Combatting Trafficking of Native Americans and Alaska Natives

Leslie A. Hagen
National Indian Country Training Coordinator
Executive Office for United States Attorneys

Benjamin L. Whittemore
Native American Issues Coordinator
Executive Office for United States Attorneys

I. Introduction

Like carnival barkers in an Internet sideshow, they tout their product: young women who will provide companionship. For a price.1

The issue of human trafficking, specifically sex trafficking, in Indian country has received increasing attention the past couple of years. Multiple jurisdictions in tribal communities may have the legal authority to investigate and prosecute crimes of human trafficking. Many of the media reports and congressional inquiries have focused on the federal government’s role in uncovering and prosecuting these offenses. However, state prosecutors and tribal prosecutors also may have the ability to charge and try these cases. The issue is nuanced, and a balanced discussion of the issue must involve the following: the location of the offense; the Indian or non-Indian status of the pimp, if known; and, if the victim is an adult, whether there was force, fraud, or coercion exerted to induce the commercial sex act. To date, there has been little research done on the topic of sex trafficking occurring in Indian country. But, some of what does exist fails to adequately distinguish between the commercial sexual exploitation of American Indian/Alaska Natives in Indian country, as defined in 18 U.S.C. §1151, and the commercial sexual exploitation of American Indian/Alaska Natives (AI/ANs) off-reservation.

To date, the two most frequently cited reports on the trafficking of Native women are Shattered Hearts: The Commercial Sexual Exploitation of American Indian Women and Children in Minnesota (Shattered Hearts)2 and Garden of Truth: the Prostitution and Trafficking of Native Women in Minnesota (Garden of Truth).3 Shattered Hearts is focused on data collected in Minnesota during the client intake process at several service provider programs, and it reports that trafficking of Native American girls is common. While Shattered Hearts is a thorough and well-written report, the reader must be aware that its analysis is based on Minnesota’s trafficking statutes and not federal law. The authors of Garden of Truth interviewed 105 Native women involved in prostitution and asked about family history, sexual and physical violence throughout their lifetimes, homelessness, symptoms of post-traumatic stress disorder and dissociation, and use of available services such as domestic violence shelters, homeless shelters, rape crisis centers, and substance abuse treatment. The survey results document a shocking level of abuse

2 MINN. INDIAN WOMEN’S RES. CTR., SHATTERED HEARTS: THE COMMERCIAL SEXUAL EXPLOITATION OF AMERICAN INDIAN WOMEN AND GIRLS IN MINNESOTA (2009).
perpetrated on these victims and an extensive list of recommendations necessary to provide desperately needed assistance. Again, this document is poignant and well researched, but it does not address the federal human trafficking statute.

One area in Indian country where there is increasing research and analysis (with a focus on the federal government’s response) is the proliferation of violence, drug abuse, and sex crimes, including human trafficking, in the Bakken Oil patch. The United States Attorney’s Offices (USAOs) and the Federal Bureau of Investigation (FBI) are very engaged in increasing law enforcement resources in the oil patch and actively investigating and prosecuting crime occurring in the Bakken. Some of these efforts are documented more fully in the case example portion of this article.

Sex trafficking of American Indians and Alaska Natives is a real and significant problem. Unfortunately, lore and urban myth about what sex trafficking in Indian country looks like has possibly done a grave disservice to Native trafficking victims residing in tribal communities or urban areas by diverting attention from looking for genuine cases of trafficking to chasing shadows. For example, many of the discussions the last couple of years regarding human trafficking in Indian country inevitably include stories about Native women being taken, held, and sexually abused in the cargo storage compartments of international ships visiting the Duluth port. In fact, since the terrorist attacks of September 11, 2001, the Duluth port has increased security because of its designation as an international point of entry. Credentials and identification are required to get on the docks and to the boats. Civilians are not permitted access to the docks or boats. So, while there may have been a time when prostitution and human trafficking were commonplace at the Duluth port, security efforts implemented nearly sixteen years ago have significantly curtailed the problem.

This article seeks to clarify the record by doing the following: outlining federal jurisdiction for commercial sex trafficking offenses in Indian country, providing examples of cases originating in tribal communities or where AI/ANs were victimized, reviewing current studies and data on victimization rates of AI/ANs, offering an example of how to develop a comprehensive community response to the issue of human trafficking in Indian country, and detailing the Department’s commitment to investigating and prosecuting this heinous crime.

II. Trafficking Victim Vulnerabilities

“He made me feel special. He found me when I was broken. He built me up. Broke me back down. And built me back up again to where I thought he was my everything.” (Heather, Alaska Sex Trafficking Survivor)

Pimps select their prey, typically adolescents, to victimize with a few specific criteria in mind. They target individuals they believe will be unable to escape, unwilling or too afraid to cooperate with law enforcement, and likely to be simply overlooked, forgotten, or ignored by society. To be marginalized is to be vulnerable—every minute of every day and at every turn. This truth is magnified in tribal communities where resources are scarce and help may be hours away.

4 See Amy Dalrymple & Katherine Lynn, Sex for Sale in the Bakken: Trafficking in ND Is on the Rise, DAILY REPUBLIC (Jan. 5, 2015).
5 Rhianon Fletcher, Secrets of the Ports Human Trafficking in Duluth, Minnesota, DULUTH J. UNDERGRADUATE RES., 2015, at 103–05.
While it is often believed that “prostitution is an adult occupation,” “80% of women engaged in prostitution started before their eighteenth birthday,” with “the average [starting age being] between twelve and fourteen years old.”7 There were “1,400 youth arrested for prostitution in the United States in 2003,” and of that group, unfortunately, “14% were age fourteen or younger.”8 Of the Department of Justice’s confirmed human trafficking cases from 2008 to 2010, 64% consist of allegations of sexual exploitation of a child.9 While adults are also victims in domestic sex trafficking cases, the adults who are sex trafficked are often “initially trafficked either while juveniles or very shortly thereafter.”10 Juveniles are found to be easier targets for pimps based on their lack of “perspective, experience, and emotional maturity” that hinders their ability to see through lies and schemes told to them by traffickers.11 Therefore, “[t]he younger the victim, the more susceptible they are to the manipulations . . . of domestic sex traffickers.”12

Beyond the factor of age, “70% of domestic sex trafficking victims were [victims of prior child sexual abuse, with the abuse occurring] between the ages of three and fourteen.”13 These previous child sexual abuse victims frequently suffer from the symptoms of “deep-seated shame, humiliation, and lack of self-worth. They also are often left ‘feeling defective and defeated,’ . . . [and] blame themselves for being sexually victimized.”14 Victims then have low self-esteem and a high need for love, increasing their vulnerability, and, in turn, making them view themselves as “dirty” or a “pervert.”15

Because of this prior sexual abuse, many sex trafficking victims come from dysfunctional families whose abuse stems further to include “physical abuse, verbal abuse, neglect, and family abandonment.”16 Most victims lack a healthy, “loving relationship with their father or another adult male” and crave what the victim understands to be a family environment, even though they lack the understanding of what a functional family environment could be.17 Sex traffickers often prey on this family void; however, it should be noted “that 25% of child sex trafficking victims were . . . trafficked by family members.”18

Another factor to note is the financial instability victims may face. This might be through “inadequate education,” “limited employment opportunities,” or “a poverty-stricken background” in which the victims find themselves unable to support themselves, a situation which, in turn, increases their vulnerability to the traffickers.19

Because of experiences like a history of abuse and lack of financial stability, victims might be runaways, “abuse drugs to self-medicate,” and “have a history of psychological problems.”20 If the victim is a runaway, the victim is more likely to engage in what is known as “survival sex” to obtain “subsistence needs” such as “shelter, food, drugs, or money.”21 If the victims are engaging in survival sex,
“it is not uncommon for [these victims to participate in] commercial sex acts prior to their exploitation,” which, in turn, increases their vulnerability to “exploitation and enslavement [by the] traffickers.”

III. Victimization Rates in American Indian and Alaska Native Populations

American Indian and Alaska Native (AI/AN) children suffer exposure to violence at rates higher than any other race in the United States. The immediate and long term effects of this exposure to violence includes increased rates of altered neurological development, poor physical and mental health, poor school performance, substance abuse, and overrepresentation in the juvenile justice system. This chronic exposure to violence often leads to toxic stress reactions and severe trauma, which is compounded by historical trauma. Sadly, AI/AN children experience posttraumatic stress disorder at the same rate as veterans returning from Iraq and Afghanistan and triple the rate of the general population. With the convergence of exceptionally high crime rates, jurisdictional limitations, vastly under-resourced programs, and poverty, service providers and policy makers should assume that all AI/AN children have been exposed to violence.

The issues of domestic violence, sexual assault, and child abuse are significant ones, and they have deservedly received greater attention by the public, criminal justice and social service systems, and the medical community during the past two decades. Research and anecdotal evidence show that individuals who are abused at home by family members, friends, or intimate partners are more likely to be vulnerable to other forms of victimization. For example, if an adolescent’s father or uncle molestes her at home, she is more likely to become a runaway or to self-medicate with drugs and alcohol. These factors put her at increased risk for falling prey to a sex trafficker. We know that AI/ANs experience much higher rates of victimization than do the rest of the population. Recent studies suggest that American Indian women are 2.5 times more likely than the national average to experience certain violent crimes, such as nonfatal strangulation. Therefore, it is important for criminal justice and social service personnel responding to crime in tribal communities to be knowledgeable of the types and frequency of abuse perpetrated on the First Americans. In addition, all must be mindful of the painful experiences Native Americans have suffered at the hands of the federal and state governments: forced removal from their ancestral homelands, boarding school, slavery, and sexual abuse.

The Department of Justice’s research component is the National Institute of Justice (NIJ). Throughout the past decade, NIJ has dedicated many resources to researching and evaluating the rate and types of violence perpetrated against AI/ANs. Results from an NIJ-funded study, researched and written by Andre Rosay, Ph.D., Director of the Justice Center at the University of Alaska–Anchorage, was released in 2016; the study shows that AI/AN women and men suffer violence at alarmingly high rates.

The study looked at the prevalence of psychological aggression and physical violence by intimate partners, stalking, and sexual violence among AI/AN women and men. It also examined the perpetrators’ race and the impact of the violence.

The [NIJ] study used a nationally representative sample from the National Intimate Partner and Sexual Violence Survey (NISVS), with a total of 2,473 adult women and 1,505 adult men who identified themselves as AI/AN, either alone or in combination with another

22 Id.
23 ATT’Y GEN.’S ADVISORY COMM. ON AM. INDIAN & ALASKA NATIVE CHILDREN EXPOSED TO VIOLENCE, supra note 6, at 2 (citation omitted).
racial group. Most women (83 percent) and most men (79 percent) were affiliated or enrolled with a tribe or village. More than half of women and men (54 percent for each group) had lived within reservation boundaries or in an Alaska Native village in the past year.

The results, which show high rates of violence against both women and men, provide the most thorough assessment on the extent of violence against [AI/AN] women and men to date.26

In short, more than four in five AI/AN women and men have experienced violence in their lifetime, and more than one in three experienced violence in the past year, according to this NIJ-funded study. NIJ published a Journal article written by Dr. Rosay, which provides an excellent summary of the longer Research Report. The information printed below is taken from the NIJ Journal article document:

Violence Against Women

Results show that more than four in five [AIAN] women (84.3 percent) have experienced violence in their lifetime. This includes 56.1 percent who have experienced sexual violence, 55.5 percent who have experienced physical violence by an intimate partner, 48.8 percent who have experienced stalking, and 66.4 percent who have experienced psychological aggression by an intimate partner. Overall, more than 1.5 million [AIAN] women have experienced violence in their lifetime.

The study also found that more than one in three [AIAN] women (39.8 percent) have experienced violence in the past year. This includes 14.4 percent who have experienced sexual violence, 8.6 percent who have experienced physical violence by an intimate partner, 11.6 percent who have experienced stalking, and 25.5 percent who have experienced psychological aggression by an intimate partner. Overall, more than 730,000 [AIAN] women have experienced violence in the past year.

Violence Against Men

[AIAN] men also have high victimization rates. More than four in five [AIAN] men (81.6 percent) have experienced violence in their lifetime. This includes 27.5 percent who have experienced sexual violence, 43.2 percent who have experienced physical violence by an intimate partner, 18.6 percent who have experienced stalking, and 73 percent who have experienced psychological aggression by an intimate partner. Overall, more than 1.4 million [AIAN] men have experienced violence in their lifetime.

More than one in three [AIAN] men (34.6 percent) have experienced violence in the past year. This includes 9.9 percent who have experienced sexual violence, 5.6 percent who have experienced physical violence by an intimate partner, 3.8 percent who have experienced stalking, and 27.3 percent who have experienced psychological aggression by an intimate partner. Overall, more than 595,000 AIAN men have experienced violence in the past year.

[AIAN] men are 1.3 times as likely as non-Hispanic white-only men to have experienced violence in their lifetime. In particular, [AIAN] men are 1.4 times as likely to have experienced physical violence by an intimate partner and 1.4 times as likely to have experienced psychological aggression by an intimate partner in their lifetime. The other estimates are not significantly different across racial and ethnic groups.

How Does the Violence Affect Victims?

The study also briefly examined how physical violence by intimate partners, stalking, and sexual violence affects [AIAN] victims. Among the victims:

- 66.5 percent of women and 26.0 percent of men expressed concern for their safety.
- 41.3 percent of women and 20.3 percent of men were physically injured.
- 49.0 percent of women and 19.9 percent of men needed services.
- 40.5 percent of women and 9.7 percent of men missed days of work or school.

[AIAN] female victims were 1.5 times as likely as non-Hispanic white-only female victims to be physically injured, 1.8 times as likely to need services, and 1.9 times as likely to have missed days of work or school. Other differences across racial and ethnic groups were not statistically significant.

[AIAN] female victims were 1.5 times as likely as non-Hispanic white-only female victims to be physically injured, 1.8 times as likely to need services, and 1.9 times as likely to have missed days of work or school. Other differences across racial and ethnic groups were not statistically significant.

Victims identified a variety of needed services. [AIAN] female victims most commonly needed medical care (38 percent of victims) and were 2.3 times as likely as non-Hispanic white-only victims to need this type of care. They also needed legal services (16 percent), housing services (11 percent), and advocacy services (9 percent). Medical care and legal services were the most commonly reported needs for male victims as well.

Unfortunately, not all victims were able to access services. More than one in three [AIAN] female victims (38 percent) and more than one in six [AIAN] male victims (17 percent) were unable to get the services that they needed. [AIAN] women were 2.5 times as likely as non-Hispanic white-only women to lack access to needed services.27

As seen through the statistics listed above, AI/ANs suffer from a heightened victimization and are often unable to receive services that could help them.

