

**Federal Prosecution of  
Misdemeanor & Felony Violent  
Crimes in Indian Country**



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**Non-Indian  
Misdemeanor Docket**

**Federal Court**

## Purpose

- Federal Responsibility
- Quell notion that crimes can be committed in Indian Country with impunity
- Provide tribal officers with the tools to maintain law in their communities

## Mechanics

- Agreement between Tribe and Department of Interior
- Special Law Enforcement Commission
- Federally approved collateral schedule
- Ticket Citation – Central Violations Bureau
  - Mandatory - appearance in federal court
  - Non-mandatory – pay collateral or contest in federal court
- Issuing Officer required to be at hearings

## Writing the Ticket

- Cite to schedule
  - e.g. simple possession of controlled substance (21 USC § 844)
- Indicate on face of ticket whether mandatory or not
- Probable cause statement
  - If in report, cite to report on ticket in probably cause section
  - Officer's signature required
    - Signature on ticket required to issue arrest warrant

## Federal Court Process

- Tribal officer required at all hearings
- Initial appearance/arraignment
  - Intake – pretrial/marshals
  - Negotiations
- Trial
  - Class A misdemeanors
    - Jury trial in federal district court
  - Class B misdemeanors
    - Non-jury trial in District Court
  - Petty Offenses
    - Bench trial in magistrate court
- Sentence

## Arrest Authority

- Federal Authority – Commissions
  - 25 U.S.C. § 2803
    - Sub-part (3) arrest authority limited to felonies and any misdemeanor committed in the officer's presence
- Tribal Authority
  - Consult Tribal Law and Order Codes
  - Have limited arrest authority over non-Indians

## Arrest Authority Cont.

- If arrested pre or post arraignment
  - Responsible for prisoner
  - Call AUSA/Marshal Service
  - Call wife (especially in pre situation)

## American Indians and a disproportionately high level of violent victimization

- Per capita rate of violence 2x that of US resident population
- A third of all violence victims between 18 and 24
  - about 1 violent crime for every 4 persons of this age
- Rate of violent crime experience by American Indian women is nearly 50% higher than that reported by black males
- At least 70% of violent victimization's experienced by Indians are committed by person of a different race
- BJS, NIJ, OJJDP, and the American Indian and Alaska Native Affairs Desk October 2002

## Sexual Assault and Domestic Violence are Prevalent

- From 1993 to 1998, the average annual rate of rape or sexual assault was higher for American Indian women than any other race surveyed
- 34.1% of American Indian and Alaska Native women will be raped in their lifetime as compared to 18.2% of the total number of women
- 17% of all Native women will be stalked during their lifetime
- From 1991 to 1998, homicide third leading cause of death for American Indians.
- Of Native American women murdered
  - 31% were killed by a family member
  - 44% were murdered by an acquaintance or someone they knew
  - 4% were murdered by a stranger
- BJS, NIJ, OJJDP, and the American Indian and Alaska Native Affairs Desk October 2002



## FBI's Role in Indian Country

- The role of the FBI in Indian Country is to develop and implement strategies and programs to address identified crime problems in Indian Country for which the FBI has responsibility.
- To support the efforts of all law enforcement personnel working in Indian Country.



## Criminal Jurisdiction

- The Federal Government exercises limited jurisdiction over major crimes that occur on those lands defined as "Indian Country" in Title 18 U.S.C. 1151. The Tribes themselves retain exclusive jurisdiction over non-major crimes committed by Indians against Indians.
- The Attorney General pursuant to Title 28 U.S.C. Section 533 has delegated the responsibility to investigate crimes in Indian Country to the FBI.
- Most serious criminal offences that occur within Indian Country are prosecuted under Title 18 U.S.C. Section 1152 (General Crimes Act) and Title 18 U.S.C Section 1153 (Major Crimes Act).

# FBI INDIAN COUNTRY RESOURCE UTILIZATION



## IC Personnel and Case Initiations

Field Wide Totals FY1999-FY2002

<u>Year</u>	<u>SA Personnel</u>	<u>New Cases</u>
2002	102	1626
2001	104	1887
2000	100	1951



## IC Case Statistics FY 2000-2002



<u>Year</u>	<u>IC Cases Initiated</u>	<u>I&amp;I</u>	<u>Arrests</u>	<u>Convictions</u>
2000	1951	744	704	696
2001	1887	880	884	876
2002	1626	791	570	637

## IC Adult Rape Case (198 S) Statistics FY 2000-2003



<u>Year</u>	<u>IC Cases Initiated</u>	<u>I&amp;I</u>	<u>Arrests</u>	<u>Convictions</u>
2000	112	17	14	9
2001	166	25	25	22
2002	159	35	37	24
2003	160	53	52	54
<b>Total</b>	<b>597</b>	<b>130</b>	<b>128</b>	<b>109</b>

### The Western District of Michigan

- Led by USA Margaret M. Chiara
- Indian Country Team
- 49 counties
- 11 federally recognized Indian Tribes
- An international border
- National forests
- Borders the state of Indiana



