootness and collateral consequences.

federal Petition for Writ of Habeas Corpus was filed, the tribal court vacated the tribal sentence and re-imposed a sentence to address the violations. The federal habeas petition was dismissed without a decision, as a result of an agreement sought by the Indian's federal public defender. *Spino v. Confederated Tribes of Warm Springs, et al.*, 09 CV -934-KI.

Recently, the Federal District Court for the District of New Mexico issued the Writ of Habeas Corpus and released an Indian prisoner who was incarcerated on a two-year sentence imposed by a tribal court. The Indian prisoner was serving his sentence in a private jail in Albuquerque pursuant to a contract administered by the Bureau of Indian Affairs and made between the tribe and the private jail. This Writ and Order of Release would not have issued without the assistance of several attorneys and months of work to seek relief from the tribe and exhaust tribal court remedies prior to federal review. *Pacheco v. Massingill*, No. 1:10-cv-00923 RB-WDS (D. N.M. 2010).

In addition, the Southwest Indian Law Clinic recently filed another case on behalf of an Indian prisoner serving an 18-month sentence in the same private jail pursuant to a tribal court order of detention. That Petition is now pending and there are several more that are in the process of being filed, including one on behalf Indian prisoner serving a four-year sentence imposed by an Arizona tribe. Because the Indian prisoner has been incarcerated for years and is without any information or paperwork on his tribal sentence, federal habeas review has been delayed pending an investigation.

In 1961-1968, during the extensive investigation that lead to the imposition of the Indian Civil Rights Act, incarceration was a little used tool of the tribal court, and when used only short sentences were imposed.[8] That has changed. But even short sentences can be imposed in violation of due process or the ICRA.

Shorter sentences or pre-trial detention orders as a result of due process or civil rights violations may go undetected if the person is released after a few months or weeks in jail. The lack of knowledge and length of time to get information out of a jail or prison means that the person may be released before any violation can be documented or addressed. By the time anyone finds out, the prisoner is out of jail, and habeas corpus may no longer be a remedy. Under standard federal habeas corpus law, the federal court has no jurisdiction, unless the petitioner is 'in custody' or suffers some collateral consequences. *Carafas v. LaVallee*, 391 U.S. 234 (1968).

I hope that this information is response to your questions. As set out above, in the absence of qualified defense counsel, the Indian individual is without the knowledge of any available post-conviction remedy internally or externally in federal court. The existence of the federal writ of habeas corpus does nothing to protect the Indian defendant from civil rights or due process violations.

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[8] Hearings on the Constitutional Rights of the American Indian Before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 87th Cong., 1st Sess., at 384-484; Pursuant to federal regulations six-months was the longest maximum sentence that could be imposed in the BIA Courts of Indian Offenses. 25 C.F.R §§ 11.33-11.87NH (1967).

If you have further questions, or need additional information on the above, please contact me. Again, thank you for your time and the chance to provide some answers these important questions.

Sincerely,

/s/ Barbara Creel

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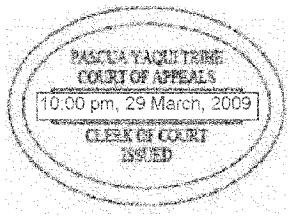


No. CA-08-015

Pascua Yaqui Tribe Court of Appeals

Pascua Yaqui Tribe, Plaintiff/Appellee

v.

Miranda, Beatrice, Defendant/Appellant

OPINION

Appeal of a decision of the Pascua Yaqui Tribal Court in Case No. CR-08-119, the Honorable Cornelia Cruz presiding.

AFFIRMED

Alfred K. Urbina, Esq., Pascua Yaqui Tribe Office of Prosecutor, Tucson, AZ, for the Plaintiff/Appellee.

Nicholas Fontana, Esq., Tucson, AZ, for the Defendant/Appellant.

I. STATEMENT OF THE FACTS

On the evening of January 25, 2008, Beatrice Miranda, by all accounts wandering around, drunk, came across Monica Valenzuela, a minor Yaqui teenager. (Transcript D at 5-7, 24-27). Miranda seems to have thought someone was laughing at her; she pulled a knife, screaming obscenities, and began chasing the girl across the reservation. (Transcript D at 24-27). Monica made it home, just ahead of this woman, and ran inside, where she was able to alert

her sister, Bridget, that Miranda was in their yard, yelling and waving a knife around. (Transcript D at 26). Bridget went outside to investigate. (Transcript D at 13). Miranda threated to kill the girls, brandishing the weapon. (Appellant's Opening Brief at 54). They called the police, and she ran off. (Transcript D at 14-21, 25-29).

Miranda was picked up, based on their description, near the Valenzuela home. (Transcript D at 4). With some difficulty, they were able to restrain and arrest her. (Transcript D at 4-6). She was searched, pursuant to this arrest; the police found a folding knife on her person, later confirmed to be the weapon used in the assault. (Transcript D at 7-10, 22-23, 30-32).

On January 26, 2008, the Tribe filed a criminal complaint against Miranda, charging her with two counts of endangerment, two counts of threatening and intimidating, two counts of aggravated assault, and two counts of disorderly conduct, one count each for each victim. (*PYT v. Miranda*, Pascua Yaqui Trial Court Record, document 38, hereinafter "R.38")

At her initial appearance, Miranda, without counsel, was advised of her rights, and declared that she was waiving them:

> The Court: The Pascua Yaqui Tribal Court is now in session in the matter of Pascua Yaqui Tribe versus Beatrice Miranda. Docket number CR-08-119.... Let me see, I now will advise you of your rights. You have the right to remain silent. Anything you say may be used against you. You have the right to counsel at your own expense, and you have the right to (inaudible) probable cause in this phase of the proceedings. Do you understand your rights?
>
> Miranda: Yes.

(Transcript A at 2). The court found probable cause and set bail at $1500.00. (R.36).

On February 4, 2008, Miranda appeared at her arraignment, without counsel. She was again advised of her rights, and again waived them:

> The Court: I will advise you of your rights. You have the right to remain silent. Anything you say will be used against you. You have the right to legal counsel at your own expense. You have the right to (inaudible). Miss Miranda, you have the right to cross-examine witnesses and evidence presented by the Tribe, and the right present witnesses and evidence in your behalf. You have the right to know the charges against you, and you have the right to appeal to the Pascua Yaqui Court of Appeals. Do you understand your rights?
>
> Miranda: Yes.

(Transcript B at 2-3). She then attempted to plead guilty to all charges. The court intervened, finding an insufficient factual basis, at that time, to substantiate her pleas, (Transcript B at 4-7), entered not guilty pleas on her behalf, and set a pre-trial hearing date, March 12, 2008. (R.34).

At pre-trial hearing Miranda appeared, was again advised of her rights, and again waived them:

> The Court: I will advise you of your rights. You have the right to remain silent. Anything you say may be used against you. You have the right to legal counsel at your own expense. You have the right to a hearing and to a jury hearing. You have the right to cross examine the witnesses, and (inaudible) about the Tribe, and the right to examine witnesses in advantage on your behalf. You have the right to know the allegations against you, and you have the right to appeal to the Pascua Yaqui Court of Appeals. Do you understand your rights?
>
> Miranda: Yes.

(Transcript C at 2). No motions were made by either party, the case was set for trial on April 12, 2008. (R.12).

March 12, 2008, the parties submitted a negotiated plea agreement, signed by Miranda. (R.25). The agreement detailed her rights explicitly, and explicitly waived them:

> I have read and understand the above. I understand I have the right to discuss this case and my civil rights with a lawyer at my expense. I understand that by pleading guilty I will be giving up my right to a trial by jury, to confront, cross-examine, and compel the attendance of witnesses, and my privilege against self-incrimination. I agree to enter this plea as indicated above on the terms and conditions indicated herein. I fully understand that if I am placed on probation as part of this plea agreement, the terms and conditions of probation are subject to modification at any time during the period of probation in the event that I violate any written condition of my probation.

(Appellee's Response Brief, Appendix A)

It was accepted by the court; change of plea hearing set for April 12, 2008. (R.25).

March 14, 2008, Miranda sent the court a written request to withdraw from the plea agreement. (R. 22). The court vacated the change of plea hearing, set the matter for trial, April 12, 2008. (R.21).

April 12, 2008, Miranda appeared *pro se*. (R.12). She was advised of her rights, again, and apparently declared that she was waiving them:

> The Court: I will advise you of your rights. You have the right to remain silent. Anything you say may be used against you. You have the right to you own counsel at your own expense. You have the right to a hearing. You have the right to cross examine witnesses and evidence presented by the Tribe, and the right to present witnesses and evidence in your behalf. You have the right to know the charges against you, and you have the right to appeal to the Pascua Yaqui Court of Appeals. Do you understand your rights?
>
> Miranda: (No audible response).

(Transcript D at 1-2).

The tribe presented testimony from arresting Officer Jose Montano (Transcript D at 2-12), Bridget Valenzuela (Transcript D at 12- 23) and Monica Valenzuela (Transcript D at 23-32) as well as entering the knife recovered from Miranda on arrest into evidence (Tribe's Exhibit 2). Miranda presented no evidence or witnesses, did not testify, and did not cross-examine any witnesses offered by the prosecution.

The court found her guilty on all counts. (R.12, Transcript D at 35-36)

While Miranda requested immediate sentencing, the Tribe asked for a pre-sentence investigative report (to be filed by the Office of Probation and Parole), and the court granted this request. (Transcript D at 36). Sentencing was scheduled for May 19, 2008. (Transcript D at 37).

At sentencing, Miranda was again advised of her rights:

> The Court: I will advise you of your rights. You have the right to remain silent. Anything you say may be used against you. You have the right to legal counsel at your own expense. You have the right to a hearing. You have the right to cross examine witnesses and evidence presented by the Tribe, and the right to present witnesses and evidence in your behalf. You have the right to know the charges against you, and in the sentencing matter, you have the right to appeal to the Pascua Yaqui Court of Appeals. And the consequences, uh, in the revocation matter may include you being found in violation of you conditions of probation, your probation term being revoked or extended, and any suspended days being imposed. Do you understand your rights?
>
> Miranda: Yes.

(Transcript E at 1-2)

The pre-sentence investigative report filed by the Office of Probation and Parole revealed that Miranda was on probation (for conviction in CR-07-064) when she perpetrated her assault against the Valenzuela sisters. (Transcript E at 1-9).

Miranda stated, contrary to her assertions in Appellant's Opening Brief, (Appellant's Opening Brief at 16), that she received a copy of the pre-sentence investigation report:

> The Court: And we will first proceed with the sentencing hearing, uh, CR-08-119. And in that matter the pre-sentence investigation report has been filed by The Court. or with The Court rather by the Probation Office. And did you receive a copy of that, Ms. Miranda?
>
> Ms. Miranda: Yes.

Her probation was revoked. (Transcript E at 9). After hearing the recommendations of the Probation officer, Miranda requested that all of the sentences "run concurrent." (Transcript E at 5). Sentence was imposed, with some of the terms running concurrent:

> The Court: At this time, the Court will enforce sentence as follows, after hearing from the probation officer and the Tribe regarding the history of the Defendant. And the Court does find that the Defendant does have a history of failures to comply, failures to appear, uhm, and failure to comply with the conditions of probation and other orders set by the court. The Court will set sentencing as follow: Count One, three-hundred and sixty-five days in jail; Count Two, three-hundred and sixty-five days in jail; Count three, Endangerment, Count Four, uh, sixty days in jail; Count Four, sixty days in jail; Count five, ninety days in jail; Count Six, ninety days in jail; Count Seven, Seven, I'm sorry, thirty days in jail; Count Eight, thirty days in jail. Counts One and Two are to be served immediately for a total of seven-hundred and thirty days in jail; counts Five and Six will be served consecutive to Counts One and two for a total of one-hundred and thirty days in jail; Counts Five and Six will be

> served consecutive to Counts One and Two for a total of on-hundred and eighty days; Sentencing, Counts Three, Four, Seven and Eight are concurrent with One, Two, Five and Six for a total of nine-hundred and ten days in jail. The Defendant is restrained for a period of two years from the victims, and Defendant will not possess any type of weapons, for a period of two years.

(Transcript E at 7-8) Miranda requested credit for time served and her request was granted, reducing the sentence going forward by one hundred and fourteen days. (Transcript E at 9-10).

Miranda's criminal history (referred to in Appellant's Opening Brief as her "alleged criminal history," Appellant's Opening Brief at 17) informed the sentencing recommendations made the court by the Probation Office and the final sentence imposed (Appellee's Response Brief, Appendix B clarifies this history, including prior criminal charges brought against Miranda in CR-05-036, (in which she was represented by Chief Public Defender Nicolas Fontana), CR-05-278 (in which she was represented by Deputy Public Defender M. June Harris), and CR-07-064, (in which she was represented by Chief Public Defender Nicolas Fontana); she was on probation for her conviction in CR-07-064 when the incidents in the current case took place (Transcript E at 8-10)).

It is unclear in the record why Miranda chose not to retain the services of the Public Defender's Office in this case; she had ample familiarity with them from past experience, as attested to above.

The Pascua Yaqui Public Defender entered its notice of appearance on behalf of Miranda on June 10, 2008. (R.3) Miranda's Notice of Appeal was filed on June 26, 2008. (R.1).

Oral argument was heard on this appeal on March 17, 2009.

II. STATEMENT OF THE ISSUES

1. Did the court fail to properly advise the Appellant of her rights as guaranteed by the Constitution of the Pascua Yaqui Tribe and the Indian Civil Rights Act, and was she thereby deprived of due process of law?
2. Was inadmissible evidence wrongly admitted, and did admission of such evidence deprive the Appellant of her rights to confront her accusers and be given a fair trial as guaranteed by the Constitution of the Pascua Yaqui Tribe and the Indian Civil Rights Act?
3. Did the Court make a negative inference to the Appellant's invocation of her right to remain silent, and did any such inference deprive her of her right to be free from self-incrimination as guaranteed by the Constitution of the Pascua Yaqui Tribe and the Indian Civil Rights Act?
4. Did the court err in exercising jurisdiction over the Appellant?
5. Was the court's conviction of Appellant on counts five and six of the complaint improper?
6. Did the sentence imposed by the court violate the Indian Civil Rights Act?

III. OPINION

1. The trial court properly advised the Appellant of her rights as guaranteed by the Constitution of the Pascua Yaqui Tribe and the Indian Civil Rights Act, and she was not deprived of due process of law.

Appellant has submitted a lengthy narrative (Appellant's Opening Brief at 26-36) detailing her experiences at every stage of the pretrial and trial process, attempting to make the claim that she was, at no point, properly advised of her rights. This attempt fails, as her recitation of events only demonstrates that she was amply advised of those rights, and waived them, repeatedly. She contends that her waiver of the right to retain counsel at her own expense (or to solicit the services of the Public Defender's office) was improper, or defective, because the court did not

recount her rights in sufficiently exhaustive detail for a waiver to have been effective. I find that the waiver was effective, both generally, based on the advisories repeatedly provided her by the court, and specifically, given her particular levels of knowledge and experience. *North Carolina v. Butler* 441 U.S. 369, 373 (1979).

While Appellant put forth an elaborate collection of arguments predicated upon her unfamiliarity with the Pascua Yaqui criminal justice system, going so far as to refer to herself as an "alleged" Indian (Appellant's Opening Brief at 46) and challenge the Tribe's demonstration of subject matter jurisdiction over her, (Appellant's Opening Brief at 42-47) she is in fact intimately familiar with the workings of the system, and her familiarity is born of direct personal experience. Appendix B of Appellee's Response Brief testifies to this experience: Appellant appeared before the Pascua Yaqui criminal court on three separate occasions prior to being charged with the offenses under examination (CR-05-036, CR-05-278, and CR-07-064), and was in fact on probation for conviction in CR-07-064 the night the incidents in this case took place. (Transcript E at 8-10). On all three of these occasions she availed herself of the services of the Public Defender's Office, (Appellee's Response Brief, Appendix B) and indeed was personally represented in two by the Chief Public Defender, her counsel on this appeal (who presumably would have raised various issues, such as the question of subject matter jurisdiction, on those other occasions, CR-05-036 and CR-07-064, had they had merit). Appellant simply cannot sustain the argument that she was unaware of her rights, or that she only waived representation by counsel in this case because some defect in the court's instructions prevented her from either learning of the existence of the Public Defender or acquiring the means to contact him. Within this context, the instructions offered by the court to Appellant, at every stage of the process, regarding her rights were more than sufficient to meet the constitutional requirements of due process, and her waiver of those rights was more than adequate to have been effective.

Any possible defect in the court's repeated admonishments to Appellant not cured by her extensive personal knowledge of the Pascua Yaqui criminal justice system would have been corrected through her voluntary adoption, by signature, of the plea bargain agreement she entered into with the Tribe. This agreement detailed her rights exhaustively. (Appellee's Response Brief Appendix A).

Appellant's entire argument, that her successive, consistent, waivers of the right to counsel were ineffective for purposes of due process, is based upon upon this Court's decision in *Pascua Yaqui Tribe v. Ramirez*, CA-02-003 (2006). *Ramirez,* however, was a different case and does not apply, as it was "limited to those circumstances where a criminal defendant is required by the trial judge to proceed involuntarily, *pro se*, without legal counsel or an advocate in his or her defense in a criminal trial" (*Ramirez* at 7). Appellant was not required to proceed without counsel, she chose to proceed without counsel. She was informed at each step of her right to retain counsel (Initial Appearance, Appellant's Opening Brief at 26 citing Transcript A at 2; Arraignment, Appellant's Opening Brief at 28 citing Transcript B at 2; Pre-Trial Hearing, Appellant's Opening Brief at 30 citing Transcript C at 2; Trial, Appellant's Opening Brief at 34 citing Transcript D at 2; at Sentencing, Appellant's Opening Brief at 35 citing Transcript E at 2-3, the right to counsel did not apply); at each step she affirmed that she understood that right and had decided to waive it. Her contrary decision on three prior occasions to retain the services of the Public Defender's Office conclusively demonstrates that she was fully aware of this option, knew how to exercise it, and made a voluntary, informed choice, in this case, not to do so.