Regarding the issue of child abuse, the most recent statistics come from Child Maltreatment 2015, the 26th edition of the annual Child Maltreatment report series, which provides data through the National Child Abuse and Neglect Data System (NCANDS). The report states that “the national estimate of children who received a child protective services investigation response or an alternative response [was] . . . 3,358,000 . . . .28 Of these cases, the number and rate of reported victims in 2015 was 683,000.29 Approximately, “[t]hree-quarters (75.3%) of the victims were neglected, 17.2 percent were physically abused, and 8.4 percent were sexually abused.”30 “For [the entirety of] 2015, a nationally estimated 1,670 children died of abuse and neglect at a rate of 2.25 per 100,000 children in the national population.”31 All of these 2015 national statistics were based upon receiving data from “the 50 states, the District of Columbia and the Commonwealth of Puerto Rico.”32

Looking specifically into Indian country, data on child sexual abuse is limited. Through the National Indian Child Welfare Association, it is reported that of the 405,000 American Indian children

27 Id. (tables omitted). For full survey information, visit: https://www.cdc.gov/violenceprevention/nisvs/index.html.
29 Id.
30 Id.
31 Id.
32 Id.
living the United States today, 28,000 or (7%) are at risk for abuse or neglect each year. Of these cases in which there is abuse, 95% are substance abuse related.

IV. Federal Criminal Jurisdiction in Indian Country

Currently, there are 567 federally recognized tribes in the United States. According to the Bureau of Indian Affairs, “[a]pproximately 56.2 million acres are held in trust by the United States for various Indian tribes and individuals.” In addition, the Bureau states the following:

There are approximately 326 Indian land areas in the U.S. administered as federal Indian reservations (i.e., reservations, pueblos, rancherias, missions, villages, communities, etc.). The largest [such land area] is the 16 million-acre Navajo Nation Reservation located in Arizona, New Mexico, and Utah. The smallest is a 1.32-acre parcel in California where the Pit River Tribe’s cemetery is located. Many of the smaller reservations are less than 1,000 acres.

Approximately, 5.2 million people in the United States identify as Native American, “either alone or in combination with one or more other races,” per the 2010 Census. And of this group, 2.9 million, or 0.9% of the total U.S. population, identify as only Native American. In 2010, more than 1.1 million Native Americans resided on tribal land.

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 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 General Crimes Act, gives the federal government exclusive jurisdiction to prosecute all crimes committed by non-Indians against Indian victims in Indian country. 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 provides that the federal government may not prosecute an Indian who has been punished by the local tribe.

To protect tribal self-government, Section 1152 specifically excludes minor crimes involving Indians, when the crimes 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, unless a specific treaty or statutory provision provides otherwise.

---

34 Id.
36 Id.
37 Id.
39 Id. at 3.
40 Id. at 13.
43 Id. § 1153(a).
44 Id. § 1152.
45 Id.
46 Id.
47 Id.
limited number of reservations, the federal criminal responsibilities under Sections 1152 and 1153 have been ceded to the States under “Public Law 280” or other federal laws.

The United States Constitution, treaties, federal statutes, executive orders, and court decisions establish and define the unique legal and political relationship that exists between the United States and Indian tribes. The FBI and the USAOs are two of many federal law enforcement agencies with responsibility for investigating and prosecuting crimes that occur in Indian country. FBI jurisdiction for the investigation of federal violations in Indian country is statutorily derived from 28 U.S.C. § 533, pursuant to which the FBI was given investigative authority by the Attorney General.48 In addition to the FBI, the Department of the Interior’s Bureau of Indian Affairs (BIA) plays a significant role in enforcing federal law, including the investigation and presentation for prosecution of cases involving violations of 18 U.S.C. §§ 1152 and 1153.

V. Application of the Federal Human Trafficking Statute to Crimes Arising in Indian Country

It must be emphasized that the General Crimes Act and Major Crimes Act deal only with the application of federal enclave law to Indians, and have no bearing on federal laws of general applicability that make actions criminal wherever committed, regardless of the status of the defendant or the location of the crime.49 Despite the explicit holdings in three circuits that jurisdiction exists over violation of statutes of general applicability, one court of appeals has held that such statutes do not automatically apply to offenses in Indian country involving only Indians, unless there is an independent federal interest to be protected.50 The Markiewicz court went on to hold that each of the statutes charged in the case, 18 U.S.C. § 1163 (theft of tribal funds), 18 U.S.C. § 844(i) (arson of property in interstate commerce), 18 U.S.C. § 1513 (witness tampering), 18 U.S.C. § 402 (contempt), 18 U.S.C. § 1621 (perjury), and 18 U.S.C. § 2101 (riot), reflected such an independent federal interest or that its violation had not occurred in Indian country.51 Markiewicz was explicitly rejected by the Ninth Circuit in United States v. Begay, which held that 18 U.S.C. § 371 (conspiracy) applied in Indian country even though it is not a crime enumerated in 18 U.S.C. § 1153.52

The federal “human trafficking” statute is found at 18 U.S.C. § 1591, and the official title in the federal code is “[s]ex trafficking of children or by force, fraud, or coercion.”53 The penalty and elements for the offense are the following:

(a) Whoever knowingly--

(1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person; or

(2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1),

49 See United States v. Young, 936 F.2d 1050, 1055 (9th Cir. 1991) (assault on federal officer and firearms), overruled on other grounds by United States v. Vela, 624 F.3d 1148 (9th Cir. 2010); United States v. Blue, 722 F.2d 383, 384–85 (8th Cir. 1983) (narcotics); United States v. Smith, 562 F.2d 453, 458 (7th Cir. 1977), (assault on federal officer), abrogated by United States v. Brisk, 171 F.3d 514, 521 n.5 (7th Cir. 1999).
50 See United States v. Markiewicz, 978 F.2d 786, 800 (2d Cir. 1992).
51 See id. at 817.
knowing, or, except where the act constituting the violation of paragraph (1) is advertising, in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).

(b) The punishment for an offense under subsection (a) is--

(1) if the offense was effected by means of force, threats of force, fraud, or coercion described in subsection (e)(2), or by any combination of such means, or if the person recruited, enticed, harbored, transported, provided, obtained, advertised, patronized, or solicited had not attained the age of 14 years at the time of such offense, by a fine under this title and imprisonment for any term of years not less than 15 or for life; or

(2) if the offense was not so effected, and the person recruited, enticed, harbored, transported, provided, obtained, advertised, patronized, or solicited had attained the age of 14 years but had not attained the age of 18 years at the time of such offense, by a fine under this title and imprisonment for not less than 10 years or for life.54

Section 1591 is a crime of general applicability. If the government can prove that the crime was committed “in or affecting interstate or foreign commerce,” there is no need to consider other bases of jurisdiction, like the General Crimes Act, for crimes occurring in Indian country. Also, 18 U.S.C. § 1591 prohibits interstate or foreign commerce in regard to sex trafficking. When defining interstate or foreign commerce, the United States Supreme Court has interpreted Congress’s power to regulate activities that involve and affect commerce through the Commerce Clause.55 Pursuant to the Commerce Clause, Congress has the power to regulate activities that have a substantial effect on interstate commerce.56 The government need only meet a de minimis standard of commerce to fall under the Commerce Clause.57

The courts have created a four-factor test to determine whether a law regulates an activity that has substantial effect on interstate commerce.58 The four factors are the following:

(1) whether the regulated activity is economic in nature; (2) whether the statute contains an ‘express jurisdictional element’ linking its scope in some way to interstate commerce; (3) whether Congress made express findings regarding the effects of the regulated activity on interstate commerce; and (4) attenuation of the link between the regulated activity and interstate commerce.59

Numerous courts have ruled § 1591 constitutional following application of the four factor test. The Campbell court said the following:

First, commercial sex acts are economic in nature. Second, section 1591 has a jurisdictional element, requiring the jury to find that the activity affected interstate commerce. Third, in enacting the [Trafficking Victims Protection Act, . . .], Congress found that “Trafficking in persons substantially affects interstate and foreign commerce.” Fourth[, . . .] there is a clear nexus between [the defendant's] intrastate recruiting and obtaining of women to

54 Id. § 1591(a)–(b).
56 Id.
57 Id.
commit commercial sex acts, the interstate aspects of [the defendant's] business, and the
interstate market for commercial sex.

Accordingly, the Court in Paris ruled that Congress had the power to regulate the defendant’s
intrastate recruiting and obtaining women to perform commercial sex acts.60

A critical question for using § 1591 in Indian country is what activity falls within the definition of
interstate commerce. Must the pimp, john, or victim travel across state lines or in and out of Indian
country? Or does purely intra-jurisdiction activity meet the legal definition? The case of United States v.
Evans addressed the issue of whether solely “intrastate” commercial sexual activity could satisfy the
interstate-commerce element of §1591(a)(1).61 In Evans, a fourteen-year-old girl (Jane Doe) worked in
Miami-Dade County as a prostitute for the defendant.62 “[Defendant] arranged ‘dates’ for Jane Doe at
local hotels.”63 Jane Doe gave all money earned to the defendant.64 Evans communicated with the victim
using a cell phone.65 “[The defendant] supplied Jane Doe with condoms to use on the dates.” Lifestyle
was the most commonly used brand of condom; this brand is produced overseas and imported into
Georgia for sale and delivery throughout the United States.66 Jane Doe was ultimately hospitalized for
eleven days and diagnosed with AIDS.67 After her release from the hospital, Evans contacted Jane Doe
via landline telephone and asked her to work for him again. Jane Doe worked for the defendant until she
was hospitalized again to be treated for AIDS.68

The Evans court found that § 1591(a)(1) was constitutional as applied to defendant’s purely
intrastate activities.69 The court said that § 1591 “was enacted as part of the Trafficking Victims
Protection Act of 2000 [(TVPA)]; this act “criminalizes and attempts to prevent slavery, involuntary
servitude, and human trafficking, . . . particularly of women and children in the sex industry.”70
Importantly, the court highlighted that “Congress found that trafficking of persons has an aggregate
economic impact on interstate and foreign commerce.”71 The court stated that Congress’s conclusions in
this regard were not irrational.72 Therefore, the Evans court concluded that defendant’s enticement of a
fourteen-year-old female to commit intrastate prostitution “had the capacity when considered in the
aggregate with similar conduct by others, to frustrate Congress’s broader regulation of interstate and
foreign economic activity.”73 In short, defendant’s “use of hotels that served interstate travelers and
distribution of condoms that traveled in interstate commerce are further evidence that Evans’s conduct
substantially affected interstate commerce.”74 This case is often cited to support a broad definition of
interstate commerce.

Evans was also charged with a count of 18 U.S.C. § 2422(b), which criminalizes the actions of
anyone who, by “using the mail or any facility or means of interstate or foreign commerce, . . . persuades,

03:06–cr–64 (CFD), 2007 WL 3124724, at *8 (D. Conn. 2007)).
62 Id. at 1177.
63 Id.
64 Id.
65 Id.
66 Id.
67 Id. at 1177–78.
68 Id.
69 Id. at 1180–81.
70 Id. at 1179.
71 Id.
72 Id.
73 Id.
74 Id.
induces, entices, or coerces any individual who has not attained the age of 18 years to engage in prostitution . . . .”75 Defendant admitted to contacting the victim via cellular telephone and landline.76 But on appeal, he argued that the government failed to prove that his intrastate calls were routed through interstate channels.77 The court disagreed and held that “telephones and cellular telephones are instrumentalities of interstate commerce.”78 This finding, too, may prove important to the prosecutor analyzing whether or not § 1591 is a viable charge for sex trafficking in Indian country.

A review of case law demonstrates that many activities undertaken to promote or support commercial sexual exploitation will meet the standard of “affecting interstate commerce.” Moreover, the prosecutor is permitted to argue that even “intrastate,” “intra-reservation,” and “intra-SMTJ” activities have an aggregate economic impact on interstate and foreign commerce. In fact, these authors were unable to find case law articulating an activity undertaken to further acts of commercial sexual exploitation that were found not to impact interstate commerce. Thus, human trafficking violations occurring in Indian country or within the special maritime and territorial jurisdiction should always be chargeable as § 1591 offenses crimes. If, however, commerce is inexplicably not implicated, the prosecutor must look to the General Crimes Act (18 U.S.C. § 1152) to determine if jurisdiction exists to charge the case in federal court. The General Crimes Act limits federal jurisdiction for a violation of § 1591 to either a non-Indian perpetrator and an Indian victim or an Indian perpetrator and a non-Indian victim when the tribe has not already punished the offender for the same offense.79 In these very specific situations, the United States could prosecute the offender under § 1591 by relying on the incorporation of SMTJ jurisdiction through the General Crimes Act by proving that the crime occurred in Indian country; by doing so, the prosecutor would eliminate the need to prove an interstate nexus.80

It is also important to note that, depending on the facts of the case, the county prosecutor or state attorney general’s office may have jurisdiction to prosecute cases of human trafficking in Indian country. Furthermore, some tribes may have human trafficking codes and the ability to prosecute Indian offenders in tribal court. Or, even if the tribe does not have a specific human trafficking code, it may have jurisdiction to prosecute co-occurring crimes.

VI. Indian Country Human Trafficking Case Examples

Human trafficking and, specifically, commercial sexual exploitation of children and adults happens everywhere, including Indian country and Alaska Native villages. The crimes may not be on the scale of offenses committed in big cities. Nevertheless, the harm done to victims and the community is just as damaging. Because residents of small towns and tribal communities may be oblivious to the signs of trafficking, cases may be overlooked. An example of a trafficking case that could easily stay off law enforcement’s radar is United States v. Jackie Little Dog (a/k/a Audrey Jacqueline Little Dog, a/k/a Audrey Jacqueline Bobtail Bear). On June 5, 2012, Little Dog, age 52, was sentenced to 30 months in custody with credit for time served, two years of supervised release, and a $100 assessment to the Victim Assistance Fund.

75 Id. at 1180; 18 U.S.C. § 2422(b) (2012).
76 Evans, 476 F.3d at 1180.
77 Id.
78 Id. at 1180–81.

Little Dog admitted that she repeatedly brought an individual who was younger than 18 from his/her home in Little Eagle to a residence in McLaughlin where she knew [the minor] would be exposed to a variety of physical dangers, including [consuming alcohol] and being expected to engage in sexual encounters with various adult men.82

The defendant had met a group of immigrant construction workers at the casino. None of the men spoke English. Little Dog began visiting the men’s rental house and partying with them. She also began taking a group of minor females and young women with her to the house. The defendant took the minor victim with her numerous times to the house. The victim had sex with one of the men and received $50.00 payment. She used the money to purchase gas for the defendant’s car and to feed each of them breakfast. The victim told the defendant where she got the money. The defendant continued to take the minor female to the house, and the victim continued to have sex with the men for various amounts of payment. She received as much as $50.00 and as little as an 18-pack of beer. The case was prosecuted by AUSA Kevin Koliner, District of South Dakota.