## Biggest Challenges for AUSA

- Geography
- Timeliness in receiving reports
- Coordination between separate governments (law enforcement and prosecution)
- Which department is leading investigation?
- Thorny jurisdictional questions
- AUSA ability to remain in contact and meet with victim

## Violent Crime in Indian Country

- Over 550 federally recognized Indian tribes
- Feds have jurisdiction for most violent IC felony offenses in over 20 federal judicial districts
- More limited fed IC jurisdiction in over 15 other federal judicial districts

## Assessing Lethality and Safety Planning

- Threats of homicide or suicide
- Fantasies of homicide or suicide
- Weapons
- “Ownership” of the victim
- Obsessed with victim or family
- Separation Violence
- Stalking
- Depression
- Access to victim or family
- Hostage taking
- Escalation of batterer risk taking
- Previous police contact
- Drug and alcohol abuse
- Strangulation
- Pet abuse
- Assaults on children

## Federal Assault Statutes

- **“Major Crimes Act” 18 USC § 1153**
  - Provides federal criminal jurisdiction over certain specified crimes if the **offender is Indian**
    - murder
    - manslaughter
    - kidnapping
    - maiming
    - sexual abuse
    - incest
    - assault with intent to commit murder
    - assault with a dangerous weapon
    - assault resulting in serious bodily injury
    - assault against a child under 16

## General Crimes Act

18 USC § 1152

- provides criminal jurisdiction over **inter-racial** crimes, exclusive jurisdiction when perp is **non-Indian**
- Laws extended are those applicable within the Special Maritime & Territorial Jurisdictions of the United States (18 USC § 7)
  - murder
  - manslaughter
  - sexual assaults
  - **assimilative crimes act (18 USC § 13)** - allows borrowing of state law when there is no applicable federal statute.

## The Jurisdiction Puzzle

Indian D	Indian V	Major Crime Act	Federal & Tribal
Indian D	Indian V	Non-Major Crime Act	Tribal
Non-Indian D	Indian V	Misd.	Federal
Non-Indian D	Indian V	Felony	Federal
Non-Indian D	Non-Indian V	Felony or Misd	State

## 18 USC §113 Assaults within Maritime and Territorial Jurisdiction

- (1) Assault w/ intent to commit murder – 20 yrs
- (2) Assault w/ intent to commit any felony – 10 yrs/fine
- (3) Assault w/ dangerous weapon, w/ intent to do bodily harm, and without just cause or excuse – 10 yrs/fine
- (4) Assault by striking, beating, or wounding – 6 mo./fine
- (5) Simple assault – 6 mo./fine
- (6) Assault resulting in serious bodily injury – 10 yrs/fine
- (7) Assault resulting in substantial bodily injury to someone under 16 – 5 yrs/fine

## Injury definitions for 18 USC §113

- “Substantial bodily injury” means bodily injury involving
  - (A) a temporary but substantial disfigurement; or
  - (B) a temporary but substantial loss or impairment of the function of any bodily member, organ, or mental faculty; and
- “Serious bodily injury” (18 USC § 1365)
  - (A) a substantial risk of death;
  - (B) extreme physical pain;
  - (C) protracted and obvious disfigurement; or
  - (D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty

## Charging Options for Non-Indian Defendants

- 18 USC § 113(a)(4) – Assault by striking, beating, or wounding (6 month misdemeanor)
- 18 USC § 661 – Larceny from a person
- Social Security or Document Fraud
- 18 USC § 1001 – False statements
- Be creative using the Assimilative Crimes Act
  - Michigan examples
    - MCL 750.540 Interference with a communications carrier
    - MCL 750.81(3) or (4) Habitual domestic violence offender

## Chapter 109A – Sexual Abuse

- 18 USC § 2241 Aggravated Sexual Abuse
  - (a) by force or threat
  - (b) by other means, i.e., renders the person unconscious or administers by force or without knowledge a drug, intoxicant etc.
  - (c) with children under 12
- 18 USC § 2242 Sexual Abuse
- 18 USC § 2243 Sexual Abuse of a minor or ward
- 18 USC § 2244 Abusive Sexual Contact

## Sexual Abuse Definitions

- Sexual act =
  - Penis/vulva, penis/anus – penetration however slight
  - Mouth/penis, mouth/vulva, mouth/anus
  - Anal or genital opening by hand or finger or any object, penetration however slight, with intent to abuse humiliate, harass, degrade or arouse or gratify the sexual desire of any person
- Sexual Contact =
  - Intentional touching, either directly or through the clothing of genitalia, anus, groin, breast, inner thigh or buttocks of any person with an intent to abuse, humiliate, harass, degrade or arouse or gratify the sexual desire of any person

## Restitution 18 USC § 2248

- Mandatory Restitution, “the court *shall* order ...”
  - Full amount of victim losses including any costs incurred by victim for..
    - Medical services relating to physical, psychiatric, or psych care
    - Physical and occupational therapy or rehabilitation
    - Necessary transportation, temporary housing and child care
    - Lost income
    - Atty’s fees, plus any costs incurred in obtaining a protection order
    - Any other losses suffered by the victim as a proximate result of the offense