Further, under the the Pascua Yaqui Constitution, the Indian Civil Rights Act, and the United States Constitution, criminal defendants before the Pascua Yaqui court have the right to retain counsel at their own expense, not the power to demand counsel be provided at public expense. Art.I § 1(f), Const. Pascua Yaqui Tribe; 25 U.S.C. § 1302(6)(2001); *United States v. Bird*, 287 F.3d 709, 713 (8th Cir. 2002). The Pascua Yaqui Tribe has chosen to fund an Office

of the Public Defender to defend indigents; nothing in federal law or the Yaqui Constitution compels it to do so. Within the separate, sovereign, Constitutional structure of the Yaqui Tribe, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978), it is sufficient that defendants be told they may retain counsel at their own expense, and be allowed to do so, should they choose. In Appellant's current case, she chose not to, repeatedly. I will respect that choice and hold her waiver of the right to counsel to have been knowing, intelligent, and effective.

Given Appellant's peculiar familiarity with the Yaqui criminal justice system, and the effectiveness of her repeated waivers of her right to counsel, she has failed to demonstrate actual harm from any alleged defect in the various recitations made to her by the court of her rights. Not having demonstrated such harm, she has shown no reversible error, and I affirm the trial courts convictions on all counts.

2. The trial judge did not exceed the bounds of her discretionary authority to admit the evidence entered against Appellant, and Appellant was not deprived of her rights to confront her accusers or be given a fair trial as guaranteed by the Constitution of the Pascua Yaqui Tribe and the Indian Civil Rights Act.

Appellant's extended discourse on this topic (Appellant's Opening Brief at 36-41) may be reduced to three claims: that the trial court erred by admitting into evidence various statements that were, purportedly, hearsay; that the court further erred by allowing the prosecution to use leading questions on direct examination; and that the court wrongly allowed into evidence "irrelevant and prejudicial statements."

A. Hearsay

While the general rule, of course, is that hearsay (a statement made by an out of court declarant offered to establish the truth of the matter asserted) is inadmissible, 3 PYT R.Evid. 37, ("Hearsay is not admissible except as provided by these rules."), most evidence having the appearance of being inadmissible hearsay is either admissible non-hearsay (e.g. party admissions

3. PYT R. Evid. Rule 38(b); FRE 801(d)(2), and out of court statements offered for some purpose other than establishing the truth of the matter asserted 3 PYT R.Evid. 36(c); FRE 801(c)), or hearsay admissible under an exception. 3 PYT R.Evid. 39, 40; FRE 803, 804. Further, even hearsay that is not admissible under a exception may be admitted, with certain qualifications, in the discretion of the court if necessary in the interests of justice (judges make that determination after examining the probative value, credibility, and possible prejudicial effect of such evidence; this is reflected in the residual exception to the hearsay rule, FRE 807, under the Federal Rules of Evidence, which the court was free to adopt, according to 3 PYT R.Crim.Proc. Rule 43(c) "whenever due process or the court require[d]") *see also Idaho v. Wright*, 497 U.S. 805, 816, 110 S.Ct. 3139, 3147, 111 L.Ed.2d 638 (1990), "[t]he Confrontation Clause is not violated if the hearsay statement falls within a firmly rooted hearsay exception; and [second] even if it does not fall within such an exception, hearsay testimony is not violative of the Confrontation Clause if it is supported by a showing of particularized guarantees of trustworthiness."

Appellant misstates the rule by treating "hearsay" as simply or "generally" inadmissible, (Appellant's Opening Brief at 36) and ignoring the wide list of exceptions to the basic rule, acting as though the mere claim that hearsay evidence was admitted would suffice to establish that it was wrongly admitted, or even that, absent any showing of prejudice, acceptance of such evidence would necessarily rise to the level of constitutional impermissibility.

Appellant makes the further, broad claim that "a substantial portion" of the evidence against her at trial was inadmissible hearsay, asserting that "rather than being the exception" the "admission of hearsay was the norm." (Appellant's Opening Brief at 37) Unfortunately, while she gives these vague remarks the appearance of specificity by assigning a number, eleven, to the supposed items of hearsay wrongly admitted, she offers no further substantiation of either the remarks or that number. Nowhere does she actually cite the eleven supposed instances of

improper hearsay, the number is merely thrown out, perhaps, in part, because it exceeds another number, ten, found to have been objectionable in the authority she cites, *Waters v. Colville Confederated Tribes*, 3 CCAR 35 (1996) (Appellant's Opening Brief at 38). Laying aside the number eleven, I find only two concrete examples of supposed hearsay in her brief: the arresting officer's testimony that when he presented the knife recovered from Appellant to the two victim witnesses, minutes after their assault, they "immediately recognized" it as the weapon brandished by the assailant, (Appellant's Opening Brief at 37 citing Transcript D at 8) and the further testimony of that officer,

> I made contact with the victims, they said that, uh, the female subject with the long blue sleeved shirt, uh, was chasing them with the knife, pointed the knife at them, uh called her names, uh, something about I'm going to kill you fucking bitches and, uh, uh, you're laughing at me and something like that.

(Appellant's Opening Brief at 37 citing Transcript D at 8)

Both instances of "hearsay" were obviously highly relevant, 3 PYT R.Evid 6(a), (they regarded statements by victims to the police, immediately after a crime, made for purposes of apprehending the assailant).

Further, nowhere in Appellant's elaborate discussion does she mention the fact that the declarants whose out of court testimony she now finds objectionable offered substantially similar testimony in court, at her trial, subject to cross examination. (Transcript D at 12-23, 23-32).

Even were the out of court statements of the victim witnesses to have been excluded entirely, those statements were cumulative, mere repetitions of the testimony these victim witness offered in court.

Nothing in the record or in Appellant's argument demonstrates that admission of these arguably superfluous statements had the slightest effect upon her ultimate conviction.

Finally, Appellant did not object to the introduction of this evidence at trial. Thus, according to 3 PYT R.Evid. Rule 3(a):

> Effect of Erroneous Ruling. Error may not be predicated on a ruling which admits or excludes evidence unless a substantial right of the party is affected, and (1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike is made and appears on the record, stating the specific ground for the objection, if such is not obvious from the context;

Even if Appellant were to establish that the evidence was wrongly admitted by the court, she would have to further demonstrate, now, that the wrongful admission at trial was plain error. 3 PYT R.Evid. Rule 3(d); *United States v. Rich*, 580 F.2d 929, 936 (9th Cir.), *cert. denied*, 439 U.S. 935, 99 S.Ct. 330 (1978). Plain error by the trial court would had to have affected a substantial right and materially affected the verdict; here, the evidence objected to was cumulative, Appellant has made no showing that it affected the verdict at all, let alone that it affected the verdict materially.

As Appellant has not shown that the trial court committed plain error by admitting the supposed items of hearsay into evidence, I find that the court did not abuse its discretion in doing so, any error it made was "harmless beyond a reasonable doubt" *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967), resulted in no "actual prejudice" *Brecht v. Abrahamson*, 507 U.S. 619 at 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993), and I will not reverse her convictions in response.

B. Leading questions

3 PYRT R.Evid. 31 (c) concerns leading questions, the relevant portion:

> Leading Questions: Leading questions shall not be used on the direct examination of a witness *except as may be necessary to develop the witness' testimony.* (emphasis added)

Appellant's assertion that "leading questions are prohibited during the direct examination of a witness" is a misstatement of law. The relevant rule of evidence 3 PYT R.Evid. 31(c); FRE 611(c) allows leading questions to be used, explicitly, whenever "necessary to develop the witness' testimony."

Furthermore, trial courts have always been given broad discretion to allow such questions under the necessity exception, *Ellis v. Chicago*, 667 F.2d 606, 613 (7th Cir. 1981); *Rodriguez v. Banco Cent. Corp.*, 990 F.2d 7, 12 (1st Cir. 1993) ("In this realm the widest possible latitude is given to the judge on the scene."); *St. Clair v. United States*, 154 U.S. 134, 150 (1894) ("much must be left to the sound discretion of the trial judge, who sees the witness, and can therefore determine, in the interest of truth and justice, whether the circumstances justify leading questions to be propounded to a witness by the party producing him") they may even go so far as to instruct that these questions be used, in the "interest of justice," without abusing that discretion. *United States v. Brown*, 603 F.2d 1022, 1026 (1st Cir. 1979). Court discretion is particularly broad when, as in this case, the finder of fact is a judge, steeped in the law and charged with the responsibility to see that defendant's rights are protected, due process accorded her at trial.

Appellant simply leaves the necessity exception out of her argument. Nowhere does she even attempt to demonstrate that the court's decision to allow leading questions was an abuse of discretion, that finding such questions necessary to develop witness testimony was error. She just baldly, wrongly, asserts that these questions may never be used.

Further, contrary to Appellant's confused rendition of the law, while courts not only have broad general discretion to allow leading questions whenever they deem them necessary to develop witnesses testimony, they have been found to have particularly strong justification for doing so when, as here, a witness is young, timid, ignorant, unresponsive or infirm. (Transcript D at 23-32, *see* the federal ruling on the FRE 611(c), substantially similar to 3 PYT R.Evid. 31(c), in *U.S.v. Nabors,* 762 F.2d 642, 651 (8th cir. 1985) which would grant the court very broad

discretion to allow such questions in this case.) Appellant has not demonstrated that this discretion was abused, or shown clearly that allowing such questions prejudiced the verdict against her. Absent such a showing, which would require a very high burden given the nature of the witnesses, the magnitude of other evidence demonstrating Appellant's guilt, and the fact that Appellant was given a bench, not a jury trial, I find that the court did not commit reversible error.

C. Irrelevant and prejudicial statements

While evidence tending to demonstrate that Appellant was a narcotics user would have been irrelevant and prejudicial if admitted into evidence at trial in this case (in which she was charged with aggravated assault, endangerment, threatening and intimidating, and disorderly conduct), (Appellant's Opening Brief at 40 citing Transcript D at 11), the record does not support Appellant's contention that such evidence was admitted, or that any brief reference to it at trial actually prejudiced her defense (made it more likely that she would have been convicted of the charges at issue than if the reference had not been made).

The exchange referenced by Appellant in her brief (Appellant's Opening Brief at 40) regarded one question by the prosecutor to the arresting officer. The record demonstrates that Appellant failed to object to this question at trial, and that further, however improper and prejudicial the question may have been, the line of inquiry was immediately abandoned. (Appellant's Opening Brief at 40 citing Transcript D at 11).

Given Appellant's failure to object at trial, the standard for review by this Court, as discussed above, is plain error. *State vs. Owens*, 112 Ariz. 223 at 228, 540 P.2d 695 at 700 (1975) "We need not consider, however, whether the comments were so prejudicial that they constituted reversible error because the defendant's failure to object during or just after the closing arguments constituted a waiver of any right to review on appeal." *citing State v. Holmes*,110 Ariz. 494, 520 P.2d 1118 (1974); *State v. Kelley*, 110 Ariz. 196, 516 P.2d 569 (1973). "A party's failure to object will be overlooked only where we find fundamental error."

citing State v. Shing, 109 Ariz. 361, 509 P.2d 698 (1973). Having failed to demonstrate such error, or that the ultimate result in this case was different from the result that would have occurred had the question not been asked, Appellant has not shown that the court committed plain error. The convictions will not be reversed in response.

Furthermore, the burden for demonstrating such error would have been particularly high on Appellant as she was given a bench, not a jury trial, and the standards for evidence heard at bench trials are considerably broader than those at jury trials (given the significantly reduced likelihood that judges will be prejudiced as triers of fact by the admission of otherwise impermissible evidence than juries). *Harris v. Rivera*, 454 U.S. 339, 346-347 (1981) (per curiam).

3. Nothing in the record establishes that the Court made a negative inference to the Appellant's invocation of her right to remain silent, thus she was not thereby deprived of her right to be free from self-incrimination as guaranteed by the Constitution of the Pascua Yaqui Tribe and the Indian Civil Rights Act.

While it would have been impermissible for the judge to have commented on Appellant's refusal to testify at trial in a way that impugned her exercise of the constitutionally protected right to remain silent, *Griffin v. California*, 380 U.S. 609, 615 (1965), Appellant has failed to establish that a comment making such an impermissible inference took place. Further, she has not demonstrated that such a comment had a prejudicial effect, that her conviction on the eight counts under examination was made any more likely by this type of judicial remark than it would have been had the judge said nothing.

Again, given that the finder of fact was the judge, not a jury, and the record attests to overwhelming evidence of Appellant's guilt on all charges, it is difficult to imagine how such a showing of prejudice could have been made.

Appellant bases the claim that her right to remain silent was violated on a single statement by the judge at trial, a comment that must be interpreted to be understood (given the flawed recording) and whose interpretation is far from clear: "And the Court will also inform you that your refusal to testify is highly (inaudible) on the Court by uh, (inaudible). " (Appellant's Opening Brief at 41-42 citing Transcript D at 33) The remark was ambiguous, at best, and is not in itself sufficient to demonstrate Appellant's contention that her silence at trial was impugned by the court.

Even were the remark to be given the interpretation provided by Appellant in her brief (Appellant's Opening Brief at 41-42), which is to say the most negative interpretation possible, she would still have to establish that it had a prejudicial effect. She has not done so, and there is little reason to believe that it did, as discussed above. The statement upon which Appellant attempts to rest this claim, however construed, is too thin a reed to sustain her assertion of reversible, constitutional harm. I find, further, that, however read, it was "harmless beyond a reasonable doubt," *Chapman v. California* 386 U.S. 18 at 24, 87 S.Ct. 824 at 828 (1967), as Appellant has failed to demonstrate the existence of any possibility, let alone a reasonable possibility, that it contributed to her conviction. *Fahy v. Connecticut*, 375 U.S. 86-87, 84 S.Ct. 229, 230, 231, 11 L. Ed. 2D 171 (1963).

4. The trial court properly exercised jurisdiction over the Appellant.

The Pascua Yaqui Tribal Court has subject matter jurisdiction to hear criminal charges brought against Indians (member and non-member) for violating Pascua Yaqui criminal law on the Yaqui Reservation. 3 PYTC § 1-1-20(a); *Oliphant v. Suquamish Indian Tribe*, 453 U.S. 191, 208 (1978); 25 U.S.C. § 1301(2); *U.S. v. Lara,* 124 S.Ct. 1628 (2004). Indian status of a defendant must be determined to establish the Tribal Court's criminal jurisdiction. *In re Certified Question*, No. 98AC00004 (Hopi 2001).

Contrary to Appellant's lengthy, speculative contentions, (Appellant's Opening Brief at 44-45) it is not difficult to establish that a defendant is an Indian; this may be done simply, quickly, and conclusively, generally by the submission of a Certificate of Indian Blood to the court. *United States v. Lawrence*, 52 F.3d 150, 152 (8th Cir. 1995) *citing St. Cloud v. United States*, 702 F.Supp.1456 (D.S.D. 1988) ("Recognition" analysis: "Those factors, which the Court considered in declining order of importance, are: 1) tribal enrollment; 2) government recognition formally and informally through receipt of assistance reserved only to Indians; 3) enjoyment of the benefits of tribal affiliation; and 4) social recognition as an Indian through residence on a reservation and participation in Indian social life."). Tribe's Exhibit 1 (Index listing #13 Certificate of Indian Blood for Beatrice Miranda. Enrollment #2694U04548.) is a Certificate of Indian Blood for Beatrice Miranda, containing Appellant's name, birth date, and tribal enrollment number. Eligibility for enrollment requires at least ¼ degree Pascua Yaqui Blood. Art III § 1(b) PYT Const.; *see United States v. Torres*, 733 F.2d 449, 455 (7th Cir. 1984) *citing Alvarado v. United States,* 429 U.S. 1099, 97 S.Ct. 1119, 51 L.Ed.2d 547 (1977) (tribal enrollment and one-fourth Indian blood is sufficient proof that one is an Indian); *United States v. Broncheau*, 597 F.2d 1260, 1263 (9th Cir.), cert. denied, 444 U.S. 859 (1979). Appellant contends that this Certificate was either never submitted to the court, or that, in the alternative, Appellee produced insufficient foundation to authenticate it. (Appellant's Opening Brief at 46-47).

Appellant seizes upon an inaudible portion of the trial transcript (Appellant's Opening Brief at 46 citing Transcript D at 3-33) to make the claim that this Certificate was never "offered, or admitted into evidence," and that the Tribe thus "failed to introduce any evidence whatsoever regarding Miranda's alleged status as an Indian." (Appellant's Opening Brief at 46) Appellant may think it "curious" that the Certificate of Indian Blood was included in the record on appeal, as "Tribe's Exhibit 1," but the Certificate was included in the record on appeal because it was part of the record at trial, and it was part of the record at trial because it was submitted to the

Court and entered into evidence. Appellant's claim that the Certificate was not submitted to the Court can not be reconciled with the fact that it was in the record. It is not necessary to have an audible recording of the Certificate' submission to the Court for it to have been properly submitted, the document's presence in the trial record amply demonstrates that it was admitted into evidence.

Further, pursuant to Rule 53, PYT Rules of Evidence,

> The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 48(D) or testified to be correct by a witness who has compared it with the original.

the Certificate of Indian Blood was a self authenticating Public Record, and thus need only to have been submitted to have been properly admitted as evidence. Appellant's claim that further foundation was required to authenticate the document is false.

As a Certificate of Indian Blood demonstrating Appellant's Indian status was submitted to the court, the Tribe met its burden at trial to establish that Appellant was in fact an Indian and that the Pascua Yaqui Tribal Court had subject matter jurisdiction to hear the charges filed against her.

5. The trial court's conviction of Appellant on counts five and six of the complaint was proper.

Appellant compounds her faulty claim that the Tribe failed to demonstrate subject matter jurisdiction by making the strange, wholly erroneous, argument that the Tribe further failed to prove, beyond a reasonable doubt, that she was an "Indian," and that therefore she was wrongly convicted on counts five and six of the charges brought against her. (Appellant's Opening Brief at 47-48).

Counts five and six concerned "threatening or intimidating", 4 P.Y.T.C. 1-260:

> Any Indian who, with the intent to scare or terrify, threatens or intimidates another person by word or conduct so as to cause physical injury to another person or serious damage to property of another person, or causes another person to reasonably believe that he/she is in danger of receiving physical injury or damage to property, shall be guilty of an offense.

Contrary to Appellant's fanciful interpretation of this statute, use of the word "Indian" in the crime's definition did not make being an Indian into an element of the crime, any more than use of the more usual word "person" would have made being a "person" an element of the crime. As the Tribe has no jurisdiction to hear claims against non-Indians, it may not prosecute a person under Tribal Law unless that person is an Indian. The words Indian and person are thus wholly interchangeable for purposes of Indian criminal statutes.

Having established Appellant's Indian status for purposes of jurisdiction, the Tribe had no further burden to demonstrate that she was an Indian. Appellant does not contend that the Tribe failed to prove beyond a reasonable doubt that she was guilty of any actual element of the crime of threatening and intimidating, so her conviction for that crime, on Counts Five and Six, was proper and is affirmed.

