

**Criminal Jurisdiction in Indian  
Country  
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# Fact Pattern

- AUSA Jane Doe is delivering training to Tribal Police Officers. During the lunch break, one of the officers disparages the Michigan State Spartans. Jane, outraged, picks up a steak knife and puts it through the officer's eye and into his brain, killing him instantly.

# Question:

- Which court or courts have jurisdiction to charge AUSA Doe?
- How would she be charged?
- Do you know enough to answer this question?
- What do you need to know?

# Always ask these 4 questions, in this order:

- Where did the crime occur?
  - Is it Indian Country or not?
- Who is the suspect?
  - Indian or Non-Indian?
- Who is the victim?
  - Indian or Non-Indian?
- What did they do?
  - Is it a Major Crime?

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# Is it Indian Country?

- Indian Country defined in 18 USC 1151-
  - (a): all land w/in limits of Indian reservation under U.S. jurisdiction including patented lands & rights of way running through Indian reservation
  - (b): dependent Indian communities, and
  - (c): Indian allotments to which Indian title has not been extinguished, including rights of way through the allotment

# Why is this Important?

- If it didn't happen in Indian Country, there's no tribal jurisdiction and there's no federal jurisdiction
- The case goes state
  - Unless Crime of General Application\*\*

# Crimes of General Application

- Those offenses in which there is a federal interest no matter where they occur and no matter who commits them:
  - Firearms offenses
  - Narcotics offenses
  - Border crimes
  - Counterfeiting
  - Bank Robbery
  - Postal Offenses
  - Violence Against Women Act Offenses



# Hypothetical:

- Joe and Bob are members of the ABC Tribal Nation. They drive into ABQ for a night of drinking at a local bar. Both of them get extremely intoxicated. They get in their car and start back to the reservation, with Joe driving. Half a mile before entering the ABC Nation, Joe crosses the center line on the Highway and hits head-on a van coming the other way, killing the occupants. Who has jurisdiction over any prosecution ?

# Are we in Indian Country?

- Not In Indian Country

No Tribal Criminal Jurisdiction

No Federal Criminal Jurisdiction,  
UNLESS  
Crime of General Applicability

- In Indian Country

There might be Tribal Criminal  
Jurisdiction

There might be Federal Criminal  
Jurisdiction

Need to answer more questions

# Always ask these 4 questions, in this order:

- Where did the crime occur?
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- Who is the victim?
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- What did they do?
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# Indian or Non-Indian?

- No Federal Statutory Definition of “Indian”
- *Morton v. Mancari* (1974) test:
- 1) **some degree of Indian Blood – federally recognized tribe**; and
- 2) **Individual is recognized by the fed. government or tribe as an Indian**

# “Recognized as an Indian” -

- Indicia of Tribal or Federal Recognition of Individual
  - Indian status follows tribe; termination
- Proof of Indian Status
  - BIA Records; CIB; Formal enrollment not always required, federal or tribal benefits

# Hypothetical

- Brad and Angelina, members of the Navajo Nation, spend 3 years in the Peace Corps working at an orphanage in Uganda. They adopt a Ugandan orphan baby girl and bring her back to live on Navajo. The Navajo Nation passes a resolution recognizing the girl as a member. She grows up and is the victim of a shooting on Navajo. Is she an Indian for purposes of criminal jurisdiction?

# Are we in Indian Country?

- Not In Indian Country

No Tribal Criminal Jurisdiction

No Federal Criminal Jurisdiction,  
UNLESS  
Crime of General Applicability

- In Indian Country

There might be Tribal Criminal  
Jurisdiction

There might be Federal Criminal  
Jurisdiction

Need to answer more questions

# In Indian Country

Indian Victim

Non-Indian Victim

Indian Suspect

1

2

Non-Indian Suspect

3

4

Indian Suspect	1	2
Non-Indian Suspect	3	4



# In Indian Country

Indian Victim

Non-Indian Victim

Indian Suspect

1

2

Non-Indian Suspect

3

4

	Indian Victim	Non-Indian Victim
Indian Suspect	1	2
Non-Indian Suspect	3	4

Non-Indian Victim

State Jurisdiction Only –

*United States v. McBratney*  
Supreme Court (1881)

Non-Indian Suspect

# In Indian Country

Indian Victim

Non-Indian Victim

Indian Suspect

1

2

Non-Indian Suspect

3

4

	Indian Victim	Non-Indian Victim
Indian Suspect	1	2
Non-Indian Suspect	3	4

Indian Victim

Federal Jurisdiction Only –

*Oliphant v. Suquamish*  
Supreme Court (1978)

Non-Indian Suspect

Indian Victim

Non-Indian Suspect

Federal Jurisdiction Only –

General Crimes Act – 18  
U.S.C. 1152

# 1152 –General Crimes Act

- Makes available in Indian Country every crime generally available in United States federal territory and defined by federal statute

