U.S. Department of Justice
Executive Office for United States Attorneys

Victim and Witness Rights

United States Attorneys' Responsibilities

LECC/Victim-Witness Staff

October 1998

of the Victims of Child Abuse Act of 1990 on Federal land or in a federally operated (or contracted) facility, learns of facts that give reason to suspect that a child has suffered an incident of child abuse, as defined in subsection (c) of that section, and fails to make a timely report as required by subsection (a) of that section, shall be guilty of a Class B misdemeanor.

18 U.S.C. § 3509. Child victims' and child witnesses' rights.

(a) Definitions.--For purposes of this section--

(1) the term "adult attendant" means an adult described in subsection (i) who accompanies a child throughout the judicial process for the purpose of providing emotional support;

(2) the term "child" means a person who is under the age of 18, who is or is alleged to be--
(A) a victim of a crime of physical abuse, sexual abuse, or exploitation; or
(B) a witness to a crime committed against another person;

(3) the term "child abuse" means the physical or mental injury, sexual abuse or exploitation, or negligent treatment of a child;

(4) the term "physical injury" includes lacerations, fractured bones, burns, internal injuries, severe bruising or serious bodily harm;

(5) the term "mental injury" means harm to a child's psychological or intellectual functioning which may be exhibited by severe anxiety, depression, withdrawal or outward aggressive behavior, or a combination of those behaviors, which may be demonstrated by a change in behavior, emotional response, or cognition;

(6) the term "exploitation" means child pornography or child prostitution;

(7) the term "multidisciplinary child abuse team" means a professional unit composed of representatives from health, social service, law enforcement, and legal service agencies to coordinate the assistance needed to handle cases of child abuse;

(8) the term "sexual abuse" includes the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist another person to engage in, sexually explicit conduct or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children;

(9) the term "sexually explicit conduct" means actual or simulated–
(A) sexual intercourse, including sexual contact in the manner of genital-genital, oral-genital, anal-genital, or oral-anal contact, whether between persons of the same or of opposite sex; sexual contact means the intentional touching, either directly or through clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify sexual desire of any person;
(B) bestiality;
(C) masturbation;
(D) lascivious exhibition of the genitals or pubic area of a person or animal; or
(E) sadistic or masochistic abuse;

(10) the term "sex crime" means an act of sexual abuse that is a criminal act;

(11) the term "negligent treatment" means the failure to provide, for reasons other than poverty, adequate food, clothing, shelter, or medical care so as to seriously endanger the physical health of the child; and

(12) the term "child abuse" does not include discipline administered by a parent or legal guardian to his or her child provided it is reasonable in manner and moderate in degree and otherwise does not constitute cruelty.

(b) Alternatives to live in-court testimony.–

(1) Child's live testimony by 2-way closed circuit television.–
(A) In a proceeding involving an alleged offense against a child, the attorney for the Government, the child's attorney, or a guardian ad litem appointed under subsection (h) may apply for an order that the child's testimony be

taken in a room outside the courtroom and be televised by 2-way closed circuit television. The person seeking such an order shall apply for such an order at least 5 days before the trial date, unless the court finds on the record that the need for such an order was not reasonably foreseeable.

(B) The court may order that the testimony of the child be taken by closed- circuit television as provided in subparagraph (A) if the court finds that the child is unable to testify in open court in the presence of the defendant, for any of the following reasons:

(i) The child is unable to testify because of fear.

(ii) There is a substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying.

(iii) The child suffers a mental or other infirmity.

(iv) Conduct by defendant or defense counsel causes the child to be unable to continue testifying.

(C) The court shall support a ruling on the child's inability to testify with findings on the record. In determining whether the impact on an individual child of one or more of the factors described in subparagraph (B) is so substantial as to justify an order under subparagraph (A), the court may question the minor in chambers, or at some other comfortable place other than the courtroom, on the record for a reasonable period of time with the child attendant, the prosecutor, the child's attorney, the guardian ad litem, and the defense counsel present.

(D) If the court orders the taking of testimony by television, the attorney for the Government and the attorney for the defendant not including an attorney pro se for a party shall be present in a room outside the courtroom with the child and the child shall be subjected to direct and cross- examination. The only other persons who may be permitted in the room with the child during the child's testimony are–

(i) the child's attorney or guardian ad litem appointed under subsection (h);

(ii) Persons necessary to operate the closed-circuit television equipment;
(iii) A judicial officer, appointed by the court; and
(iv) Other persons whose presence is determined by the court to be necessary to the welfare and well-being of the child, including an adult attendant.

The child's testimony shall be transmitted by closed circuit television into the courtroom for viewing and hearing by the defendant, jury, judge, and public. The defendant shall be provided with the means of private, contemporaneous communication with the defendant's attorney during the testimony. The closed circuit television transmission shall relay into the room in which the child is testifying the defendant's image, and the voice of the judge.

(2) Videotaped deposition of child.—(A) In a proceeding involving an alleged offense against a child, the attorney for the Government, the child's attorney, the child's parent or legal guardian, or the guardian ad litem appointed under subsection (h) may apply for an order that a deposition be taken of the child's testimony and that the deposition be recorded and preserved on videotape.

(B) (i) Upon timely receipt of an application described in subparagraph (A), the court shall make a preliminary finding regarding whether at the time of trial the child is likely to be unable to testify in open court in the physical presence of the defendant, jury, judge, and public for any of the following reasons:
(I) The child will be unable to testify because of fear.
(II) There is a substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying in open court.
(III) The child suffers a mental or other infirmity.
(IV) Conduct by defendant or defense counsel causes the child to be unable to continue testifying.

(ii) If the court finds that the child is likely to be unable to testify in open court for any of the reasons stated in clause (i), the court shall order that the child's deposition be taken and preserved by videotape.
(iii) The trial judge shall preside at the videotape deposition of a child and shall rule on all questions as if at trial. The only other persons who may be permitted to be present at the proceeding are—
(I) the attorney for the Government;
(II) the attorney for the defendant;
(III) the child's attorney or guardian ad litem appointed under subsection (h);
(IV) persons necessary to operate the videotape equipment;
(V) subject to clause (iv), the defendant; and
(VI) other persons whose presence is determined by the court to be necessary to the welfare and well-being of the child.

The defendant shall be afforded the rights applicable to defendants during trial, including the right to an attorney, the right to be confronted with the witness against the defendant, and the right to cross-examine the child.

(iv) If the preliminary finding of inability under clause (i) is based on evidence that the child is unable to testify in the physical presence of the defendant, the court may order that the defendant, including a defendant represented pro se, be excluded from the room in which the deposition is conducted. If the court orders that the defendant be excluded from the deposition room, the court shall order that 2-way closed circuit television equipment relay the defendant's image into the room in which the child is testifying, and the child's testimony into the room in which the defendant is viewing the proceeding, and that the defendant be provided with a means of private, contemporaneous

communication with the defendant's attorney during the deposition.

(v) Handling of videotape.—The complete record of the examination of the child, including the image and voices of all persons who in any way participate in the examination, shall be made and preserved on video tape in addition to being stenographically recorded. The videotape shall be transmitted to the clerk of the court in which the action is pending and shall be made available for viewing to the prosecuting attorney, the defendant, and the defendant's attorney during ordinary business hours.

(C) If at the time of trial the court finds that the child is unable to testify as for a reason described in subparagraph (B)(i), the court may admit into evidence the child's videotaped deposition in lieu of the child's testifying at the trial. The court shall support a ruling under this subparagraph with findings on the record.

(D) Upon timely receipt of notice that new evidence has been discovered after the original videotaping and before or during trial, the court, for good cause shown, may order an additional videotaped deposition. The testimony of the child shall be restricted to the matters specified by the court as the basis for granting the order.

(E) In connection with the taking of a videotaped deposition under this paragraph, the court may enter a protective order for the purpose of protecting the privacy of the child.

(F) The videotape of a deposition taken under this paragraph shall be destroyed 5 years after the date on which the trial court entered its judgment, but not before a final judgment is entered on appeal including Supreme Court review. The videotape shall become part of the court record and be kept by the court until it is destroyed.

(c) Competency examinations.—

(1) Effect on Federal Rules of Evidence.—Nothing in this subsection shall be construed to

abrogate rule 601 of the Federal Rules of Evidence.

(2) Presumption.—A child is presumed to be competent.

(3) Requirement of written motion.—A competency examination regarding a child witness may be conducted by the court only upon written motion and offer of proof of incompetency by a party.

(4) Requirement of compelling reasons.—A competency examination regarding a child may be conducted only if the court determines, on the record, that compelling reasons exist. A child's age alone is not a compelling reason.

(5) Persons permitted to be present.—The only persons who may be permitted to be present at a competency examination are—
(A) the judge;
(B) the attorney for the Government;
(C) the attorney for the defendant;
(D) a court reporter; and
(E) persons whose presence, in the opinion of the court, is necessary to the welfare and well-being of the child, including the child's attorney, guardian ad litem, or adult attendant.

(6) Not before jury.—A competency examination regarding a child witness shall be conducted out of the sight and hearing of a jury.

(7) Direct examination of child.—Examination of a child related to competency shall normally be conducted by the court on the basis of questions submitted by the attorney for the Government and the attorney for the defendant including a party acting as an attorney pro se. The court may permit an attorney but not a party acting as an attorney pro se to examine a child directly on competency if the court is satisfied that the child will not suffer emotional trauma as a result of the examination.

(8) Appropriate questions.—The questions asked at the competency examination of a child shall be appropriate to the age and developmental level of the child, shall not be related to the issues at trial, and shall focus on determining the child's ability to understand and answer simple questions.

(9) Psychological and psychiatric examinations.—Psychological and psychiatric examinations to assess the competency of a child witness shall not be ordered without a showing of compelling need.