6. The sentence imposed by the court of nine hundred and ten (910) days did not violate the Indian Civil Rights Act.

Under the Indian Civil Rights Act, 25 U.S.C. § 1302(7) , and the Constitution of the Pascua Yaqui Tribe, Art. 1, § 1(g) PYT Const., the court may not impose a sentence exceeding one year's imprisonment for conviction of any one offense. Appellant contends that these statutory limitations act to bar any sentence exceeding one year's imprisonment, period, even if a defendant is convicted of multiple offenses, provided those offense are part of "the same criminal transaction" or "course of conduct." (Appellant's Opening Brief at 51-54, "It is clear

that Congress intended to adopt the concept that separate crimes arising from a single criminal episode should normally be treated as a single offense for sentencing purposes.")

Appellant's contention is a misstatement of law and flies in the faces not only of the plain language of the statute in question (which restricts the sentences for "any one offense" not the sentencing of "all offenses" cumulatively) but also the law as it has been construed and applied in Indian Country universally since the passage of the Indian Civil Rights Act in 1968.

Contrary to Appellant's assertion, the phrase "any one offense" is not ambiguous and the purported standard she offers to interpret it is neither controlling on this court nor a correct statement of law as applied within the United States at either the Federal or State level.

Appellant puts forth a "same transaction" test to make the claim that the language "any one offense" must be read to mean that no more than one offense may be charged against a defendant, however many crimes she commits, if those crimes are part of a "single criminal episode" (Appellant's Opening Brief at 54-55) She cites *Spears v. Red Lake,* 363 F.Supp. 2D 1176, 1178 (D. Minn. 2005), which is not binding on this court, and a concurrence, *Ashe v. Swenson,* 397 U.S. 436, 449-54 (1970) (Brennan, J., concurring), which is not binding on any court, to support this theory.

What Appellant does not cite is the law that is binding in Arizona, and the United States generally, as articulated by the Arizona Supreme Court , *State v. Barber*, 133 Ariz. 572, 576, 653 P.2d 29, 33 (App. 1982), *State v. Eagle*, 196 Ariz. 188, 190, 994 P. 2d 395, 397 (2007), and the United States Supreme Court, *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 182 (1932). While decisions of the Arizona and United States Supreme Courts are not controlling authority in this court, they are highly persuasive, particularly when they reflect the majority, or unanimous, legal opinion regarding construction of a disputed term or phrase substantially similar to the term or phrase under examination. Indeed, the authority of the United States Supreme court is particularly instructive here, as Appellant purports to base her argument

upon a construction of the Indian Civil Rights Act, a statute enacted by the United States Congress. The presumption that language in such a statute was intended to have the meaning accorded similar language by the Supreme Court is difficult to overcome, and was not overcome by Appellant in her attempt to impose an alternate, unique, construction.

Under *Blockburger*, as restated in *State v. Barber, State v. Eagle,* and drawn from a venerable understanding of the meaning of the phrase "same offense" given expression in *Morey v. Commonwealth*, 108 Mass. 433, 434 (1871),

> A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.

The construction of the phrase "same offense" given in *Blockburger* is the construction that is nearly universally controlling now and the construction that controls interpretation of that phrase within the Indian Civil Rights Act, namely, that so long as conviction of one statutory crime requires proof of at least one additional element not required to be convicted of a different crime, the two crimes are separate offenses. *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 182 (1932) As separate offenses, a defendant may be properly charged with both, convicted of both, and sentenced separately for both. While Appellant could not have been sentenced to a term of more than one year for any one offense, she was not convicted of one offense, but eight, and sentenced separately for each.

Appellant attempts to circumvent this construction through a purported recitation of the statutory history of the Indian Civil Rights Act, (Appellant's Opening Brief at 51-52), the balance it supposedly struck between federal and Indian jurisdiction over crimes, (Appellant's Opening Brief at 52-54), and the "absurd result" that would, in her claim, be the product of using the *Blockburger* test to interpret its language, offering her own "single criminal transaction" test as

the "clear" expression of Congressional intent, (Appellant's Opening Brief at 54), even though that test never appeared anywhere in the legislative history of the Indian Civil Rights Act, was not the meaning accorded the phrase "same offense" under federal law when the statute was enacted, and has only been applied by one court, in *Spears*, since that statute went into effect. *See United States v Dixon*, 509 US 688, 704, 113 S Ct 2849, rejecting this interpretation of "same offense", "That test inquires whether each offense contains an element not contained in the other;", further "but there is no authority, except *Grady*[overturned], for the proposition that it has different meanings in the two contexts. That is perhaps because it is embarrassing to assert that the single term 'same offense' (the words of the Fifth Amendment at issue here) has two different meanings-that what is the same offense is yet not the same offense."; 125 L Ed 2d 556(1993) and *Carter v McClaughry*, 183 US 367, 394-395; 22 S Ct 181; 46 L Ed 236 (1901) further "Having found the relator to be guilty of two offenses, the Court was empowered by the statute to punish him as to one by fine and as to the other by imprisonment. The sentence was not in excess of its authority. Cumulative sentences are not cumulative punishments, and a single sentence for several offenses, in excess of that prescribed for one offense, may be authorized by statute. *citing In re De Bara*, 179 U. S. 316; *In re Henry*, 123 U. S. 372. Finally, *Ramos v. Pyramid Lake Tribal Ct.*, 621 F. Supp. 967, 970 (D. Nev. 1985), examining consecutive sentences under the ICRA,

> "This Court could find no cases holding that the imposition of consecutive sentences constitutes cruel and unusual punishment. Indeed, the imposition of consecutive sentences for numerous offenses is a common and frequently exercised power of judges. Ramos was found guilty by the Pyramid Lake Tribal Court and sentenced accordingly to those findings of guilt. He may be unhappy with the sentence he received, but there was no violation of his right against cruel and unusual punishment and, thus, no habeas relief lies."

Appellant cites *Griffin v. Oceanic Contractors*, 458 U.S. 5644, 575 (1982)

> Interpretation of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative history are available.

No interpretation would be more absurd in this case than one that reversed the meaning the law had for four decades and straightjacketed Indian courts, reducing them to one year, maximum, sentences of imprisonment, however many crimes an Indian offender has committed against Indians on Indian land, whenever, as is usually the case, those crimes were part of a "course of conduct" "criminal episode" or "criminal transaction." Such a ruling would reduce Indians to life on reservations where their own courts cannot maintain order and federal courts will not. I reject that interpretation, and choose instead to follow the essential principles of the *Blockburger* test.

Furthermore, I recognize that Indian courts have wider discretion to apply this test then federal or state courts, discretion derived both from their status as separate sovereigns (whose sovereignty antedates the existence of the United States) and from compelling, particular interests they have in maintaining order and the rule of law in Indian country. The reality, as long recognized by federal courts, is that Indian courts have primary responsibility to dispense justice to Indian victims of crimes perpetrated by Indians on Indian land. While the Federal Government of the United States curtailed much of the sovereign authority of Indian courts through the Major Crimes Act, 18 U.S.C. § 1153, and the Indian Civil Rights Act, it did not destroy that authority, or abrogate the fundamental responsibilities of those courts. *United States v. Montana*, 450 U.S. 544, 564 101 S. Ct. 1245 (1981) *citing United States v. Wheeler*, 435 U.S. 313, 323-326 (1978). Indeed, the federal government has manifested a general unwillingness to take jurisdiction over crimes committed by Indians in Indian country, which leaves Indian courts as the sole effective guarantors of safety, order and justice for Indians living on Indian land. To fulfill that crucial role, Indian courts are, and must be, accorded greater discretion to charge

criminals and mete out sentences than federal or state courts operating more simply within the confines of the *Blockburger* test.

Accordingly, I find that the court acted properly, under *Blockburger*, and within the wide latitude Indian courts have to charge and sentence criminal defendants, by hearing the charges filed against Appellant, convicting her, and imposing the sentence she received. Each charge heard against Appellant required that sufficient additional facts be proven to satisfy the expansive form of the *Blockburger* test I am applying. Further, Appellant was not convicted of eight separate charges against one victim, as her Brief implies, but of four sets of charges against two separate victims, making the sentences actually handed down particularly appropriate. When making this sentence, the court took notice of her prior criminal record, (Transcript E at 7-8, Appellee's Response Brief Appendix B, CR-05-036, CR-05-278, CR-07-064), the fact that she was on probation when the crimes occurred, (for conviction in CR-07-064), and the possible future threat she might pose to the continued safety of the victims in this case (Transcript E at 5-6); it then gave her credit for time served, reducing the actual sentence imposed considerably (subtracting one hundred and fourteen days from the sentence to be served, Transcript E at 9-10) and ran several of the sentences concurrently, further moderating their impact (Counts Three, Four, Seven and Eight, Transript E at 7-8, subtracting 240 days from the actual sentence).

The trial courts judgment on all counts is affirmed.

Temporary Stay

On this portion of my decision I am issuing a temporary stay effective until April 30th, 2009, as questions regarding the breadth of discretion given to the Pascua Yaqui Courts to hear multiple charges and confer sentence are fundamentally political in nature. The legislative drafters of the Constitution of the Pascua Yaqui Tribe made a deliberate effort to harmonize Art. 1, § 1(g) PYT with its counterpart in the Indian Civil Rights Act, 25 U.S.C. § 1302(7). Both inform the reader that the court may not impose a sentence

exceeding one year's imprisonment for conviction of any one offense. And yet, the Appellant's interpretation leads one to conclude that these statutory limitations act to bar any sentence exceeding one year's imprisonment, period, even if a defendant is convicted of multiple offenses, provided those offenses are part of "the same criminal transaction" or "course of conduct."

Questions regarding the interpretation and breadth of discretion conferred upon the Pascua Yaqui Courts by the Constitution to hear multiple charges and confer sentence are fundamentally political and reside within the domain of the Legislative branch. Moreover, the culture, traditions, and separate sovereign structure of the Pascua Yaqui Tribe make it appropriate that questions of significant policy be decided by the legislative than the judicial branch of our government. Accordingly, I am submitting to the Attorney-General the question as to (1) whether or not Art 1, 1(g) of the Pascua Yaqui Constitution is to be interpreted in harmony with the Indian Civil Rights Act; and (b) whether the two must be interpreted – and thus applied - by the Pascua Yaqui Courts pursuant to the Appellant's more formalistic construction.

Given Appellant's declaration at oral argument (March 17, 2009) that she intends to use this Court's disposition to perfect her filing of a habeas corpus petition in federal district court, I consider it of paramount importance that the legislative branch of the Yaqui government make a concrete determination of these disputed points of policy before our order concerning them is given full effect. The impact of the delay resulting from the stay will be minimal as counsel for the Appellant, Mr. Fontana, has made it abundantly clear that he intends to file a writ of habeas corpus in federal district court. And yet, during the March 17 hearing it was apparent that the decision sought by the Appellant will have far reaching public policy implications for offenders convicted in the Pascua Yaqui Courts. Thus, before the Appellant moves to pierce the veil of

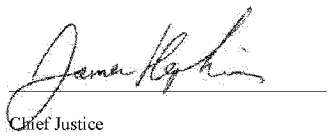
tribal sovereignty at federal district court, the Pascua Yaqui Court of Appeals will continue to hold jurisdiction over this matter until the stay expires in light of the constitutional issue.

At first blush, this may not appear to be a conventional remedy in the Pascua Yaqui Tribal Courts – despite being employed by Appellate Courts in other jurisdictions. And yet, by close analogy matters before the Tribal Courts where the Tribe is not a party and tribal sovereignty is at issue the Constitution prescribes clear notice requirements pursuant to Section 20, 3 PYTC § 2-5-20. In sum, I consider it to be of paramount importance that the legislative branch of the Yaqui government make a determination of the disputed points of policy before my order concerning them is given full effect.

IV. CONCLUSION

The Tribal Court's decision is affirmed on all counts. A temporary stay with respect to the foregoing issue will be in effect until April 30th, 2009. As I have already ruled on every issue, absent a response by the legislative branch removing the stay will simply affirm my decision that has already made - not reverse it.

Filed this 29th day of March, 2009.



Chief Justice

Pascua Yaqui Court of Appeals

Written Testimony Submitted by Amnesty International USA

House Judiciary Subcommittee on Crime, Terrorism and Homeland Security: Hearing on H.R. 1924, Tribal Law and Order Act 2009

Hearing Date: December 10, 2009

Mr. Chairman and members of the Committee:

On behalf of Amnesty International and the over 2 million members that our international movement represents, we would like to express deep appreciation and thanks for inviting us to submit written testimony for the hearing held December 10, 2009 on H.R. 1924, the 2009 Tribal Law and Order Act.

We would like to commend the Chairman for his leadership on this issue, and today's hearing in the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security is yet another sign of your continued commitment to addressing the devastating problems that Native American and Alaska Native women face in the United States.

In April 2007, Amnesty International issued a compelling report on the epidemic levels of sexual violence against Native American and Alaska Native women in the United States entitled *"Maze of Injustice: The failure to protect Indigenous women from sexual violence in the USA."* The high rates of sexual and domestic violence perpetrated against Native American and Alaska Native women are violations of human rights.

Amnesty's report documented that according to the Department of Justice (DOJ)'s own statistics, Native American and Alaska Native women are more than two and a half times more likely to be raped or sexually assaulted than women in the United States in general and that one in three American Indian and Alaska Native women will be raped in their lifetime. According to the DOJ, 86 per cent of perpetrators of sexual and rape against Native women are non-Native men. For a vast majority of the victims, the perpetrators of these crimes will go unpunished.

There are three major challenges to ensuring adequate law enforcement response to sexual violence against Native American and Alaska Native women that the United States government must urgently address: 1) the difficulty that exists in determining initially whose responsibility it is to respond to violent crime in Indian Country, 2) the lack of appropriate funding for tribal and federal agencies responsible for providing the services necessary to ensure that perpetrators are held accountable, and 3) the failure, in many cases, of law enforcement officers and health care providers to respond appropriately if and when they do.

For different reasons and in different ways, federal, state and tribal justice systems are failing to respond adequately to Native survivors of sexual violence. The US federal government has created a complex interrelation between these three jurisdictions that undermines tribal authority and often allows perpetrators to evade justice. Tribal governments are hampered by a complex set of laws and regulations that make it difficult, if not impossible, to respond to sexual assault in an effective manner.

Three main factors determine where jurisdictional authority lies: whether the victim is a member of a federally recognized Indian tribe or not; whether the accused is a member of a federally recognized Indian tribe or not; and whether the alleged offence took place on tribal land or not. The answers to these questions are often not self-evident. However, they determine who should investigate and prosecute the crime and under which laws. The jurisdiction of these different authorities often overlaps, resulting in confusion and uncertainty. The end result can sometimes be so confusing that no one intervenes, leaving victims without legal protection or redress and resulting in impunity for the perpetrators, especially non-Native offenders who commit crimes on tribal land.

The US government has interfered with the ability of tribal justice systems to respond to crimes of sexual violence by underfunding tribal justice systems, prohibiting tribal courts from prosecuting non-Indian suspects and limiting the custodial sentences which tribal courts can impose for any one offense to just one year. In the 1978 case of *Oliphant v. Suquamish*, the Supreme Court ruled that tribal courts could not exercise criminal jurisdiction over non-Indian US citizens. This ruling effectively stripped tribal authorities of the power to prosecute crimes committed by non-Indian perpetrators on tribal land and the decision is a violation of tribal sovereignty. Jurisdictional distinctions based on the Indigenous status of the accused, such as the jurisdictional limitation determined in *Oliphant*, have the effect in many cases of depriving victims of access to justice, in violation of international law.

The *Oliphant* decision is of particular concern given the number of reported crimes of sexual violence against Native women involving non-Native men. According to the Department of Justice figures, 86 per cent of perpetrators of sexual assault and rape against Native women are non-Native men. Through this legislation, the maximum prison sentence tribal courts can impose for crimes, including rape, is being increased to three years, but the penalty for such a violation still pales in comparison to the average prison sentence for rape handed down by state or federal courts, which is between eight years and eight months and 12 years and 10 months respectively[1].1 We ask that you continue this discussion regarding the need for restoring greater tribal court authority to handle all domestic violence and sexual assault crimes that are perpetrated against Indigenous people and occur on tribal Native American or Alaska Native lands.

This bill begins to address the issue of jurisdiction by laying out the legislative groundwork in Section 401 for increased cooperation and consultation between federal, tribal and state authorities and through the establishment of the Indian Law and Order Commission.

However, we are concerned to ensure the applicability of this important piece of legislation to Alaska Native peoples. Because the Supreme Court has narrowed the definition of Indian Country, it is important to ensure that Alaska Native villages are not excluded from some of the critical issues

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[1] Bureau of Justice Statistics Bulletin, *Felony Sentences in State Courts, 2002*, December 2004, NCJ 206916, available athttp://www.ojp.usdoj.gov/bjs/pub/pdf/fssc02.pdf, visited 7 December 2009.

that this legislation would address. Given that Alaska has the highest levels of rape in the United States it is particularly important that this legislation also apply to Alaska Native villages. We urge you to consult further with experts on law enforcement issues on Alaska Native lands.

Furthermore, while we welcome that tribal governments would have the option to transfer jurisdiction back to federal authorities in states where criminal jurisdiction has been transferred from federal to state authorities (including Public Law 280 states) we continue to be concerned that by maintaining simultaneous state jurisdiction in such situations, an already confusing jurisdictional maze would be exacerbated with tribal, federal and state authorities all having concurrent jurisdiction.

The current dearth of specific data about sexual violence against Native American and Alaska Native women is the next issue to be addressed. The extent to which cases involving Native women are dropped before they even reach a federal court is difficult to quantify as statistical data is not currently collected. However evidence collected by Amnesty International suggests that prosecution of crimes of sexual violence against American Indian and Alaska Native women at the federal level are rare. The Executive Office for US Attorneys provided Amnesty International with a list of some of the cases of sexual violence arising in Indian Country that had been prosecuted in recent years. Of the 84 cases provided, however only 20 involved adult women. In the cases listed, prosecutions for sexual violence against Native American women took place in only eight of the 93 districts, and only Arizona and South Dakota saw more than two. When federal prosecutors decline to prosecute cases involving non-Native perpetrators, there is no further recourse for Native survivors of sexual violence. We continue to request that the Executive Office of U.S. Attorneys provide documentation on the declination rates of violent offenses in Indian country.