The rural nature and geographic size and scope can make it difficult to detect trafficking cases occurring in the City of Anchorage and in “the bush” Alaska. In Anchorage, there are some reoccurring themes in trafficking cases: (1) cases are primarily Internet based; (2) traffickers directly recruit the victims; (3) drugs are typically involved; (4) victims are promised a better life and the chance to earn large sums of money; and (5) pimps isolate victims and remove them from their families.83 Cases originating in rural Alaska, or “the bush,” also have certain characteristics: (1) victims are lured to Anchorage by family members or boyfriends (referred to as “Tundra Pimping”); (2) something other than money, like drugs, may be exchanged for sex; and (3) the victim typically has a history of prior victimization.84 The average age of becoming a trafficking victim is fifteen to seventeen. Alaska Native youth are particularly vulnerable to traffickers because they may be unfamiliar with Anchorage, have little to no support system outside of their village, and may be unaware of resources or assistance available to them in Anchorage.85 Covenant House Alaska, a youth shelter in Anchorage, reports that “1 in 3 youth will be approached by a trafficker in Anchorage within forty-eight to seventy-two hours of becoming homeless.”86

Fortunately, in 2012, the FBI in Alaska developed a robust “Innocence Lost” task force to tackle the problem of sex trafficking in Alaska. In 2003, the FBI created the Innocence Lost National Initiative in conjunction with the Department of Justice Child Exploitation and Obscenity Section and the National Center for Missing & Exploited Children. The initiative’s goal is to address the growing problem of domestic sex trafficking of children in the United States.87 In addition to developing and working cases, FBI agents in Alaska, along with their task force partners, do a tremendous amount of training and outreach, even in remote Alaska Native villages. Sharing information with other criminal justice, social

82 See id.
83 Written testimony of Diana Bline submitted at the Fourth Hearing of the Advisory Committee of the Attorney General’s Task Force on American Indian/Alaska Native Children Exposed to Violence, Anchorage, Alaska 2014.
84 Id.
85 Id.
86 Id.
87 See What We Investigate, FBI (last visited Sept. 15, 2017).
service, medical personnel, and community members has paid real dividends by saving victims and getting pimps off the street. One such case example is United States v. Randall Scott Hines. Hines was a charter fishing boat captain in Homer, Alaska. Hines admitted to engaging in sexual relationships with a series of teenage girls in Homer, Alaska. He also admitted to frequently supplying these same girls with methamphetamine and, at times, with oxycodone, “often in conjunction with having sex with them. Four of the six teenage girls with whom Hines had a sex and drug relationship were under the age of sixteen . . . .” In part, the crimes were discovered when an astute health care professional, who had been trained by the FBI on how to identify trafficking victims, noted that a group of young women and adolescents had the same sexually transmitted infection. Hines was ultimately convicted of “one consolidated count of distributing drugs to underage individuals and one count of possession of child pornography” because he had “a sexually explicit video clip of him engaged in sex[ual] conduct with one of the minor victims.” He was sentenced to ten years’ imprisonment to be followed by ten years’ supervised release. As part of the case, his charter boat was seized by authorities. Hines agreed to sell the boat and use the proceeds to fund a $160,000 trust fund to help the victims obtain drug treatment and counseling. The case was prosecuted by AUSA Kim Sayers-Fay, District of Alaska.

An example of a trafficking case occurring in Indian country is United States v. Dustin Morsette. Morsette received a 45-year prison term following a jury trial and his conviction on charges of sex trafficking, sexual abuse, drug trafficking, and witness tampering.

In or about September 2009, Morsette and another person conspired to distribute marijuana in and around the Fort Berthold Indian Reservation [in North Dakota]. As part of this conspiracy, Morsette began to recruit minors and young adults to be part of a gang he described as the Black Disciples. According to testimony at trial, Morsette used physical force and coercion to cause an adult female he had recruited for the gang to engage in commercial sex acts on the Fort Berthold Indian Reservation and in Williston and Minot. After his arrest in July 2010, Morsette attempted to influence this adult female’s testimony in this case and to prevent communication of information about the sexual abuse and prostitution activity to law enforcement.

Also according to trial testimony, gang members were required to distribute marijuana for Morsette and/or engage in sexual acts with Morsette. Morsette used force and threats to coerce individuals he recruited for the gang into engaging in the sexual acts with him. Morsette also engaged in a sexual act with a minor who was physically incapable of consenting to the act due to her consumption of alcoholic beverages and drugs. Morsette utilized several minors whom he had recruited for the gang to distribute or assist with the distribution of marijuana in the New Town area.

At the time of his sentencing, the United States Attorney for the District of North Dakota said the following:

“Defendant Morsette is a predator who targeted and exploited young girls and women of the Fort Berthold Reservation. He sexually abused multiple young girls[,] he engaged

---

89 See id.
90 Id.
91 See id.
93 Id.
minor children to sell drugs for him, and he used physical force and coercion to force an additional young woman to perform sex acts for money in Minot and Williston. The stiff sentence imposed by the court today is a just punishment for defendant Morsette’s crimes. The climate of fear he created for young girls and women on the Fort Berthold Reservation is no more.”

The case was prosecuted by AUSA Rick Volk, District of North Dakota.

From the above listed case examples, it is clear that commercial sex trafficking cases in Indian country or rural Alaska look different from big city cases. In addition, as evidenced by the cases outlined above, cases originally charged as a violation of § 1591 may ultimately be resolved by plea to another criminal offense, like sexual abuse or child abuse. Defendants who plead guilty to a crime other than trafficking typically receive stiff penalties on par with sentences meted out for trafficking convictions. However, plea agreements allow for resolution of a case without the necessity of putting the victim through trial. Particularly, for victims in Indian country, a public trial and the exposure that it entails can be devastating to a young victim who may be struggling physically, mentally, and emotionally with the after effects of being trafficked.

In March 2017, the United States Government Accountability Office (GAO) released a report titled “Human Trafficking: Action Needed to Identify the Number of Native American Victims Receiving Federally-Funded Services.” The GAO looked at the data of four agencies with the authority to investigate or prosecute human trafficking in Indian country: the FBI, Bureau of Indian Affairs (BIA), Immigration and Customs Enforcement Homeland Security Investigations (ICE HSI), and the U.S. Attorneys’ Offices (USAO). The USAOs, FBI, and BIA not only report case statistics, but also track whether or not the crime occurred in Indian country. The GAO report states that for the fiscal years 2013 through 2016, “there were 14 federal investigations and 2 federal prosecutions of human trafficking in Indian country.” During fiscal years 2013-2015, GAO reports “there were over 6,100 federal human trafficking investigations and approximately 1,000 federal human trafficking prosecutions . . . .” Importantly, GAO noted that “state or tribal law enforcement may have jurisdiction to investigate crimes in Indian country; therefore, these figures likely do not represent the total number of human trafficking-related cases in Indian country.” GAO also recognized that crimes like human trafficking may be underreported; therefore, prosecution data may not reflect the full extent of the trafficking problem.

VII. Department of Justice’s Commitment to Fighting Violent Crime and Working Together with American Indians and Alaska Natives

Improving public safety and the fair administration of justice in tribal communities is a top priority for the Department of Justice. On February 28, 2017, U.S. Attorney General Sessions announced the formation of the U.S. Department of Justice Task Force on Crime Reduction and Public Safety. The Task Force was formed pursuant to the President’s Executive Order on a Task Force on Crime Reduction and Public Safety, and is chaired by the Deputy Attorney General, Rod Rosenstein. Task Force members include the Director of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), the

---

94 Id.
95 Id.
97 Id. at 17.
98 Id.
99 Id.
100 Id.
101 Id.
Administrator of the Drug Enforcement Administration (DEA), the Director of the FBI, and the Director of the U.S. Marshals Service (USMS).

Attorney General Sessions said the following:

“On my first day in office, I called in the heads of the four major law enforcement agencies to discuss this plan. Violent crime is on the rise, and we must always remember that crimes are committed against real people. The creation of this task force is a critical step toward confronting this crisis vigorously, effectively and immediately.”

“The task force is central to the Attorney General’s commitment to combatting illegal immigration and violent crime, such as drug trafficking, gang violence and gun crimes, and to restoring public safety to all of the nation’s communities.”

The task force is charged with developing strategies to reduce crime; identifying deficiencies in existing laws and policies that have made them less effective in reducing crime and proposing new legislation and policies to improve public safety and reduce crime; evaluating the availability and adequacy of crime-related data and identifying measures to improve it; and conducting any other relevant studies. In conducting its work, the task force will consult with federal, state, tribal and local law enforcement, law enforcement organizations and victims’ and community advocacy organizations, among others, to learn about successful local efforts and how they can best be supported at the federal level.

Violent crime in Indian country and human trafficking are certainly two of the important public safety issues addressed by the task force. In April 2017, the Executive Office for United States Attorneys (EOUSA) organized the Violent Crime in Indian Country Subcommittee. EOUSA’s Native American Issues Coordinator chairs this Subcommittee, which is part of the larger Task Force on Crime Reduction and Public Safety.

The Department recognizes the United States’ unique legal relationship with federally recognized Indian tribes. The United States Constitution, treaties, federal statutes, executive orders, and court decisions establish and define the unique legal and political relationship that exists between the United States and Indian tribes. In December 2014, the Attorney General issued guidelines stating principles for working with federally recognized Indian tribes. These guidelines apply to all Department personnel working in Indian country. The overarching principles as directed by the Attorney General are the following:

- “The Department of Justice honors and strives to act in accordance with the general trust relationship between the United States and tribes.”
- “The Department of Justice is committed to furthering the government-to-government relationship with each tribe, which forms the heart of its federal Indian policy.”
- “The Department of Justice respects and supports tribes’ authority to exercise their inherent sovereign powers, including powers over both their citizens and their territory.”
- “The Department of Justice promotes and pursues the objectives of the United Nations Declaration on the Rights of Indigenous Peoples.”

103 Id.
104 Id.
• “The Department of Justice is committed to tribal self-determination, tribal autonomy, tribal nation-building, and the long-term goal of maximizing tribal control over governmental institutions in tribal communities, because tribal problems generally are best addressed by tribal solutions, including solutions informed by tribal traditions and custom.”

The Attorney General’s guidelines for working with federally recognized tribes also addresses Department efforts concerning law enforcement and the administration of justice in tribal communities, priorities for USAOs and the FBI:

• “The Department of Justice is committed to helping protect all Native Americans from violence, takes seriously its role in enforcing federal criminal laws that apply in Indian Country, and recognizes that, absent the Department’s action, some serious crimes might go unaddressed.”

• “The Department of Justice prioritizes helping protect Native American women and children from violence and exposure to violence, and works with tribes to hold perpetrators accountable, to protect victims, and to reduce the incidence of domestic violence, sexual assault, and child abuse and neglect in tribal communities.”

VIII. Department of Justice Indian Country Training Resources

In July 2010, EOUSA launched the National Indian Country Training Initiative (NICTI) to ensure that Department prosecutors, as well as state and tribal criminal justice personnel, receive the training and support needed to address the particular challenges relevant to Indian country prosecutions. The Department’s National Indian Country Training Coordinator (Coordinator) leads this training effort, which is based at the National Advocacy Center (NAC) in Columbia, SC. Since its inception, the NICTI has delivered dozens of training opportunities at the NAC or in the field, including well over 100 lectures for other federal agencies, tribes, and tribal organizations held around the country. The NICTI has reached all United States Attorneys’ Offices with Indian country responsibility and over 300 tribal, federal, and state agencies. In addition to live training, the NICTI issues written publications and serves as faculty for other federal agency trainings, webinars, tribally hosted conferences, and technical assistance providers serving Indian country. Importantly, the Department’s Office of Legal Education covers the costs of travel and lodging for tribal attendees at classes sponsored by the NICTI. This allows many tribal criminal justice and social service professional to receive cutting-edge training from national experts at no cost to the student or tribe.

In February 2015, the NICTI, together with the FBI, held the first-ever Human Trafficking in Indian Country Seminar at the NAC. The seminar was for federal and tribal criminal justice professionals working in Indian Country. The seminar enhanced participants’ understanding of legal definitions, elements of federal offenses, and current issues and challenges of human trafficking enforcement. The training also included in-depth discussions of effective strategies for identifying, investigating, and prosecuting human trafficking cases, including prosecutors' roles in the following: planning successful enforcement operations; strategies for developing victim testimony; pretrial litigation strategies; effective trial presentation in human trafficking prosecutions; and sentencing issues. The seminar focused primarily on sex trafficking. A second residential Human Trafficking in Indian Country Seminar was held in early 2017. This training, too, was held at the NAC.

In addition to training at the NAC, the National Indian Country Training Coordinator has lectured on the topic of human trafficking in Indian country at several national conferences, including sessions hosted by the BIA, the USAOs for the Districts of Kansas, Nebraska, and Northern Iowa, a community


106 Id.
The NICTI has also worked with the Office for Victims of Crime, the Office on Violence Against Women, and a video production company, Video/Action, to put together a series of five training videos focused on violence committed against Alaska Natives. One of the videos in the series concerns the issue of sex trafficking. The video highlights several cases where Alaska Natives were targeted by traffickers. Many of these crimes occurred when young Alaska Natives travel from the bush to more urban areas, like Anchorage. The video training series was released in October 2016. The target audience for the training videos is tribal, state, and federal leadership and criminal justice and social service professionals who deal with cases of domestic violence, sexual assault, and sex trafficking committed against Alaska Natives.107

IX. Collaboration Is Key

Working in Indian country is complex because multiple jurisdictions and a myriad of criminal justice and social services personnel may have an active role to play in a single case. This is certainly the situation when a trafficking allegation is reported. Cases must be thoroughly investigated, victims needs identified and met, justice done, and offenders held accountable. Thus, the federal, state, and tribal governments must be coordinated and collaborative, and maintain good lines of communication. Concerning human trafficking in Indian country, there are few examples where all stakeholders in a state, including the tribes, have come together to explore the issue and to develop recommendations. However, one example is the state of Oregon.

In 2010, the Willamette University College of Law’s International Human Rights Clinic (Clinic) released a report that measured how well state and federal officials in Oregon were doing to prevent human trafficking, to prosecute traffickers, and to protect trafficking victims. Their final report is titled “Modern Slavery in Our Midst: A Human Rights Report on Ending Human Trafficking in Oregon.”108 Following release of this report, it was brought to the Clinic’s attention that Native Americans, nationally and in Oregon, are vulnerable to traffickers. Consequently, a second human rights legal fact-finding investigation was initiated. A report titled “Human Trafficking & Native Peoples in Oregon: A Human Rights Report” (Report) was published in May 2014.109

The Report outlined a number of areas where its authors believed that more could be learned or accomplished to deal with criminal justice and victim services issues concerning human trafficking in Indian country: (1) “statistical data and focus on natives in human trafficking”; (2) “knowledge of human trafficking involving Native Americans”; (3) granular information about the location of offenses, identifying characteristics of traffickers and victims, and mechanisms used to facilitate offenses; (4) the impact of foster care placements; (5) the impact of generational trauma and oppression; (6) the causes and effects of underreporting; (7) the “causes and effects of under-enforcement”; (8) the impact of jurisdictional complexities; (9) the impact of state law; (10) training needs; and (11) lack of available resources to fund service provider programs.110 Accordingly, to address these concerns, a list of recommendations is included in the Report.111

107 To access this video, visit: https://www.ovc.gov/library/healing-journey.html.
110 Id. at 41–58.
111 Id. at 58–62.
The Report provides an excellent template for other states or federal judicial districts seeking to undertake a similar examination of trafficking responses in their jurisdictions. The Report also includes the interview questions used to gather the information forming the basis of the recommendations.\textsuperscript{112}

USAOs are engaged in an unprecedented level of collaboration with tribal law enforcement, consulting regularly with them on crime-fighting strategies in each district, joining in federal-tribal task forces, sharing case and grant information, training investigators, and cross-deputizing tribal police and prosecutors to enforce federal law and to allow those deputized individuals to bring cases directly to federal court. Across the country, USAOs and the NICTI have trained over 1,000 tribal and local police officers, enabling those officers to receive their Special Law Enforcement Commissions (SLECs). SLEC holders are cross-deputized to enforce federal laws on Indian land—an important “force multiplier” for tribal communities where federal law enforcement resources may be thin or remotely located. United States Attorneys around the country are also designating tribal prosecutors as Special Assistant United States Attorneys, enabling them to bring cases directly to federal court.