(d) Privacy protection.—

(1) Confidentiality of information.—(A) A person acting in a capacity described in subparagraph (B) in connection with a criminal proceeding shall—

(i) keep all documents that disclose the name or any other information concerning a child in a secure place to which no person who does not have reason to know their contents has access; and

(ii) disclose documents described in clause (i) or the information in them that concerns a child only to persons who, by reason of their participation in the proceeding, have reason to know such information.

(B) Subparagraph (A) applies to—

(i) all employees of the Government connected with the case, including employees of the Department of Justice, any law enforcement agency involved in the case, and any person hired by the Government to provide assistance in the proceeding;

(ii) employees of the court;

(iii) the defendant and employees of the defendant, including the attorney for the defendant and persons hired by the defendant or the attorney for the defendant to provide assistance in the proceeding; and

(iv) members of the jury.

(2) Filing under seal.—All papers to be filed in court that disclose the name of or any other information concerning a child shall be filed under seal without necessity of obtaining a court order. The person who makes the filing shall submit to the clerk of the court—

(A) the complete paper to be kept under seal; and

(B) the paper with the portions of it that disclose the name of or other information

concerning a child redacted, to be placed in the public record.

(3) Protective orders.—(A) On motion by any person the court may issue an order protecting a child from public disclosure of the name of or any other information concerning the child in the course of the proceedings, if the court determines that there is a significant possibility that such disclosure would be detrimental to the child.

(B) A protective order issued under subparagraph (A) may—

(i) provide that the testimony of a child witness, and the testimony of any other witness, when the attorney who calls the witness has reason to anticipate that the name of or any other information concerning a child may be divulged in the testimony, be taken in a closed courtroom; and

(ii) provide for any other measures that may be necessary to protect the privacy of the child.

(4) Disclosure of information.—This subsection does not prohibit disclosure of the name of or other information concerning a child to the defendant, the attorney for the defendant, a multidisciplinary child abuse team, a guardian ad litem, or an adult attendant, or to anyone to whom, in the opinion of the court, disclosure is necessary to the welfare and well-being of the child.

(e) Closing the courtroom.—When a child testifies the court may order the exclusion from the courtroom of all persons, including members of the press, who do not have a direct interest in the case. Such an order may be made if the court determines on the record that requiring the child to testify in open court would cause substantial psychological harm to the child or would result in the child's inability to effectively communicate. Such an order shall be narrowly tailored to serve the Government's specific compelling interest.

(f) Victim impact statement.—In preparing the presentence report pursuant to rule 32(c) of the Federal Rules of Criminal Procedure, the probation

officer shall request information from the multidisciplinary child abuse team and other appropriate sources to determine the impact of the offense on the child victim and any other children who may have been affected. A guardian ad litem appointed under subsection (h) shall make every effort to obtain and report information that accurately expresses the child's and the family's views concerning the child's victimization. A guardian ad litem shall use forms that permit the child to express the child's views concerning the personal consequences of the child's victimization, at a level and in a form of communication commensurate with the child's age and ability.

(g) Use of multidisciplinary child abuse teams.—

(1) In general.—A multidisciplinary child abuse team shall be used when it is feasible to do so. The court shall work with State and local governments that have established multidisciplinary child abuse teams designed to assist child victims and child witnesses, and the court and the attorney for the Government shall consult with the multidisciplinary child abuse team as appropriate.

(2) Role of multidisciplinary child abuse teams.—The role of the multidisciplinary child abuse team shall be to provide for a child services that the members of the team in their professional roles are capable of providing, including—
(A) medical diagnoses and evaluation services, including provision or interpretation of x-rays, laboratory tests, and related services, as needed, and documentation of findings;
(B) telephone consultation services in emergencies and in other situations;
(C) medical evaluations related to abuse or neglect;
(D) psychological and psychiatric diagnoses and evaluation services for the child, parent or parents, guardian or guardians, or other caregivers, or any other individual involved in a child victim or child witness case;
(E) expert medical, psychological, and related professional testimony;
(F) case service coordination and assistance, including the location of services available

from public and private agencies in the community; and

(G) training services for judges, litigators, court officers and others that are involved in child victim and child witness cases, in handling child victims and child witnesses.

(h) Guardian ad litem.—

(1) In general.—The court may appoint a guardian ad litem for a child who was a victim of, or a witness to, a crime involving abuse or exploitation to protect the best interests of the child. In making the appointment, the court shall consider a prospective guardian's background in, and familiarity with, the judicial process, social service programs, and child abuse issues. The guardian ad litem shall not be a person who is or may be a witness in a proceeding involving the child for whom the guardian is appointed.

(2) Duties of guardian ad litem.—A guardian ad litem may attend all the depositions, hearings, and trial proceedings in which a child participates, and make recommendations to the court concerning the welfare of the child. The guardian ad litem may have access to all reports, evaluations and records, except attorney's work product, necessary to effectively advocate for the child. (The extent of access to grand jury materials is limited to the access routinely provided to victims and their representatives.) A guardian ad litem shall marshal and coordinate the delivery of resources and special services to the child. A guardian ad litem shall not be compelled to testify in any court action or proceeding concerning any information or opinion received from the child in the course of serving as a guardian ad litem.

(3) Immunities.—A guardian ad litem shall be presumed to be acting in good faith and shall be immune from civil and criminal liability for complying with the guardian's lawful duties described in paragraph (2).

(i) Adult attendant.—A child testifying at or attending a judicial proceeding shall have the right to be accompanied by an adult attendant to provide

emotional support to the child. The court, at its discretion, may allow the adult attendant to remain in close physical proximity to or in contact with the child while the child testifies. The court may allow the adult attendant to hold the child's hand or allow the child to sit on the adult attendant's lap throughout the course of the proceeding. An adult attendant shall not provide the child with an answer to any question directed to the child during the course of the child's testimony or otherwise prompt the child. The image of the child attendant, for the time the child is testifying or being deposed, shall be recorded on videotape.

(j) Speedy trial.—In a proceeding in which a child is called to give testimony, on motion by the attorney for the Government or a guardian ad litem, or on its own motion, the court may designate the case as being of special public importance. In cases so designated, the court shall, consistent with these rules, expedite the proceeding and ensure that it takes precedence over any other. The court shall ensure a speedy trial in order to minimize the length of time the child must endure the stress of involvement with the criminal process. When deciding whether to grant a continuance, the court shall take into consideration the age of the child and the potential adverse impact the delay may have on the child's well-being. The court shall make written findings of fact and conclusions of law when granting a continuance in cases involving a child.

(k) Stay of civil action.—If, at any time that a cause of action for recovery of compensation for damage or injury to the person of a child exists, a criminal action is pending which arises out of the same occurrence and in which the child is the victim, the civil action shall be stayed until the end of all phases of the criminal action and any mention of the civil action during the criminal proceeding is prohibited. As used in this subsection, a criminal action is pending until its final adjudication in the trial court.

(l) Testimonial aids.—The court may permit a child to use anatomical dolls, puppets, drawings, mannequins, or any other demonstrative device the court deems appropriate for the purpose of assisting a child in testifying.

Child Sexual Abuse In Indian Country
February 27 & 28,2000
Sheraton Tucson Hotel & Suites
5151 East Grant Road,Tucson, AZ 85712

193507

February 27

11:00-1:00 **Registration**

1:00-1:10 **Welcome And Invocation**
Isaac Dog Eagle
Standing Rock Sioux Tribe

1:10-3:00 **Debunking Common Misperceptions About Child Sexual Abuse**

An Examination of why the Legal System has oftentimes failed the victims of child sexual abuse and the reliability of children as witnesses

Richard Ducote
Attorney at Law
New Orleans, La

Geraldine Benally
District Prosecutor
Navajo Nation

3:00-3:10 **Break**

3:10-5:00 **Federal And Tribal Definitions Of Child Sexual Abuse**
An Examination Of The Federal Criminal Statutes And Tribal Criminal And Civil Laws Governing Child Sexual Abuse And How Each Court System Adjudicates Cases.

Honorable John St. Clair
Chief Judge- Shoshone & Arapaho Tribal Court

Dori Arter
Victim Service Coordinator-Arizona

Sandy Hansen
Asst. U.S. Attorney-Arizona

February 28

8:00-8:10 **Welcome And Invocation**
Honorable B.J. Jones
Chief Judge Sisseton Wahpeton Sioux Tribal Court

Gene Thin Elk
University Of South Dakota-Vermillion, S.D.

8:10-10:00 **Examining Child Sexual Abuse In Indian Country**
An Examination Of The Prevalence Of Child Sexual Abuse In Indian Country, The Sociological Factors, And Cultural Impact Of Child Sexual Abuse On Indian Families.

Gene Thin Elk
Co-Founder Of The "Red Road Approach"
University Of South Dakota
Vermillion, S.D.

10:00-10:10 **Break**

10:10-12:00 **Coordinating The Tribal And Federal Investigation Of Child Sexual And Pre-Trail Detention**
An Examination Of How Child Sexual Abuse Is Investigated, Federal And Tribal Reporting Requirements, Interrogating Child Victims, And Coordination Between Tribal And Federal Authorities On Pre-Trail Release. Discussion Of Apparent Reluctance Of Other Family Members To Testify In Child Sexual Abuse Cases.

Carl Free
Chief Of Police- Crow Creek Tribal Police
Fort Thompson, S.D.

John Ellis
Former F.B.I. Agent
Pierre,S.D.