At all levels, law enforcement and justice systems are failing to inform survivors about the progress of their cases and there is little accountability for failure to investigate or prosecute. For some survivors this can mean months or even years of fear and insecurity. Federal law enforcement authorities and US Attorneys, in consultation with Native American and Alaska Native peoples, must develop methodologies to obtain comprehensive and accurate public data on the Native American or other status of victims and perpetrators and the localities where offenses take place; the number of cases referred for prosecution; the number declined by prosecutors; and tbe reasons for declination. The proposed amendment to Section 102 of the bill lays the groundwork for greater accountability by U.S. attorneys to report to the appropriate authorities on this information and the reasons for any declination. We applaud you for incorporating this essential language and framework for accountability into the bill with the hope that collecting and providing this information will begin to allow for a more complete understanding of the scale of sexual violence against Indigenous women in the U.S.

One of our continued concerns is that of funding for IHS. The per capita health expenditure for Native Americans continues to be less than half that for non-Natives in the United States. The lack of appropriate funding for IHS affects American Indian and Alaska Native women's ability to obtain a properly and sensitively administered sexual assault forensic examination.

The Native American Women's Health Education Resource Center in 2005 found that at least 44 percent of IHS facilities lacked personnel trained to provide emergency services in the event of sexual violence. Sexual Assault Nurse Examiners, known as SANEs, are health care providers with advanced education and clinical preparation in collecting forensic examination in cases of sexual violence. SANEs and other IHS staff who have been trained to respond to sexual assault cases, including on the administration of forensic examinations, can play a critical role in bringing

perpetrators to justice. This year's legislation has been critically amended to put in place a standardized sexual assault protocol for IHS, including a process to help ensure testimony from IHS employees in prosecutions. The legislation also provides greater funding for Sexual Assault Response Teams (SART) that can play a vital role in coordinating the response to crimes of sexual violence.

Most federal, tribal and state law enforcement officers receive basic training on crime scene investigation and general techniques for interviewing victims, witnesses and suspects. Although federal, tribal and state officers may have the opportunity to attend continued training on how to respond specifically to crimes of sexual violence, such critical courses are generally not mandatory. Amnesty International is concerned that federal, state and trihal training programs for law enforcement officials may not include adequate or sufficiently in-depth components on responding to rape and other forms of sexual violence, on issues surrounding jurisdiction and on knowledge of cultural norms and practices. As a result officers often do not respond effectively and are not equipped with the necessary skills to deal with crimes of sexual violence.

Lack of cultural competence can also be an obstacle to officers communicating effectively and appropriately with Native people. There is a need for all officers to receive training that enables them to ensure that their responses take into account differences hetween trihes, which may have implications for how police approach and speak to victims, witnesses and suspects, including, for example, a greater awareness of potential language barriers. The proposed legislation has been amended appropriately to include domestic and sexual violence offense training for law enforcement officials, and this should be expanded or clarified to apply to all judicial authorities, including court and prosecution officials, to ensure competency at all levels in dealing with sexual and domestic violence and Indigenous issues.

Amnesty International is grateful for the truly historic steps taken by the Congress already this year to map out a path toward combating domestic and sexual violence against Native American and Alaska Native women. The FY 09 Omnibus Appropriations Act and American Recovery and Reinvestment Act included historic funding for construction and infrastructure upgrades for the Indian Health Service (IHS) and the Bureau of Indian Affairs (BIA). The recently passed FY10 Interior Appropriations Bill (H.R. 2996) includes increased funding for the IHS and the BIA and directs the IHS to revise its personnel policies to ensure that IHS personnel are able to testify and present evidence in cases of sexual violence in Indian Country. Pending FY10 Commerce, Justice and Science Appropriations bill (H.R. 2847) also includes critical language which directs the Attorney General to establish an interagency and tribal working group to clarify and resolve the law enforcement jurisdictional challenges and other problems that hinder investigations and prosecutions in Indian Country. While progress has been made in addressing some of the issues that we have outlined in this testimony, however, much more remains to be done. Amnesty International strongly believes that H.R. 1924 addresses critical issues long faced by the Indigenous communities in the United States and marks the beginning of an effort to address one of the gravest human rights abuses faced by Native American and Alaska Native communities in the United States – sexual assault and domestic violence against women

Mr. Chairman, H.R. 1924 reflects a historic and groundbreaking move in the right direction, giving Indigenous communities hope and opportunity for the future. Thank you for all of the work you have done thus far, and we look forward to working with you in the future to stop this epidemic of sexual violence against Native American and Alaska Native women.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

RONALD F. ROMERO,

Petitioner,

vs. CIVIL NO. 1:09-cv-232 RB/DJS

DONNA K. GOODRICH, Warden, Gallup McKinley Adult Detention Center, and PUEBLO OF NAMBÉ,

Respondents.

MAGISTRATE JUDGE'S PROPOSED FINDINGS AND RECOMMENDED DISPOSITION[1]

By Order of Reference [Doc. 5], filed March 17, 2009, this matter was referred to Magistrate Judge Don J. Svet to conduct hearings as warranted, and to perform any legal analysis required to recommend an ultimate disposition of the case. The Court recommends that: (1) the *Petition for Writ of Habeas Corpus Pursuant to 25 U.S.C. § 1303 for Relief from Indian Tribal Court Conviction and Order of Detention* [Doc. 1] be **GRANTED**; (2) the sentence of the Nambé Pueblo Tribal Court be vacated and set aside; (3) the parties be required to advise the Court of the current status and circumstances of Petitioner Romero's confinement so that it can be determined if release is appropriate; and (4) the Motion to Dismiss [Doc. 11] be denied as moot.

I. BACKGROUND

A. Factual Background

The following facts appear from the pleadings and record before the Court.

[1]Within fourteen (14) days after a party is served with a copy of these proposed findings and recommendations, that party may, pursuant to 28 U.S.C. § 636(b)(1), file written objections to such proposed findings and recommendations. A party must file any objections within the fourteen-day period allowed if that party wants to have appellate review of the findings and recommendations. If no objections are filed, no appellate review will be allowed.

Petitioner Ronald Romero ("Romero") is an enrolled member of the Pueblo of Nambé ("Pueblo"). [Doc. 1, ¶ 1.] On Thursday, February 22, 2007, an officer of the Santa Fe County Sheriff's Department was dispatched to a residence within the boundaries of the Pueblo where Romero reportedly was causing a violent domestic disturbance. [Doc. 11-8 at 1.] Upon arrival, the officer made contact with three females—two juvenile relatives of Romero, and one elderly woman identified as Romero's mother, Mrs. Romero. [Id.] They reported that they were watching television when Romero entered the home, apparently intoxicated, and began demanding money. [Id.] He yelled profanities, and when one of the younger females asked him to leave the residence and to demonstrate respect for his mother, Romero spit in the juvenile's face. [Id.] He then threatened to kill everyone in the house. [Id.] He continued yelling at Mrs. Romero who was standing behind a recliner chair. [Id.] He then shoved the recliner into her, causing her to fall backward; one of the girls caught Mrs. Romero. [Id.] Romero then swung a punch at his mother, missed her, almost hitting the girl in the face. [Id.]

Romero went on a rampage throughout the house, knocking things over and punching holes in the walls. [Doc. 11-2 at 2.] One of the girls ran for the telephone to call for help, but Romero grabbed it and threw it across the room, disabling it. [Id.] He threatened to burn the house down. [Id.] He did not let the victims leave the house, keeping them confined in the living room and pinning one girl against the refrigerator. [Id.] They eventually were able to escape from the house and call for help on a cell phone. [Id.] When the officer arrived, they reported to him they were in fear of lives because Romero was out of control and they thought he would hurt or kill them. [Id.]

The officer took Romero into custody and placed him in handcuffs in the back of the police vehicle. [Doc. 11-8 at 2.] En route to the police department, Romero verbally threatened the officer by stating he would kill the officer and his family once he was released. [Id.]

These incidents gave rise to numerous charges. Romero refused a plea agreement, and on May 30, 2007, was convicted in Nambé Tribal Court after a bench trial before a tribal court judge. [Doc. 1 at 2.] The Judgment and Sentence [Doc. 1-3 at 2] reflects that he was convicted and sentenced as follows:

Count 1:	Battery against a household member	365 days
Count 2:	Assault against a household member	365 days
Count 3:	Assault	365 days
Count 4:	Assault	365 days
Count 5:	Battery	365 days
Count 6:	Assault on a Peace Officer	365 days
Count 7:	Criminal Damage to Property	365 days
Count 8:	Interference with communications	365 days
Count 9:	Criminal Trespass	365 days
Count 10:	False Imprisonment	365 days
Count 11:	False Imprisonment	365 days
Count 12:	False Imprisonment	365 days

Counts 7, 9, 11, and 12 ran concurrently with sentences for other counts, but otherwise the sentences were consecutive, resulting in a total term of imprisonment of eight years. [Doc. 1-3 at 2.] The Tribal Court also imposed $7,050 in fines and fees. [Id.]

Romero was held in custody for the entire time between his arrest in February 2007, and his conviction in May 2007. [Doc. 1 at 5.] During that time, he appeared for an arraignment and a pretrial conference. At no time during these proceedings was Romero represented by legal counsel.

On June 15, 1007, Romero appealed the Tribal Court's decision. [Doc. 10-2.] On June 23, 2007, he addressed a letter to the Tribal Counsel and the Pueblo of Nambé Governor requesting a retrial. [Doc. 10-4.] In the letter, he complained among other things that he had not been read his *Miranda* rights, that he had no legal representation, and that the judge was not impartial. [Id.] The Pueblo characterized the letter as an appeal and submitted it to the Southwest Intertribal Court of Appeals ("SWITCA").[2]

The SWITCA upheld Romero's conviction and sentence in a written opinion dated November 7, 2007. [Doc. 11-4 at 6–8.] The opinion addressed Romero's right to counsel and *Miranda* claims, and concluded that neither provided grounds for reversing the conviction. [Id.]

Romero, who was at that time incarcerated in Colorado, filed a *pro se* Petition for Writ of Habeas Corpus in the District of Colorado on November 21, 2008.[3] The district court entered an order directing Romero to cure deficiencies by either paying the filing fee or filing a motion and affidavit for leave to proceed *in forma pauperis*. The district court also directed Romero to file an Application for a Writ of Habeas Corpus on the proper form. [Doc. 1-4 at 1.] The docket sheet reflects that a money order and a Motion and Affidavit for Leave to Proceed under 28 U.S.C. § 1915 were received from Romero on December 22, 2008. [Id.]

On December 23, 2008, the district court granted Romero an additional 30 days to comply with the previous Order to Cure Deficiencies. [Doc. 1-4 at 1.] However, in December 2008, Romero was relocated from Colorado to a facility in Gallup, New Mexico. [Doc. 1 at 3.] Consequently, the District of Colorado's order granting an extension was returned as undeliverable,

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[2]Pursuant to a Tribal Council resolution, the SWITCA acts as an independent court of appeals for the Pueblo of Nambé. [Doc. 10-6.]

[3]The case was assigned cause No. 1:08-cv-2539-ZLW.

and on February 2, 2009, the Colorado petition was dismissed without prejudice. [Id.]

B. Procedural Background

Romero, who is now represented by counsel, filed his *Petition for Writ of Habeas Corpus Pursuant to 25 U.S.C. § 1303 for Relief from Indian Tribal Court Conviction and Order of Detention* [Doc. 1] in this court on March 10, 2009. Respondents are Donna K. Goodrich, the warden of the Gallup McKinley Adult Detention Center where Romero was incarcerated when the petition was filed, and the Pueblo.

The Court ordered Respondents to answer the petition, and also to provide copies of "any pleadings pertinent to the issue of exhaustion which was filed by Petitioner in the sentencing and appellate courts, together with copies of all memoranda filed by both parties in support of or in response to those pleadings...[and] all tribal court findings and conclusions, docketing statements and opinions issued in Petitioner's post-conviction or appellate proceedings." [Doc. 6 (emphasis in original).] As ordered by the Court, each Respondent filed an answer to the petition. [Docs. 8, 10.] The Pueblo also filed a Motion to Dismiss. [Doc. 11.] Romero responded to the Motion to Dismiss by moving to compel the Pueblo to produce the record and requesting an evidentiary hearing. [Doc. 12.] Apparently in response to Romero's allegations that the record was incomplete, the Pueblo filed a *Notice of Lodging of Tapes to Records Department* [Doc. 14], simultaneously submitting six[4] audiotapes and copies of eight exhibits from Romero's trial; the Pueblo also filed a reply in support of its Motion to Dismiss [Doc. 13]. Five months later, Romero sought leave to file a surreply. [Doc. 18], and several weeks after that, moved for a status conference [Doc. 22].

II. ANALYSIS

[4]The Notice states that five audio tapes were submitted, but in fact, the Court received six tapes, with two tapes designated "Tape 2."

A. Habeas Corpus Relief under the Indian Civil Rights Act of 1968 ("ICRA")

Romero claims his conviction and subsequent detention violate the Indian Civil Rights Act of 1968 ("ICRA"). ICRA provides that: "The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian Tribe." 25 U.S.C. § 1303.

ICRA embodies two distinct and competing purposes: on the one hand, it serves to strengthen "the position of individual tribal members vis-á-vis the tribe"; on the other hand, it promotes "the well-established federal policy of furthering Indian self-government." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62 (1978) (citation and internal quotation marks omitted). To achieve a balance between these two purposes, ICRA extends a number of constitutional protections that otherwise would not be available to Indians within the jurisdiction of the tribe.

"Indian tribes are distinct political entities retaining inherent powers to manage internal tribal affairs." *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 880 (2d. Cir 1996) (citation omitted). Because tribes retain powers of self-government that predate the federal Constitution, constitutional limitations applicable to federal and state authority "do not apply to tribal institutions exercising powers of self-government with respect to members of the tribe or others within the tribe's jurisdiction." *Poodry*, 85 F.3d at 880–81. In other words, Indian tribes are not bound by the United States Constitution in the exercise of their powers, including their judicial powers. *Means v. Navajo Nation*, 432 F.3d 924, 931 (9th Cir. 2005).

Congress nevertheless "has plenary authority to limit, modify, or eliminate the powers of local self-government which the tribes otherwise possess." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) (citations omitted). With the passage of ICRA, Congress did limit tribal authority by imposing some basic constitutional norms on tribal governments. *Poodry*, 85 F.3d at

881. The Constitutional rights that Indian Tribes must extend to those within their jurisdiction are enumerated in ICRA; the rights are similar—though not identical—to those contained in the Bill of Rights and the Fourteenth Amendment. *See* 25 U.S.C. § 1302. Among the most notable distinctions between ICRA and constitutional guarantees "are the absence in ICRA of a clause prohibiting the establishment of religion; the omission of a right to the assistance of counsel for the indigent accused; the absence of a right to a jury trial in civil cases; and the specific limitation on terms of imprisonment and fines." *Poodry*, 85 F.3d at 882.

To enforce the rights enumerated in section 1302, Congress has authorized habeas corpus relief. *Santa Clara Pueblo*, 436 U.S. at 60–61. Habeas relief generally is the sole federal remedy for a violation of ICRA. *See id.* at 69–70.

With these principles in mind, the Court turns to the issues in this case.

B. <u>Petitioner's Grounds for Issuance of Writ of Habeas Corpus</u>

Romero asserts seven grounds for issuing the writ: (1) the Pueblo violated his Sixth Amendment right to counsel when it tried, convicted, and sentenced him to eight years without benefit of counsel; (2) the Pueblo violated his Fifth Amendment right to due process by appointing the arresting officer to serve as his lay counsel during pretrial plea negotiations; (3) the Pueblo violated his due process rights when it allowed the tribal court judge who presided over his trial and sentencing to participate in plea negotiations; (4) the Pueblo violated his Fifth and Sixth Amendment rights by failing to timely inform him of the nature of the accusations against him and by failing to provide compulsory process for obtaining witnesses in his favor; (5) the Pueblo violated his due process rights by applying conflicting state and tribal codes; (6) the sentence imposed is in excess of the statutory maximum of one year; and (7) the Pueblo deprived him of his Sixth Amendment right to a jury trial.

Several of Romero's claims require him to bridge the gap between the "constitutional" rights contained in ICRA and those guaranteed by the United States Constitution. For example, although ICRA affords "due process," 25 U.S.C. § 1302(8), the term is construed with regard to the historical, governmental and cultural values of the tribe; it is not always given the same meaning as it has come to represent under the United States Constitution. *Tom v. Sutton*, 533 F.2d 1101, 1104 n.5 (9th Cir. 1976). Furthermore, while the Sixth Amendment guarantees a right to appointed counsel, ICRA does not. *Compare* U.S.Const. amend. VI ("In all criminal prosecutions, the accused shall...have the Assistance of Counsel for his Defence."), *with* 25 U.S.C. § 1302(6) ("No Indian Tribe in exercising powers of self-government shall...deny to any person in a criminal proceeding the right to...*at his own expense* have the assistance of counsel for his defense[.]" (emphasis added)).

To avoid the variances between the rights guaranteed by the Constitution, and the subset of rights afforded by ICRA, Romero argues that the Pueblo has adopted the United States Constitution, along with all the rights and protections contained therein. Romero's argument is that the Pueblo by resolution dated June 24, 1996, adopted the New Mexico Criminal and Traffic Law Manual, and that such manual contains reference to the United States Constitution. Thus, according to Romero, the Tribe has adopted the Constitution wholesale and without limitation. [Doc. 1 at 10.] Other of Romero's grounds potentially involve mixed questions of law and fact. For example, he argues that he was not afforded a "meaningful opportunity" to secure retained counsel because he was confined from the time of his arrest until trial. [Doc. 1 at 5 (Count 1).]

He also argues the Pueblo deprived him of his right to a jury trial.[5] The Pueblo, on the other hand, claims the tribal court judge informed him at his arraignment of his right to jury trial and that

[5]ICRA guarantees criminal defendants a trial by jury. 25 U.S.C. § 1302(10).

it attempted to locate counsel to represent him, but that he waived both rights. [Doc. 11 at 12.]

The Court concludes that it need not address the question of whether the Pueblo has adopted the Constitution or determine the contours of due process available to Pueblo criminal defendants; nor must the Court address questions of waiver of counsel and jury trial on the spare tribal court record, nor must it resolve disputed questions of fact. The imposition of an eight-year sentence under the circumstances presented here violates ICRA and is grounds alone to grant the writ.