Indian Victim

Non-Indian Suspect

Federal Jurisdiction Only –

General Crimes Act – 18

U.S.C. 1152

Assimilated Crimes Act –

18 U.S.C. 13

# Assimilated Crimes Act

- Gap filler
- When an act would be a crime under state law,
- But state has no jurisdiction because we are on federal or tribal territory,
- And there is no federal law addressing the act,
- Apply state criminal law
  - i.e., Interference with a telecommunications carrier MCL 750.540 (Michigan)



# In Indian Country

Indian Victim

Non-Indian Victim

Indian Suspect

1

2

Non-Indian Suspect

3

4

	1	2
	3	4

Indian Victim

Tribal Jd. – ICRA

Federal Jd. – Major  
Crimes Act – 18 USC 1153

Indian Suspect

# Major Crimes Act

## 18 USC 1153

- *Enumerated Offenses*
  - 17 listed crimes (Murder, Aggravated Assault, Sexual Assault, and Child Abuse)
  - No Federal Jurisdiction to prosecute attempts or conspiracies unless the particular MCA crime permits
  - For example - Sex Offenses punish attempts as well as completed acts
  - What if Major Crime is Undefined?

# Indian on Indian

- If the offense is not one of the enumerated crimes in MCA, tribal jurisdiction only
  - Gap in federal coverage as yet unaddressed by Congress

# In Indian Country

Indian Victim

Non-Indian Victim

Indian Suspect

1

2

Non-Indian Suspect

3

4

Indian Suspect	1	2
Non-Indian Suspect	3	4

Non-Indian Victim

Indian Suspect

Tribal Jd. – ICRA

Federal Jd. – Major  
Crimes Act – 18 USC 1153;

If no Major Crime Fits:

General Crimes Act – 18  
U.S.C. 1152 and/or  
Assimilated Crimes Act –  
18 U.S.C. 13

(\*\*Only if tribe hasn't prosecuted first)

# Always ask these 4 questions, in this order:

- Where did the crime occur?
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- What did they do?
  - Is it a Major Crime?

# Felony Offense Jurisdiction

Indian Victim

Non-Indian Victim

Indian Suspect

Federal –  
Major Crimes Act

Federal –  
Major Crimes Act or  
General Crimes/  
Assimilated Crimes

Non-Indian Suspect

Federal –  
General Crimes Act/  
Assimilated Crimes Act

State



# *Misdemeanor* Offense Jurisdiction

Indian Victim

Non-Indian Victim

Indian Suspect

Tribal

Tribal

Non-Indian Suspect

Federal

State

Indian Victim	Indian Suspect	Tribal	Non-Indian Victim	Tribal
Indian Victim	Non-Indian Suspect	Federal	Non-Indian Victim	State

# Victimless Crimes?

- Treated like non-Indian Victim
- So if non-Indian perpetrator, STATE JURISDICTION

# Fact Pattern Revisited

- AUSA Jane Doe is delivering training to Tribal Police Officers. During the lunch break, one of the officers disparages the Michigan State Spartans. Jane, outraged, picks up a steak knife and puts it through the unwise officer's eye and into his brain, killing him instantly.

# Question:

- Which court or courts have jurisdiction to charge AUSA Doe?
- How would she be charged?
- What else do you need to know to answer these questions?

# Public Law 280

- 1953 Congressional statute giving 6 states criminal and civil jurisdiction in all or parts of Indian Country in those states
  - Alaska, California, Minnesota, Nebraska, Oregon, Wisconsin (No Fed Jur based on MCA or ICC)
- Codified at 18 USC 1162
- 1968 Congress permitted other states to assume all or part of jurisdiction but only with a tribe's consent
- 2010 – TLOA allows tribes in PL 280 jurisdictions to ask AG to assume concurrent federal jurisdiction over crimes in IC

# Tribal Law and Order Act of 2010

- Amends the Indian Civil Rights Act and restore felony sentencing authority to tribes provided certain protections are afforded to the defendant.

# Subtitle C-Empowering Tribal Law Enforcement

- **Subtitle C §234—TRIBAL COURT SENTENCING AUTHORITY**
- Amends the Indian Civil Rights Act §1302.
  - 1.(a) In General---No Indian tribe;
  - (7) (A) require excessive bail, impose excessive fines etc.
    - (B) except as provided for (C) impose sentence greater than 1 yrs. and \$5,000 fine.
    - (C) except as provided for under (b) impose a sentence greater than 3 yrs or a fine of \$15,000
    - (D) impose a total penalty greater than 9 yrs.