Indian country prosecutions, particularly violent crime prosecutions, are an important part of the Department’s mission, and the Department continually works to improve efforts in this area. These cases are a specific district priority for the forty-nine federal judicial districts with Indian country responsibility.

All USAOs with Indian country responsibility have at least one Tribal Liaison to serve as the primary point of contact with tribes in the district. Tribal Liaisons are an important component of the USAOs’ efforts in Indian country. The Tribal Liaison program was first established in 1995 and codified with the passage of the Tribal Law and Order Act in 2010.\textsuperscript{113} Tribal Liaisons play a critical and multi-faceted role. In addition to their duties as prosecutors, Tribal Liaisons generally fulfill a number of other functions. For example, they often coordinate and train law enforcement agents investigating violent crime and sexual abuse cases in Indian country. They also train BIA criminal investigators and tribal police presenting cases in federal court.

Tribal Liaisons often serve in a role similar to a local 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 United States Attorneys (AUSAs). Tribal Liaisons are assigned specific functions dictated by the nature of the district. They serve as the primary point of contact between the USAO and the Indian tribes located in the district. Tribal Liaisons typically have personal relationships with tribal governments, including tribal law enforcement officers, tribal leaders, tribal courts, tribal prosecutors, and social service agency staff.

Tribal Liaisons also know and work well with state and local law enforcement officials from jurisdictions adjacent to Indian country. These relationships enhance information sharing and assist the coordination of criminal prosecutions, whether federal, state, or tribal. It is important to note that while the Tribal Liaisons are collectively the most experienced prosecutors of crimes in Indian country, they are not the only AUSAs doing these prosecutions. The volume of cases from Indian country requires these prosecutions in most USAOs to be distributed among numerous AUSAs.

Indian country and violent crime, including human trafficking, remain priorities for the Department of Justice. Working together in partnership with our state and tribal counterparts, the

\textsuperscript{112} \textit{Id.} at B-1--B-2.

Department of Justice has the ability to increase prevention efforts, improve the success of trafficking investigations and prosecutions—and most importantly—reduce the victimization and suffering of AI/AN trafficking victims.

ABOUT THE AUTHORS

❑ **Leslie A. Hagen** serves as the Department of Justice’s first National Indian Country Training Coordinator. In this position, she is responsible for planning, developing, and coordinating training in a broad range of matters relating to the administration of justice in Indian country. Previously, Ms. Hagen served as the Native American Issues Coordinator for EOUSA. In that capacity, she served as EOUSA’s principal legal advisor on all matters pertaining to Native American issues, provided management support to the United States Attorneys’ Offices, and coordinated and resolved legal issues. She also served as a liaison and technical assistance provider to Department of Justice components and the Attorney General’s Advisory Committee on Native American Issues. Ms. Hagen started with the Department of Justice as an AUSA in the Western District of Michigan. As an AUSA, she was assigned to Violent Crime in Indian Country and handled federal prosecutions and training on issues of domestic violence, sexual assault, child abuse, and human trafficking affecting the eleven federally recognized tribes in the Western District of Michigan.

❑ **Benjamin L. Whittemore** serves as the Native American Issues Coordinator for EOUSA. Ben is responsible for coordinating with the United States Attorneys and Tribal Liaisons on matters of national significance in Indian country, and maintains a direct line of communication to the Native American Issues Sub-Committee regarding such issues. He is also responsible for coordinating with other federal components on matters affecting Indian country, and serves as the main point of contact for EOUSA for all matters pertaining to Indian country. As part of Attorney General Jeff Sessions’s Task Force on Crime Reduction and Public Safety, Ben serves as the chair of the Violent Crime in Indian Country Subcommittee. Previously, Ben served as the Community Prosecutor assigned to the Menominee Indian Reservation for the USAO in the Eastern District of Wisconsin. His responsibilities included creating programming to reduce violent crime on the reservation, drafting appropriate legislation for consideration by the Menominee Tribal Legislature, performing various types of community outreach, and prosecuting all major crimes occurring on the Menominee Reservation.
Indian Country Issues

In This Issue

Jurisdictional Conflicts Between Tribes and States: Disputes Over
Land Set Aside Pursuant to the Indian Reorganization Act and
Reservation Boundary Disputes .................................................. 1
By Gina Allery and Daron T. Carreiro

Protecting the Civil Rights of American Indians and Alaska Natives:
The Civil Rights Division's Indian Working Group ...................... 10
By Verlin Deerinwater and Susana Lorenzo-Giguere

Reentry Programming in Indian Country: Building the Third Leg
of the Stool ................................................................................. 16
By Timothy Q. Purdon

Native Children Exposed to Violence: Defending Childhood in
Indian Country and Alaska Native Communities ....................... 22
By Amanda Marshall

Investigating and Prosecuting the Non-Fatal Strangulation Case .. 28
By Leslie A. Hagen

Native American Graves Protection and Repatriation Act
(NAGPRA): The Law Is Not an Authorization for Disinterment . .41
By Sherry Hutt and David Tarler

The Investigation and Federal Prosecution of the Native Mob—
Responding to a Statewide Gang Threat Through the Use of the
Racketeering Statute .................................................................... 52
By Andrew R. Winter
Investigating and Prosecuting the Non-Fatal Strangulation Case

Leslie A. Hagen
National Indian Country Training Coordinator

I. Introduction

In the early morning hours of August 19, 2013, Zackeria Crawford strangled his girlfriend until she lost consciousness and became incontinent. The assault occurred within the exterior boundaries of the Blackfeet Indian Reservation in Montana. The defendant is an enrolled member of the tribe.

The victim told FBI Special Agent Mark Zahaczeewsky that she was asleep in the home that she shared with defendant Crawford, her boyfriend of three years. Crawford woke her up, began to threaten her, and accused her of cheating. The defendant then forced the victim into the crawlspace located in a closet leading under the residence. While in the crawlspace, Crawford beat the victim with his hands and feet. He then placed his hands on the victim’s throat and began strangling her. The victim told law enforcement that he said words to the effect of, “I really hate to do this to you, but I’m going to kill you.”

The victim told investigators that she twice lost consciousness and lost control of her bladder. The victim said the assault lasted for approximately twenty minutes. When the defendant went to another room in the house, the victim escaped the crawl space and ran out of the house to her car and attempted to drive away. The defendant jumped on to the hood of the vehicle and hung on for several blocks. Crawford eventually rolled off of the vehicle, and the victim drove directly to the Browning Correctional Center and reported the assault.

Law enforcement obtained photographs of the injuries, and the victim obtained medical treatment. The treating physician documented that there was a substantial risk of death. The defendant confessed to the FBI and, ultimately, pled guilty to one count of assault by strangulation under 18 U.S.C. § 113(a)(8). The case was prosecuted by Assistant U.S. Attorney (AUSA) Ryan Weldon, and it represents one of the first in the country prosecuted under the new federal strangulation and suffocation statute. The defendant was sentenced to 30 months’ imprisonment and 3 years of supervised release at his March 2014
sentencing hearing. (A copy of the sentencing press release can be found online at http://www.justice.gov/usao/mt/pressreleases/20140605140846.html.)

II. The scope and severity of the problem

Police and prosecutors are only recently learning what survivors of non-fatal strangulation have known for years: “Many domestic violence offenders and rapists do not strangle their partners to kill them; they strangle them to let them know they can kill them—any time they wish.” Casey Gwinn, Strangulation and the Law, The Investigation and Prosecution of Strangulation Cases 5 (The Training Inst. on Strangulation Prevention & the Cal. Dist. Attorneys Ass’n eds., 2013) (Gwinn). There are clear reasons why strangulation assaults—particularly in an intimate partner relationship—should be a separate felony offense and taken seriously at sentencing.

- “Strangulation is more common than professionals have realized. Recent studies have now shown that 34 percent of abused pregnant women reported being ‘choked;’ 47 percent of female domestic violence victims reported being ‘choked.’ ” Press Release, Office of Public Affairs, Department of Justice, Justice Department Holds First National Indian Country Training on Investigation and Prosecution of Non-Fatal Suffocation Offenses (Feb. 4, 2013), available at http://www.justice.gov/opa/pr/2013/February/13-opa-148.html.

- “Victims of multiple [non-fatal strangulation] ‘who had experienced more than one strangulation attack, on separate occasions, by the same abuser, reported neck and throat injuries, neurologic disorders and psychological disorders with increased frequency.”” Id. (citing Donald J. Smith, Jr. et al., Frequency and Relationship of Reported Symptomology in Victims of Intimate Partner Violence: The Effect of Multiple Strangulation Attacks, 21 J. EMERGENCY MED. 3, 323, 325–26 (2001)).

- “Almost half of all domestic violence homicide victims had experienced at least one episode of non-fatal strangulation prior to a lethal [or near-lethal] violent incident. [Victims of one episode of strangulation are 700 percent more likely to be a victim of attempted homicide by the same partner.] Victims of prior non-fatal strangulation are 800 percent more likely of later becoming a homicide victim [at the hands of the same partner].” Id. (internal citations omitted) (citing Nancy Glass et al., Non-Fatal Strangulation Is an Important Risk Factor for Homicide of Women, 35 J. EMERGENCY MED. 329, 329 (2008)).

- Even given the lethal and predictive nature of these assaults, the largest non-fatal strangulation case study ever conducted to date (the San Diego Study) found that most cases lacked physical evidence or visible injury of strangulation. Gael B. Strack, George E. McClane & Dean Hawley, A Review of 300 Attempted Strangulation Cases Part 1: Criminal Legal Issues, 21 J. EMERGENCY MED. 3, 303, 305–06 (2001). Only 15 percent of the victims had a photograph of sufficient quality to be used in court as physical evidence of strangulation, and no symptoms were documented or reported in 67 percent of the cases. Id. The San Diego Study found major signs and symptoms of strangulation that corroborated the assaults, but little visible injury. Id.

- “Strangulation is more serious than professionals have realized. Loss of consciousness can occur within 5 to 10 seconds . . . and death within 4 to 5 minutes. The seriousness of the internal injuries [even with no external injuries] may take a few hours to be appreciated and delayed death can occur days later.” Press Release, Office of Public Affairs, Department of Justice, Justice Department Holds First National Indian Country Training on Investigation and Prosecution of Non-Fatal Suffocation Offenses (Feb. 4,
"Because most strangulation victims do not have visible [external] injuries, strangulation cases may be minimized or trivialized by law enforcement, medical and mental health professionals [and even courts]." Id.

Even in fatal strangulation cases, there is often no evident external injury (confirming the findings regarding the seriousness of non-fatal, no-visible-injury strangulation assaults). Id.

Non-fatal strangulation assaults may not fit the elements of other serious assaults due to the lack of visible injury. Studies are confirming that an offender can strangle someone nearly to death with no visible injury, resulting in professionals viewing such an offense as a minor misdemeanor or no provable crime at all. Id.

Experts across the medical profession now agree that manual or ligature strangulation is "lethal force" and is one of the best predictors of a future homicide in domestic violence cases. Id. (citing Nancy Glass et al., Non-Fatal Strangulation Is an Important Risk Factor for Homicide of Women, 35 J. EMERGENCY MED. 329, 329 (2008)).

Ten percent of violent deaths in the United States are from strangulation, with six female victims to every male victim. Allison Turkel, "And Then He Choked Me": Understanding, Investigating, and Prosecuting Strangulation Cases, 2 THE VOICE 1, 1 (2008), available at http://www.ndaa.org/pdf/the_voice_vol_2_no_1_08.pdf. However, the percentage of women that survive strangulation is far greater. Numerous studies show that 23 to 68 percent of women who are victims of intimate partner violence have experienced strangulation assault by a male partner in their lifetime. Another study conducted at a battered women's shelter found that on average each woman with a history of strangulation had been strangled 5.3 times in her intimate relationships. Lee Wilbur et al., Survey results of women who have been strangled while in an abusive relationship, 21 J. EMERGENCY MED. 297, 297–302 (2001). Furthermore, a strong correlation exists between strangulation and other types of domestic abuse. In a study of 300 strangulation cases, a history of domestic violence existed in 89 percent of the cases, and children were present during at least 50 percent of the incidents. GAELE B. STRACK & GEORGE MCCLANE, HOW TO IMPROVE YOUR INVESTIGATION AND PROSECUTION OF STRANGULATION CASES 2 (David C. James ed., 1998) (updated January 2003, September 2007).

This correlation is disturbing, especially in the context of Indian Country, where violent crime rates can far exceed those of other American communities. Some tribes have experienced rates of violent crime over 10 times the national average. RONET BACHMAN, HEATHER ZAYKOWSKI, RACHEL KALLMYER, MARGARITA POTEYeva & CHRISTINA LANIER, VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND THE CRIMINAL JUSTICE RESPONSE: WHAT IS KNOWN 5 (2008). Reservation-based and clinical research show very high rates of intimate partner violence against American Indians and Alaska Native women.

Police, prosecutors, and medical providers across the country have begun to appreciate the inherent lethality risks for strangulation and suffocation crimes. Approximately 30 states have enacted strangulation-specific laws that range from misdemeanor offenses to felonies. Because domestic violence and sexual assault remains primarily a matter of state, local, and tribal jurisdiction, the Federal Government historically lacked jurisdiction over some intimate partner violence crimes. The Violence Against Women Reauthorization Act of 2013 (VAWA 2013) changed that by providing the Federal Government with additional statutory tools to prosecute intimate partner violence. With the passage of
VAWA 2013, Congress recognized the gravity of strangulation and suffocation crimes and, accordingly, amended the federal assault statute, 18 U.S.C. § 113, to include a specific charge of assault or attempted assault by strangulation or suffocation. This change in the law was effective March 7, 2013.

This article addresses how to improve the investigation and prosecution of perpetrators in strangulation cases under 18 U.S.C. § 113. It concisely summarizes what strangulation is and why it is so difficult to investigate and prosecute. It also offers guidance on how to approach these types of cases.