Noon-1:00 **Working Lunch-**
Protecting the Children of Indian Country
Cecelia Fire Thunder

1:00-3:00	***Evidentiary Issues In Child Sexual Abuse Cases*** *An Examination Of The Medical Evidence Of Child Sexual Abuse, Issues Surrounding The Questioning Of Victims And The Testimony Of Abused Children Including Corroborating Testimony, Psychological Evidence Of The Child Abuse Syndrome, Use Of Hearsay Exceptions In Child Sexual Abuse Cases And Other Evidentiary Issues.* ***Dr. Richard Kaplan*** ***University Of South Dakota School Of Medicine*** ***Sioux Falls, S.D.***
3:00-3:10	***Break***
3:10-5:00	***Seasons Of Change : Understanding Purpose In Times Of Confusion.*** *Working with Child Victims of Abuse and Inspiring both Children and those who work with them to rise above the events of their lives .* ***Luke Yellow Robe*** ***Children"S Home Society*** ***Keystone,S.D.***

Sponsored By Northern Plains Tribal Judicial Institute
Under A Grant From The Department Of Justice,
Office For Victims Of Crime

List of Presenters and Biographies
Child Sexual Abuse in Indian Country
February 27 & 28, 2000
Tucson,AZ.

Honorable Isaac Dog Eagle
Standing Rock Sioux Tribe
P.O. Box 363
Fort Yates, North Dakota 58538
Phone 701-854-3807

Isaac is presently a tribal councilman for the Standing Rock Sioux Tribe representing the Little Eagle District. He was formerly a Juvenile Court Judge for the Standing Rock Sioux Tribal Court and is an advocate of utilizing traditional native beliefs and practices in dispensing justice in Indian country.

Honorable John St. Clair
Chief Judge - Shoshone & Arapahoe Tribal Court
P.O. Box 608
Ft. Washakie, Wyoming 82514
307-332-7094

Judge St. Clair is currently the Chief Judge of the Shoshone and Arapahoe Tribal Court in central Wyoming, located on the Wind River Reservation. He received his high school diploma from Haskell Institute, Lawrence,Kansas in 1961. He received his BA in 1971 and his JD in 1973 from the University of Wyoming. In 1981 he was admitted to the Wyoming State Bar and is currently in good standing.

In 1979-81 he assisted in investigating irregularities in royalty reporting and accounting by oil companies holding leases in the reservation that resulted in the Indian Mineral Leasing Act of 1982. In 1987 he wrote a comprehensive law and order code creating the tribal court which was enacted in 1988 replacing the CFR court.

While in law school he was awarded the J.J. Hickey Law Scholarship and in 1996 he was the recipient of the Outstanding Alumni award by the University of Wyoming. He currently serves as Chairman of Wyoming Legal

Services, Inc. Board and is a member of the Board of Directors of the National Indian Justice Center. He is also a member of the Fremont County Bar Association, the Native American Bar Association and the Wind River Bar Association.

B.J. Jones
Northern Plains Tribal Judicial Institute
University of North Dakota School of Law
P.O. Box 9003
Grand Forks, North Dakota 58202
701-777-6176

B.J. directs the Northern Plains Tribal Judicial Institute at the University of North Dakota School of Law which provides training and technical assistance to 21 tribal courts in the Northern Plains area. He also serves as Chief Judge for the Sisseton-Wahpeton Sioux Tribal Court and Chief Justice for the Turtle Mountain Band of Chippewa Indians Tribal Court. He graduated from the University of Virginia School of Law in 1984.

Gene Thin Elk
P.O. Box 501
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605-677-5426

Gene is an internationally known consultant in the area of Indigenous healing methods dealing with recovery from substance abuse and associated lifestyles in a manner called the "Red Road Approach." Gene is Lakota from Sicangu Nation (Rosebud Sioux Tribe) and is a believer in the Lakota way of Life. He originated the Red Road Approach to the therapeutic "wholistic" healing process by incorporating the modern medical model of addressing disease in thee traditional Lakota healing methods which address the disease of personhood and social structure. These healing applications are appropriate to all of humankind.

Red Road Approach workshops and seminars have been presented to schools, colleges, universities, traditional Native ceremonial gatherings, prisons, business corporations, Christian gatherings and many other forms of healing gatherings. These have taken place in 45 states in the United States and several different Canadian provinces.

He has worked for tribally owned enterprises in the area of human resources development. This work has culminated in the development of human resources models based upon traditional indigenous culture beliefs and values.

Mr. Thin Elk earned his bachelors's degree in Health and Physical Education and is a Master's Candidate in Educational Administration. He is also an adjunct instructor for the Alcohol and Drug Abuse Studies Program, and Native American Cultural Advisor for the University of South Dakota.

Carl A. Free
Chief of Police
BIA Law Enforcement
P.O. Box 139
Fort Thompson, SD 57339
605-245-2351

Carl is currently the Chief of Police for the Bureau of Indian Affairs in Fort Thompson, South Dakota. He started his law enforcement career in 1979 as a village officer in Winnebago, Nebraska. Since that time he has served as a city officer in Pender, Nebraska and deputy sheriff for the Dakota County Sheriff's Department in Dakota City, Nebraska. HE became of BIA law enforcement officer in 1987 and became the BIA Criminal Investigator for the Sisseton Agency in 1997, and served in that position until he became the Chief of Police in Fort Thompson.

Carl received an award from the US Attorney's Office in 1998 for his work with victims of crime. Much of his work involves the investigation of sexual and physical abuse of children. Carl is actively involved in conducting trainings for all tribal programs in child sexual abuse investigation, mandatory reporting and background investigations.

Carl has set up a protocol for victims of sexual abuse who are interviewed and examined by Child's Voice in Sioux Falls, SD by using a trained forensic interviewer and physician to do examinations of victims. This limits the interview process to help reduce stressful victimization from being interviewed several times.

John Ellis
Consulting and Investigations
103 Lee Hill Road
Pierre, SD 57501
605-224-1008

John is a retired FBI agent from South Dakota who investigated hundreds of cases involving child sexual abuse of Indian children during his term. He was also the Director of Law Enforcement for the Rosebud Sioux Tribe after he retired from the FBI. He is now a consultant and works extensively providing trainings on investigating child sexual abuse cases for law enforcement and others.

Dr. Richard Kaplan
Department of Pediatrics
USD School of Medicine
1100 S. Euclid Avenue
Sioux Falls, SD 57117-5039
605-357-7650

Dr. Kaplan is an Associate Professor of Pediatrics at the University of South Dakota School of Medicine. He came to the University of South Dakota with a primary focus of nurturing a special interest in the medical evaluation of child maltreatment into essentially a full-time medical specialty. Before going to medical school at age 30, Dr. Kaplan served as a psychiatric social worker having receive his Master in Social Work from St. Louis University. His current position as medical director for inpatient and outpatient pediatric child abuse programs at South Dakota Children's Hospital in Sioux Falls enables him to blend his social work and pediatric backgrounds and provided specialized care in a multidisciplinary setting.

Dr. Kaplan's main interests medically focus around serious and life threatening child physical abuse with special interest in Shaken Baby Syndrome and child sexual abuse. Since opening April 1, 1998, the outpatient sexual abuse center at South Dakota Children's Hospital, known as Child's Voice, has evaluated over one hundred children. The inpatient program continues to grow and now evaluates on the average of two to four patients per week.

Geraldine Benally
District Prosecutor
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Luke Yellow Robe
Cultural Relations Director
Children's Home Society
2410 South Rockerville Road
Rapid City, SD 57701-9277
605-343-5422

Luke Yellow Robe is Cultural Relations Director with Children's home Society. Children's Home provides a home, therapeutic care, and special education for children, ages 4-12, with severe emotional disturbances and behavioral disorders. Most are victims of extreme abuse and neglect. Prior to Children's Home Luke served as an Investigator for the Rapid City Sheriffs Department for 11 years, attended and graduated from the FBI National Academy in Quantico Virginia. Married wife Sandra, 4 children, Brandon, Amanda, Brittany, and Lance.

Cecelia Fire Thunder
P.O.Box 990
Martin S.D. 57551
(605)-455-2244

Cecelia is an internationally known motivational speaker and facilitator on issues of wellness, personal responsibility and community healing. Cecelia is known for her expertise, high energy level and humorous, positive attitude. According to Cecelia, the key to healing Indian

communities is celebrating the "Indianness" of all native peoples. She works for Cangleska Inc. on the Pine Ridge Indian reservation, a program devoted to ending violence against women and children on the Pine Ridge Indian reservation.

Richard Ducote
Attorney at Law
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504-524-0095
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Richard has achieved a rare record of child advocacy successes in his twenty years of practicing law. He helped create the Tulane University School of Law's Juvenile Law Clinic which trains both law students and social works to advocate zealously for the rights of children. From 1978-1981 he personally represented hundreds of abused children in foster care litigating termination of parental rights proceedings in all parishes in Louisiana. In 1984 he began representing victims of child sexual abuse and domestic violence in tort, custody and TPR cases. He has appeared on *Oprah, the Donahue show, CNN, Sixty Minutes, Leeza.*, and other shows. The New Orleans Times-Picayune described him in a 1987 feature story as "raising hell for children in courtrooms all over the country."

CHAPTER 3 OFFENSES AGAINST PERSONS

Section 7-3-1 Assault

Any person who attempts or threatens bodily harm to another person through the use of unlawful force or violence shall be deemed guilty of a misdemeanor and upon conviction thereof shall be sentenced to a fine of twenty (20) dollars or shall be required to furnish a peace bond, or both.

Section 7-3-2 Assault and Battery

Any person who shall willfully strike another person or otherwise inflict bodily injury, or who shall by offering violence cause another to harm himself shall be deemed guilty of a misdemeanor and upon conviction thereof shall be sentenced to 180 days payable and in appropriate cases ordered to make restitution for the benefit of the injured party.

Section 7-3-3 Abduction

Any person who shall willfully take away or detain another person against his will or without the consent of the parent or other person having lawful care or charge of him, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be sentenced to 180 days payable.

Section 7-3-4 Child Neglect

Any person responsible for a child's welfare who fails or neglects to provide adequate care, maintenance, supervision, education, medical or surgical care including failing to or refusing to send children to school shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than $100.00 nor more than $500.00 or imprisoned not more than 6 months, or both.