C. Jurisdiction

Respondent Goodrich has notified the Court that there has been a change in Romero's custody: he is no longer housed in New Mexico. [Doc. 25.] On or about December 21, 2009, McKinley County released Romero pursuant to a Writ of Habeas Corpus Ad Prosequendum, and he was transported to a Bureau of Indian Affairs correctional facility in Colorado to answer charges of assaulting and injuring a federal officer. [Id.] Thus, although Romero was in custody in New Mexico at the time he filed this Petition, he no longer is incarcerated in New Mexico. This change of custody raises the question of the Court's authority to issue a writ of habeas corpus while Romero is absent from the jurisdiction.

The Court is not aware of any cases specifically addressing the authority to issue a writ of habeas corpus for violations of ICRA when the petitioner is not detained within the court's territorial jurisdiction. However, when it comes to matters of jurisdictional prerequisites, the court should "conduct the same inquiry under § 1303 as required by other habeas statutes." *Poodry*, 85 F.3d at 890.

According to principles under other habeas statutes, a petition that attacks the execution of a sentence must be filed in the district where the prisoner is confined. *Haugh v. Booker*, 210 F.3d 1147, 1149 (10th Cir. 2000) (holding that petition that attacks execution of sentence under 28 U.S.C.

§ 2241 is filed where prisoner is confined); *see also Zani v. United States Marshals Svc.*, 338 Fed.Appx. 759, 761 (10th Cir. 2009) (holding that district court in Colorado lacked jurisdiction to consider petition under 28 U.S.C. § 2241 where prisoner was incarcerated in Texas).

Romero, however, does not attack the execution of his sentence; rather, he attacks the legality of his detention pursuant to an order issued by a court located in New Mexico, albeit a tribal court. When a petitioner attacks the validity of an underlying a detention order, venue is proper in the state where the detainer was issued. *See Bradshaw v. Story*, 86 F.3d 164, 166 (1996) (28 U.S.C. § 2255 motion, which tests validity of judgment and sentence, is filed in sentencing court). A petition for habeas corpus under ICRA is by definition a means to test the legality of a detention order. 25 U.S.C. § 1303. Furthermore, when a petitioner attacks the validity of a detention order, his presence within the district is not necessary to confer jurisdiction. *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 500 (1973). The Court thus concludes that, where the tribal entity that issued the order resulting in detention has been properly served, as the Pueblo has in this case, the Court has jurisdiction over the matter, even though the petitioner is incarcerated outside the Court's territorial jurisdiction.

D. Exhaustion

The Court now turns to consider the question of exhaustion. The Pueblo concedes that "Petitioner has exhausted his Tribal remedies for issues related to alleged violations under the ICRA[.]" [Doc. 10 at 1.] If this were a case involving a collateral attack on a state court conviction, a concession of this nature normally would permit the Court to conclude that the defense of nonexhaustion had been waived and proceed to the merits. *Odum v. Boone*, 62 F.3d 327, 332 & n.2 (10th Cir. 1995) (holding that, after the Supreme Court decision of *Granberry v. Greer*, 481 U.S.

129 (1987), the defense of nonexhaustion may in fact be waived if the State fails to assert it).[6] Given the unique status of Indian nations in our constitutional order, however, the question of exhaustion merits discussion in this case, because it is not readily apparent from the record that Romero has exhausted the issue of the eight-year sentence.

In the context of a section 2254 petition seeking relief from a state court judgment, the exhaustion doctrine serves the important purposes of comity and federalism. *McCormick v. Kline*, 572 F.3d 841, 851 (10th Cir. 2009). The doctrine requires that the substance of the claim be "fairly presented" to the state courts before it can be raised in federal court. *Id.* Regarding tribal courts:

> [P]roper respect for tribal legal institutions requires that they be given a full opportunity to consider the issues before them and to rectify any errors.... The federal policy of promoting tribal self-government encompasses the development of the entire tribal court system, including appellate courts. At a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts.

Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 16–17 (1987) (internal citation and quotation marks omitted).

Exhaustion of tribal court remedies generally is a requirement for obtaining habeas relief in federal court, but it is not an inflexible requirement. *Selam v. Warm Springs Tribal Corr. Facility*, 134 F.3d 948, 953 (9th Cir. 1998). Instead:

> A balancing process is evident; that is weighing the need to preserve the cultural identity of the tribe by strengthening the authority of the tribal courts, against the need to immediately adjudicate alleged deprivations of individual rights.

United States ex re. Cobell v. Cobell, 503 F.2d 790, 793 (9th Cir. 1974) (quoting *O'Neal v. Cheyenne River Sioux Tribe*, 482 F.2d 1140, 1146 (8th Cir. 1973)).

In this case, Romero filed a Notice of Appeal, but the Notice of Appeal did not identify any

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[6]Even if waived or not raised, the Court may raise exhaustion *sua sponte*. *Odum v. Boone*, 62 F.3d 327, 332 & n.2 (10th Cir. 1995).

particular grounds for appeal. [Doc. 10-2.] The letter Romero wrote to the Tribal Governor, and which the Pueblo construed as an appeal, complained of the lack of counsel, judicial bias, and the failure to have his *Miranda* rights read to him, among other things. It did not, however, complain of the length of the sentence. [Doc. 10-4.] The SWITCA opinion upholding the judgment and conviction addressed the right to counsel issue and the self-incrimination (*Miranda*) issues, but did not address the length of the sentence, either. [Doc. 10-5.]

However, the SWITCA was aware that the Tribal Court had imposed an eight-year sentence. [Doc. 10-5 at 1 (noting consecutive sentences amounting to 2,920 days in jail)]. Furthermore, while observing that Romero did not identify any specific grounds for appeal, the SWITCA acknowledged he had appeared *pro se* at trial, and concluded his application should be liberally construed even though he had not provided all the required information for appeal. [Id. at 2.] Consequently, the SWITCA independently reviewed the record, but "did not find any...possible bases for appeal" other than the lack of counsel and *Miranda* issues. Given that the SWITCA acknowledged and accounted for Romero's *pro se* status by performing an independent review of the record, yet found no defect in sentencing, the Court concludes that SWITCA had a fair opportunity to consider the issue despite Romero's failure to specifically raise it.

Alternatively, even if Romero failed to exhaust the sentencing issue, the Court concludes the exhaustion requirement should be relaxed or excused in this case. When failure to adequately raise issues on appeal can be attributed to lack of effective counsel, exhaustion may be excused, particularly when there has been a fundamental miscarriage of justice. *Hammon v. Ward*, 466 F.3d 919, 925–26 (10th Cir. 2006). Given the express language in ICRA limiting the Tribal Court's authority to one-year prison terms, Romero's failure to complain of an eight-year sentence is very likely attributable to the absence of counsel. Furthermore, the exhaustion requirement must be

balanced "against the need to immediately adjudicate alleged deprivations of individual rights." *Cobell*, 503 F.2d at 793 (9th Cir. 1974) (quoting *O'Neal*, 482 F.2d at 1146). As discussed next, Romero already has served in excess of two years—more than twice as long as ICRA permits.

E. Merits

Romero contends the Pueblo violated ICRA when it sentenced him to eight years in jail plus fines and fees totaling $7,050. [Doc. 1 at 11–12.] The Court agrees that an eight-year sentence violates ICRA under the circumstances presented here. Because the sentencing issue is dispositive, the Court does not consider whether the fines and fees violate ICRA, nor any of the other grounds Romero asserts for granting the writ.

1. The meaning of "any one offense"

ICRA states:

No Indian tribe in exercising powers of self-government shall—

> require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and a fine of $5,000, or both.

25 U.S.C. § 1302(7).

The Pueblo argues the eight-year sentence does not violate ICRA because no sentence for any individual charge exceeds 365 days. [Doc. 11 at 14.] According to the Pueblo, the Tribal Court Judge determined that the sentences should be imposed consecutively due to Romero's lack of remorse, failure to take responsibility for his actions, and prior violent history. [Id.]

Only a handful of courts have addressed the issue of whether consecutive sentences that in total exceed the statutory maximum violate ICRA. In *Ramos v. Pyramid Tribal Court*, the district court held that consecutive sentences exceeding the statutory maximum did not violate ICRA. *Ramos v. Pyramid Tribal Court*, 621 F.Supp. 967 (D. Nev. 1985). The petitioner in *Ramos* was

convicted after embarking on a high speed ride while highly intoxicated. *Id.* at 969. He nearly ran several cars off the road, rammed a patrol jeep, broke through a barricade, and resisted arrest when he was finally apprehended. *Id.* He was convicted of seven offenses and sentenced to over two years, though no individual sentence exceed the statutory maximum.[7] In reaching its decision, the court focused on ICRA's prohibition against cruel and unusual punishment. *Id.* at 970. It reasoned that "the imposition of consecutive sentences for numerous offenses is a common and frequently exercised power of judges" and did not constitute cruel and unusual punishment. *Id.*

This Court does not find the reasoning of *Ramos* persuasive support for the Pueblo's position. ICRA's limitation on fines and imprisonment is in addition to its prohibition against cruel and unusual punishment. In other words, a punishment that is not cruel and unusual still may violate ICRA. Thus, the *Ramos* analysis is incomplete because it did not address whether the tribal court exceeded its authority by imposing a sentence in excess of the statutory maximum.

Spears v. Red Lake Band of Chippewa Indians, 363 F.Supp.2d 1176 (D. Minn. 2005) provides a more thorough analysis and is squarely on point. The petitioner in *Spears* was driving while intoxicated when he struck and killed a person. *Spears*, 363 F.Supp. at 1176. He failed to stop, notify the police, or render assistance. *Id.* After being released from a federal prison term for involuntary manslaughter, he was prosecuted in tribal court and plead guilty to six charges arising from the same incident. *Id.* at 1176–77. The tribal court imposed consecutive sentences; the net result was a 30-month sentence. *Id.* at 1177. Spears argued, as does Romero here, that the sentence violated ICRA.

The court in *Spears* found that ICRA's phrase "any one offense" has, in other contexts, been

[7]At the time *Ramos* was decided, the ICRA maximum sentence was six months. *Ramos*, 621 F.Supp. at 970 (citing 25 U.S.C. § 1302(7)).

subject to at least two reasonable interpretations, and is therefore ambiguous. *Id.* at 1178. After reviewing ICRA's history and underlying purposes, the court concluded that in ICRA, the phrase "any one offense" means "a single criminal transaction." *Id.* at 1181. Supporting this conclusion was the conviction that "Congress did not intend to subject tribal court defendants to many years' imprisonment—without any right to publicly funded counsel—under the guise of a statute ostensibly extending the benefits of the United States Constitution." *Id.* The court further reasoned that "separate violations form a single criminal transaction when they are factually and legally intertwined." *Id.* Applying this standard, the court found petitioner's offenses—flight from the scene of the crime, the accident, the DUI, refusal to take a field sobriety test, and the negligent homicide—were factually related and legally intertwined such that they formed a single criminal transaction. *Id.* Accordingly, the 30-month sentence was held to be illegal.

A more recent case also adopted the reasoning of *Spears* and impliedly rejected the reasoning of *Ramos*. *Miranda v. Nielsen*, No. CV-09-8065-PCT-PGR (ECV), 2010 WL 148218 (D. Ariz. Jan 12, 2010). In *Miranda*, the petitioner was convicted of eight counts arising from an incident involving two separate victims. The petitioner chased one victim down the street with a knife. The victim's sister came outside and confronted the petitioner, and the petitioner, who was intoxicated, brandished the knife and threatened the sister as well. *Id.* at *2. The tribal court judge sentenced the petitioner to 910 days of incarceration, with credit for 114 days of time served. *Id.* The petitioner was not represented by counsel at trial.

The petitioner filed a *pro se* petition for habeas corpus relief under ICRA. The court recommended granting the writ, and held:

> In light of the history and purpose behind the passage of ICRA in 1968, the court is convinced that Congress did not intend to allow tribal courts to impose multiple consecutive sentences for criminal violations arising from a single transaction. To hold otherwise would

> expose a tribal court defendant to a lengthy prison term without the protection of representation by counsel and other critical constitutional rights....Therefore, like the *Spears* court, the court here finds that the phrase "any one offense" in § 1302(7) of the ICRA means "a single criminal transaction."

Id. at *5. The court further concluded that since the petitioner had served more than one year of her sentence, she was entitled to immediate release. *Id.* at *1.

In this case, the Pueblo argues that eight consecutive one-year sentences following conviction of twelve offenses does not violate ICRA. [Doc. 11 at 13–20.] In this regard, the Pueblo urges the Court to adopt the reasoning of *Ramos*, and to reject the reasoning of *Spears*. The Court concludes that *Spears* contains the sounder reasoning.

According to the Pueblo, *Spears* is faulty because it mistakenly determined that the term "any one offense" is ambiguous, and that the mistake was compounded when the *Spears* court failed to apply canons of statutory construction that favor Tribes. The Court concludes, however, that the term is ambiguous, and in fact has given rise to controversy and disagreement in other contexts, such as whether criminal conduct constitutes a single offense for purposes of double jeopardy and the right to counsel, and whether several petty offenses should be considered a single serious offense for purposes of the Sixth Amendment right to trial by jury. *See Texas v. Cobb*, 532 U.S. 162 (2001) (right to counsel); *Codispoti v. Pa.*, 418 U.S. 506 (1974) (right to jury trial for petty offenses); *Blockburger v. United States*, 284 U.S. 299 (1932) (double jeopardy).

The Pueblo also relies upon a principle of statutory construction that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1191 (10th Cir. 2002) (quoting *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 506 (1986)). With due regard for the special position Indian tribes occupy in the constitutional order, the Court does not understand this rule of construction to

mean that every ambiguous term must be resolved in favor of the tribe. While Congress "intended ICRA to promote the well-established federal policy of furthering Indian self-government," a central purpose also is to "secure for the American Indian the broad constitutional rights afforded to other Americans." *Santa Clara Pueblo*, 436 U.S. at 61, 62 (citation, brackets, and internal quotation marks omitted). As aptly stated in *Miranda*:

> The circumstances surrounding the passage of the ICRA clearly demonstrate that in return for alleviating the tribes of the burden of extending every federal constitutional right to its members, Congress intended to significantly limit the sentence that a tribal court can impose.

Miranda, 2010 WL 148218 at *5. In the case of ICRA, though the term "any one offense" may be ambiguous, Congress' intent to extend certain constitutional protections to individual tribe members is clear, and it is a policy on near equal footing with the policy promoting tribal sovereignty and self-government.

The Court thus concludes, as did the court in *Spears*, that the term "any one offense" means "a single criminal transaction." The Court now turns to consider whether the twelve counts of conviction in this case constitute a single criminal transaction.

2. Application to the facts of this case

The record reflects that Romero verbally and physically assaulted three female family members, at least one of whom was a juvenile and another who was elderly. He also threatened and confined the victims. During the course of this violent episode, he went on a rampage damaging the house, destroying numerous items of personal property, and ripping out a telephone to prevent the victims from calling for help. After he was arrested for these actions, he threatened the arresting officer, and the officer's family, with violence and death.

The Court concludes these events constitute a single criminal transaction. The separate charges primarily arise from a single episode of domestic violence which—though deplorable and

apparently not the first such incident in Romero's history—nevertheless must be considered a single transaction for the purposes of ICRA's sentencing limitations. The assault on the officer, which occurred upon his arrest for the other crimes, likewise is another facet of the domestic violence event.

Even if the assault on the officer could be considered a separate criminal transaction from the incident occurring inside the home, and thus could support a separate one-year sentence under ICRA, Romero has already served more than two years. According to the Petition, he was taken into custody on February 21, 2008, and has been incarcerated ever since.[8] [Doc. 1, ¶ 5.] Thus, whether these incidents comprise one criminal transaction or two, Romero has been in custody for longer than ICRA permits.

III. RECOMMENDATION

The Court recommends that:

1. the *Petition for Writ of Habeas Corpus Pursuant to 25 U.S.C. § 1303 for Relief from Indian Tribal Court Conviction and Order of Detention* [Doc. 1] be **granted**;
2. the sentence of the Nambé Pueblo Tribal Court be vacated and set aside;
3. the parties be required to advise the Court of the current status and circumstances of Romero's detention so it can be determined if release is appropriate; and
4. the *Motion to Dismiss* [Doc. 11] be denied as moot.

DON J. SVET
United States Magistrate Judge

[8]The Pueblo contends that the correct date is actually February 22, 2008, but otherwise agrees that Romero has been under continuous confinement since February 2008. [Doc. 10, ¶ 5.]

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Lawless lands | The search for solutions

Path to justice unclear

LAST IN A SERIES: Empower the tribes, or beef up the federal role? Each side has its own history of failure.

By Michael Riley, photos by RJ Sangosti
The Denver Post

Posted: 11/14/2007 01:00:00 AM MST

Updated: 11/14/2007 06:09:55 AM MST

hem Ute police Cpl. Richard Aragon hears a woman's complaint that her ex-boyfriend e and choked her. Aragon is part of a new program in Colorado that gives tribal police des more jurisdictional flexibility. (Post / RJ Sangosti)

BROWNING, MONT. — On a bitter February morning four years ago, a well-armed federal SWAT team rolled across the cheat-grass prairie of Montana's Blackfeet reservation on a mission to re-establish order in a lawless land.

They started by firing the entire tribal-run police force - such as it was. In truth, the tribe's slipshod police had long ago ceased to be much of a deterrent. Serious crimes routinely went uninvestigated. In one notorious incident, a prisoner released from jail unsupervised to go to an Alcoholics Anonymous meeting instead went to the house of a former girlfriend, where he beat and raped her.

Promising to hire more officers, modernize the jail and enforce the rule of law, the takeover of police powers by the federal Bureau of Indian Affairs was cheered by many residents on this 1-million-acre reservation.

Indian Justice

- Watch video and see photos that detail the justice crisis that plagues Native American reservations in the United States.
- Discuss the felony-prosecution law on Indian reservations. What's wrong with the justice system, and how can it be fixed?

Fast forward four years and many of those

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residents say the situation has, if anything, gotten worse. Under federal control, a promised force of 32 uniformed officers has fallen to just 12. The jail is still a mess. Nearly 200 criminal charges were dismissed from tribal court last year because federal police never finished an arrest report.

For anyone looking for a comprehensive solution to the public-safety crisis plaguing the country's Indian reservations, the episode is telling.

To those who complain that federal authorities do a poor job and that tribes should run their own full- fledged justice systems like cities or states, skeptics can point to examples of incompetent tribal police forces or meddling by tribal leaders in the affairs of their courts and cops.