III. The Violence Against Women Reauthorization Act of 2013: 18 U.S.C. § 113

Under § 113, it is now possible to prosecute perpetrators in Indian County for the specific offenses of strangulation and suffocation. Section 113(a) provides that:

whoever, within the special maritime and territorial jurisdiction of the United States, is guilty of... an assault of a spouse, intimate partner, or dating partner by strangling, suffocating, or attempting to strangle or suffocate, [shall be punished] by a fine under this title, imprisonment for not more than 10 years, or both.


In this section, the term “strangling” means “intentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood of a person by applying pressure to the throat or neck, regardless of whether that conduct results in any visible injury or whether there is any intent to kill or protractedly injure the victim.” The definitions of spouse, intimate partner, and dating partner are found in 18 U.S.C. § 2266. Id. § 133(b)(3).

Prior to the passing of VAWA 2013, strangulation cases were typically prosecuted as an Assault Resulting in Serious Bodily Injury (ARSBI), pursuant to 18 U.S.C. § 113(a)(6). ARSBI is punishable by a fine, imprisonment for not more than 10 years, or both. Serious bodily injury is defined in 18 U.S.C. § 1365 as:

(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.


Most federal prosecutors charging a defendant with ARSBI following an allegation of strangulation argue that the crime presented a “substantial risk of death” to the victim. AUSAs may need to enlist expert medical testimony to explain just how easy it is to strangle someone to death and yet leave no visible external injuries. Only 11 pounds of pressure placed on the carotid arteries (arteries that supply oxygenated blood to the head and neck) for 10 seconds is necessary to cause unconsciousness. J.L. Luke et al., Correlation of Circumstances with Pathological Findings in Asphyxial Deaths by Hanging: A Prospective Study of 61 Cases from Seattle, WA, 30 J. FORENSIC SCI. 1140, 1140-47 (1985). Brain death will occur in four to five minutes if strangulation continues.

The crime of ARSBI was infrequently used to charge strangulation cases occurring in the context of intimate partner violence. And, if other assaults occurred during the violent episode, charges were more likely to address those violent acts as opposed to the strangling. See, e.g., United States v. Mitchell, 420 F. App’x 920, 921-22 (11th Cir. 2011) (defendant strangled the victim and was charged with one count of assault with intent to commit murder and one count of assault resulting in serious bodily injury); but see,
Because this new statute became effective in March 2013, prosecutors are just beginning to charge defendants. It is important to note that § 113(a)(8) only addresses situations where the victim is the spouse, intimate partner, or dating partner of the defendant. Consequently, a defendant who committed a strangulation offense outside this context will not be charged in federal court as a violation of § 113(a)(8). The prosecutor will instead need to look to the crimes of ARSBI, attempted murder, or murder, depending on the facts. To date, there are no pending cases on appeal where the new strangulation/suffocation statute itself is being challenged.

IV. Understanding strangulation

While most people think that they understand strangulation and that it would be easy to recognize when someone has been strangled, identifying strangulation is much more nuanced. It is a serious, violent act that has historically been treated as a minor incident in the criminal justice system. Such treatment resulted for a variety of reasons, some of which stem from misconceptions about the act itself and its potentially fatal consequences.

A. Identifying strangulation

The terminology used to describe the act displays a misunderstanding of what strangulation is. Choking and suffocation are the typical misnomers used by victims, law enforcement agents, and even legal professionals, to describe strangulation incidents. While all three lead to asphyxia, a lack of oxygen to the brain, the mechanics are different. Choking is the internal blockage of the airway preventing the victim from breathing. Suffocation is the obstruction of the airway at the nose or mouth. Strangulation is the external compression of the neck that can either directly block the airway, preventing breathing, or can impede the flow of blood to and from the brain by closing off arteries and jugular veins. There are three forms of strangulation: manual (hands, forearm, kneeling on victim’s throat), ligature (use of a cord-like object), or by hanging.

B. Identifying injuries

Another common misconception is that strangulation causes bruises or other visible marks on the victim. Strangulation is a form of intimate partner violence often committed without witnesses. Therefore, when police arrive to investigate, they are faced with a “he said/she said” dilemma. A lack of visible injuries may be mistakenly viewed as a lack of harm to the victim, thereby allowing responding police officers, the abuser, and even the victim herself to minimize the assault. If the alleged victim appears unharmed, little to no evidence is collected for later use in prosecuting the abuser.

Absence of bruising should not be mistaken for denial of the act. In a study of 300 police reports on strangulation, victims in only 50 percent of the cases displayed visible injuries. GAEL B. STRACK & GEORGE MCCLANE, HOW TO IMPROVE YOUR INVESTIGATION AND PROSECUTION OF STRANGULATION CASES 2 (David C. James ed., 1998) (updated January 2003, September 2007). Of the 50 percent, 35 percent of the injuries were too minor to photograph. Id. Bruises sometimes take a few days to show the force of the injury, and internal swelling of the throat could develop and restrict breathing hours after the strangle.

Importantly, the statutory definition for strangling under § 113(a)(8) states that the crime can be proven even in the absence of any visible injury. Besides bruising and swelling around the neck, other signs of strangulation may include:

- Scratches, abrasions, and discoloration to the neck, face, chest, shoulders
• Swelling of the tongue
• Appearance of red dots, called petechiae, from ruptured capillaries in the eyes, under the eyelids, on the face, or on the neck
• Voice changes (hoarse, raspy, or no voice)
• Trouble or pain when swallowing
• Breathing changes (difficulty breathing, hyperventilation, wheezing)
• Behavioral changes (restlessness or combativeness, problems concentrating, amnesia, agitation, Post-Traumatic Stress Disorder, hallucinations)
• Involuntary urination or defecation
• Coughing and/or vomiting
• Loss of consciousness/fainting
• Blue fingernails
• Dizziness/headaches
• Miscarriage

In extreme cases, swelling could be an early indication of internal injuries, such as a fractured larynx (voice box) or hyoid bone, seizures, or pulmonary edema (lungs filled with fluid). If medical treatment is not sought, these symptoms can lead to death.

V. Prosecuting cases under § 113(a)(8)

To overcome the misconceptions of strangulation, it is important to bring awareness to the issue and to educate both the public at large and the professionals dealing with the legal or medical consequences of strangulation. Training efforts like those of the Department of Justice’s National Indian Country Training Initiative and the Training Institute on Strangulation Prevention (TISP) provide training and technical assistance to family violence professionals, while local women’s shelters provide immediate assistance to survivors of domestic abuse and strangulation for medical, psychological, and protective care. (More information on TISP can be found at http://strangulationtraininginstitute.com/index.php.)

The Maricopa County Attorney’s Office in Arizona took up the fight against domestic violence strangulation. In 2012, a partnership initiative between the local healthcare system, the local law enforcement, and the County Attorney’s office created a program to establish more reliable methods of obtaining the necessary evidence to effectively prosecute strangulation incidents. Law enforcement officers received special training on how to recognize and respond to strangulation incidents, which includes transporting domestic violence victims to either a medical care facility or to a family advocacy center. There, forensic nurses are available 24 hours a day to perform specialized medical-forensic examinations and to collect evidence, including photographs of any visible injuries. These forensic nurses then provide testimony as expert witnesses in court. Their testimonies allow certain cases to proceed, even if the victim is unavailable or unwilling to testify. News Release, Maricopa County Attorney, New Strategies Unveiled to Fight Against Domestic Violence Strangulations (June 8, 2011) News Release available at http://www.maricopacountyattorney.org/pdfs/news-releases/2012-06-08-New-Strategies-in-Fight-Against-Domestic-Violence-Strangulations.pdf. Since launching the program, Maricopa County was awarded the National Association of Counties Award in the category of Criminal Justice and Public Safety, and more than 38 percent of reported strangulation allegations have resulted in convictions. News Release, Maricopa County Attorney, Strangulation Program Honored with NACo Award (June 13, 2013), available at http://www.maricopacountyattorney.org/pdfs/news-releases/2013-06-13-Strangulation-Program-Honored-with-NACo-Award.pdf.
The Maricopa County program is effective because it addresses three obstacles that hinder the prosecution of domestic violence: the inability of first responders to recognize strangulation, the reluctance of victims to testify, and the loss or lack of evidence.

A. Training first responders

Law enforcement officers in every jurisdiction—federal, state, and tribal—must be trained on the severity of strangulation, and the common misconceptions that officers may hold need to be corrected. Officers should be aware that strangulation is a potentially lethal form of intimate partner violence and that it should not be associated with other abuse, like a slap in the face. Without that training, police will not be able to effectively identify signs of strangulation. The signs of strangulation are easy to overlook because visible injuries are not always evident when police officers or medics first arrive at the scene of a domestic dispute. Police officers need to be trained on how to detect the initial symptoms and signs of strangulation.

When law enforcement arrives at a domestic violence scene, officers should assess the situation. They should make note of the surroundings, the demeanor of the victim, and the demeanor of the alleged abuser, if still present. If the abuser has apparent injuries, those should be noted and photographed along with any visible injuries to the victim. If an officer suspects that strangulation has occurred, he or she must call for paramedics or at least strongly encourage the victim to seek medical attention because, as mentioned earlier, swelling or other undetected injuries of the throat can be life threatening.

Ironically, medical personnel, who should be the most qualified to recognize symptoms of strangulation, often under-evaluate reports of strangulation and attribute the signs of strangulation to other causes. For example, a victim’s hoarseness may be reported as resulting from screaming during an argument, not from strangulation, and broken blood vessels in the victim’s eye may be reported as resulting from pink eye or a substance abuse problem. Gael B. Strack, George E. McClane & Dean Hawley, A Review of 300 Attempted Strangulation Cases Part II: Clinical Evaluation of the Surviving Victim, 21 J. EMERGENCY MED. 311, 312 (2001). Medical personnel should not minimize these signs, but should note in the medical record that the victim is displaying signs consistent with strangulation. Having the record state that the symptoms are consistent with strangulation is helpful when it comes to gathering evidence for the prosecution.

When interviewing the victim, it is important for police officers or investigators to quote the victim’s own words (“He choked me.”) when she is describing the event, but should otherwise use the word “strangulation” in the official report. Any symptoms that the victim is experiencing should be noted on the report along with any apparent injuries. The more details the officer includes in his report, the more useful it will be in prosecuting the case later.

It is important to ask the victim to demonstrate how she was strangled and to ask questions that will elicit specific information about the signs and symptoms of strangulation. Below is a list of questions police and prosecutors should consider asking when interviewing strangulation victims. (A two-page interview form is attached to the end of this article for additional guidance.)

1. Ask the victim to describe and demonstrate how she was strangled. Take photographs.
2. Document whether the victim was strangled with one or two hands, forearm, and/or objects.
3. If an object was used to strangle the victim, locate, photograph, and impound the object.
4. Determine if the suspect was wearing any jewelry, such as rings or watches. Look for pattern evidence.
5. If an object was used, how did it get there? Determine if the suspect brought the object with him to the crime scene. This information may be used to show premeditation.

6. What did the suspect say when he was strangling the victim? Use quotes.

7. Describe the suspect’s demeanor and facial expression.

8. Was the victim shaken simultaneously while being strangled?

9. Was the victim thrown against the wall, floor, or ground? Describe surface.

10. How long did the suspect strangle the victim?

11. How many times and how many different methods were used to strangle the victim?

12. How much pressure or how hard was the grip?

13. Did the victim have difficulty breathing or hyperventilate?

14. Any complaint of pain to the throat?

15. Any trouble swallowing?

16. Any voice changes? Complaint of a hoarse or raspy voice?

17. Any coughing?

18. Did the victim feel dizzy, faint, or lose consciousness?

19. What did the victim think was going to happen? (For example, did she think she was going to die?)

20. Did the victim urinate or defecate as a result of being strangled?

21. Was the victim pregnant at the time?

22. Did the victim feel nauseated or vomit?

23. Any visible injury, however minor? If so, take photograph and follow-up photos.

24. Any prior incidents of strangulation?

25. Any pre-existing injuries?

26. Were the injuries shown to anyone? Were any subsequent photos taken?

27. Did the victim attempt to protect herself or himself? Describe.

28. Was any medical treatment recommended or obtained? If so, obtain medical release.

29. Were there any witnesses?


B. Victim testimony

Another obstacle in these cases is the reluctance of domestic abuse victims to get involved in the criminal justice system and to testify. Even though these women have suffered pain and feared for their and their children’s lives at the hands of their abusers, myriad emotions exist that prevent victims from removing themselves from the abusive relationship. As opposed to other violent crimes, domestic violence and frequent sexual assault occur in the privacy of homes between people with intimate
relationships. While they fear their partner, they also love them and rely on them not only emotionally, but often times financially, as well. If their abuser is prosecuted and sentenced to jail or prison, that affects the family’s income and leads to financial hardship. Also, imprisonment only offers temporary relief to the victim. The abuser will eventually be released, and victims fear the retribution that will follow. Retribution is also a concern if the prosecution is unsuccessful.

Because of that fear, studies show that 80 to 85 percent of abused women will deny allegations of abuse after the incident and will refuse to testify. Tom Lininger, Prosecuting Batterers After Crawford, 91 VA. L. REV. 747, 768 (2005). As a result, prosecutors are placed in the difficult position of having to explain to the court and the jury why a victim is unavailable to testify, calling into question the legitimacy of the claims in the jury’s and court’s eyes.

As a way to introduce evidence from the victim despite their reluctance or inability to testify, prosecutors can attempt to use exceptions to the hearsay rule. However, in Crawford v. Washington, 541 U.S. 36 (2004), the Supreme Court held that, where the Government offers at trial hearsay evidence that is “testimonial” in nature, the Confrontation Clause of the Sixth Amendment requires actual confrontation, that is, cross examination, regardless of how reliable the hearsay statement may be. Id. at 59. Consequently, testimonial statements to police or emergency personnel may be excluded if the victim does not testify, but non-testimonial statements, which include statements given by the witness to police or 911 responders to help them resolve an ongoing emergency, may be admitted. See Davis v. Washington, 547 U.S. 813, 828 (2006). And, because medical attention should be sought for all survivors of strangulation, it may be the case that a physician, a Sexual Assault Nurse Examiner, or another medical provider, can testify to what the victim told them about the assault pursuant to Federal Rule of Evidence 803(4), the medical hearsay exception. Moreover, if the victim is unavailable to testify because of the defendant’s actions, the prosecutor should explore using the forfeiture by wrongdoing exception under Federal Rule of Evidence 804(b)(6). This exception allows a victim’s statements to come into evidence if the victim stays away from the court because of actions by the defendant that were purposefully done to keep the witness from testifying, See Giles v. California, 554 U.S. 353, 367 (2008).

C. Evidence

To overcome any skepticism that the judge or the jury develops due to a lack of participation by the victim in the criminal proceedings, it is helpful to have physical and demonstrative evidence of the crime. Evidence that is useful during prosecution includes photographs of the victim’s injuries and of the scene of the abuse, physical evidence, medical evaluation forms, expert testimony, and if possible, a recording of the 911 call. Brigitte P. Volochinsky, Obtaining Justice for Victims of Strangulation in Domestic Violence: Evidence Based Prosecution and Strangulation-Specific Training, 4 STUDENT PULSE 1, 3 (2012).