Section 7-3-5 Child Abuse

Any person who inflicts or causes physical or mental injury, harm or imminent danger to the physical or mental health or welfare of a child other than by accident, including abandonment, excessive or unreasonable corporal

punishment, malnutrition or substantial risk thereof, is guilty of a misdemeanor and upon conviction thereof shall be fined not less than $500.00 nor more than $5,000.00 or imprisoned not more than one year, or both.

Section 7-3-6 Soliciting to Engage in Illicit Sexual Behavior

Any person who solicits, procures or encourages any child to engage in illicit sexual penetration or sexual intrusion is guilty of a misdemeanor, and upon conviction thereof shall be imprisoned not more than one year or fined not less than $500.00 nor more than $5,000.00 or both.

Section 7-3-7 Immoral or Indecent Act

Any person taking immodest, immoral or indecent liberties, including but not limited to touching, fondling or masturbating with any person or causing or encouraging another person to commit with him any immoral or indecent act is guilty of a misdemeanor and upon conviction thereof shall be imprisoned not more than one year or fined not less than $500.00 nor more than $5,000.00 or both.

Section 7-3-8 Other Acts Prohibited Against Children

Any person who:

(1) Causes, encourages, aids, or contributes to a child's violation of any law; or

(2) Causes, encourages, aids, or permits a child to enter or remain or be employed in house of prostitution; or

(3) Commits any indecent or obscene act in the presence of a child; or

(4) Sells, gives or otherwise furnishes a child alcohol or any drug prohibited by tribal or federal law without a physician's prescription; or

(5) Causes, encourages, aids, or contributes to the endangering of a child's health, welfare or morals, including using, employing or permitting a child;

(a) In any business enterprise which is

injurious or dangerous to the health, welfare and morals, life or physical safety of the child;

(b) In any place for any medicant purposes;

(c) To be exhibited for the purpose of displaying any deformity of a child except to physicians;

(d) In any obscene or indecent exhibition or practice is guilty of a misdemeanor and upon conviction thereof shall be fined not less than $500.00 nor more than $5,000.00 or imprisoned for not more than one year or both.

Section 7-3-9 Abuse of Spouse, Handicapped or Elderly Persons

Any person who willfully and knowingly commits any act of physical or mental abuse which results in injury upon his or her spouse or any handicapped person or anyone over 60 years of age shall be deemed guilty of a misdemeanor and upon conviction thereof be ordered to seek and complete treatment and/or counseling for a period not to exceed 90 days after which a report must be submitted to the court showing that. If the defendant fails to abide by the order, he or she shall be arrested and brought before a judge and sentenced to six (6) months imprisonment.

CHAPTER 4 OFFENSES AGAINST PUBLIC ORDER AND DECENCY

Section 7-4-1 Carrying a Concealed Weapon

Any person who shall go about in public places armed with a dangerous weapon concealed on or about his person, unless he has a valid permit to carry it, is guilty of a misdemeanor and upon conviction thereof shall be sentenced to fifty days payable, and the weapon so carried may be confiscated.

Section 7-4-2 Inhaling Noxious Substances

Any person who:

(1) Shall knowingly and deliberately inhale the fumes of any gasoline, airplane glue or any other noxious substance for the purpose of producing intoxication or;

restrictive facility pending court disposition or execution of a court order for placement or commitment.

(9) "Detention Facility" - A physically restrictive facility which has been approved or licensed by the Bureau of Indian Affairs Department of Social Services, or Wyoming Department of Public Assistance and Social Services or the Shoshone and Arapahoe Tribes.

(10) "Domicile" - The place where a person has their true, fixed and permanent home and to which, whenever absent, he has the intention of returning.

(11) "Extended Family" - A person over the age of eighteen and who is the child's grandparent, aunt or uncle, brother or sister, brother-in-law, or sister-in-law, niece or nephew, first or second cousin, or step-parent.

(12) "Guardian" - A person other than the parent who is by law responsible for that child.

(13) "Guardian Ad Litem" - A guardian appointed by the court to represent or defend a child in any action to which he is a party.

(14) "Guardianship" - The office, duty or authority of a guardian. Also the relationship subsisting between guardian and ward.

(15) "Imminent Danger" - Includes threatened harm and means a statement, overt act, condition or status which represents an immediate and substantial risk of physical, sexual or mental abuse or injury.

(16) "Indian" - A person who is:

a) An enrolled member of any Indian Tribe;

b) Eligible for enrollment in any Indian tribe and a biological child of an enrolled member of an Indian tribe; or

c) A descendant of a member of any Indian tribe who is a resident or domicilliary of the Wind River Reservation or who has significant family or cultural contacts with the Wind River Reservation.

adoption or as otherwise defined by law or tribal custom.

(24) "Shelter Care" - A temporary home or facility which does not physically restrict the freedom of a child that provides food, clothing and shelter pending court disposition of a court order for placement.

(25) "Substantial Risk" - Means a strong possibility as contrasted with a remote or insignificant possibility.

(26) "Sexual Abuse" - Injury to the genital organs of a child in attempt of carnal knowledge falling short of actual intercourse.

(27) "Status Offense" - Non-criminal behavior of a minor which violates tribal laws that apply only to minors, such as curfew, delinquency, liquor, etc.

(28) "Status Offender" - A minor who commits a status offense within the jurisdiction of the Wind River Children's Court.

CHAPTER 2. THE COURT SYSTEM

Section 3-2-1. Establishment

There is at Title I, Ch. 3, Sec. 1, established for the Shoshone and Arapahoe Tribes of the Wind River Indian Reservation a court to be known as the Shoshone and Arapahoe Children's Court.

The Shoshone and Arapahoe Children's Court shall consist of a judge as appointed by the Joint Business Council, acting pursuant to this Law and Order Code.

Section 3-2-2. Powers and Duties

No adjudication upon the status of any child in the jurisdiction of the Children's Court shall be deemed criminal or be deemed a conviction of a crime, unless the Children's Court refers the matter to the adult tribal court. Therefore, the disposition of a child or of evidence given shall not be admissible as evidence against the child in any proceedings in another court.

Section 3-2-3. Authority of Court

(1) The Children's Court is authorized to cooperate fully with any federal, state, tribal, public or private agency to participate in any diversion,

terms and conditions of probation or parole arising out of a sentence incurred while a minor, but only if the child leaves or is expected to leave the Wind River Reservation.

Section 3-1-6 Definitions

For the purpose of this code the words and phrases shall have the meanings respectively ascribed to them.

(1) "Abandon" - When a parent, guardian, custodian or other person responsible for the welfare of a child:

a) Leaves the child without communication, or

b) Fails to support the child and there is no indication of that person's willingness to assume his parental role for a period in excess of one (1) year.

(2) "Abuse" - Inflicting or causing physical or mental injury, harm or imminent danger to the physical or mental health or welfare of a child other than by accidental means, including abandonment, excessive or unreasonable corporal punishment, malnutrition or substantial risk thereof.

(3) "Adult" - A person eighteen (18) years of age or older.

(4) "Children's Court" - The Shoshone and Arapahoe Tribal Court when exercising jurisdiction under this code.

(5) "Children's Court Judge" - A duly appointed judge of the Shoshone and Arapahoe Tribal Court when exercising jurisdiction under this code.

(6) "Custodian" - person, agency, organization or institution who has legal and physical custody of a minor and who is obligated to provide food, shelter and supervision to the minor.

(7) "Delinquent Act" - An act which if committed by an adult is designated as a crime under this code or if on probation, an act which violates the conditions of that probation, or an act which violates Title VII, Section 7-3, of this Law and Order Code.

(8) "Detention" - The placement of a person under eighteen (18) years of age in a physically

OVERVIEW OF FEDERAL STATUTES REGARDING CHILD SEXUAL ABUSE

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SEXUAL OFFENSES UNDER CHAPTER 109A, AND INCEST

All the felony sexual abuse offenses under Chapter 109A are major felonies that can be used in prosecutions under either § 1153 or § 1152, regardless of the tribal affiliation of the offender or victim. There are four substantive statutes: aggravated sexual abuse (§ 2241), sexual abuse (§ 2242), sexual abuse of a minor (§ 2243), and abusive sexual contact (§ 2244). Until September 13, 1994, § 2245 contained the pertinent definitions. With passage of the Violent Crime Control and Law Enforcement Act of 1994, a new potentially capital offense, sexual abuse resulting in death, was added as § 2245[1], and the definitions were moved to § 2246. New sections were also added relating to punishments for repeat offenders (§ 2247)[2] and restitution to victims (§ 2248).

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[1] The death penalty is only applicable if the tribe has opted in under § 3598. Thus, if the tribe has not opted in, the punishment is life in prison for any type of sexual abuse in Chapter 109A that results in death. If the tribe has opted in, the offense is capital.

[2] The maximum penalties stated in the discussions below are for first-time offenders in cases not resulting in death. Pursuant to § 2247, recidivists face a maximum penalty of up to twice what would be otherwise authorized. A recidivist for these purposes is a person who commits at Chapter 109A offense after he has a final conviction for a Chapter 109A offense or similar state offense.

Incest is also a § 1153 major felony. It is not defined in federal law and must be assimilated from state statutes.

A. DEFINITIONS

1. Critical Terms in Definitions

To understand the differences between the Chapter 109A offenses, it is important to know the difference between a sexual act and a sexual contact. Conduct that includes a sexual act is treated much more seriously than conduct that includes only sexual contact.

The common misconception is that "penetration" involves an actual intrusion, however slight, into the interior of the vagina or the rectum. As will be discussed more fully below, that is not required.

2. Sexual Acts -- § 2246(2)

a. Penis to vulva or anus

Section 2246(2)(A) defines one form of sexual act: "contact between the penis and the vulva or the penis and the anus. " It specifically states that "contact involving the penis occurs upon penetration, however slight." So, if the penis "penetrates" either the vulva or the anus, the defendant has engaged in a sexual act.