# Subtitle C-Empowering Tribal Law Enforcement

- (b) Offenses Subject to Greater Than 1-year or fine of \$5,000 only if:
  - (1) previous conviction of same or comparable offense by any jurisdiction in U.S.; or
  - (2) is being prosecuted for an offense comparable to an offense that would be punishable by more than 1 yr. of imprisonment if prosecuted by the U.S. or any of the States



# Subtitle C-Empowering Tribal Law Enforcement

- (c) Rights of the Defendant—in any criminal proceeding in which an Indian Tribe in exercising power of self-government imposes a total term of more than 1 yr shall:
  - (1) provide the right to effective assistance of counsel at least equal to that guaranteed by the U.S. Constitution;
  - (2) at the expense of the tribal government, provide an indigent defendant assistance of a defense attorney licensed to practice law by any jurisdiction in the U.S. that applies appropriate licensing standards and effectively ensures the competence and professional responsibilities of its licensed attorneys.

# Subtitle C-Empowering Tribal Law Enforcement

- (3) require that each judge presiding over the applicable criminal case---
  - (i) have sufficient legal training; and
  - (ii) be licensed to practice law in any jurisdiction in the United States (state, federal or tribal); and
- (4) prior to charging the defendant make publicly available the criminal laws, rules of evidence, criminal rules ...of the tribal government
- (5) maintain a record of the criminal proceeding (audio or other recording)

# Subtitle C-Empowering Tribal Law Enforcement

- (d) Sentences-In case of a defendant sentenced in accordance with (b) or (c) the defendant may be ordered to serve time in:
  - (A) tribal correctional center
  - (B) appropriate federal facility, at the expense of the U.S. pursuant to the Bureau of Prisons tribal prisoner pilot project
  - (C) state or local government approved per agreement
  - (D) in an alternative rehab center of the Tribe

# Subtitle C-Empowering Tribal Law Enforcement

- (c) Bureau of Prisons Tribal Prison Project
  - (A) IN GENERAL---No later than 120 days the Director of Prisons shall establish a pilot project where the Bureau will accept offenders from tribal court
    - conviction must be for a violent crime (comparable to 1153(a))
    - --must be incarcerated for 2 years or more
    - --limit of 100 tribal offenders at any time (if more is need director can ask for reassessment)

## GAO Report dated May 30, 2012

- GAO surveyed 171 tribes (out of 566) that
  - reported allocating Tribal Priority Allocations (TPA) – federal funding that BIA distributes to tribes and that tribes may allocated to a variety of activities – to their tribal courts,
  - Received Byrne JAG grant from DOJ, or
  - Both

## GAO Report Asked These Questions:

- To what extent did selected tribes report that they exercise, or have plans to exercise, TLOA's new sentencing authority?
- What types of assistance do the feds provide tribes to implement TLOA sentencing authority and what assistance would tribes like to receive?

## GAO Findings

- 109 Tribes (64%) responded to the survey and NONE are currently exercising felony sentencing authority
  - 36% plan to exercise the new sentencing authority
  - 34% did not know the tribe's plans
  - 31% do not plan to exercise the authority
- Limited funding identified by 96% as the primary challenge
  - Need to change code or constitution (40%)
  - Waiting for appellate decision or not seen as traditional

## Does my Tribe have to implement enhanced sentencing?

- “We don’t have a law trained defense attorney, so does the tribe have to shut down the court?”
- NO. The tribe can still have a fully operational court; it just cannot sentence an individual to longer than one year in jail.



# Using Tribal Court Convictions in Federal Prosecutions

## Domestic Assault by an Habitual Offender 18 USC 117

- Is a federal offense when D commits a domestic assault in IC and he has two prior federal, state or tribal court convictions for offenses that would be, if subject to federal jurisdiction, an assault, a sexual abuse offense, an offense under Chapter 110A, or a serious violent felony against a spouse or intimate partner.
- 5 year statutory maximum sentence unless substantial bodily injury to victim – then is increased to a statutory maximum of 10 years.

## US v. Roman Cavanaugh, Jr.

- 1/19/09 D indicted in ND
- D a member of the Spirit Lake Tribe
- D had 3 previous DV convictions in the Spirit Lake Tribal Court
- D was indigent and was not provided a law trained, licensed atty in the tribal court
- District court judge quashed the indictment
- US appeals and wins

## Constitutional Challenges

Issue: Can uncounseled tribal court convictions be used as predicate offenses for a 18 USC 117 prosecution?

Yes.

- *United States v. Cavanaugh*, 643 F.3d 592 (8<sup>th</sup> Cir. 2011)
  - Recent sentencing for felony child abuse and neglect
- *United States v. Shavanaux*, 647 F.3d 993 (10<sup>th</sup> Cir. 2011)

Important point – victims in earlier cases can be different than current victim(s)

# Questions

**Link for mentioned GAO Report: GAO-12-658R, May 30, 2012**

**None of the Surveyed Tribes Reported Exercising the New Sentencing Authority,  
and the Department of Justice Could Clarify Tribal Eligibility for Certain Grant  
Funds**

<http://www.gao.gov/products/GAO-12-658R>