Men who were picked up by Navajo police in Chinle, Ariz., wait under a tent to be loaded into a van headed to jail. They must wait for at least eight people to fill the van before it leaves for another town that has enough jail space to house them. (Post / RJ Sangosti)

To those who argue that only the feds have the resources and expertise to solve the enormous public- safety crisis in Indian Country, there is a long history of underfunding, lack of attention and the federal government's own stunning failures.

So those are the horns of the dilemma: There is little doubt that the current system, which severely limits the law-enforcement powers of American Indians on their own land and makes the federal government solely responsible for prosecuting felony crime on reservations, is badly flawed. Tribes have been complaining about it for years. And many in the federal government, including key Washington lawmakers, agree it doesn't work.

"I think what's going on is appalling. ... The option of doing nothing is not an option. We have to solve this problem," said Sen. Byron Dergan, a North Dakota Democrat and chairman of the Senate Indian Affairs Committee.

Two popular paths considered

But finding a way to do that is another matter.

Most agree it means one of two paths. Either pour in significant new federal resources to better fight reservation crime or rewrite federal Indian law to give tribes more authority to do the job themselves - allowing them to prosecute felony crime, for one; giving them jurisdiction

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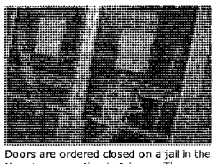
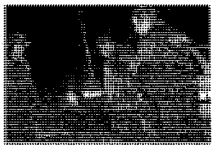
over non-Indians, for another.



Doors are ordered closed on a jail in the Navajo reservation in Arizona. The reservation is having a difficult time keeping up with the amount of crime and up-keep of jails. This facility was deemed too run-down to be used. (Post / RJ Sangosti)



Southern Ute police Cpl. Richard Aragon, left, helps a county sheriff's deputy arrest a man on suspicion of DUI after he crashed his truck on the reservation. Aragon is part of a cross-deputization program that was started recently on the southwestern Colorado reservation. (Post / RJ Sangosti)

The first would mean diverting Justice Department resources from high-priority efforts such as anti-terrorism to vast and isolated Indian reservations with stunning crime problems but few voters. The second would be costly, legally complex and politically dicey.

For as bad as the status quo is, any comprehensive solution that enhances the legal authority of tribes holds risks for leaders on both sides.

Lawmakers from Western states face strong pressures from white communities that border reservations not to cede jurisdiction over their residents even on tribal land. And tribal governments' own spotty record in exercising the limited authority they have gives plenty of others pause.

In one case in New Mexico three years ago, the tribal chairwoman of the Jicarilla (hick-a-ree-ya) Apache asked for federal help to investigate corruption in the tribe's police force - including accusations of sexual assault against female prisoners - and was summarily fired by her own tribal council. In another in Washington state, the governing council of the Spokane tribe

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responded to claims by a federal investigator that he had uncovered a web of tribal police

Aragon fills out a report during a patrol for the Southern Ute police. Under a program begun in Colorado in February, tribal police now can arrest non-Indians committing crimes on Indian land. Also, sheriff's deputies and state troopers can now act as backup for tribal cops on reservations and make felony arrests. (Post / RJ Sangosti)

corruption by demanding he be transferred. The agent's bosses in Washington complied.

For their part, many tribal officials aren't eager to trade the political points easily made decrying lousy federal law enforcement for the massive task of fixing the crime problem on reservations themselves.

"It's beautiful to have someone else to blame, but tribes don't necessarily want to take it on themselves," said Kevin Washburn, a Minnesota law professor and a member of the Oklahoma Chickasaw, who advocates giving tribes more criminal jurisdiction.

"I've thought that here I am, saying what I think is all these important things about Indian Country criminal justice, and people are going to rally behind everything I say. And that hasn't necessarily happened."

As those forces have slowed reform, the result has been a peculiar Washington ritual: At least once a decade for the past 30 years, a blue-ribbon commission or congressional hearings cite the breakdown of public safety on reservations, without being able to muster the political momentum necessary to solve it.

There has been some progress. Since a Clinton administration task force cited a "public safety crisis in Indian Country" in 1997, Congress has steadily increased funding for Bureau of Indian Affairs law enforcement programs through the Department of the Interior, more than doubling it to $201 million over 10 years. That money pays for patrol officers and tribal police investigators on most reservations.

But staffs were so low to begin with that a 2006 BIA analysis found that the number of police officers protecting reservations is still 42 percent below the minimum necessary.

New lines of authority proposed

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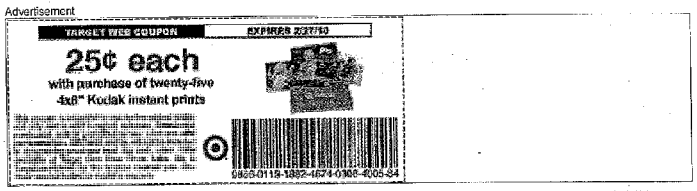

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Now, advocates for comprehensive reform believe there is a new window of opportunity. An Amnesty International report earlier this year blamed the jurisdictional maze for high rates of domestic violence and rape suffered by American Indian women. Spurred by the report, lawmakers on the Senate Indian Affairs Committee are preparing a bipartisan reform bill they hope will finally rein in the public-safety crisis roiling Indian lands.

If passed, it would reshape lines of authority on reservations for the first time in decades, giving Indians some law enforcement authority over non-Indians accused of sexual or domestic crimes on tribal lands - a major complaint of some tribes today.

"To the extent that the federal government is willing to return jurisdiction over non-Indians to Indian tribes right now, it may be because they know they're doing a bad job and are tired of getting yelled at," said Virginia Davis of the National Congress of American Indians (NCAI), a lobbying group for the tribes in Washington.

Some longtime observers are skeptical.

Ted Quasula, former Bureau of Indian Affairs law enforcement chief, was part of the previous reform effort during the Clinton administration. He remembers sitting in the same hearings a decade ago, dissecting the same problems.

The result was an administration proposal to double Justice Department funding for reservation law enforcement programs - the biggest increase in history and one that would have hired 500 more tribal police officers, 30 more FBI agents and 33 new federal prosecutors who focus solely on reservation crime.

Congress funded just 60 percent of the request in the first year. Some of the prosecutors ended up being used for other priorities, insiders say, and the number of dedicated Indian Country FBI agents has increased by just 12. Despite millions of dollars spent to build new tribal prisons, the unmet need is still $400 million, a recent analysis found.

And this year, none of four major Justice Department grant programs directed at reservations - money for prisons, police, tribal courts and youth crime prevention - are funded in President Bush's 2008 budget request. (Though Congress has restored a portion of the the programs' combined total budget of $42 million, that appropriations bill faces a veto threat.)

"For a lot of (lawmakers), it's out of sight, out of mind - it's-not-my-problem sort of thing," said Sen. John Thune, the South Dakota Republican who recently offered an amendment to provide $20 million to U.S. attorneys to boost reservation prosecutions. The amendment failed in a vote.

"I'm not saying people just tune it out. There just isn't a groundswell out there," he said.

Still, Thune believes that the problems are desperate and getting worse.

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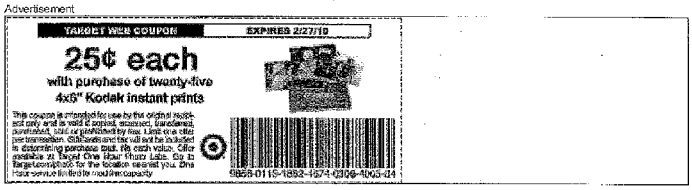

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The rich profits from casino gambling that have poured in for some tribes over the past 10 years have created a Native American renaissance of sorts, but there are other forces - just as powerful - pulling the other way.

Meth - a scourge in much of the rural West - has hit reservations especially hard, feeding a wave of crime and violence that's shaken some tribes to the bone. American Indian gangs are also on the rise.

Statistics from the Indian Health Service in 2003, the latest available, show that the chances of an Indian living on a reservation being murdered is more than double that of the average American. An adult male on the Pine Ridge reservation in South Dakota can expect to live to just 57 years old - 17 years less than the national average.

So distant from the political calculations of Washington, tribal and federal law enforcement officials are taking things into their own hands: Small, sometimes desperate steps, those involved point out, but better than nothing.

Members of the Lummi tribe in Washington state recently burned the house of drug dealer to the ground, a ritual act of communal justice.

Many others - the San Juan Pueblo in New Mexico, the Turtle Mountain Chippewa in North Dakota and the Eastern Cherokee in North Carolina among them - have aggressively revived the practice of banishment - forbidding tribal members or non-Indians who have broken certain laws from entering the reservation. It's a civil process not limited by the restrictions on tribal criminal courts.

Different view in Colorado

Ultimately, Colorado's top federal law-enforcement officer says, the only real solution is something much more sweeping. Troy Eid, Colorado's U.S. attorney, has turned into one of the Justice Department's most vocal advocates for jettisoning much of its current role on reservations.

It's more simple than it sounds, he says. Eid has called for transferring to American Indian tribes wholesale authority for prosecuting felony crime over all suspects, Indian and non-Indian alike.

The system he envisions would be optional. Those tribes that wanted the responsibility would opt in. And in exchange, the tribes would have to upgrade their legal codes and judicial systems, agreeing to meet strict benchmarks designed to guarantee individual rights.

"I look at this issue something like the reunification of Germany," Eid said. "They used to say it was absolutely impossible for East Germany to come back into the West without massive dislocation and unthinkable cost. But you know, it's been done."

The scale of the job implied by the metaphor may be closer to the mark than Eid intends: Many

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tribal judges and prosecutors now at work don't have law degrees. Tribal legal codes are often out of date or incomplete. Suspects on most reservations have a right to a defense attorney only if they can pay for one.

Federal prosecutors quietly concede that weak cases that should fall under their jurisdiction are routinely sent instead through tribal court, where guilty verdicts are easier to obtain.

"The tribal council appoints the judges and the courts, and they don't have to have experience in legal matters. And as appointees, there is political sway there. Those are all problems," said Thune, who as a South Dakota senator represents not only some of the country's largest reservations but also many adjacent communities worried about the vagaries of tribal justice.

And then there is the question of who would pay for it.

Davis, the NCAI lobbyist, said that as much as tribes want the kind of law enforcement powers that cities and states have, running those systems is incredibly expensive. Police forces and courts would have to be overhauled. And hundreds of millions of dollars in new prisons would have to be built.

The tribes that need it the most don't have the money. Many that do believe that paying the cost is part of the trust responsibility the federal government assumed when it took Indian lands.

"Of course they're not going to pay for it," said Philip S. Deloria, director of the American Indian Law Center in Albuquerque and a member of the Standing Rock Sioux. "It may be a mandate that the Indians have been begging for, but no matter. There's your headline. 'Inconsistency discovered in Indian position,' a brand- new thing in politics."

More important, Deloria said, even with significant federal help there are only a handful of tribes that could ever muster the resources and expertise to handle felony crime. While it's a great applause line, he says, significantly expanding American Indian law enforcement authority would most likely leave the problem on most reservations untouched.

"What most people overlook is that 70 percent of tribes are 1,000 people or fewer. We're not talking about the Navajo police system, where they can afford undercover officers," he said. "We're talking about Andy and Barney. You give Andy and Barney felony jurisdiction over everyone in Mayberry, and what are they going to do?"

Small steps in Senate bill

The Indian Affairs Committee in the U.S. Senate is currently drawing up a bill that takes a different approach: Combining limited expansion in tribal jurisdiction with an effort to push the feds to be more effective at pursing Indian Country crime.

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Politically more viable - in part because it is less sweeping - that approach largely has the support of the NCAI, the tribes' primary lobbying group in Washington.

But even supporters concede that it represents a series of small steps in the face of what is admittedly a problem of staggering dimensions.

Jurisdictionally, a pilot program would expand the power of tribes to include misdemeanor criminal authority over non-Indians who commit domestic or sexual violence on reservation lands, an early summary of the bill indicates.

Tribes would gain no jurisdiction over felony crime. And a non-Indian convicted of rape could serve at most a year in tribal jails. But supporters say it would give tribes a powerful tool to address at least one chronic problem: domestic violence committed by non-Indians who live on reservations.

On the federal side, the bill would create a series of benchmarks against which the performance of federal investigators and prosecutors responsible for the most serious reservation crime could be judged. And tribal prosecutors could be appointed as special assistant U.S. attorneys, allowing them to bring reservation cases in federal court.

"This is a really complicated system and there are a whole lot of different approaches you could take to fixing it, and our hope is that if you do enough of those at the same time, it will make a meaningful difference," the NCAI's Davis said.

But even the political prospects of that effort are uncertain. Any expansion of tribal authority over non-Indians is likely to be a tough sell in the Senate, and an early, more expansive jurisdictional proposal has been whittled to a pilot program.

"The only chance I've got to pass legislation is if I can put legislation together that has pretty broad support," said Dorgan, who expects a bill to be ready by February.

And while the bill could reauthorize and even increase the budgets for dozens of programs meant to bolster reservation law enforcement, that's no guarantee the money will ever leave federal coffers. Longtime observers point out that many of the best efforts in the past were authorized but never fully funded, habitual losers in Congress' Byzantine appropriations process.

Ben Nighthorse Campbell, Colorado's former senator, views those failures with the cynical eye of a lawmaker who, on this issue at least, was often on the losing side.

As the former head of the Senate Indian Affairs Committee, Campbell said he spent endless hours talking and negotiating with his fellow senators over the problem of public safety on tribal lands. He tried for years to strengthen the authority of tribal courts, always without luck.

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"I tried over and over," Campbell said. "But it goes back to old prejudices. 'I don't trust those Indians. I'm not going to let *them* try me.'

"There is still a lot of latent prejudice out there just under the surface," he said. "I think it prevents any meaningful change."

Always "a niche issue"

Doris Meissner, who was part of a Ford administration effort to examine the Justice Department's enforcement role on reservations long before she gained prominence as Bill Clinton's immigration chief, insists you don't need racism to explain the failures. You only need the tried-and-true math of power politics.

After months spent touring reservations, listening to the complaints of tribal authorities and crime victims, that effort in the 1970s ended with only minimal tinkering, none of it focused on the problem of criminal enforcement. The only significant change was a new section in the Justice Department to represent tribes' interest in civil litigation.

"We talked to a lot of people about the criminal side," Meissner said, "and we discussed it in our report in exactly the same way people are talking now: There are insufficient resources available from the community itself; the FBI has lots of other demands on its time; it's not a priority for the U.S. attorneys."

But "we are a system where those voices that can be backed up by votes at the ballot box are going to be the ones that prevail, and that's never been the case with Native Americans."

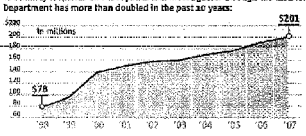
"It's a little along the lines of trying to get the vote for (Washington) D.C.," she said. "No matter how compelling it is, it always ends up being a niche issue."

Michael Riley: 303-954-1614 or mriley@denverpost.com

Indian Country law enforcement

Congress spends millions of dollars on Indian Country law enforcement every year, but while substantially increasing some programs in recent years, it has cut others.

The money it spends on tribal police and investigators through the Interior Department has more than doubled in the past 10 years:



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lawless lands | first in a series

Promises, justice broken

A dysfunctional system lets serious reservation crimes go unpunished and puts Indians at risk.

By Michael Riley
The Denver Post

Posted: 11/11/2007 01:00:00 AM MST

Updated: 11/21/2007 04:00:44 PM MST

Senior Prosecutor Vernon Roanhorse looks through files at his office in Tohajiilee, New Mexico on the Navajo reservation. (Post / RJ Sangosti)

In the stacks of thick folders that cover Jonnie Bray's desk, there are tales of monsters.

The one in her hand starts on a winter night in 2003, when Ronnie Tom tries to rape the 12-year-old sister of his live-in girlfriend on the Colville Indian Reservation in eastern Washington. When she manages to escape, he moves on to his girlfriend's 7-year-old daughter who is nearby, and here he succeeds.

Bray, a Colville Indian and one of the tribe's prosecutors, said an expert forensics interviewer found the 7-year-old's testimony recounting the rape clear and credible. And a sexual-predator profile of Tom warned that he should never be allowed to be alone with children, including his own, or live "near places designed for children, such as schools, playgrounds (or) swimming pools."

Indian Justice

- Watch video and see photos that detail the justice crisis that plagues Native American reservations in the United States.
- Discuss the felony-prosecution law on Indian reservations. What's wrong with the justice system, and how can it be fixed?

But Tom was never charged with a felony crime. That's because here, as on the majority of the country's nearly 300 Indian reservations, the sole authority to prosecute felony crime lies with the federal government. One hundred fifty miles away in Spokane, an assistant U.S. attorney -

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faced with a distant case and a 7-year-old witness - simply declined to prosecute, something that crime data show they do in 65 percent of all reservation cases.

Now Ronnie Tom is out of jail, freed after serving less than two years on the equivalent of misdemeanor charges Bray cobbled together in tribal court, including a separate incident involving the 12-year-old discovered later. Bray said he is again living with his girlfriend and their new child - a girl.

"He is a danger to our community and to any community," Bray said. "I was just disgusted. I don't think I've ever spoken to that U.S. attorney again."

Already some of the most violent and impoverished places in America, facing a steep rise in meth-fueled crime, the country's Indian reservations are also plagued by a systematic breakdown in the delivery of justice, a six-month investigation by The Denver Post found.

Ben Francisco, right, with his wife talks about the day he was assaulted in Tohajiiee, New Mexico on the Navajo Reservation. (Post / RJ Sangosti)

U.S. attorneys and FBI investigators face huge challenges fighting crime on reservations: They a re viewed as outsiders who shouldn't be trusted; locations are remote; the high levels of alcohol use among victims, suspects and witnesses that accompany many serious crimes can also make them very difficult to prove, several U.S. attorneys said.

"We have the obligation before proceeding to a grand jury to make sure we have a prosecutable case," said James A. McDevitt, the U.S. attorney for the Eastern District of Washington, who said he could speak only generally and couldn't comment on why his assistants rejected the Tom case. "We're not in the business of taking cases we're going to lose."

But the system is also badly dysfunctional, insiders say, burdened by competing federal priorities such as immigration and terrorism and undermined by institutional resistance to using the high-powered federal judicial machine to prosecute run-of-the-mill violent crime.

"I've had (assistant U.S. attorneys) look right at me and say, 'I did not sign up for this,'" said Margaret Chiara, who until March was the U.S. attorney for western Michigan, with jurisdiction over several reservations. "They want to do big drug cases, white-collar crime and conspiracy.