Note that the anatomical terms used are "vulva" and "anus," not "vagina " and "rectum." The "vulva" is commonly held to mean the external genital organs of the female, including specifically the labia majora, or outer labia. It includes the area immediately outside the

vaginal opening, between the labia minora and the labia majora. Similarly, the "anus" is the tissue that constitutes the opening of the rectum, which includes the outer surface of that tissue.

b. Oral sexual acts

Section 2246(2)(B) defines the second type of sexual act: contact between the mouth and the penis, vulva, or anus. Unlike with § 2246(2)(A), discussed above, "contact" is not defined and there is no requirement of "penetration." Note also that the terms used are again "vulva" and "anus," such that oral contact with the external surfaces would fall within the definition of a sexual act.

c. Digital penetration

Section 2246(2)(C) defines the third type of sexual act: "penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person."

First, this type of sexual act always requires the specified unlawful intent. Second, it need not be the defendant whose sexual desires are intended to be aroused or gratified. Third, the anatomical terms change from "vulva" and "anus" to "genital opening" and "anal opening." Penetration through clothing is sufficient to support a prosecution under this statute.

d. Direct touching of child's genitalia

The Violent Crime Control and Law Enforcement Act of 1994 added a new type of sexual act in § 2246(2)(D). It consists of "the intentional touching, not through the clothing, of the genitalia of another person who has not reached the age of 16." It requires the same unlawful intent as § 2246(2)(C). The touching is not restricted to touching with the defendant's hands or fingers, and the victim's full "genitalia" are included. However, since "genitalia" commonly means one's reproductive organs, it probably does not include the victim's anus, buttocks, groin, inner thighs, or breasts.

3. Sexual Contact -- § 2246(3)

Sexual contact is defined as "the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person."

The requisite intent is the same as that required under § 2246(2)(C) and (D) for digital penetration and direct genital touching. The term "clothing" is not limited to wearing apparel. A touching through a blanket may qualify.

B. AGGRAVATED SEXUAL ABUSE -- 18 U.S.C. § 2241

Aggravated sexual abuse is the most serious of the four substantive sexual abuse statutes. It always involves a sexual act, rather than sexual contact, and attempts to commit aggravated sexual abuse also constitute in themselves aggravated sexual abuse. There is no spousal immunity, so committing these acts upon one's

spouse is criminal.

There are several ways to commit aggravated sexual abuse. The maximum penalty in each case is life imprisonment, unless the offense causes death, in which case the penalty is death where the tribe has opted for the death penalty, and life in prison if the tribe has not. In addition, for violations of § 2241(c), Aggravated Sexual Abuse with Children, the penalty for second offenders is a mandatory term of life in prison, if the death penalty is inapplicable.

1. By Force or Threat -- § 2241(a)

One type of aggravated sexual abuse occurs when the defendant knowingly causes another person to engage in a sexual act by either using force against the victim, or threatening or placing the victim in fear that someone will be killed, kidnapped, or subjected to serious bodily injury.

The force requirement may be satisfied by showing the use or threatened use of a weapon; sufficient force to overcome, restrain, or injure a person, or the use of a threat of harm sufficient to coerce or compel submission by the victim. A victim's will can be overcome by threats to harm a third person, usually the victim's child.

2. By Rendering the Victim Incapable of Refusing -- § 2241(b)

Section 2241(b) provides that it is also aggravated sexual abuse when, essentially, the defendant knowingly makes the victim incapable of refusing to engage in a sexual act and "thereby" engages in the sexual act with the victim.

The theory is that deliberately causing a person to be unable to assert his or her will is as reprehensible as overcoming the victim's will with force or threats.

There are two ways of causing the victim to be incapable of refusing consent:

a. Rendering victim unconscious

The defendant commits aggravated sexual abuse if he knowingly renders the victim unconscious and "thereby" engages in a sexual act with the unconscious victim.

b. Administering intoxicants

The defendant also commits aggravated sexual abuse if he knowingly administers a drug, intoxicant, or other similar substance to the victim by force or threat of force, or without the victim's knowledge or permission, and "thereby" "substantially impairs the ability of [the victim] to appraise or control conduct" and engages in a sexual act with the impaired victim.

So, if the defendant spikes the victim's drinks without her knowledge and gets her so drunk that she cannot understand what is going on well enough to refuse him sex, he has committed forcible rape as if he had held a gun to her head.[3]

3. With Children Under 12 -- § 2241(c)

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[3] The sentencing guidelines also equate force or threats with the forcible or surreptitious administration of intoxicants. See U.S.S.G. § 2A3.1(b)(1).

It is aggravated sexual abuse for the defendant to engage--or, as noted above, attempt to engage--in a sexual act with a child under 12. Period. There is no requirement of threats, force, unconsciousness, or impairment. It is also a strict liability offense with respect to the age of the child. 18 U.S.C. § 2241(d).

Unlike the case with statutory rape of a child between 12 and 16, which is contained in § 2243(a) and discussed below, in a prosecution for aggravated sexual abuse with a child under 12, the age of the defendant does not matter. So long as the victim is under 12, there is no minimum age requirement for the defendant. Theoretically, a seven-year-old boy could be proceeded against as a juvenile offender for engaging in a sexual act with a girl aged 11 years and 11 months. Of course, the girl would be equally liable for engaging in the sexual act with the boy.

On September 23, 1996, Congress added a new crime to § 2241(c), making it a separate federal offense to cross a state line with the intent to engage in a sexual act with a child under 12. This new crime is not specific to Indian Country, and does not include crossing into or out of Indian Country with the required intent. It could be used in an Indian Country prosecution, if, for example, it could be proven that the suspect crossed from one state to another with the intent to sexually abuse a child under 12 in Indian Country, even if the suspect was stopped before he was able to complete, or even initiate, the act.[4]

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[4] The amendment to § 2241(c) was part of the Amber Hagerman Child Protection Act of 1996, which was incorporated in an appropriations act in the waning days of the Congressional session. The Amber Hagerman Child Protection Act also adds to § 2241(c) the

C. SEXUAL ABUSE -- 18 U.S.C. § 2242

Sexual abuse is the second most serious of the four substantive sexual abuse statutes. It, too, always involves a sexual act rather than sexual contact, and attempts to commit sexual abuse also constitute sexual abuse in themselves. Again, there is no spousal immunity, so committing these acts upon one's spouse is criminal.

There are two types of sexual abuse. Neither is a lesser included offense of aggravated sexual abuse by use of force or aggravated sexual abuse of a person incapable of consenting.

The maximum penalty for sexual abuse is 20 years imprisonment, unless the crime results in death.

1. Sexual Abuse by Threats -- § 2242(1)

One type of sexual abuse occurs when the defendant knowingly causes another person to engage in a sexual act by threatening or placing the victim in fear, other than the high degree of fear specified in § 2241(a)(2) that someone will be killed, kidnapped, or subjected to serious bodily injury.

Under this statute, the requirement of threats or placing the victim in fear may be satisfied by showing that the threat or intimidation created in the victim's mind in apprehension of fear of harm to herself or to others. See United States

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new crime of committing sexual abuse "under the circumstances described in subsections (a) and (b)" with victims between the ages of 12 and 16. This "new crime" is not really new, as aggravated sexual abuse through the use of force or with a person rendered incapable of refusing consent was already a serious crime under § 2241(a) or (b), regardless of the age of the victim. However, as noted above, the penalty for this crime is greatly enhanced for second offenders, who now face a mandatory term of life imprisonment for non-consensual sexual abuse of children age 16 or under.

v. Johns, 15 F.3d 740 (8th Cir. 1994) (fear victim would be rejected by religious spirits).

2. Sexual Abuse of Person Unable to Consent -- § 2242(2)

Section 2242(2) makes it sexual abuse to engage in a sexual act with another person if the victim is either: (A) incapable of appraising the nature of the conduct; or (B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act."

Although, as stated above, sexual abuse is not a lesser included offense of aggravated sexual abuse of a person incapable of consenting, the type of conduct in this instance is similar. If the defendant takes advantage of the victim by deliberately causing her to be unable to resist, the crime is aggravated sexual abuse. On the other hand, if the defendant happens across a victim who is already impaired in her ability to refuse and simply takes advantage of the fortuitous circumstance, the crime is sexual abuse.

Common applications of § 2242(2) include sexual acts with developmentally handicapped adults or with drunken or stoned victims who knowingly and voluntarily got drunk or stoned. See e.g., United States v. Barrett, 937 F.2d 1346 (8th Cir.), cert. denied, 502 U.S. 916 (1991).

D. SEXUAL ABUSE OF A MINOR OR WARD -- 18 U.S.C. 2243

The third type of sexual abuse that also requires proof of a sexual act is sexual abuse of a minor or ward. As with aggravated sexual abuse and sexual abuse, attempts are included within the definition of the crime. However, sexual abuse of a

minor or ward is not a lesser included offense of either aggravated sexual abuse or sexual abuse. United States v. Amos, 952 F.2d 992 (8th Cir. 1991).

1. Sexual Abuse of a Minor -- § 2243(a)

This is the federal statutory rape law. It consists of engaging in a sexual act with a person between the ages of 12 and 16, or crossing a state line with the intent to do so. Consent is not a defense, but either (a) a reasonable belief that the victim was at least 16, or (b) being married to the victim at the time of the offense is a valid defense. Also, the defendant must be at least four years older than the victim. The government does not have to prove, however, that the defendant knew how old the victim was, nor that he knew there was a four-year age difference between them.

The maximum penalty for sexual abuse of a minor that does not result in death is fifteen years in prison. However, if the sexual abuse was perpetrated by force or against a person rendered incapable of refusing consent, as defined in § 2241(a) or (b), and if the perpetrator has a prior state or federal conviction for aggravated sexual abuse, then the mandatory penalty is life in prison.

