

# **Prosecuting Indian Country Domestic Violence Crimes in Federal Court**

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**Leslie A. Hagen**

**Native American Issues Coordinator**

**Executive Office for United States Attorneys**

**202-353-3424**

**[Leslie.Hagen3@usdoj.gov](mailto:Leslie.Hagen3@usdoj.gov)**

# VAWA 2005 Title IX – Safety for Indian Women

- 1 of 3 Indian (including Alaska Native) women are raped in their lifetimes
- Indian women experience 7 sexual assaults per 1000, compared with 4 per 1000 among Black Americans, 3 per 1000 among Caucasians, 2 per 1000 among Hispanic women, and 1 per 1000 among Asian women
- Indian women experience the violent crime of battering at a rate of 23.2 per 1000, compared with 8 per 1000 among Caucasian women

## Congressional findings continued.....

- During the period 1979 – 1992, homicide was the third leading cause of death of Indian females aged 15 to 34, and 75% were killed by family members or acquaintances
- Indian tribes require additional criminal justice and victim services resources to respond to violent assaults against women
- The unique relationship of the U.S. to Indian tribes creates a Federal trust responsibility to assist tribal governments in safeguarding the lives of Indian women

# 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

# Relevant Federal Statutes

- Sexual Abuse Statutes
- Violence Against Women Act
- Domestic Assault by a Habitual Offender
- Indian Country Statutes – Major Crimes Act and General Crimes Act
  - Assimilative Crimes Act
- Gun Control Act

# Sexual Abuse Statutes

- Aggravated Sexual Abuse – 18 USC 2241
- Sexual Abuse – 18 USC 2242
- Sexual Abuse of a Minor or Ward – 18 USC 2243
- Abusive Sexual Contact -- 18 USC 2244
- Sexual Abuse Resulting in Death – 18 USC 2245

# Penalties

- Sections 2241, 2242, 2243, 2244 and 2245  
- two years to life depending upon the seriousness of the sexual assault or the age of the victim. § 2245 is death eligible.
- Mandatory life if conviction of child sex offense and prior conviction for child sex offense - § 3559(e)

# The Major Crimes Act

## 18 USC 1153

- US Attorneys can only prosecute Indian offenders for crimes committed on Indian country if enumerated in §1153.
- Crimes include: murder, manslaughter, kidnapping, maiming, a felony under Chapter 109A (§§ 2241, 2242, 2243, 2244 and 2245), assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, and assault against a person under the age of 16 (not all crimes listed).

# Assault Crimes – 18 USC 113

- Crimes range from assault to commit murder (20 year penalty) to simple misdemeanor assault (6 mo. penalty)

# “Serious Bodily Injury”

## 18 U.S.C. § 1365(h)(3)

- Substantial risk of death;
- Extreme physical pain;
- Protracted and obvious; disfigurement;  
or
- Protracted loss or impairment of the function of a bodily member, organ or mental faculty.

# Domestic Assault by a Habitual Offender 18 USC 117

- Punishes any person who commits a domestic assault within IC and who has 2 prior federal, state, or tribal court convictions for offenses that would, if subject to federal jurisdiction, qualify as assault, sexual abuse, an offense under Chapter 110A, or a violent felony against a spouse of intimate partner.
- Punishable by a prison term not to exceed 5 years. Maximum sentence increased to 10 years of the offense results in substantial bodily injury.

# Domestic Assault Defined

- Means an assault committed by a current or former spouse, parent, child, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse, parent, child or guardian, or by a person similarly situated to a spouse, parent, child, or guardian of the victim.