"And I'll tell you, the vast majority of the judges feel the same way. They will look at these Indian Country cases and say, 'What is this doing here? I could have stayed in state court if I wanted this stuff,'" she said.

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A 12-year-old victim of sexual molestation looks out the front door of her family's home in To'hajillee, N.M., on the Navajo reservation. She told police in October 2006 that she had been molested numerous times while babysitting for a neighbor. After nearly a year of apparent inaction on the case by federal authorities, her mother moved her family off the reservation in September. (Post / RJ Sangosti)

"It's a terrible indifference, which is dangerous because lives are involved."

Most cases rejected

A review by The Post of dozens of criminal cases on more than 20 reservations substantiates widely held concerns among American Indians that the system as it now stands functions poorly, including investigations that are chronically delayed or dropped, and serious crimes never prosecuted as felonies.

On the Fort Peck reservation in Montana, a man recently assaulted his girlfriend and broke her jaw, a result that didn't count as "serious bodily injury," according to the U.S. attorney, who therefore declined the case. According to the tribal prosecutor, who was forced to charge the suspect in tribal court, the same man has since committed several other crimes, "literally wreaking havoc here," she said.

On the Blackfeet reservation on a remote stretch of the Canadian border, a 41-year-old mentally handicapped woman named Maria Kennerly allegedly was raped by a neighbor more than a year ago. With no word yet on the progress of the investigation and with the neighbor still living next door, Kennerly's mother said she now keeps her daughter under constant supervision, virtually a prisoner in her own home.

And on the Navajo reservation in Arizona, federal prosecutors recently declined to prosecute the rape and incest case of a man who had sex with his 23-year-old daughter after she had passed out following a family party. The federal prosecutor cited lack of a viable DNA sample on the condom used by the father, Larry Nez. Faced with the testimony of the victim, Nez pleaded guilty in tribal court but served just 60 days in a Navajo jail.

With prosecutors and investigators exercising wide discretion, the effectiveness of justice on reservations varies widely, swayed by personal

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relationships, the commitment of individual agents or prosecutors, even such vagaries as distance. A General Accounting Office report in the 1980s found that the farther a reservation was from an FBI field office, the higher the percentage of felony prosecutions that were declined.

The sometimes inconsistent politics of tribal sovereignty haven't helped, some American Indians concede. A decades-long effort to shift more police powers to the tribes hasn't necessarily been matched by tribal governments' willingness to fully pay for and professionalize those ranks. A primary reason so many cases are rejected, federal prosecutors complain, is botched crime scenes or poorly prepared cases by tribal investigators who aid the FBI.

"It has been too easy for everybody to fall into role- playing on the federal part of it," said Philip S. Deloria, director of the American Indian L aw Center in Albuquerque and a member of the Standing Rock Sioux. "The FBI doesn't care. The U.S. attorneys are unfeeling. And so the Indians pay the price.

"That's not entirely untrue," he said, "but it's not as exhaustive an explanation as it might seem."

Deep sense of anger

But taken together, data and interviews from reservations across the country show vast gaps in justice in Indian Country that have spawned a deeply felt rage over what is seen as the latest in the federal government's string of failures concerning American Indians.

"They've created a lawless land," Vernon Roanhorse, a Navajo tribal prosecutor, said of the federal justice system.

Among The Post's findings:

Between 1997 and 2006, federal prosecutors rejected nearly two-thirds of the reservation cases brought to them by FBI and Bureau of Indian Affairs investigators, more than twice the rejection rate for all federally prosecuted crime. As prosecutors and investigators triage scarce resources or focus on new priorities such as terrorism, hundreds of serious cases of aggravated assault, rape and child sexual abuse occurring on reservations are sent instead through tribal misdemeanor courts.

Investigative resources are spread so thin that federal agents are forced to focus only on the highest-priority felonies while letting the investigation of some serious crime languish for years. Long delays in investigations without arrest leave child sexual assault victims vulnerable or suspects free to commit other crimes, including, in two cases The Post found, homicide.

With overwhelmed federal agents unable to complete thousands of investigations or supplement those done by poorly trained tribal police, many low-priority felonies never make it to federal prosecutors in the first place. Of the

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nearly 5,900 aggravated assaults reported on reservations in fiscal year 2006, only 558 were referred to federal prosecutors, who declined to prosecute 320 of them, according to data from the Interior Department and the Transactional Records Access Clearinghouse, or TRAC, at Syracuse University. Of more than 1,000 arson complaints reported last year on Indian reservations, 24 were referred to U.S. attorneys, who declined to prosecute 18 of them.

After decades of complaints, Congress has doubled the amount of money allocated to the Bureau of Indian Affairs for tribal police. But that increase - to $200 million this year - has been largely spent on patrol officers and chasing misdemeanor crimes. Federal investigators and prosecutors have also received sizable boosts in their budgets for work in Indian Country, but those increases have failed to produce a perceptible rise in the number of investigations or prosecutions from reservations.

While some tribal authorities are demanding stepped-up federal enforcement, the debate over sovereignty has complicated a unified cry for reform. Efforts in the 1990s to increase federal agents assigned to Indian Country or place more federal magistrate judges there were opposed by some tribes because they enhanced federal power. And any effort to give tribes more authority over felony crimes would have to be optional, Indian Country experts say, because some tribes - whose resources and commitment to law enforcement vary - wouldn't be willing to pay for it.

Low expectations

Of the many costs of those failures, the worst may be this: Many people on reservations no longer expect justice.

Anna Yellow Owl, a slight 39-year-old woman who lives on Montana's Blackfeet reservation, was trying to protect her 18-year-old son from an angry neighbor three years ago when the man struck her in the face, causing partial loss of use of one eye, surgery and permanent disfigurement.

"Every morning when I'd get up, every time I'd wash my hands, I'd look in the mirror and see my face.

"I know what I used to look like," Yellow Owl said. "I was so angry."

But while the attack took place in midafternoon in front of 14 witnesses, it took nearly two years - until early 2006 - for the FBI to complete its investigation and for the U.S. attorney to decide to prosecute the case. Having recently lost a daughter in an auto accident, Yellow Owl told the FBI agent who finally called that it was too late; she no longer wanted to pursue the matter.

"If they had only acted right away," she said.

"As a woman on a reservation, I've always been treated as a second-class citizen, and I've gotten used to it. I try not to let it get me upset. But justice doesn't happen here."

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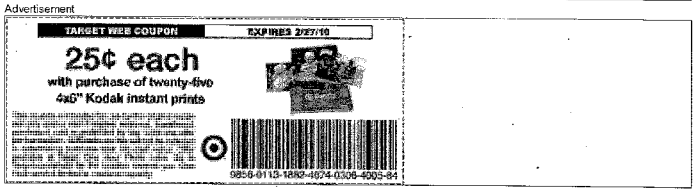

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It's a despair that echoes through Indian Country.

On the Crow reservation in Montana, a 6-year-old girl allegedly was sexually assaulted by a family member, but according to the tribal prosecutor, the case is still under investigation by the FBI nearly three years later. Frustrated by the delay, the Crow prosecutor recently filed charges in tribal misdemeanor court, only to realize that the delay in the case put it beyond the tribe's statute of limitations.

On South Dakota's Cheyenne River reservation, three men broke into a house, stealing several thousand dollars' worth of property. When tribal detectives failed to investigate thoroughly, the victim spent weeks collecting evidence himself. Based on that investigation, the U.S. attorney filed an indictment, and all three pleaded guilty to burglary, the tribe's prosecutor said. It turned out that a key piece of evidence - a plate covered with the thieves' fingerprints and which tribal detectives swore they had sent to a forensics lab - was found months later in the tribe's evidence room.

Straddling old and new

Few places show the system's breakdown so readily as the collection of towns and remote villages tucked in the folds of the country's largest reservation - the land of the Diné, the Children of God, as the Navajo call themselves.

Navajo society straddles both old and new: The tribe has one of Indian Country's most advanced judicial systems but one of its worst prison systems. Women adorned in sweeping traditional skirts swish through the doors at Wendy's, their faces deeply creased by the desert sun.

A small offshoot set away from the main reservation, the enclave of To'hajiilee (pronounced Toe-hajee-lay) just west of Albuquerque is in many ways typical. At the end of 5 miles of deteriorating road, it dissolves into clusters of villages organized along clan lines and fiercely private.

But the peaceful veneer is deceptive. Alcoholism and drug use are chronic, and from that stems crime that is at once brutal and intimate - often committed by family members, but certainly among people who know each other: Rape. Bloody beatings. The physical and sexual assault of children.

Trying to trace what happens once those crimes are reported is difficult, even for Vernon Roanhorse, To'hajiilee's veteran tribal prosecutor, whose frustration is evident as he flips through a tall stack of recent case files.

Pulling out a blue folder, Roanhorse scans the case of a 4-year-old girl who doctors at a tribal clinic suspect had been molested by her father. Following tribal protocol, they contacted authorities in March 2006, when the girl was brought to the hospital, but neither the Navajo police nor the FBI seems to have investigated the report, and the case remains in limbo, he said.

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Grabbing another folder, this one red, Roanhorse scans the file of Ben Francisco. The 45-year-old Navajo man was driving a truck on a muddy road in January 2007 when he slid into another car. The two men inside pulled him from the cab, beating him with a bat so badly that he had to be flown by helicopter to an Albuquerque hospital, where a metal plate was put in his cheek. In seven months, the FBI had never interviewed Francisco, the victim said, and no arrests had been made, though both suspects had been identified.

The FBI office in Albuquerque declined to comment on any Indian Country cases in New Mexico, either closed or ongoing. Capt. Robert Platero, the Navajo head of criminal investigations for the area that includes To'hajiilee, said the FBI is notified of cases his investigators are working on through weekly reports, cooperating with his agents on those most likely to go before federal prosecutors.

But in many cases, the reality is less smooth - and highlights a badly fragmented system in which neither the tribe nor the FBI takes responsibility for ensuring that serious crime is fully investigated.

To begin with, Roanhorse said, the Navajo tribe's own investigator assigned to the community works out of his home 30 minutes away in Albuquerque. On one Tuesday this summer, his office mailbox was full, and the last time Roanhorse or any of his staff had seen him in the office was two months before.

Division of duties

In the case of child sexual assault - to take the example of one crime that seems to plague this reservation - tribal and federal investigators divide the cases by a rough rule of thumb: Federal investigators usually take the lead when the victim is 9 or younger, authorities say; tribal investigators take the lead with older victims. But federal prosecutors often decline those cases precisely because the victim has been interviewed too many times or by investigators who aren't specially trained to handle child sexual assault - as few Navajo investigators are.

One of the files on Roanhorse's desk is for Kim Platero's 12-year-old daughter, who reported to police in October 2006 that she had been sexually molested more than a dozen times by a neighbor beginning at the age of 11.

Over the past year, as the investigation languished, Platero (who is no relation to the Navajo investigator) said her daughter spent most of her time cooped up in a small bedroom, the suspect's house clearly visible through a curtained window. Her sleep habits changed, and her daughter's personality, once outgoing, became dark.

In such a tight-knit community, it's difficult to step forward. But Platero's experience as a sexual assault counselor convinced her it was important.

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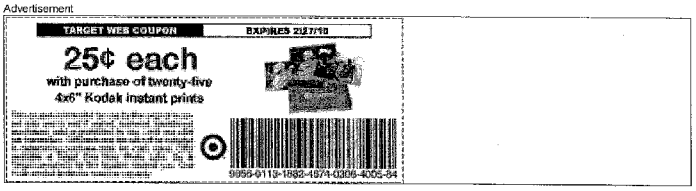

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Platero's daughter told a tribal investigator that she was molested several times while babysitting, the neighbor escalating contact over a period of months. He once lay on top of her and masturbated, the child told police. Another time, he allegedly reached beneath her underpants to touch her vaginal area.

Roanhorse said the FBI apparently is aware of the case but in nearly a year had never contacted Platero, followed up on the tribal police's initial interview of her daughter or, as far as the mother can tell, talked to the suspect, a distant family relative.

The tribe's social services department recently lost the only caseworker who served To'hajiilee. The U.S. attorney's office in Albuquerque wouldn't confirm whether it knew of the case or the status of any federal investigation.

Even if Roanhorse wanted to take the case through misdemeanor tribal court, it hardly merits the effort. Navajo jails are so crowded that the community of To'hajiilee is allocated space for just one prisoner at a time, creating what amounts to a revolving jailhouse door.

To Platero, who occasionally calls authorities for an update, always without luck, it shows how a system with overlapping opportunities for intervention can also fail multiple times.

When two strangers came to the door in July, Platero said her daughter "was really excited because she thought (they) were the FBI," only to be disappointed by a pair of journalists.

Tired of waiting and worried about her daughter's deteriorating emotional state, Platero finally moved off the reservation in September, convinced it was the only way to protect her family.

"It's hard for me to explain to her why nothing is happening," Platero said.

"If this had happened in Albuquerque, something would have been done."

Staff researchers Barbara Hudson and Barry Osborne contributed to this report. Michael Riley: 303-954-1614 or mriley@denverpost.com

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denver and the west

Obama to address breakdown of reservation justice

U.S. vows to address Indian Country crime, but doubters see nothing new

By Michael Riley
The Denver Post

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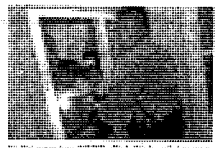

In Farmington, N.M., Capt. Richard Arragon of the Southern Ute police department answers a complaint. (RJ Sangosti, The Denver Post)

WASHINGTON — The Obama administration is vowing to address rising crime and the breakdown of justice on Indian reservations across the West, planning to roll out a series of initiatives this year to address what officials concede is a mounting crisis.

The package will be designed in consultation with tribal leaders in the coming months and presented at a final "listening session" in the fall a ttended by representatives from hundreds of tribes and led by Attorney General Eric Holder.

It's an effort to address spiraling rates of vio! ent reservation crime, including rape, child sexual assault, domestic assault and beatings — as well as a net of underlying causes, from insufficient prison space to neglect by federal investigators and prosecutors.

"We envision this tribal nations listening conference to be really about bringing a true action agenda," said Associate Attorney General Tom Perrelli, the Justice Department's third in command.

Comparing it to a similar initiative under the Clinton administration, Perrelli said the agenda might include "a very significant request for additional resources. We're not at that point yet, but we hope soon to know what it is we're going to ask for."

But in addressing Indian Country crime, an administration that already plans to tackle some of the country's most vexing policy problems has taken on another — a breakdown in public safety complicated by jurisdictional oddities, insufficient resources and thorny politics.

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Already, its early efforts are being criticized by some federal lawmakers and advocates, who fear the new administration is making some of the same mistakes as its predecessors.

Carter-era tactic

Perrelli faced skepticism from listeners at a National Congress of American Indians in Niagara Falls, N.Y., recently, several of whom pressed for specific action rather than another "listening session," a tactic tried by administrations going back to Jimmy Carter.

And at a Senate hearing June 25, Perrelli announced that the administration would oppose a provision in a Senate bill requiring the public release of statistics on reservation prosecutions by the Department of Justice, which is responsible by law for all serious Indian Country crimes but routinely declines to take those cases.

The release of those statistics — known as declinations — has been a high priority for policymakers and advocates, who say it would pressure federal prosecutors to take more cases and help end the growing sense of lawlessness on reservations.

"I'm never sympathetic to the argument that less information is a good thing," said former Colorado U.S. Attorney Troy Eid, a Bush appointee who has pushed for more vigorous prosecution of Indian Country cases and who also testified at the June Senate hearing.

Eid said that after the hearing, he met with several tribal leaders in Arizona and the Four Corners areas, and they "were stunned and disappointed by Perrelli's testimony."

"There was shock because the talking points weren't any different (from the Bush administration) and in fact it was worse, because the expectations were higher," Eid said.

Crisis building

The public-safety crisis for American Indians has been brewing for years, but many tribal leaders say it is getting worse as drugs and violence sweep across often isolated and impoverished Indian lands across the West.

At a Senate hearing Wednesday in North Dakota, the chairman of the Standing Rock Sioux, Ron His Horse Is Thunder, said that there had been nine suicides and 50 attempted suicides in the small villages of the reservation since January, a phenomenon he linked directly to rising crime and hopelessness.

Although the Bureau of Indian Affairs added 12 positions to the tribe's police force — doubling the size — none of those positions has been filled.

"There hasn't been an assistant secretary for the Bureau of Indian Affairs for four years, so there is a lot to be done," said Interior Department

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spokeswoman Kendra Barkoff, when asked about the unfilled positions.

"We're coming up with ideas as fast as we can so we can implement them as fast as we can," she said.

But Sen. John Thune, a South Dakota Republican and member of the Senate Indian Affairs Committee, cited several instances of mixed signals by the Obama administration when it came to fighting reservation crime, including the administration's failure to fund in its 2010 budget an amendment passed last year devoting $750 million to do just that.

"My impression is that the administration is grappling with so many issues right now that this is something that may be falling through the cracks," Thune said.

"But I hope they decide to do something about this, because there is this pattern that has gone on from one administration to the next of benign neglect," he said.

"Many of these reservations are in parts of the country that are not visible, they don't have a powerful lobby in Washington, so conditions just continue to deteriorate and get worse."

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lawless lands | third in a series

Principles, politics collide

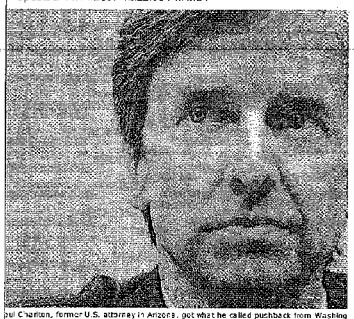
Some U.S. attorneys who emphasize fighting crime on Indian lands have seen themselves fall out of favor in D.C.

By Michael Riley
The Denver Post

Posted: 11/13/2007 01:00:00 AM MST

Updated: 11/14/2007 12:22:03 PM MST

As U.S. attorney for western Michigan, Margaret Chiara, right, made violent reservation crime a priority but said a bureaucratic culture resisted her efforts. She was one of eight U.S. attorneys whose firings sparked a Capitol Hill uproar. (Grand Rapids Press / Kary Batdorff)



Paul Charlton, former U.S. attorney in Arizona, got what he called pushback from Washington over his efforts to fight crime on the state's reservations. He was one of eight U.S. attorneys fired by Washington earlier this year. (AP file)

Grasping for a way to explain the breakdown of justice on America's Indian reservations and the role of the Justice Department in that failure, Paul Charlton, the former U.S. attorney in Arizona and a Bush appointee, picks this moment:

Talking with superiors about a gruesome double murder on the Navajo reservation, Charlton was stopped midsentence and asked by a high-level Justice Department official why he was involved in a case on the reservation in the first place.