2. Sexual Abuse of a Ward -- § 2243(b)

This crime consists of engaging in a sexual act with a person who is in "official detention" and "under the custodial, supervisory, or disciplinary authority" of the defendant at the time of the act. There is no age requirement,

but marriage, oddly enough, is a defense.[5]

"Official detention" is defined at § 2246(5). It includes, among other things, being detained by, or at the direction of, a federal officer or employee after charge, arrest, conviction, or adjudication of juvenile delinquency; or being in the custody of, or in someone else's custody at the direction of, a federal officer or employee for purposes incident to the detention, such as transportation, medical services, court appearances, work, and recreation. It specifically does not include persons released on bail, probation, or parole.

The maximum penalty for sexual abuse of a ward that does not result in death is one year in prison.

E. ABUSIVE SEXUAL CONTACT -- 18 U.S.C. § 2244

Abusive sexual contact is the fourth and least serious type of sexual offense in Chapter 109A. It is contained in § 2244, and the various types parallel the elements of aggravated sexual abuse, sexual abuse, and sexual abuse of a minor or ward, except that they involve sexual contact instead of sexual acts. However, abusive sexual contact is not a lesser included offense of aggravated sexual abuse, sexual abuse or sexual abuse of a minor, to the extent that these do not require proof of the specific intent to abuse, humiliate, harass, degrade, or arouse or gratify sexual desires. United States v. Demarrias, 876 F.2d 674 (8th Cir. 1989).

Sexual contact engaged in under circumstances that would constitute

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[5] It seems fairly unlikely that a federal officer or employee would be entrusted, in his or her official capacity, with the detention of his or her spouse.

aggravated sexual abuse if the contact had been a sexual act carries a maximum penalty of ten years, unless death results. If the circumstances would have constituted sexual abuse, sexual abuse of a minor, or sexual abuse of a ward, the maximum penalties are three years, two years, and six months, respectively. Under "other circumstances" that would not fit any of §§ 2241, 2242, or 2243, knowingly engaging in sexual contact punishable by six months in prison. The misdemeanor offenses, of course, cannot be prosecuted federally if both the offender and victim are Indian.

CHILDREN AS VICTIMS AND WITNESSES

18 U.S.C. 3509

The Crime Control Act of 1990 (18 U.S.C. § 3509 provides the following special alternatives for child victims:

1. Establishment of a multi-disciplinary team, including representatives from health social service, law enforcement, and legal service agencies to coordinate the assistance needed to help child victims.

2. Alternatives to live, in-court testimony, if the child is unable to testify out of fear or if it would traumatize him. Any videotaped deposition shall be destroyed five years after the judgment of the trial court, but not before a final judgment by the Supreme Court.

3. Competence exam, if there is a compelling reason to suspect that the child is not competent.

4. Privacy protection. All documents which disclose the name of the child in an abuse case shall be filed under seal and a protective order may be issued.

5. Closed courtroom, if necessary to prevent substantial psychological harm or if an open courtroom would render him unable to communicate.

6. Victim Impact Statements prepared by the multi-disciplinary team to express the crime's personal consequences on the child.

7. Guardian ad litem to protect the best interests of the child and to attend all depositions, hearings, and trial proceedings.

8. Adult attendant for emotional support.

9. Speedy trial. The court may designate the case as being of special public importance and may give it precedence over other cases.

10. Extension of child statute of limitations so that prosecution may not be precluded before the child reaches the age of 25 years.

11. Testimonial aids. The child may use anatomical dolls, drawings, etc. to assist in testifying.

FEDERAL RULES OF EVIDENCE 413, 414 and 415

I. Enactment of Fed. R. Evid. 413, 414 and 415

A. Congress enacted these rules to establish a general rule of admissibility for similar crimes evidence in sexual assault cases. Congress recognized and intended that this would make the admission of similar crimes evidence in sexual assault cases the norm, and its exclusion exceptional. These rules were enacted as part of the Violent Crime Control and Law Enforcement Act of 1994.

B. Rule 413 applies to sexual assault prosecutions generally. Rule 414 applies specifically to child molestation prosecutions, and Rule 415 applies in civil suits premised on sexual offenses. Rule 413 is generally broader in scope than Rule 414 because it incorporates no limitation based on the age of the victims. However, Rule 414 is broader in one respect because it includes among its predicate offenses child pornography crimes.

By way of illustration, if a defendant is charged with molesting a child, evidence that a search of his apartment showed him to be in possession of a large trove of child pornography would be relevant since it would tend to establish that he has an abnormal sexual interest in children. In contrast, if a defendant were charged with raping an adult victim, knowledge that he possessed child pornography would have relatively little relevance. Rule 414 accordingly includes child pornography offenses as predicates, while Rule 413 does not.

C. The trial court must engage in Rule 403 balancing in relation to the evidence offered under these rules. Rule 403 provides a limited basis for excluding evidence, though relevant, if its probative value is substantially outweighed by the danger of unfair prejudice. Exclusion of evidence under Rule 403 is an extraordinary remedy. United States v. LeCompte, 1997 W.L. 781217.

II. Fed. R. Evid. 413-414 supersede Fed. R. Evid. 404(b).

A. Rules 413-414 supersede in sex offense cases the restrictive aspects of Fed. R. Evid. 404(b). In contrast to Rule 404(b)'s general prohibition of evidence of character or propensity, the new rules for sex offense cases authorize admission and consideration of evidence of an uncharged offense for its bearing "on any matter to which it is relevant." This includes the defendant's propensity to commit sexual assault or child molestation offenses, and assessment of the probability or improbability that the defendant has been falsely or mistakenly accused of such an offense.

140 Cong. Rec. H8991 (1994) (remarks of principal House sponsor, Rep. Molinari); see 137 Cong. Rec. S3238-40 (1991)(statement of Senate sponsors); David J. Karp, Evidence of Propensity and Probability in Sex Offense Cases and

Other Cases, 70 Chi.-Kent L.Rev. 15, 18-21-33-34 (1994).

B. Evidence of offenses for which the defendant has not previously been prosecuted or convicted is admissible, as well as prior convictions. No time limit is imposed on the uncharged offenses for which evidence may be admitted; as a practical matter, evidence of other sex offenses by the defendant is often probative and properly admitted, notwithstanding very substantial lapses of time in relation to the charged offense or offenses.

140 Cong. Rec. H8992 (1994)(remarks of Rep. Molinari); see 137 Cong. Rec. S3240, 4342 (1991)d(similar points in Senate sponsors' statement); Karp, 70 Chi.-Kent L. Rev. at 19.

III. Appellate Decisions

A. The decisions of the Eighth Circuit and other circuits confirm that evidence of other sexual offenses offered under Rules 413-15 is normally to be admitted. The Eighth Circuit has held that "Rule 414 and its companion rules...Rule 413...and Rule 415...are general rules of admissibility in sexual assault and child molestation cases for evidence that the defendant has committed offenses of the same type on other occasions," and that the "'new rules...supersede in sex offense cases the restrictive aspects of Federal Rules of Evidence 404(b).'" United States v. LeCompte, 1997 W.L. 781217 (1997). In United States v. Sumner, 119 F.3d 658 (8th Cir. 1997), the Eighth Circuit noted the legislative "presumption favoring admissibility" under Rule 414. The court further noted the legislative intent that Rules 413-415 put "evidence of uncharged offenses in sexual assault and child molestation cases on the same footing as other types of relevant evidence that are not subject to a special exclusionary rule. The presumption is in favor of admission." 119 F.3d at 662 (quoting and citing the legislative sponsor).

B. United States v. Mound is a pending Eighth Circuit case involving admission of evidence of a prior child molestation crime under Rule 413. The constitutionality of Rule 413 is at issue. The district court engaged in Rule 403 balancing and allowed admission of the defendant's prior conviction for assaulting another 12-year-old girl. The district court found the prior conviction was relevant and probative for purposes allowed under Rule 413. On appeal the defendant challenges the constitutionality of Rule 413.

C. In United States v. Sumner, 119 F.3d 658 (8th Cir. 1977), the court noted the legislative "presumption favoring admissibility" under Rule 414. The court further noted that Rules 413-415 put "evidence of uncharged offenses in sexual assault and child molestation cases on the same footing as other types of relevant evidence that are not subject to a special exclusionary rule. The presumption is in favor of admission." Id. At 662.

D. Other appellate decisions have directly upheld the constitutionality of propensity evidence. In United States v. Enjady, 1998 W.L. 17344 (10th Cir. 1998), the Court held that admission of a prior sexual assault to show propensity under Rule 413 did not violate the defendant's constitutional right to due process. Following Enjady, in United States v. Castillo, 1998 W.L. 156558 (10th Cir. 1998), the Court noted the broad historical support for allowing propensity evidence in sexual offense cases.

E. United States v. Guardia, 135 F.3d 1326 (10th Cir. 1998), set forth the following:

Evidence must pass several hurdles before it can be admitted under Rule 413. First, the defendant must be on trial for "an offense of sexual assault." Second, the proffered evidence must be of "another offense of ... sexual assault." Third, the trial court must find the evidence relevant--that is, the evidence must show both that the defendant had a particular propensity, and that the propensity it demonstrates has a bearing on the charged crime. Fourth and finally, the trial court must make a reasoned, recorded finding that the prejudicial value of the evidence does not substantially outweigh its probative value.

Id. At 1332.

The Court concluded that the exclusion of evidence that a physician charged with sexual abuse had improperly touched women other than the victims was not an abuse of discretion.

F. Twenty-nine states allow propensity evidence in some category or categories of sex offense cases. See Reed, 21 Am. J. Crim. L. At 188. In People v. Fitch, 63 Cal. Rptr. 2d 753 (1997), the California Court of Appeals upheld the validity of sexual offenses to show propensity and rejected constitutional objections.