Photographs: Photographs should always be taken. They are important to a judge and jury because they humanize the victim and make the assault personal. Photographs of the victim’s injuries, if any are evident, should be taken soon after law enforcement arrives. Officers and investigators should continue to monitor the victim to ensure her safety and to capture any emerging bruises or injuries that can become visible hours after the assault took place. Full-shot photographs should be taken along with close-ups of injuries. The full-shots help the jury place the injuries in perspective to the victim’s body and the close-ups show the details of the injuries that can be lost in distance shots.

Besides the victim, photographs of the scene should be included in the evidence. If a domestic fight occurred, furniture could be displaced and objects strewn about the room and broken. Also, because strangulation can cause urination, defecation, or vomiting, it is important to photograph any bodily fluids at the scene. These photographs will help portray the struggle a victim went through and will help set the scene for the strangulation.
Physical evidence: There may not be a lot of physical evidence, but it is important to present what is available during trial. Persuasive evidence can include the clothes of either the victim or the assailant if they are torn or ripped, and if they have any blood on them. Also, if the assailant used a ligature to strangle the victim, having the ligature and demonstrating how it was used on the victim is powerful evidence of the crime.

Medical forms: Studies show that victims sought medical attention in only three percent of strangulation cases. GAEL B. STRACK & GEORGE MCCLANE, HOW TO IMPROVE YOUR INVESTIGATION AND PROSECUTION OF STRANGULATION CASES 2 (David C. James ed., 1998) (updated January 2003, September 2007). The records from those visits may be crucial to the prosecution. If no visible injuries are present, the documentation of internal injuries, if present, may be the only medical evidence that the victim was strangled. Also, the victim’s description of her injuries to the medical personnel can also be introduced as evidence, if it is documented in the medical record.

Expert testimony: A couple of different types of expert testimony may be used in a strangulation trial. First, expert testimony on strangulation may be introduced. This can be important because it provides the opportunity to educate the court and the jury about the physical mechanics of strangulation and also its inherent lethality. Medical personnel frequently provide this type of testimony; however, a law enforcement officer or investigator trained in strangulation may also serve as an expert witness. The prosecutor may also want to call an expert on the nature and dynamics of domestic violence and the effects it has on victims, particularly if the victim recants or is a hostile witness. Many jurors may be unable to understand why a victim will remain with her assailant and/or be reluctant to testify against him at trial. An expert witness can make these seemingly counterintuitive behaviors understandable to the judge and jury.

911 recording: If the victim dialed 911 after the incident, this can be extremely useful evidence. It will likely be the first time that the victim explains what happened. The stress and fear in the victim’s voice will have a strong effect on the jury. More importantly, the recording may show that the victim’s voice was hoarse, that she was coughing, or that she was unable to catch her breath. All three are indicators of strangulation.

If the victim calls 911 when the abuser is still present or when the victim feels like she is still in danger, the recording may qualify as an exception to the hearsay rule and be admitted into evidence.

VI. Amendments to the Sentencing Guidelines


Accordingly, the U.S.S.C. issued the following amendments to the Sentencing Guidelines:

the amendment amends Appendix A to reference section 113(a)(8) to § 2A2.2 (Aggravated Assault) and amends the Commentary to § 2A2.2 to provide that the term “aggravated assault” includes an assault involving strangulation, suffocation, or an attempt to strangle or suffocate. The amendment amends § 2A2.2 to provide a 3-level enhancement at § 2A2.2(b)(4) for strangling, suffocating, or attempting to strangle or
suffocate a spouse, intimate partner, or dating partner. The amendment also provides that the cumulative impact of the enhancement for use of a weapon at § 2A2.2(b)(2), bodily injury at § 2A2.2(b)(3), and strangulation or suffocation at § 2A2.2(b)(4) is capped at 12 levels. The Commission determined that the cap would assure that these three specific offense characteristics, which data suggests co-occur frequently, will enhance the ultimate sentence without leading to an excessively severe result.

Although the amendment refers section 113(a)(8) offenses to § 2A2.2, it also amends § 2A6.2 (Stalking or Domestic Violence) to address cases involving strangulation, suffocation, or attempting to strangle or suffocate, as a conforming change. The amendment adds strangulation and suffocation as a new aggravating factor at § 2A6.2(b)(1), which results in a 2-level enhancement, or in a 4-level enhancement if it applies in conjunction with another aggravating factor such as bodily injury or the use of a weapon.

These amendments become effective November 1, 2014. Official text of the amendments can be found at www.uscc.gov.

VII. Conclusion

Strangulation is a serious crime that affects too many women in vulnerable positions. A strangulation survivor from Illinois provided written testimony to the U.S. Sentencing Commission in February 2014 as the Commission contemplated appropriate sentencing guidelines for the amended federal assault statute. She succinctly and profoundly described the devastating fear and effects of the crime of strangulation:

> After two years of marriage filled with verbal abuse, shoving, and other physical abuse, one night my husband threw me down on the bed and began strangling me. Unlike any other way that he had attacked me in the past, this horror instantly sent me to a level of terror and trauma I had never known in my whole life. I knew I was seconds away from dying. This was a fear unlike anything I had ever known. Everything was suddenly different in my whole consciousness. I was going to die. The unthinking rage in his eyes made that clear.

> He had even pulled a gun on me once, slapped me black and blue, but nothing felt as scary as this. There was that first part of the attack that so utterly terrified me as I anticipated my imminent death, panicking with what I could do. The fighting for freedom, the pain of his hands around my neck. Then as I began to suffocate, I could feel myself dying. Gasping for breath, desperate for air. Feeling myself slipping away, so fully conscious and hyper aware. And watching him - how personal the rage was. How he was using his bare hands to kill me - it was so intimate, he was so close to me. His skin on my skin. Like drowning, trapped in the water beneath the ice, the panic, the desperation to breathe, yet not being able to.

> He felt me going limp and thankfully let go. I coughed myself back to life. What I learned in the days and the weeks after was the on-going and constant re-traumatization of the aftermath of the strangulation. For weeks, every time I moved my head, I was grabbed with pain. I couldn't sleep, I couldn't eat or drink well. Every move was a painful reminder. I had to take time off work without pay to cover up the worst of it, then I had to lie to deal with answering questions about the bruises, etc., at my teaching job. The aftermath was a constant reminder of what had happened. It's vivid to me as any moment of my life.
The neck is so easy to grab, so vulnerable, so vital to all life, connecting breathing and heart to mind. The viciousness and harm of this terroristic act is far different than mere broken bone or a physical injury. I have suffered the range of these injuries and nothing comes close to strangulation and suffocation in sheer terror.


Hopefully, with the new provisions in § 113(a)(8), more victims of intimate partner violence in Indian Country will find protection under the law from their abusers, but the enactment of strangulation laws is not enough. Law enforcement, medical care providers, and criminal justice personnel must be able to identify when strangulation has occurred and must be willing to take the necessary steps to help victims who may not be willing to or are unable to help themselves. By training first responders in detection of strangulation and effective evidence gathering techniques, the prosecution of abusers will be more successful.

Documentation Chart for Strangulation Cases

Symptoms and/or Internal Injury:

<table>
<thead>
<tr>
<th>Breathing Changes</th>
<th>Voice Changes</th>
<th>Swallowing Changes</th>
<th>Behavioral Changes</th>
<th>OTHER</th>
</tr>
</thead>
<tbody>
<tr>
<td>□ Difficulty</td>
<td>□ Raspy voice</td>
<td>□ Trouble swelling</td>
<td>□ Agitation</td>
<td>□ Dizzy</td>
</tr>
<tr>
<td>□ Breathing</td>
<td>□ Hoarse voice</td>
<td>□ Painful to swallow</td>
<td>□ Amnesia</td>
<td>□ Headaches</td>
</tr>
<tr>
<td>□ Hyperventilation</td>
<td>□ Coughing</td>
<td>□ Neck Pain</td>
<td>□ PTSD</td>
<td>□ Fainting</td>
</tr>
<tr>
<td>□ Unable to breathe</td>
<td>□ Unable to speak</td>
<td>□ Nausea or Vomiting</td>
<td>□ Hallucinations</td>
<td>□ Urination</td>
</tr>
<tr>
<td>Other:</td>
<td></td>
<td>□ Drooling</td>
<td>□ Combativeness</td>
<td>□ Defecation</td>
</tr>
</tbody>
</table>

Use face & neck diagrams to mark visible injuries:

<table>
<thead>
<tr>
<th>Face</th>
<th>Eyes &amp; Eyelids</th>
<th>Nose</th>
<th>Ear</th>
<th>Mouth</th>
</tr>
</thead>
<tbody>
<tr>
<td>□ Red or flushed</td>
<td>□ Petechiae to R and/or L eyelid (circle one)</td>
<td>□ Bloody nose</td>
<td>□ Petechiae (external and/or ear canal)</td>
<td>□ Bruising</td>
</tr>
<tr>
<td>□ Pinpoint red spots (petechiae)</td>
<td>□ Petechiae to R and/or L eyelid (circle one)</td>
<td>□ Broken nose (ancillary finding)</td>
<td>□ Bleeding from ear canal</td>
<td>□ Swollen tongue</td>
</tr>
<tr>
<td>□ Scratch marks</td>
<td>□ Bloody red eyeball(s)</td>
<td>□ Petechiae</td>
<td>□ Ear</td>
<td>□ Swollen lips</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>□ Cuts/abrasions (ancillary finding)</td>
</tr>
</tbody>
</table>
Under Chin | Chest | Shoulders | Neck | Head
---|---|---|---|---
☐ Redness | ☐ Redness | ☐ Redness | ☐ Redness | ☐ Petechiae
☐ Scratch marks | ☐ Scratch marks | ☐ Scratch marks | ☐ Scratch marks | (on scalp)
☐ Bruise(s) | ☐ Bruise(s) | ☐ Bruise(s) | ☐ Finger nail | Ancillary
☐ Abrasions | ☐ Abrasions | ☐ Abrasions | Impressions | findings:

Ancillary findings:
☐ Hair pulled
☐ Abrasions
☐ Hair pulled
☐ Bump
☐ Finger nail
☐ Bruise(s)
☐ Skull fracture
☐ Swelling
☐ Ligature mark
☐ Concussion

Questions to ASK: Method and/or Manner:

How and where was the victim strangled?
☐ One Hand (R or L) ☐ Two hands ☐ Forearm (R or L) ☐ Knee/Foot
☐ Ligature (Describe): _________________________

☐ How long? _____ seconds ______ minutes ☐ Also smothered?
☐ From 1 to 10, how hard was the suspect’s grip? (Low): 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 (high)
☐ From 1 to 10, how painful was it? (Low): 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 (high)
☐ Multiple attempts:___________ ☐ Multiple methods:___________

Is the suspect RIGHT or LEFT handed? (Circle one)

What did the suspect say while he was strangling the victim, before and/or after?
Was she shaken simultaneously while being strangled? Straddled? Held against wall?
Was her head being pounded against wall, floor or ground?

What did the victim think was going to happen?
How or why did the suspect stop strangling her?

What was the suspect’s demeanor?

Describe what suspect’s face look like during strangulation?

Describe Prior incidents of strangulation? Prior domestic violence? Prior threats?

MEDICAL RELEASE

To All Health Care Providers: Having been advised of my right to refuse, I hereby consent to the release of my medical/dental records related to this incident to law enforcement, the District Attorney’s Office and/or the City Attorney’s Office.

Signature: ____________________________ Date: ____________________________

Leslie A. Hagen serves as the Department of Justice’s first National Indian Country Training Coordinator. In this position, she is responsible for planning, developing, and coordinating training in a broad range of matters relating to the administration of justice in Indian Country. Previously, Ms. Hagen served as the Native American Issues Coordinator in the Executive Office for United States Attorneys (EOUSA). In that capacity, she served as EOUSA’s principal legal advisor on all matters pertaining to Native American issues, among other law enforcement program areas; provided management support to the U.S. Attorneys’ offices; and coordinated and resolved legal issues. She is also a liaison and technical assistance provider to Department of Justice components and the Attorney General’s Advisory Committee on Native American Issues. Ms. Hagen started with the Department of Justice as an AUSA in the Western District of Michigan. As an AUSA, she was assigned to Violent Crime in Indian Country and handled federal prosecutions and training on issues of domestic violence, sexual assault, and child abuse affecting the 11 federally recognized tribes in the Western District of Michigan. Ms. Hagen has worked on criminal justice issues related to domestic violence, sexual assault, and child abuse for over 25 years.*
SEC. 1301. DEFINITIONS.—For purposes of this subchapter, the term—
(1) “Indian tribe” means any tribe, band, or other group of Indians subject to the
jurisdiction of the United States and recognized as possessing powers of self-government;
(2) “powers of self-government” means and includes all governmental powers
possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies,
and tribunals by and through which they are executed, including courts of Indian
offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed,
to exercise criminal jurisdiction over all Indians;
(3) “Indian court” means any Indian tribal court or court of Indian offense; and
(4) “Indian” means any person who would be subject to the jurisdiction of the
United States as an Indian under section 1153, Title 18, if that person were to commit an
offense listed in that section in Indian country to which that section applies.

SEC. 1302. CONSTITUTIONAL RIGHTS
(a) IN GENERAL.—No Indian tribe in exercising powers of self-government shall—
(1) make or enforce any law prohibiting the free exercise of religion, or abridging
the freedom of speech, or of the press, or the right of the people peaceably to assemble
and to petition for a redress of grievances;
(2) violate the right of the people to be secure in their persons, houses, papers, and
effects against unreasonable search and seizures, nor issue warrants, but upon probable
cause, supported by oath or affirmation, and particularly describing the place to be
searched and the person or thing to be seized;
(3) subject any person for the same offense to be twice put in jeopardy;
(4) compel any person in any criminal case to be a witness against himself;
(5) take any private property for a public use without just compensation;
(6) deny to any person in a criminal proceeding the right to a speedy and public
trial, to be informed of the nature and cause of the accusation, to be confronted with the
witnesses against him, to have compulsory process for obtaining witnesses in his favor,
and at his own expense to have the assistance of counsel for his defense (except as
provided in subsection (b));
(7) (A) require excessive bail, impose excessive fines, or inflict cruel and
unusual punishments;
(8) (B) except as provided in subparagraph (C), impose for conviction of any
1 offense any penalty or punishment greater than imprisonment for a term of 1
year or a fine of $5,000, or both;
(9) (C) subject to subsection (b), impose for conviction of any 1 offense any
penalty or punishment greater than imprisonment for a term of 3 years or a fine of
$15,000, or both; or
(10) (D) impose on a person in a criminal proceeding a total penalty or
punishment greater than imprisonment for a term of 9 years;
(11) 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;
(12) pass any bill of attainder or ex post facto law; or
deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

(b) Offenses Subject to Greater Than 1-Year Imprisonment or a Fine Greater Than $5,000.—A tribal court may subject a defendant to a term of imprisonment greater than 1 year but not to exceed 3 years for any 1 offense, or a fine greater than $5,000 but not to exceed $15,000, or both, if the defendant is a person accused of a criminal offense who—

(1) has been previously convicted of the same or a comparable offense by any jurisdiction in the United States; or

(2) is being prosecuted for an offense comparable to an offense that would be punishable by more than 1 year of imprisonment if prosecuted by the United States or any of the States.