# US V. Roman Cavanaugh, Jr.

- D is a member of the Spirit Lake Sioux Tribe and resides on the reservation in ND.
- Indictment alleged that on July 7, 2008, D assaulted his common-law wife and mother of his child. Assault took place in Indian Country. D inflicted substantial bodily injury.
- D had three final convictions for domestic assault in Spirit Lake Tribal Court prior to July 7, 2008 assault

# Earlier Convictions in Tribal Court

- For each conviction, D had been advised of his right to be represented by counsel retained at his own expense. D waived that right and elected to represent himself.
- In tribal court, no right to appointed counsel if indigent (Indian Civil Rights Act)
- D filed a motion to dismiss the indictment arguing that Due Process Clause of the Federal Constitution forbids reliance on use of uncounseled tribal misdemeanor convictions

# Federal District Court Decision

- District Court Judge dismissed the indictment
- Court concluded that “introduction of uncounseled tribal court convictions in federal court as proof of an essential element of a federal crime violate[s] a defendant’s right to counsel and due process. Thus, to the extent that 18 USC 117 allows for the use of such convictions in such a manner, it is unconstitutional.”

# Department of Justice has Appealed

- Briefs have been filed and case should be set for argument in mid-October (8<sup>th</sup> Circuit).
- Bill of Rights does not apply to Indian Tribal governments (*Duro v. Reina*)
- Consequently, the Sixth Amendment right to counsel does not apply in tribal court prosecutions.
- Minimum federal rights guaranteed to defendants in tribal court are the statutory rights provided in ICRA (25 USC 1301)

# Government's Position Continued

- ICRA provides that a D in tribal court may have, at his own expense, the assistance of counsel for his defense. (25 USC 1302(6))
- US argues that it does not violate the 6<sup>th</sup> Amendment or the Due Process Clause for Congress to provide that tribal court convictions be used as predicate “final conviction” under 18 USC 117(a)
- Proof of the fact of existence of prior conviction is all that is required to satisfy the element of crime

# So what should an AUSA do now?

- Until such time as there is a published circuit court opinion finding the use of uncounseled tribal court convictions in a prosecution under 18 USC 117(a) unconstitutional, federal prosecutors are encouraged to continue using this statute.
- And, don't forget – there is no issue for previous convictions in federal, state, local, municipal or tribal court where D offered counsel.

# **VAWA**

**Enacted 1994, amended 1996,  
2000, and 2006**

- Interstate Domestic Violence – 18 USC 2261
- Interstate Stalking – 18 USC 2261A
- Interstate Violation of a Protection Order – 18 USC 2262

# **Interstate Domestic Violence**

**18 U.S.C. 2261(a)(1),  
Amended January 5, 2006**

- **It is a federal crime to cross state, foreign or tribal lines or within the SMTJ to commit or attempt to commit a crime of violence against an “intimate partner.”**

# **Crime of Violence - Section 16**

- **An offense that has as an element the use, attempted use or threatened use of physical force against a person**
- **An offense that is a felony and that, by its nature, involves a substantial risk that physical force against a person may be used.**

# Interstate Domestic Violence

## 18 U.S.C. 2261(a)(1),

- Statute now covers “dating partners” – a person who is or has been in a social relationship of a romantic or intimate nature with the abuser. Factors to consider are the length of the relationship, the type of relationship and the frequency of interaction.
- The defendant must have intended to kill, injure, harass or intimidate when crossing the line.

# Interstate Domestic Violence

## 18 U.S.C. 2261(a)(2)

- It is a federal crime to force or coerce an “intimate partner” to cross state, foreign or tribal lines if the conduct or travel leads to the commission or the attempted commission of a crime of violence against the victim.

# **Interstate Stalking**

**18 U.S.C. 2261A(1), amended January 5, 2006**

- It is a federal crime to cross state, foreign or tribal lines or within SMTJ to stalk another person. There must be proof that the stalking placed the victim in reasonable fear of death or serious bodily injury or that the stalking caused substantial emotional distress.

# **Interstate Stalking**

**18 U.S.C. 2261A(1), amended January 5, 2006**

- The defendant must have intended to kill, injure, harass, or place under surveillance with intent to kill, injure, or harass, or intimidate when crossing the line.