## Detention

- 18 USC § 3142
  - Upon motion of the atty for the Government, in a case that involves –
    - (A) a crime of violence
    - (B) an offense for which the maximum sentence is life imprisonment or death
- 18 USC § 3156(4)
  - The term “crime of violence” means
    - (C) any felony under chapter 109A

## **Victim Contact – Can be Difficult in Indian Country due to Distance**

- Victim interview(s) - sort out the facts and discover “problems” in the case
- Preparing the victim to testify in prosecutor’s case in chief
- Preparing the victim for cross-examination
- Preparing the victim for contact by defense atty or defense investigators
- Preparing the victim for defense motions for privileged materials

## Pretrial Motion Practice

- Prior violence by the defendant
  - FRE 404(b) Character Evidence - other crimes, wrongs or acts
  - ***FRE 413 Similar Crimes in Sexual Assault Cases***
  - FRE 609 Impeachment by Conviction of Crime
- Prior inconsistent statements FRE 613
- Hearsay Exceptions
  - FRE 803(1) Present sense impression
  - ***FRE 803(2) Excited utterance***
  - FRE 803(3) Then existing mental, emotional, or physical condition
  - ***FRE 803(4) Statements for purpose of medical treatment***
  - FRE 803(5) Recorded recollection

## Rape Shield FRE 412

- Prevent D from introducing evidence of V's past sexual conduct, except in 3 narrow circumstances
  - “evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence”
  - “evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution”
  - “evidence the exclusion of which would violate the constitutional rights of the defendant”



## Expert Testimony

a. FRE 702 Testimony by experts –

- testimony is based upon sufficient facts or data
- the testimony is the product of reliable principles and methods, and
- the witness has applied the principles and methods reliably to the facts of the case

b. FRE 703 Bases of opinion testimony by experts

Consider using an expert to testify about grooming and characteristics of sexual predators, or to explain delay in reporting, minimizing or recanting by the victim

## Medical Testing for Defendants

- The Defendant Agrees to Medical Testing. The Defendant agrees to be tested for the etiologic agent for acquired immune deficiency syndrome. The Defendant further agrees that if the initial test for the etiologic agent for acquired immune deficiency syndrome is negative, he will be retested six (6) months and again twelve (12) months following the initial test. Title 42, United States Code § 14011.

## Sex Offender Registration

- The Defendant Agrees to Register as a Sexual Offender. The Defendant agrees that prior to sentencing he will report to the appropriate local law enforcement agency and complete all paperwork necessary to become registered as a sexual offender under the laws of the State of Michigan.

## What do AUSA's look for when making SA Charging Decision

- Third party witness who can corroborate victim's testimony
- Scientific evidence
- Defendant's confession and or admissions
- Other evidence that will corroborate the victim's testimony

## Perceived Problem Areas in IC Sexual Assault Cases

- No training in DV and SA for many federal law enforcement officers
- No required training for AUSA in SA
- Cases with non-Indian defendants
- Timely referral of cases to federal law enforcement by the tribes
- Timely handling of cases by the AUSA
- Failure by those handling cases to appreciate lethality risks to victims
- Community's willingness to blame victim if prior relationship with defendant or if used alcohol
- Difficulty in some cases with proving force or coercion
- In remote areas there may be no trained medical staff to perform forensic exams
- Some protocols set up to prove "who done it" – these typically are consent cases and not identification cases
- DOJ data collection system

## Crawford v. Washington 124 S.Ct. 1354 (March 8, 2004)

- Supreme Court interprets the Confrontation Clause to require:
  - (1) Unavailability of the declarant and
  - (2) Opportunity for cross-examination as prerequisites for admitting out-of-court testimonial statements against defendants in criminal prosecution
- *So what is a testimonial statement?*
- United States v. Bruce Thunder Horse (8<sup>th</sup> Cir. 2004)
  - Statement of forensic examiner admitted through residual hearsay exception

**Blakely v. Washington**  
2004 WL 1402697 (June 24, 2004)

- Supreme Court applied the rule announced in *Apprendi v. New Jersey*, to invalidate an upward departure under the Washington State sentencing guidelines system that was imposed on the basis of facts found by the court at sentencing. Because the facts supporting the departure were “neither admitted by the defendant nor found by a jury,” the Court held, the sentence violated the Sixth Amendment.
- How could this effect sex crime cases?
  - “abduction” – 4 level upward departure
  - “obstruction of justice” –3 level upward departure

**Steps taken in WDMI**

- Designated Indian Country Team
- Twice monthly meetings of the team
- Case Intake Checklist
- Quarterly newsletter
- Annual Government to Government meetings
- Attendance at MDT meetings by AUSA or advocate
- 24/7 on call by AUSA
- Press releases at the conclusion of all IC cases
- Trainings sponsored by USA on DV and SA
- Re-opening of previously declined cases

## WDMI Success Stories

- **United States v. Albert Kappell**
  - 9 cts of SA of children – life sentence
- **United States v. Severo Garcia-Meza**
  - 1 ct murder (DV)– life sentence
- **United States v. Gary Phillips**
  - 1 ct SA by force – 136 months
- **United States v. John Kavo**
  - 1 ct SA by force – 121 months