(c) Rights of Defendants.—In a criminal proceeding in which an Indian tribe, in exercising powers of self-government, imposes a total term of imprisonment of more than 1 year on a defendant, the Indian tribe shall—

(1) provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and

(2) at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys;

(3) require that the judge presiding over the criminal proceeding—

(A) has sufficient legal training to preside over criminal proceedings; and

(B) is licensed to practice law by any jurisdiction in the United States;

(4) prior to charging the defendant, make publicly available the criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances) of the tribal government; and

(5) maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding.

(d) Sentences.—In the case of a defendant sentenced in accordance with subsections (b) and (c), a tribal court may require the defendant—

(1) to serve the sentence—

(A) in a tribal correctional center that has been approved by the Bureau of Indian Affairs for long-term incarceration, in accordance with guidelines to be developed by the Bureau of Indian Affairs (in consultation with Indian tribes) not later than 180 days after July 29, 2010;

(B) in the nearest appropriate Federal facility, at the expense of the United States pursuant to the Bureau of Prisons tribal prisoner pilot program described in section 304(c) of the Tribal Law and Order Act of 2010;

(C) 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

(D) in an alternative rehabilitation center of an Indian tribe; or

(2) to serve another alternative form of punishment, as determined by the tribal court judge pursuant to tribal law.
(e) DEFINITION OF OFFENSE.—In this section, the term “offense” means a violation of a criminal law.

(f) 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.

SEC. 1303. HABEAS CORPUS
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.

SEC. 1304. TRIBAL JURISDICTION OVER CRIMES OF DOMESTIC VIOLENCE
(a) DEFINITIONS.—In this section:

(1) DATING VIOLENCE.—The term “dating violence” means violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

(2) DOMESTIC VIOLENCE.—The term “domestic violence” means violence committed by a current or former spouse or intimate partner 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 or intimate partner, or by a person similarly situated to a spouse of the victim under the domestic- or family- violence laws of an Indian tribe that has jurisdiction over the Indian country where the violence occurs.

(3) INDIAN COUNTRY.—The term “Indian country” has the meaning given the term in section 1151 of Title 18.

(4) PARTICIPATING TRIBE.—The term “participating tribe” means an Indian tribe that elects to exercise special domestic violence criminal jurisdiction over the Indian country of that Indian tribe.

(5) PROTECTION ORDER.—The term “protection order”—

(A) means any injunction, restraining order, or other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person; and

(B) includes any temporary or final order issued by a civil or criminal court, whether obtained by filing an independent action or as a pendent lite order in another proceeding, if the civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection.

(6) SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION.—The term “special domestic violence criminal jurisdiction” means the criminal jurisdiction that a participating tribe may exercise under this section but could not otherwise exercise.

(7) SPOUSE OR INTIMATE PARTNER.—The term “spouse or intimate partner” has the meaning given the term in section 2266 of Title 18.

(b) NATURE OF THE CRIMINAL JURISDICTION.

(1) IN GENERAL.—Notwithstanding any other provision of law, in addition to all powers of self-government recognized and affirmed by sections 1301 and 1303 of this title, the powers of self-government of a participating tribe include the inherent power of
that tribe, which is hereby recognized and affirmed, to exercise special domestic violence criminal jurisdiction over all persons.

(2) **CONCURRENT JURISDICTION.**—The exercise of special domestic violence criminal jurisdiction by a participating tribe shall be concurrent with the jurisdiction of the United States, of a State, or of both.

(3) **APPLICABILITY.**—Nothing in this section—
   
   (A) creates or eliminates any Federal or State criminal jurisdiction over Indian country; or
   
   (B) affects the authority of the United States or any State government that has been delegated authority by the United States to investigate and prosecute a criminal violation in Indian country.

(4) **EXCEPTIONS.**

   (A) **VICTIM AND DEFENDANT ARE BOTH NON-INDIANS.**

      (i) **IN GENERAL.**—A participating tribe may not exercise special domestic violence criminal jurisdiction over an alleged offense if neither the defendant nor the alleged victim is an Indian.

      (ii) **DEFINITION OF VICTIM.**—In this subparagraph and with respect to a criminal proceeding in which a participating tribe exercises special domestic violence criminal jurisdiction based on a violation of a protection order, the term “victim” means a person specifically protected by a protection order that the defendant allegedly violated.

   (B) **DEFENDANT LACKS TIES TO THE INDIAN TRIBE.**—A participating tribe may exercise special domestic violence criminal jurisdiction over a defendant only if the defendant—

      (i) resides in the Indian country of the participating tribe;
      
      (ii) is employed in the Indian country of the participating tribe; or
      
      (iii) is a spouse, intimate partner, or dating partner of—

         (I) a member of the participating tribe; or
         
         (II) an Indian who resides in the Indian country of the participating tribe.

   (c) **CRIMINAL CONDUCT.**—A participating tribe may exercise special domestic violence criminal jurisdiction over a defendant for criminal conduct that falls into one or more of the following categories:

      (1) **DOMESTIC VIOLENCE AND DATING VIOLENCE.**—An act of domestic violence or dating violence that occurs in the Indian country of the participating tribe.

      (2) **VIOLATIONS OF PROTECTION ORDERS.**—An act that—

         (A) occurs in the Indian country of the participating tribe; and
         
         (B) violates the portion of a protection order that—

            (i) prohibits or provides protection against violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person;
            
            (ii) was issued against the defendant;
            
            (iii) is enforceable by the participating tribe; and
            
            (iv) is consistent with section 2265(b) of Title 18.
(d) RIGHTS OF DEFENDANTS.—In a criminal proceeding in which a participating tribe exercises special domestic violence criminal jurisdiction, the participating tribe shall provide to the defendant—

1. all applicable rights under this Act;
2. if a term of imprisonment of any length may be imposed, all rights described in section 1302(c) of this title;
3. the right to a trial by an impartial jury that is drawn from sources that—
   (A) reflect a fair cross section of the community; and
   (B) do not systematically exclude any distinctive group in the community, including non-Indians; and
4. all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction over the defendant.

(e) PETITIONS TO STAY DETENTION.

1. IN GENERAL.—A person who has filed a petition for a writ of habeas corpus in a court of the United States under section 1303 of this title may petition that court to stay further detention of that person by the participating tribe.
2. GRANT OF STAY.—A court shall grant a stay described in paragraph (1) if the court—
   (A) finds that there is a substantial likelihood that the habeas corpus petition will be granted; and
   (B) after giving each alleged victim in the matter an opportunity to be heard, finds by clear and convincing evidence that under conditions imposed by the court, the petitioner is not likely to flee or pose a danger to any person or the community if released.
3. NOTICE.—An Indian tribe that has ordered the detention of any person has a duty to timely notify such person of his rights and privileges under this subsection and under section 1303 of this title.

(f) GRANTS TO TRIBAL GOVERNMENTS.—The Attorney General may award grants to the governments of Indian tribes (or to authorized designees of those governments)—

1. to strengthen tribal criminal justice systems to assist Indian tribes in exercising special domestic violence criminal jurisdiction, including—
   (A) law enforcement (including the capacity of law enforcement or court personnel to enter information into and obtain information from national crime information databases);
   (B) prosecution;
   (C) trial and appellate courts;
   (D) probation systems;
   (E) detention and correctional facilities;
   (F) alternative rehabilitation centers;
   (G) culturally appropriate services and assistance for victims and their families; and
   (H) criminal codes and rules of criminal procedure, appellate procedure, and evidence;
(2) to provide indigent criminal defendants with the effective assistance of licensed defense counsel, at no cost to the defendant, in criminal proceedings in which a participating tribe prosecutes a crime of domestic violence or dating violence or a criminal violation of a protection order;

(3) to ensure that, in criminal proceedings in which a participating tribe exercises special domestic violence criminal jurisdiction, jurors are summoned, selected, and instructed in a manner consistent with all applicable requirements; and

(4) to accord victims of domestic violence, dating violence, and violations of protection orders rights that are similar to the rights of a crime victim described in section 3771(a) of Title 18, consistent with tribal law and custom.

(g) SUPPLEMENT, NOT SUPPLANT.—Amounts made available under this section shall supplement and not supplant any other Federal, State, tribal, or local government amounts made available to carry out activities described in this section.

(h) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated $5,000,000 for each of fiscal years 2014 through 2018 to carry out subsection (f) and to provide training, technical assistance, data collection, and evaluation of the criminal justice systems of participating tribes.
MEMORANDUM FOR UNITED STATES ATTORNEYS
WITH DISTRICTS CONTAINING INDIAN COUNTRY*

FROM: David W. Ogden
Deputy Attorney General

SUBJECT: Indian Country Law Enforcement Initiative

This memorandum implements a critical component of the Attorney General's initiative to improve public safety in tribal communities by setting forth new policy for U.S. Attorneys’ Offices (USAOs) with Indian Country jurisdiction, and by identifying as a Justice Department priority the goal of combating violence against women and children in tribal communities.

The Department of Justice recognizes the unique legal relationship that the United States has with federally recognized tribes. As one aspect of this relationship, in much of Indian Country, the Justice Department alone has the authority to seek a conviction that carries an appropriate potential sentence when a serious crime has been committed. Our role as the primary prosecutor of serious crimes makes our responsibility to citizens in Indian Country unique and mandatory. Accordingly, public safety in tribal communities is a top priority for the Department of Justice.

Indian Country Law Enforcement Initiative

The Attorney General has launched a Department-wide initiative on public safety in tribal communities. As part of this effort, Department of Justice leadership conducted a series of meetings across the country addressing violent crime in Indian Country. On October 28-29, 2009, the Justice Department convened a national tribal leaders listening session in St. Paul, Minnesota. Also in October, the Justice Department held its annual tribal consultation on violence against women, as required by the Violence Against Women Act of 2005. The Department again had the opportunity to engage with tribal leaders on public safety in tribal communities during the White House Tribal Nations Conference in November. In addition to these sessions with tribal leaders, Department leadership has conducted meetings with Indian Country experts on law enforcement and public safety efforts. I also have had the opportunity to

* A list of districts that contain Indian Country as of the date of this memorandum is attached hereto as Appendix A.
meet with our own Justice Department specialists in the field – including U.S. Attorneys with significant Indian Country responsibility, Assistant U.S. Attorneys serving as Tribal Liaisons, and FBI Special Agents and Victim Witness personnel working in Indian Country – and have relied on their invaluable insights.

Tribal leaders have confirmed what our own experts working in Indian Country have reported: violent crime in Indian Country is at unacceptable levels and has a devastating impact on the basic quality of life there. Many tribes experience rates of violent crime far higher than most other Americans; indeed, some face murder rates against Native American women more than ten times the national average. Tribal law enforcement resources are typically scarce, a problem exacerbated by the geographic isolation and/or vast size of many reservations. Federal and state resources devoted to Indian Country have also typically been insufficient to address law enforcement needs.

Despite these challenges, tribal governments have the ability to create and institute successful programs when provided with the resources to develop solutions that work best for their communities. And the tireless efforts of the dedicated women and men working for the Department of Justice in Indian Country to seek justice for victims of crime, hold offenders accountable, and safeguard tribal communities are commendable. Assistant U.S. Attorneys and federal prosecutors serving as Tribal Liaisons continue to contribute greatly to the success of those efforts; Safe Trails Task Forces, coordinated by the FBI, play a critical role in coordinating law enforcement in tribal communities; FBI agents work tirelessly to investigate Indian Country crimes; and FBI and USAO victim specialists working in Indian Country are often the sole providers of essential services for the victims of violent crime there.

There is no one-size-fits-all solution to the challenges confronting Indian Country. Indeed, each district and each tribe presents a different set of issues. It is clear, however, that our success depends on the leadership of our U.S. Attorneys, and the focus and commitment of our law enforcement personnel in the field. This memorandum therefore directs each U.S. Attorney with Indian Country jurisdiction to establish a structure and plan for that leadership and focus in his or her district.

In developing this directive, I have worked closely with the Attorney General’s Advisory Committee through its Native American Issues Subcommittee (NAIS) and the Executive Office for United States Attorneys (EOUSA), and I am grateful to them for their leadership in this area. I have also asked the NAIS and EOUSA to identify next steps for implementing this directive at the NAIS’s January meeting.
U.S. Attorney Consultations and District-Level Operational Plans

The United States has a government-to-government relationship with federally recognized Indian tribes. The success of any intergovernmental relationship is based on consistent and effective communication. Moreover, the public safety challenges in Indian Country are not uniform; they vary widely from district to district—and from tribe to tribe—based upon unique conditions, a complex set of legal jurisdictional issues, geographic challenges, differences in tribal cultures and the number of tribes and reservations within a particular district.

Accordingly, I direct every USAO with Indian Country in its district to engage annually, in coordination with our law enforcement partners, in consultation with the tribes in that district. In addition to tribal governmental and law enforcement leaders, consultation sessions should include other federal law enforcement partners, including FBI, BIA, USMS, DEA, and ATF, and, where appropriate, state and local law enforcement. In addition, it may be appropriate and helpful to include other federal agency representatives with Indian Country responsibility in your district, for example, the Department of Housing and Urban Development, the Department of Health and Human Services' Indian Health Service, and the Interior Department's Bureau of Indian Education.

Following such consultation, I direct all such USAOs to develop an operational plan addressing public safety in Indian Country.

In coordination with the law enforcement agencies and tribes in that district, every USAO with Indian Country jurisdiction should review and, as necessary, revise its operational plan on an annual basis. Every newly confirmed U.S. Attorney in such districts, upon assuming office, should conduct a consultation with tribes in his or her district and develop or update the district's operational plan within eight months of assuming office, unless an extension of time is provided by EOUSA.

The subject matter of each district's plan will depend on the legal status of the tribes in that district (i.e., whether the jurisdiction is Public Law 280, non-Public Law 280, or partial-Public Law 280) as well as the unique characteristics and challenges confronting those tribal nations. Districts that include non-Public Law 280 or partial-Public Law 280 tribes should generally consider inclusion of the following elements in their operational plans: a plan to develop and foster an ongoing government-to-government relationship; a plan to improve communications with each tribe, including the timely transmittal of charging decisions to tribal law enforcement, where appropriate; a plan to initiate cross-deputization agreements, Special Law Enforcement Commission training and a tribal SAUSA program, where appropriate; and a plan to establish training for USAO staff and all relevant criminal justice personnel on issues related to Indian Country criminal jurisdiction and legal issues. Districts that include non-Public Law 280 or partial-Public Law 280 tribes are encouraged to meet individually with each of those
Memorandum for United States Attorneys with Districts Containing Indian Country

Subject: Indian Country Law Enforcement Initiative

Tribes in the course of the planning process. Districts containing only Public Law 280 tribes may consult with EOUSA on an appropriate strategy to ensure regular engagement with tribes and an appropriate assessment of the Justice Department's responsibility with respect to those reservations.