To Charlton, it was suddenly clear that the official didn't understand the most basic aspect of federal Indian law — that on most reservations, U.S. attorneys are the sole

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authority empowered to prosecute felony crime there.

"If the first question is 'Why are you even prosecuting this case?' you're starting far, far behind," Charlton said.

Indian Justice

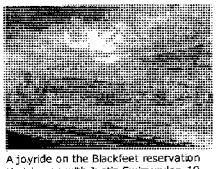
- Watch video and see photos that detail the justice crisis that plagues Native American reservations in the United States.
- Discuss the felony-prosecution law on Indian reservations. What's wrong with the justice system, and how can it be fixed?

Within two years, Charlton was out of a job, fired for what a Justice Department memo described as "insubordination," but better known as one of the eight U.S. attorneys dismissed in the political scandal that roiled Washington early this year.

Widely respected as an aggressive prosecutor with a lauded record, Charlton was part of a small cadre of Bush appointees who fought what they say was a losing battle to convince the administration of the importance of stepping up federal efforts to fight reservation crime.

That battle, which played out over several years and provides a rare look into internal Justice Department debates over its role in Indian Country, is now mostly over, several participants say, culminating with the dismissal or resignation of some of the most committed prosecutors in the past two years.

Of the eight fired U.S. attorneys, five had played leadership roles pushing for aggressive Indian Country prosecutions or systemic reform — Charlton, David Iglesias of New Mexico, Margaret Chiara of western Michigan, Daniel Bogden of Nevada and John McKay of western Washington, according to testimony before the



A joyride on the Blackfeet reservation that began with Justin Swimunder, 19, buying a case of beer ended several hours later with the car seized by police in nearby Cut Bank, Mont. Drug and alcohol use not only fuels crime but also can be a real problem in terms of deciding whether a crime has occurred, U.S. Attorney Bill Mercer said. (Post / RJ Sangosti)

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Senate Indian Affairs Committee.

All had crossed important Republican figures in myriad ways, and it is virtually certain that they were not targeted due solely or even in large part to their active stance on reservation crime. But it is also clear that such a commitment didn't weigh in their favor in Washington.

The name of Thomas Heffelfinger, the U.S. attorney from Minnesota, was put on a 2006 termination list circulated among White House and Justice Department aides because "he spent an extraordinary amount of time" on American Indian issues, according to Monica Goodling, the department's former White House liaison who testified to Congress under a grant of immunity. Heffelfinger resigned before he was fired.

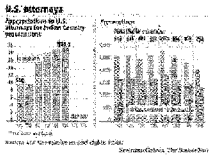
On the Blackfeet reservation in Montana, Johnathon Heavyrunner, 32, takes a hit of marijuana through a toilet-paper roll as Lundy Red Head, 19, positions the hot knives holding the drug. The rising use of drugs is quickly outpacing alcohol as a factor feeding reservation crime. (Post / RJ Sangosti)

"That was another in a great series of disappointments," Charlton said of the testimony concerning Heffelfinger, who as former chairman of the attorney general's Native American Issues Subcommittee was essentially the department's point man on improving the effectiveness of reservation prosecutions.

"It is unbelievable that someone who was the counselor to the attorney general and White House liaison would feel that it was possible to spend too much time on Indian Country issues when you were the chairman of the Native American Issues Subcommittee," he said.

Questioning feds' dedication

For many tribal authorities, that internal fight appeared to confirm long-held suspicions that



despite official insistence that the Justice Department considered the energetic fight of reservation crime a priority, the reality was something different: a law enforcement bureaucracy that viewed the expenditure of scarce federal prosecution resources on reservations with skepticism, was sometimes vastly ignorant of Indian Country issues, and

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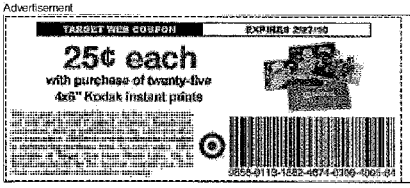

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communicated that combination of hostility and indifference through everything from budget decisions to closed-door reprimands.

While he didn't address specific issues brought up in recent congressional hearings or by former appointees, a Justice Department spokesman broadly defended the administration's record and the energy it has devoted to fighting reservation crime. "During this Administration, the Department of Justice has committed substantial resources to Indian country, and our record reflects that the Department takes justice in Indian country seriously," spokesman Peter Carr said in written comments, noting that 5 percent more reservation cases were filed by the Justice Department last year than the average since 1994.

Records vary

But the money provided to U.S. attorneys' offices to prosecute Indian Country crime has increased m uch more significantly, nearly doubling since 1998. And the number of federal prosecutions from reservations has actually fallen 26 percent from a high in fiscal year 2003, according to Justice Department data compiled by the Transactional Records Access Clearinghouse, or TRAC, part of Syracuse University.

Critics say that Carr's figures do underscore one thing: The country's vast and violence-ridden reservations have never been an important priority of federal prosecutors under any administration.

Over the past 10 years, U.S. attorneys have declined to prosecute nearly two-thirds of felony Indian Country cases nationally, TRAC figures show, a rate that has remained steady under both Democratic and Republican presidents.

Not all districts the same

But those ratios also mask a significant variation among districts, confirming both that individual U.S. attorneys can make a difference

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and that many fail to do so.

Since 2004, federal prosecutors in South Dakota, a state with some of the country's largest reservations, declined 76 percent of felony prosecutions from Indian lands. In Arizona, with a large caseload but several innovative programs and aggressive leadership, the declination rate was 50 percent.

Those refusals matter for a simple reason: A century-old law makes U.S. attorneys the only ones with the authority to prosecute felony crime on the majority of Indian reservations. With the exception of six states governed by a law known as Public Law 280, states have no authority to investigate or prosecute crimes on reservations within their boundaries unless both the victim and the assailant are non-Indian.

And while tribes can prosecute any crime in their own courts, they are limited to imposing a sentence of a year or less in jail. Because of chronically overcrowded tribal jails, it is often much less. The average jail time on the Navajo reservation, the nation's largest, is eight days.

Worse still, many tribal authorities say, the Supreme Court has determined that the tribes have no authority over non-Indians who commit crime on Indian lands.

That cookie-cutter jurisdiction has created vast holes through which non-Indian criminals and others can game the system, tribal officials say:

Tribal police in Nevada, eastern Michigan and elsewhere complain that federal prosecutors consistently decline cases of employees who embezzle from tribal casinos, in some instances stealing tens of thousands of dollars. Because those employees often are non-Indian, they are beyond the jurisdiction of tribal courts, making the crime virtually risk free.

In many districts, U.S. attorneys establish guidelines for drug cases that restrict federal prosecutions to large quantities in order to focus resources on major dealers. In Nevada and South Dakota, Mexican cartels are taking advantage of the hole by selling meth and other drugs on reservations in amounts below the guidelines, tribal officials say. Untouchable by tribal courts and untouched by federal ones, they operate with impunity.

Juveniles who commit rape, arson and other serious crimes on reservations are rarely prosecuted in federal courts because the federal system has so few detention facilities capable of holding juveniles. In a recent Colorado case, four juveniles torched the youth center on the Ute Mountain Ute reservation, causing more than $10,000 in damage. Because of the logistical difficulties in holding the four, federal prosecutors declined the case, and it had yet to be prosecuted in tribal court nearly a year later.

Over and over, tribal authorities complain of cycles of crime that could easily be stopped with certain or severe punishment but instead escalate: A series of assaults that ends in murder. A chronic abuser who becomes a rapist.

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On the Fort Berthold reservation in North Dakota, tribal prosecutor Bill Woods wrote a letter to federal prosecutors in late 2003 pleading for help with the case of an alleged serial rapist who preyed on intoxicated women. The suspect, an American Indian man, allegedly had already struck twice on Fort Berthold and once on Montana's Crow reservation in a case dating from the 1990s. But Woods was unable to investigate or charge a case from another reservation to help establish the pattern.

The tribal prosecutor kept the case open for three years, but he never got a response from the U.S. attorney's office in Billings. Just after the case was closed a few months ago, another woman reported that the man coaxed her into a car after the two were drinking and began driving her into the woods. Fearing she was in danger, the woman jumped from the vehicle, spending the night in freezing temperatures until she could reach safety.

"I'm sorry to the extent that this wasn't something that came to my attention," said Bill Mercer, the U.S. attorney for Montana, adding, "I just don't know why in a circumstance like that people don't pick up the phone and call me directly if they don't believe they are getting a response."

Remoteness a challenge

There is little doubt that Mercer and other federal prosecutors face major challenges operating in Indian Country.

The Havasupai tribe of Arizona lives at the bottom of the Grand Canyon; the nearest federal courthouse is in Phoenix. To try a rape that occurs on one of Colorado's two reservations, U. S. Attorney Troy Eid must transport a covey of witnesses, investigators and the victim six hours to Denver and put them up in a hotel for at least a week — a cost that could easily pass $10,000.

"As the U.S. attorney in Colorado, I take about 1 percent of all criminal cases in this state — big cases, organized-crime cases and big drug cases. Ninety-nine percent of the heavy lifting is done by district attorneys who are elected and closer to the people," Eid said.

"What about Indian Country? It's exactly the reverse. Everything becomes federal, all the major crimes, the felonies. The nearest federal judge is 400 miles away. Does that sound like local justice, the American value of local control?"

And there is what Kevin Washburn, a former federal prosecutor and law professor at the University of Minnesota, calls the "cavalry effect" — a distrust of the federal government held by many American Indian crime victims and tribal authorities, part of a cultural memory of the violence and abuse that came with colonization of the West.

"It's like, 'You've taken our land; you've taken our water. How can we trust that you'll take this

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case and take these people dear to our hearts and really take care of them?" " said Janelle Doughty, head of justice and regulatory affairs for the Southern Ute tribe in Colorado.

In the end, the efforts expended in prosecuting a possibly difficult rape case have to be weighed against the hundreds of other potential cases competing for federal prosecutors' time — gun crime, major drug cases, terrorism.

"You name a brand of crime, and we're involved in it. Everyone is lining up at the door with their favorite case they want us to take," said James A. McDevitt, the U.S. attorney for the Eastern District of Washington.

A square-jawed former general, McDevitt oversees a 41,826-square-mile district that includes three reservations and 185 miles of Canadian border. When a state/tribal anti-drug task force allegedly made four controlled buys of crack cocaine in 2002 from Merton Solomon and Eva Valdez — an Indian couple dealing on the Colville reservation — his office declined to prosecute the case, although, according to officials, the buys together totaled more than 15 grams and were gathered as part of a costly undercover operation.

What would have been an easy case in state court had to compete with the prosecution of major smugglers carrying huge loads across the border. "We've got guys dealing in 30 or 40 pounds of meth a week," McDevitt said. "We normally don't (prosecute) hand-to-hand drug buys."

The result: Solomon and Valdez spent 104 days in a tribal jail rather than the mandatory minimum of five years in a federal one.

Politically charged environment

If there is one clear message that emerged from the congressional hearings over the eight fired U.S. attorneys earlier this year, it's that federal prosecutors operate in a politically charged environment, constantly navigating the demands of various constituencies. In some instances — such as terrorism or immigration — priorities are set in Washington and communicated through funding decisions and other channels.

"I know that the performance of my office will be compared to other U.S. attorneys around the country on specific criteria. My gun cases have to compete with those of other U.S. attorneys. My white-collar crime cases have to compete," said a serving federal prosecutor, who declined to be quoted by name because of the sensitivity of the subject. "One criterion that is never on that list is Indian Country cases."

But the internal fights within the Bush administration show how strong those signals to U.S. attorneys can be.

Charlton, the former U.S. attorney from Arizona, got what he called "pushback" from Washington on the stepped-up prosecution of bootleggers on the Navajo reservation, even though a pilot program in Tuba City showed the effort reduced

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overall violent crime, often linked on reservations to alcohol and drug use.

One of his biggest battles with the administration stemmed from his push to get the FBI to tape interviews and confessions, especially involving child sex assault cases on reservations.

The Justice Department ordered that he back down, and Charlton offered to resign. In congressional testimony, Charlton said he found "no small amount of irony" that he was later fired.

In some cases, U.S. attorneys who tried to ramp up reservation prosecutions faced dissent from within their own offices — complaints that the prosecution of run-of-the-mill violence were career killers or that there were better uses of busy prosecutors' time.

Margaret Chiara, the former U.S. attorney for western Michigan, created an "Indian Country unit" within her office and made prosecutions of violent reservation crime a key part of the district's strategic plan. But she said she also ran smack into what she called a bureaucratic "culture" that saw those prosecutions as a low priority.

"It is the case that many people, both (office) leaders as well as staff, just do not recognize the obligation that is ours. And I can tell you that far from everybody supported the emphasis that I placed on prosecuting violent crime in Indian Country. People thought it was too much of my time and that it was too small of a population," said Chiara, whom President Bush appointed in 2001 and the attorney general fired last December.

When she served on the attorney general's Native American Issues Subcommittee, Chiara was surprised to learn that many districts were taking grant-funded assistant U.S. attorney slots meant specifically for prosecution of Indian Country crime and using them on other cases considered higher priority. (Those grant-funded positions were a carry-over from the Clinton administration.)

But perhaps the clearest signal of how the issue was viewed in Washington, Chiara said, was that the head of the Native American Issues Subcommittee wasn't part of a key power platform in the Justice Department known as the attorney general's advisory council. Virtually every other subcommittee head had a seat on the council, Chiara said, which gave experts in such key areas as white-collar crime, environmental prosecution or terrorism direct access to the attorney general and his deputy.

"That was indicative of the general receptivity on the part of the (Justice) department's leadership to Indian Country" issues, Chiara said.

"I don't care about people's hearts and minds," she said. "All I care about is what they do. What you want to see here is that resources reflect our responsibility. If it's all about us in Indian Country, then the resources better be there, and they are not."

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Little appetite for "pedestrian" cases

What's most dysfunctional about the current system, say tribal authorities, is that federal prosecutors appear to respond least to exactly the kinds of felony crime that most plagues reservations — aggravated assault, serious domestic assault, sex crimes and midlevel drug crimes.

"Most federal prosecutors went into the U.S. attorney's office because they wanted to do complex, sophisticated, sexy prosecutions, not felony prosecutions of pedestrian crime," said Washburn, the former federal prosecutor.

"Certainly, murders are going to be a high priority. They're going to give less attention to some of the lesser offenses, including serious assaults, robbery, arson, a whole host of things."

But a multiyear study by the University of Colorado on two reservations, among the most systematic look at the victimization associated with life in Indian Country, found American Indian men experienced serious assaults as much as twice the rate of the general population. For Indian women, the experience of violent physical assault, including domestic assault, was almost four times as high, nearly four in 10 women. (The incidence of rape — between 12 percent and 14 percent — was slightly higher than the 10 percent of female victims in the United States generally.)

Indeed, many reservations can be places of unrelenting, low-level violence, residents and law enforcement officials say — unspectacular but capable over time of wearing down lives. The fact that that violence becomes accepted is perhaps the justice system's greatest failure, they say.

On the Hopi reservation recently, a man battered his girlfriend, targeting her genitals in the attack. After the U.S. attorney declined the case, tribal authorities filed charges, but the man simply left the reservation. Because tribal warrants aren't recognized by other jurisdictions, he faces almost no risk of arrest.

On the Laguna Pueblo in New Mexico, a man bludgeoned his neighbor with a frying pan in a bloody fray that required the victim be helicoptered to Albuquerque. When another man tried to intervene, he was beaten too. Even though the federal government has clear jurisdiction on reservations over any assault "resulting in serious bodily injury," the U.S. attorney in Albuquerque refused to prosecute. So it was tried in Laguna tribal court as a misdemeanor instead.

Vincent Knight, the Laguna tribal prosecutor, said he understands the difficulties that federal authorities face, but he also understands that if the violence is ever going to stop, federal prosecutors will have to take more risks in the courtroom.

The U.S. attorney recently rejected the case of a 12-year-old girl allegedly molested by a Laguna

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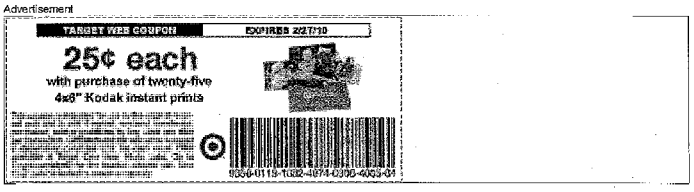

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Pueblo resident. Investigators could establish that the suspect was at the time and place the crime occurred, but beyond that, the only evidence was the testimony of the victim, which seems credible, Knight said.

"Part of me understands, this is a difficult case. But my responsibility isn't necessarily to slam-dunk, winning cases; it's to prosecute on behalf of the pueblo," Knight said. "Hopefully we get a conviction, but if we don't, we've done our job."

Sex-assault case passed up

If Jennifer Crossguns' tone is less reasonable when she talks about the issue, it's because to her the debate is less abstract.

After a fight with her husband on Montana's Blackfeet reservation two years ago, Crossguns was out drinking late one night with friends, including several female relatives and a male friend named Daniel Blevins. About 4 a.m., she went into a back room and fell asleep. When she woke up a short time later, Blevins was having sex with her.

Alternating between tears and screams, Crossguns immediately called police, then spent most of the rest of the morning at a tribal hospital as investigators collected evidence and prepared a rape kit.

Blevins was found guilty in tribal court and spent several months in jail. But after successive interviews with the FBI and agents from the Bureau of Indian Affairs, the U.S. attorney in Great Falls declined to prosecute the case as a felony. (The U.S. Supreme Court has found that crimes can be charged in both federal and tribal court without violating double jeopardy.)

As adamant as Crossguns was, federal prosecutors were still left with the fact that everyone involved had been drinking that night.

"There are factors in Indian Country that sometimes make prosecution a real challenge," said Mercer, the U.S. attorney for Montana, emphasizing that he could only speak generally and couldn't address a specific case. "It is fair to say we see a lot of cases where significant intoxication ends up being a real problem in terms of deciding whether a crime has occurred."

Crossguns said the message she took away from the experience was clear: All the humiliation she suffered by going to police, by pushing the case, wasn't worth it — at least not on the Blackfeet reservation.

"I wished it had happened off the reservation," she said. "He'd be in prison right now."

Staff researchers Barbara Hudson and Barry Osborne contributed to this report.

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