UNITED STATES CODE ANNOTATED
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART II–CRIMINAL PROCEDURE
CHAPTER 223–WITNESSES AND EVIDENCE

Current through P.L. 104-333, approved 11-12-96

§ 3509. Child victims' and child witnesses' rights

(a) Definitions.–For purposes of this section–

(1) the term "adult attendant" means an adult described in subsection (i) who accompanies a child throughout the judicial process for the purpose of providing emotional support;

(2) the term "child" means a person who is under the age of 18, who is or is alleged to be–

(A) a victim of a crime of physical abuse, sexual abuse, or exploitation; or

(B) a witness to a crime committed against another person;

(3) the term "child abuse" means the physical or mental injury, sexual abuse or exploitation, or negligent treatment of a child;

(4) the term "physical injury" includes lacerations, fractured bones, burns, internal injuries, severe bruising or serious bodily harm;

(5) the term "mental injury" means harm to a child's psychological or intellectual functioning which may be exhibited by severe anxiety, depression, withdrawal or outward aggressive behavior, or a combination of those behaviors, which may be demonstrated by a change in behavior, emotional response, or cognition;

(6) the term "exploitation" means child pornography or child prostitution;

(7) the term "multidisciplinary child abuse team" means a professional unit composed of representatives from health, social service, law enforcement, and legal service agencies to coordinate the assistance needed to handle cases of child abuse;

(8) the term "sexual abuse" includes the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist another person to engage in, sexually explicit conduct or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children;

(9) the term "sexually explicit conduct" means actual or simulated–

(A) sexual intercourse, including sexual contact in the manner of genital-genital, oral-genital, anal-genital, or oral-anal contact, whether between persons of the same or of opposite sex; sexual contact means the intentional touching, either directly or through clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify sexual desire of any person;

(B) bestiality;

(iii) A judicial officer, appointed by the court; and

(iv) Other persons whose presence is determined by the court to be necessary to the welfare and well-being of the child, including an adult attendant.

The child's testimony shall be transmitted by closed circuit television into the courtroom for viewing and hearing by the defendant, jury, judge, and public. The defendant shall be provided with the means of private, contemporaneous communication with the defendant's attorney during the testimony. The closed circuit television transmission shall relay into the room in which the child is testifying the defendant's image, and the voice of the judge.

(2) Videotaped deposition of child.—(A) In a proceeding involving an alleged offense against a child, the attorney for the Government, the child's attorney, the child's parent or legal guardian, or the guardian ad litem appointed under subsection (h) may apply for an order that a deposition be taken of the child's testimony and that the deposition be recorded and preserved on videotape.

(B)(i) Upon timely receipt of an application described in subparagraph (A), the court shall make a preliminary finding regarding whether at the time of trial the child is likely to be unable to testify in open court in the physical presence of the defendant, jury, judge, and public for any of the following reasons:

(I) The child will be unable to testify because of fear.

(II) There is a substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying in open court.

(III) The child suffers a mental or other infirmity.

(IV) Conduct by defendant or defense counsel causes the child to be unable to continue testifying.

(ii) If the court finds that the child is likely to be unable to testify in open court for any of the reasons stated in clause (i), the court shall order that the child's deposition be taken and preserved by videotape.

(iii) The trial judge shall preside at the videotape deposition of a child and shall rule on all questions as if at trial. The only other persons who may be permitted to be present at the proceeding are—

(I) the attorney for the Government;

(II) the attorney for the defendant;

(III) the child's attorney or guardian ad litem appointed under subsection (h);

(IV) persons necessary to operate the videotape equipment;

(V) subject to clause (iv), the defendant; and

(VI) other persons whose presence is determined by the court to be necessary to the welfare and well-being of the child.

The defendant shall be afforded the rights applicable to defendants during trial, including the right to an attorney, the right to be confronted with the witness against the defendant, and the right to cross-examine the child.

(iv) If the preliminary finding of inability under clause (i) is based on evidence that the child is unable to

(E) persons whose presence, in the opinion of the court, is necessary to the welfare and well-being of the child, including the child's attorney, guardian ad litem, or adult attendant.

(6) Not before jury.--A competency examination regarding a child witness shall be conducted out of the sight and hearing of a jury.

(7) Direct examination of child.--Examination of a child related to competency shall normally be conducted by the court on the basis of questions submitted by the attorney for the Government and the attorney for the defendant including a party acting as an attorney pro se. The court may permit an attorney but not a party acting as an attorney pro se to examine a child directly on competency if the court is satisfied that the child will not suffer emotional trauma as a result of the examination.

(8) Appropriate questions.--The questions asked at the competency examination of a child shall be appropriate to the age and developmental level of the child, shall not be related to the issues at trial, and shall focus on determining the child's ability to understand and answer simple questions.

(9) Psychological and psychiatric examinations.--Psychological and psychiatric examinations to assess the competency of a child witness shall not be ordered without a showing of compelling need.

(d) Privacy protection.--

(1) Confidentiality of information.--(A) A person acting in a capacity described in subparagraph (B) in connection with a criminal proceeding shall--

(i) keep all documents that disclose the name or any other information concerning a child in a secure place to which no person who does not have reason to know their contents has access; and

(ii) disclose documents described in clause (i) or the information in them that concerns a child only to persons who, by reason of their participation in the proceeding, have reason to know such information.

(B) Subparagraph (A) applies to--

(i) all employees of the Government connected with the case, including employees of the Department of Justice, any law enforcement agency involved in the case, and any person hired by the Government to provide assistance in the proceeding;

(ii) employees of the court;

(iii) the defendant and employees of the defendant, including the attorney for the defendant and persons hired by the defendant or the attorney for the defendant to provide assistance in the proceeding; and

(iv) members of the jury.

(2) Filing under seal.--All papers to be filed in court that disclose the name of or any other information concerning a child shall be filed under seal without necessity of obtaining a court order. The person who makes the filing shall submit to the clerk of the court--

(A) the complete paper to be kept under seal; and

(B) the paper with the portions of it that disclose the name of or other information concerning a child redacted, to be placed in the public record.

(3) Protective orders.--(A) On motion by any person the court may issue an order protecting a child from

(E) expert medical, psychological, and related professional testimony;

(F) case service coordination and assistance, including the location of services available from public and private agencies in the community; and

(G) training services for judges, litigators, court officers and others that are involved in child victim and child witness cases, in handling child victims and child witnesses.

(h) Guardian ad litem.–

(1) In general.–The court may appoint a guardian ad litem for a child who was a victim of, or a witness to, a crime involving abuse or exploitation to protect the best interests of the child. In making the appointment, the court shall consider a prospective guardian's background in, and familiarity with, the judicial process, social service programs, and child abuse issues. The guardian ad litem shall not be a person who is or may be a witness in a proceeding involving the child for whom the guardian is appointed.

(2) Duties of guardian ad litem.–A guardian ad litem may attend all the depositions, hearings, and trial proceedings in which a child participates, and make recommendations to the court concerning the welfare of the child. The guardian ad litem may have access to all reports, evaluations and records, except attorney's work product, necessary to effectively advocate for the child. (The extent of access to grand jury materials is limited to the access routinely provided to victims and their representatives.) A guardian ad litem shall marshal and coordinate the delivery of resources and special services to the child. A guardian ad litem shall not be compelled to testify in any court action or proceeding concerning any information or opinion received from the child in the course of serving as a guardian ad litem.

(3) Immunities.–A guardian ad litem shall be presumed to be acting in good faith and shall be immune from civil and criminal liability for complying with the guardian's lawful duties described in paragraph (2).

(i) Adult attendant.–A child testifying at or attending a judicial proceeding shall have the right to be accompanied by an adult attendant to provide emotional support to the child. The court, at its discretion, may allow the adult attendant to remain in close physical proximity to or in contact with the child while the child testifies. The court may allow the adult attendant to hold the child's hand or allow the child to sit on the adult attendant's lap throughout the course of the proceeding. An adult attendant shall not provide the child with an answer to any question directed to the child during the course of the child's testimony or otherwise prompt the child. The image of the child attendant, for the time the child is testifying or being deposed, shall be recorded on videotape.

(j) Speedy trial.–In a proceeding in which a child is called to give testimony, on motion by the attorney for the Government or a guardian ad litem, or on its own motion, the court may designate the case as being of special public importance. In cases so designated, the court shall, consistent with these rules, expedite the proceeding and ensure that it takes precedence over any other. The court shall ensure a speedy trial in order to minimize the length of time the child must endure the stress of involvement with the criminal process. When deciding whether to grant a continuance, the court shall take into consideration the age of the child and the potential adverse impact the delay may have on the child's well-being. The court shall make written findings of fact and conclusions of law when granting a continuance in cases involving a child.

(k) Stay of civil action.–If, at any time that a cause of action for recovery of compensation for damage or injury to the person of a child exists, a criminal action is pending which arises out of the same occurrence and in which the child is the victim, the civil action shall be stayed until the end of all phases of the criminal action and any mention of the civil action during the criminal proceeding is prohibited. As used in this subsection, a criminal action is pending until its final adjudication in the trial court.

(l) Testimonial aids.–The court may permit a child to use anatomical dolls, puppets, drawings, mannequins, or

(a) serving a warrant of arrest; or

(b) arresting or attempting to arrest a person committing or attempting to commit an offense in his presence, or who has committed or is suspected on reasonable grounds of having committed a felony; or

(c) making a search at the request or invitation or with the consent of the occupant of the premises.

(June 25, 1948, c. 645, 62 Stat. 803; Oct. 11, 1996, Pub.L. 104–294, Title VI, § 601(a)(8), 110 Stat. 3498.)

HISTORICAL AND STATUTORY NOTES

Reviser's Note

Based on Title 18, U.S.C., 1940 ed., § 53a (Aug. 27, 1935, c. 740, § 201, 49 Stat. 877).

Words "or any department or agency thereof" were inserted to avoid ambiguity as to scope of section. (See definitive section 6 of this title.)