To assist in this process, I have asked EOUSA to develop and provide to the USAOs, by February 1, 2010, model approaches for district tribal consultations and operational planning. These models may be used as guidance to develop individual consultations and operational plans for each district. To help districts address training needs, EOUSA has also created a new position devoted to Indian Country prosecution and investigation training.

Upon adoption of its plan, or revision or update thereto, I request that each district provide the Office of the Deputy Attorney General, through EOUSA, a summary of its operational plan to improve public safety in Indian Country. I also direct that you make these summaries available to the tribes in your district.

The public safety challenges confronting Indian Country are great, and I realize that our efforts in Indian Country can be resource intensive. I am therefore pleased to be able to inform you that the Justice Department's FY 2010 appropriation includes an additional $6,000,000 for Indian Country prosecution efforts. Overall, at least 35 additional Assistant U.S. Attorneys and 12 additional FBI victim specialists will be added in offices with an Indian Country caseload. These new resources will also enable the Justice Department to bring the federal justice system closer to Indian Country, including through a Community Prosecution Pilot Project that EOUSA is currently developing.

The Attorney General is depending upon you, as leaders of the Justice Department in your respective districts, to craft individual tribal assessments and action plans that respond to the unique challenges facing tribal communities in your district.

Violence against Women and Children in Tribal Communities

Addressing violence against women and children in Indian Country is a Department of Justice priority. The Department, through the USAOs, has a duty to investigate and prosecute serious crimes in Indian Country, including crimes against women and children. In much of Indian Country, the federal government alone has authority to prosecute certain violent crimes against Native Americans where the offender is non-Indian and to obtain meaningful punishment for any serious offender. In those circumstances, only USAOs can pursue justice for the victim and the community.

Reports of sexual assault or domestic violence in Indian Country should be investigated wherever credible evidence of violations of federal law exists, and prosecuted when the
Principles of Federal Prosecution are met. Although sexual assault offenses may often occur outside the presence of witnesses and may present other prosecutorial challenges, these factors should not deter law enforcement personnel from diligently and thoroughly investigating the crime or pursuing prosecution. Where federal jurisdiction exists, the responsibility to investigate and prosecute violence against women in Indian Country also extends to misdemeanor assaults committed by non-Indian offenders against Native American women on federally recognized reservations. Due care should be exercised to recognize ongoing risks to victims in sexual assault and domestic violence cases, and to expeditiously make charging decisions in high-risk cases to minimize or eliminate those risks.

In developing district-specific operational plans for public safety in tribal communities, I direct every U.S. Attorney to pay particular attention to violence against women, and to work closely with law enforcement to make these crimes a priority. This may include reevaluating, together with law enforcement partners including the FBI and the Department of Interior’s BIA, existing memoranda of understandings addressing such crimes. Federal law provides for a number of felony level domestic violence offenses in addition to those crimes listed in the Major Crimes Act (18 U.S.C. §1153) and the General Crimes Act (18 U.S.C. §1152), and I have asked EOUSA, working closely with the NAIS, to develop guidance on these additional statutes.

Many sexual assault cases arising in Indian Country require a team investigative effort involving FBI, tribal police, and BIA. Successful multijurisdictional investigations and prosecutions also require a collaborative working relationship. Tribal Liaisons and Assistant U.S. Attorneys assigned to cases of child sexual abuse on the reservations currently use the multidisciplinary model provided in 18 USC §3509(g) with great success. USAOs are encouraged to consider also using this team approach in cases where adult women are the victims of sexual assault. EOUSA will provide further guidance on this issue in coming weeks.

Conclusion

The Department has a responsibility to build a successful and sustainable response to the scourge of violent crime on reservations. In partnership with tribes, our goal is to find and implement solutions to immediate and long-term public safety challenges confronting Indian Country. This directive creates a structure through which U.S. Attorneys will develop targeted plans to help make tribal communities in their districts safer, and to turn back the unacceptable tide of domestic and sexual violence there.

Attachment

cc: All United States Attorneys

B. Todd Jones
United States Attorney
District of Minnesota
Chair, Attorney General’s Advisory Committee
Memorandum for United States Attorneys with Districts Containing Indian Country
Subject: Indian Country Law Enforcement Initiative

Robert S. Mueller, III
Director
Federal Bureau of Investigation

Michele Leonhart
Acting Director
Drug Enforcement Administration

Kenneth E. Melson
Acting Director
Bureau of Alcohol, Tobacco, Firearms & Explosives

John F. Clark
Director
United States Marshals Service

H. Marshall Jarrett
Director
Executive Office for United States Attorneys
Appendix A: Federal Districts with Federally Recognized Tribes

1. Southern District of Alabama
2. District of Alaska
3. District of Arizona
4. Central District of California
5. Eastern District of California
6. Northern District of California
7. Southern District of California
8. District of Colorado
9. District of Connecticut
10. Southern District of Florida
11. District of Idaho
12. Northern District of Iowa
13. District of Kansas
14. Western District of Louisiana
15. District of Maine
16. District of Massachusetts
17. Eastern District of Michigan
18. Western District of Michigan
19. District of Minnesota
20. Southern District of Mississippi
21. District of Montana
22. District of Nebraska
23. District of Nevada
24. District of New Mexico
25. Eastern District of New York (anticipating federal recognition of the Shinnecock Nation)
27. Western District of New York
28. Western District of North Carolina
29. District of North Dakota
30. Eastern District of Oklahoma
31. Northern District of Oklahoma
32. Western District of Oklahoma
33. District of Oregon
34. District of Rhode Island
35. District of South Carolina
36. District of South Dakota
37. Eastern District of Texas
38. Western District of Texas
39. District of Utah
40. Eastern District of Washington
41. Western District of Washington
42. Eastern District of Wisconsin
43. Western District of Wisconsin
44. District of Wyoming
DEPARTMENT OF JUSTICE
Office of the Attorney General
[AG Order No. 3481–2014]

Attorney General Guidelines Stating Principles for Working With Federally Recognized Indian Tribes

AGENCY: Office of the Attorney General, Department of Justice.

ACTION: Notice.

SUMMARY: The Attorney General is issuing guidelines stating principles for working with federally recognized Indian tribes.

DATES: This notice is effective December 3, 2014.

ADDRESSES: Mr. Tracy Toulou, Director, Office of Tribal Justice, Department of Justice, 950 Pennsylvania Avenue NW., Room 2310, Washington, DC 20530, email OTJ@usdoj.gov.

FOR FURTHER INFORMATION CONTACT: Mr. Tracy Toulou, Director, Office of Tribal Justice, Department of Justice, at (202) 514–8812 (not a toll-free number) or OTJ@usdoj.gov.

SUPPLEMENTARY INFORMATION: The Attorney General Guidelines state the following principles for working with federally recognized Indian tribes:

Overarching Principles
- The Department of Justice honors and strives to act in accordance with the general trust relationship between the United States and tribes.
- The Department of Justice is committed to furthering the government-to-government relationship with each tribe, which forms the heart of our federal Indian policy.
- The Department of Justice respects and supports tribes’ authority to exercise their inherent sovereign powers, including powers over both their citizens and their territory.
- The Department of Justice promotes and pursues the objectives of the United Nations Declaration on the Rights of Indigenous Peoples.
- The Department of Justice is committed to tribal self-determination, tribal autonomy, tribal nation-building, and the long-term goal of maximizing tribal control over governmental institutions in tribal communities, because tribal problems generally are best addressed by tribal solutions, including solutions informed by tribal traditions and custom.

Consultation and Communication With Tribes
- The Department of Justice recognizes that its commitment to tribal self-determination requires regular, meaningful, and informed consultation with American Indian and Alaska Native tribal officials when developing new or amended policies, regulations, and legislative actions initiated by the Department that may affect tribes, as detailed in the Department’s Policy Statement on Tribal Consultation.
- The Department of Justice recognizes that—in addition to, but not in lieu of, formal consultation—there can be great benefit in timely, detailed, informal communications with tribal officials and other community leaders.
- The Department of Justice supports the Attorney General’s Tribal Nations Leadership Council and other task forces and advisory groups that allow elected tribal representatives to provide direct input to the Department’s leaders and components.

Culture and Mutual Respect
- The Department of Justice recognizes that each tribe’s history and contemporary culture are unique, and that solutions that work for one tribe may not be suitable for others.
- The Department of Justice works to respectfully consider traditional tribal cultural practices and values, and is sensitive to the need for effective cross-cultural communication.
- The Department of Justice seeks to foster an internal Departmental culture, from top to bottom, that will encourage its officers and employees to identify and be responsive to the needs of tribes routinely, not merely as an afterthought.

Law Enforcement and Litigation
- The Department of Justice is committed to helping protect all Native Americans from violence, takes seriously its role in enforcing federal criminal laws that apply in Indian country, and recognizes that, absent the Department’s action, some serious crimes might go unaddressed.
- The Department of Justice prioritizes helping protect Native American women and children from violence and exposure to violence, and works with tribes to hold perpetrators accountable, to protect victims, and to reduce the incidence of domestic violence, sexual assault, and child abuse and neglect in tribal communities.
- The Department of Justice is committed to fully implementing the Indian Civil Rights Act of 1968 (ICRA), the Tribal Law and Order Act of 2010 (TLOA), and the Violence Against Women Reauthorization Act of 2013 (VAWA), and believes that working with tribes to strengthen their justice systems, including indigent defense services, is critical to fulfilling the promise of these statutes.

Coordination and Outreach
- The Department of Justice, when working with other federal agencies on issues involving tribes, advocates respecting tribal self-determination, tribal autonomy, tribal nation-building, and the government-to-government relationship.
- The Department of Justice works to facilitate communication and build relationships among the federal agencies engaged with tribal governments and to promote the sharing of federal resources and expertise.
The Department of Justice works to facilitate communication and build relationships between tribes and state, local, and private partners in law enforcement, public safety, victim services, and civil rights, to promote prosperous and resilient tribal communities, and to use dispute resolution techniques such as mediation to resolve community conflicts and tensions.

The Department of Justice recognizes the link between healthy, prospering families and public safety, and the need to coordinate law enforcement efforts with educational, housing, environmental-protection, and public-health services.

**Sustainability**

The Department of Justice will continue taking steps to institutionalize its commitment to tribal justice and to make its officers and employees aware of these Attorney General Guidelines stating principles for working with federally recognized Indian tribes, so that progress in areas important to tribes continues regardless of changes in Department personnel.

These guidelines and principles are intended to improve the internal management of the Department of Justice. They are not intended to and do not create any right or benefit, substantive or procedural, enforceable at law or in equity by any party in any matter, civil or criminal, against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person, nor do these guidelines or principles place any limitations on otherwise lawful litigative prerogatives of the Department of Justice. Please contact the Department’s Office of Tribal Justice (OTJ) with any questions about these guidelines and principles.


*Eric H. Holder, Jr.,
  Attorney General.*

**DEPARTMENT OF JUSTICE**

**Bureau of Alcohol, Tobacco, Firearms, and Explosives**

[Docket No. ATF 2014R–50N]

**Granting of Relief; Federal Firearms Privileges**

**AGENCY:** Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), Department of Justice.

**ACTION:** Notice of granting of restoration of Federal firearms privileges.

**SUMMARY:** Northrop Grumman Systems Corporation (NGSC), a wholly owned subsidiary of Northrop Grumman Corporation (NGC), has been granted relief from the disabilities imposed by Federal laws by the Director of ATF with respect to the acquisition, receipt, transfer, shipment, transportation, or possession of firearms.

**FOR FURTHER INFORMATION CONTACT:** Shermaine Kenner, Enforcement Programs and Services; Bureau of Alcohol, Tobacco, Firearms and Explosives; U.S. Department of Justice; 99 New York Avenue NE., Washington, DC 20226; telephone (202) 648–7070.

**SUPPLEMENTARY INFORMATION:**

The Attorney General is responsible for enforcing the provisions of the Gun Control Act of 1968 (GCA), 18 U.S.C. Chapter 44. He has delegated that responsibility to the Director of ATF, subject to the direction of the Attorney General and the Deputy Attorney General. 28 CFR 0.130(a). ATF has promulgated regulations that implement the provisions of the GCA in 27 CFR part 478.

Section 922(g) of the GCA prohibits certain persons from shipping or transporting any firearm in interstate or foreign commerce, or receiving any firearm which has been shipped or transported in interstate or foreign commerce, or possessing any firearm in or affecting commerce. These prohibitions apply to any person who—

1. Has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year;
2. Is a fugitive from justice;
3. Is an unlawful user of or addicted to any controlled substance;
4. Has been adjudicated as a mental defective or committed to a mental institution;
5. Is an alien illegally or unlawfully in the United States or, with certain exceptions, aliens admitted to the United States under a nonimmigrant visa;
6. Has been discharged from the Armed Forces under dishonorable conditions;
7. Having been a citizen of the United States, has renounced U.S. citizenship;
8. Is subject to a court order that restrains the person from harassing, stalking, or threatening an intimate partner or child of such intimate partner; or
9. Has been convicted in any court of a misdemeanor crime of domestic violence.

The term "person" is defined in section 921(a)(1) as including "any individual, corporation, company, association, firm, partnership, society, or joint stock company." Section 925(c) of the GCA provides that a person who is prohibited from possessing, shipping, transporting, or receiving firearms or ammunition may make application to the Attorney General to remove the firearms disabilities imposed under section 922(g) "if it is established to his satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." The Attorney General has delegated the authority to grant relief from firearms disabilities to the Director of ATF.

Section 925(c) further provides that "[w]henever the Attorney General grants relief to any person pursuant to this section he shall promptly publish in the Federal Register notice of such action, together with the reasons therefor." Regulations implementing the provisions of section 925(c) are set forth in 27 CFR 478.144.

Since 1992, Congress has eliminated funding for ATF to investigate or act upon applications for relief from federal firearms disabilities submitted by individuals. However, since 1993, Congress has authorized funding for ATF to investigate and act upon applications filed by corporations for relief from Federal firearms disabilities.

An application to ATF for relief from Federal firearms disabilities under 18 U.S.C. 925(c) was submitted for NGSC. In the matter under review, between 1993 and 2002, NGSC, a wholly owned subsidiary of NGC, merged with and succeeded the operations of three non-surviving entities that had been convicted in Federal court of crimes punishable by imprisonment for a term exceeding one year. Specifically, TRW Electronic Products, Inc. was convicted on September 25, 1987, in the United States District Court for the District of Colorado, Case No. 87 CR–250, for violations of 18 U.S.C. 2 and 1001. TRW, Inc. was convicted on August 25, 1988, in the United States District Court for the Northern District of Ohio for a violation of 18 U.S.C. 371. Litton Applied Technology Division was convicted on June 30, 1999, in the United States District Court for the