# Cyberstalking

**18 U.S.C. 2261A(2), amended January 5, 2006**

- It is a federal crime to use the mail or an interactive computer service or any facility of interstate or foreign commerce to engage in a course of conduct that causes substantial emotional distress or places a person in reasonable fear of death or serious bodily injury.

# Cyberstalking

- The defendant must have intended to kill, injure, harass or place under surveillance with intent to kill, injure or harass or intimidate, or cause substantial emotional distress to a person in another jurisdiction in reasonable fear of death or serious bodily injury.

# **Interstate Violation of a Protection Order**

**18 U.S.C. 2262(a)(1), amended January 5, 2006**

- It is a federal crime to cross state, foreign or tribal lines or within SMTJ and violate a Protection Order that protects the victim against violence, threats, harassment against contact or communication with, or physical proximity.

# **Interstate Violation of a Protection Order**

**18 U.S.C. 2262(a)(1), amended October 28, 2000**

- The defendant must have intended to violate the Protection Order when crossing the line.

# Interstate Violation of a Protection Order

## 18 U.S.C. 2262(a)(2)

- It is a federal crime to force or coerce a person to cross state or foreign lines or enter or leave Indian country if the force or coercion leads to a violation of the portion of the Protection Order that...

# Interstate Violation of a Protection Order

## 18 U.S.C. 2262(a)(2)

- ...prohibits or provides protection against violence, threats or harassment against, contact or communication with, or physical proximity to the protected person.

# Penalties

- Sections 2261, 2261A and 2262
  - 5 years to life depending upon the seriousness of the bodily injury inflicted
- Section 922(g)
  - 10 year maximum sentence

# Statute of Limitations

- Five years unless otherwise provided - § 3281
- Offenses involving sexual or physical abuse or kidnapping of a child may be prosecuted during the life of the child or for 10 years after the offense, whichever is longer. § 3283
- In a case involving DNA evidence, S/L runs from time when the defendant is implicated by the DNA testing. Now applies to offenses under Chapter 109A. § 3297.

# **Gun Control Act – Domestic Violence Offenses**

- Possession of a firearm and/or ammunition while subject to a protection order – Section 922(g)(8)
- Possession of a firearm and/or ammunition after conviction of a domestic violence misdemeanor – Section 922(g)(9)

# Firearm Offenses

## 18 U.S.C. 922(g)(8)

- It is a federal crime to possess a firearm and/or ammunition while subject to a valid qualifying Protection Order.
- Law enforcement officers are not subject to this law.

# 922(g)(8) Restrictions

**Protection Order will qualify if it meets these requirements:**

Order was issued by a court after a hearing of which the defendant had actual notice and an opportunity to participate;

- What satisfies the “hearing” requirement?

# **922(g)(8) Restrictions (Continued)**

2. Order restrained the defendant from harassing, stalking, or threatening an intimate partner, or from engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury.

# 922(g)(8) Restrictions (Continued)

3. Order included a finding that the defendant posed a credible threat to the physical safety of an intimate partner; OR
4. Order explicitly prohibited the use, attempted use or threatened use of physical force that would reasonably be expected to cause bodily injury.

# Firearm Offenses

## **18 U.S.C. 922(g)(9), enacted September 30, 1996**

- It is a federal crime to possess a firearm and/or ammunition after conviction of a qualifying state misdemeanor crime of domestic violence.
- Must be a misdemeanor under federal or state law.  
Can tribal misdemeanors qualify?
- Due process restrictions
- This statute applies to law enforcement.

# Notice to prohibited persons

- It is preferable, although not legally required, for defendants to receive notice of a prohibition under 922(g)(8) or 922(g)(9).

# Advantages to Firearm Prosecutions

- May be able to prosecute without the Victim
- No need to establish interstate or interjurisdictional travel by the defendant- instead prove travel of the firearm
- No need to establish defendant's intent at the time the boundary was crossed.

# Penalty

- Section 922(g) Offense
  - 10 year maximum sentence

# **QUESTIONS AND ANSWERS**