The exception in the case of an invitation or the consent of the occupant, was inserted to make the section complete and remove any doubt as to the application of this section to searches which have uniformly been upheld.

Reference to misdemeanor was omitted in view of definitive section 1 of this title. (See reviser's note under section 212 of this title.)

Words "upon conviction thereof shall be" were omitted as surplusage, since punishment cannot be imposed until conviction is secured.

Minor changes were made in phraseology.

Legislative History

For legislative history and purpose of Pub.L. 104–294, see 1996 U.S. Code Cong. and Adm. News, p. ____

CHAPTER 109A—SEXUAL ABUSE

§ 2241. Aggravated sexual abuse

(a) By force or threat.—Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly causes another person to engage in a sexual act—

(1) by using force against that other person; or

(2) by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping;

or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.

(b) By other means.—Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly—

(1) renders another person unconscious and thereby engages in a sexual act with that other person; or

(2) administers to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance and thereby—

(A) substantially impairs the ability of that other person to appraise or control conduct; and

(B) engages in a sexual act with that other person;

or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.

(c) With children.—Whoever crosses a State line with intent to engage in a sexual act with a person who has not attained the age of 12 years, or in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in a sexual act with another person who has not attained the age of 12 years, or knowingly engages in a sexual act under the circumstances described in subsections (a) and (b) with another person who has attained the age of 12 years but has not attained the age of 16 years (and is at least 4 years younger than that person), or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both. If the defendant has previously been convicted of another Federal offense under this subsection, or of a State offense that would have been an offense under either such provision had the offense occurred in a Federal prison, unless the death penalty is imposed, the defendant shall be sentenced to life in prison.

(d) State of mind proof requirement.—In a prosecution under subsection (c) of this section, the Government need not prove that the defendant knew that the other person engaging in the sexual act had not attained the age of 12 years.

(Added Pub.L. 99–646, § 87(b), Nov. 10, 1986, 100 Stat. 3620, and amended Pub.L. 103–322, Title XXXIII, § 330021(1), Sept. 13, 1994, 108 Stat. 2150; Pub.L. 104–208, Div. A, Title I, § 101(a) [Title I, § 121, subsection 7(b)], Sept. 30, 1996, 110 Stat. 3009–31.)

HISTORICAL AND STATUTORY NOTES

Codification

Identical provision was enacted by Pub.L. 99–654, § 2, Nov. 14, 1986, 100 Stat. 3660.

Effective Date

Pub.L. 99–646, § 87(e), Nov. 10, 1986, provided that: "This section and the amendments made by this section [enacting this chapter; amending sections 113(a), (b), 1111(a), 1153, and 3185(12) of this title, sections 300w–3(a)(1)(G), 300w–4(c)(6), and 9511 of Title 42, The Public Health and Welfare, and section 1472(k)(1) of Title 49, Transportation; and repealing chapter 99 (sections 2031 and 2032) of this title] shall take effect 30 days after the date of the enactment of this Act [Nov. 10, 1986]."

[Effective Date provision similar to Pub.L. 99–646, § 87(e), was enacted by Pub.L. 99–654, § 4, Nov. 14, 1986, 100 Stat. 3664.]

Short Title of 1996 Amendments

Pub.L. 104–208, Div. A, Title I, § 101(a) [Title I, § 121, subsec. 7(a)], Sept. 30, 1996, 110 Stat. 3009–31, provided that: "This section [probably should be this subsection, which amended this section and section 2243 of this title] may be cited as the 'Amber Hagerman Child Protection Act of 1996'."

Short Title

Pub.L. 99–646, § 87(a), Nov. 10, 1986, provided that: "This section [enacting this chapter; amending sections 113(a), (b), 1111(a), 1153, and 3185(12) of this title, sections 300w–3(a)(1)(G), 300w–4(c)(6), and 9511 of Title 42, The Public Health and Welfare, and section 1472(k)(1) of Title 49, Transportation; repealing chapter 99 (sections 2031 and 2032) of this title; and enacting note provision under this section] may be cited as the 'Sexual Abuse Act of 1986'."

[Short Title provision similar to Pub.L. 99–646, § 87(a), was enacted by Pub.L. 99–654, § 1, Nov. 14, 1986, 100 Stat. 3660.]

Legislative History

For legislative history and purpose of Pub.L. 99–646 see 1986 U.S.Code Cong. and Adm.News, p. 6139. See, also, Pub.L. 103–322, 1994 U.S. Code Cong. and Adm. News, p. 1801.

§ 2242. Sexual abuse

Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly—

(1) causes another person to engage in a sexual act by threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping); or

(2) engages in a sexual act with another person if that other person is—

(A) incapable of appraising the nature of the conduct; or

(B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act;

or attempts to do so, shall be fined under this title, imprisoned not more than 20 years, or both.

(Added Pub.L. 99–646, § 87(b), Nov. 10, 1986, 100 Stat. 3621, and amended Pub.L. 103–322, Title XXXIII, § 330021(1), Sept. 13, 1994, 108 Stat. 2150.)

HISTORICAL AND STATUTORY NOTES

Codification

Identical provision was enacted by Pub.L. 99–654, § 2, Nov. 14, 1986, 100 Stat. 3661.

Effective Date

Section effective 30 days after Nov. 10, 1986, see section 87(e) of Pub.L. 99–646, set out as a note under section 2241 of this title.

Legislative History

For legislative history and purpose of Pub.L. 99–646 see 1986 U.S.Code Cong. and Adm.News, p. 6139. See, also, Pub.L. 103–322, 1994 U.S. Code Cong. and Adm. News, p. 1801.

§ 2243. Sexual abuse of a minor or ward

(a) Of a minor.—Whoever crosses a State line with intent to engage in a sexual act with a person who has not attained the age of 12 years, or, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in a sexual act with another person who—

(1) has attained the age of 12 years but has not attained the age of 16 years; and

(2) is at least four years younger than the person so engaging;

or attempts to do so, shall be fined under this title, imprisoned not more than 15 years, or both.

(b) Of a ward.—Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in a sexual act with another person who is—

(1) in official detention; and

(2) under the custodial, supervisory, or disciplinary authority of the person so engaging;

or attempts to do so, shall be fined under this title, imprisoned not more than one year, or both.

(c) Defenses.—(1) In a prosecution under subsection (a) of this section, it is a defense, which the defendant must establish by a preponderance of the evidence, that the defendant reasonably believed that the other person had attained the age of 16 years.

(2) In a prosecution under this section, it is a defense, which the defendant must establish by a preponderance of the evidence, that the persons engaging in the sexual act were at that time married to each other.

(d) State of mind proof requirement.—In a prosecution under subsection (a) of this section, the Government need not prove that the defendant knew—

(1) the age of the other person engaging in the sexual act; or

(2) that the requisite age difference existed between the persons so engaging.

(Added Pub.L. 99–646, § 87(b), Nov. 10, 1986, 100 Stat. 3621, and amended Pub.L. 101–647, Title III, § 322, Nov. 29, 1990, 104 Stat. 4818; Pub.L. 104–208, Div. A, Title I, § 101(a) [Title I, § 121, subsection 7(c)], Sept. 30, 1996, 110 Stat. 3009–31.)

HISTORICAL AND STATUTORY NOTES

Codification

Identical provision was enacted by Pub.L. 99–654, § 2, Nov. 14, 1986, 100 Stat. 3661.

Effective Date

Section effective 30 days after Nov. 10, 1986, see section 87(e) of Pub.L. 99–646, set out as a note under section 2241 of this title.

Legislative History

For legislative history and purpose of Pub.L. 99–646 see 1986 U.S.Code Cong. and Adm.News, p. 6139. See, also, Pub.L. 101–647, 1990 U.S.Code Cong. and Adm.News, p. 6472.

§ 2244. Abusive sexual contact

(a) Sexual conduct in circumstances where sexual acts are punished by this chapter.—Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in or causes sexual contact with or by another person, if so to do would violate—

(1) section 2241 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than ten years, or both;

(2) section 2242 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than three years, or both;

(3) subsection (a) of section 2243 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than two years, or both; or

(4) subsection (b) of section 2243 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than six months, or both.

(b) In other circumstances.—Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in sexual contact with another person without that other person's permission shall be fined under this title, imprisoned not more than six months, or both.

(Added Pub.L. 99–646, § 87(b), Nov. 10, 1986, 100 Stat. 3622, and amended Pub.L. 100–690, Title VII, § 7058(a), Nov. 18, 1988, 102 Stat. 4403; Pub.L. 103–322, Title XXXIII, § 330016(1)(K), Sept. 13, 1994, 108 Stat. 2147.)

HISTORICAL AND STATUTORY NOTES

Codification

Identical provision was enacted by Pub.L. 99–654, § 2, Nov. 14, 1986, 100 Stat. 3661.

Effective Date

Section effective 30 days after Nov. 10, 1986, see section 87(e) of Pub.L. 99–646, set out as a note under section 2241 of this title.

Legislative History

For legislative history and purpose of Pub.L. 99–646 see 1986 U.S.Code Cong. and Adm.News, p. 6139. See, also, Pub.L. 100–690, 1988 U.S. Code Cong. and Adm. News, p. 5937; Pub.L. 103–322, 1994 U.S. Code Cong. and Adm. News, p. 1801.

§ 2245. Sexual abuse resulting in death

A person who, in the course of an offense under this chapter, engages in conduct that results in the death of a person, shall be punished by death or imprisoned for any term of years or for life.

(Added Pub.L. 103–322, Title VI, § 60010(a)(2), Sept. 13, 1994, 108 Stat. 1972.)

HISTORICAL AND STATUTORY NOTES

Prior Provisions

A prior section 2245 was renumbered section 2246 by Pub.L. 103–322, Title VI, § 60010(a)(1), Sept. 13, 1994, 108 Stat. 1972.

Legislative History

For legislative history and purpose of Pub.L. 103–322, see 1994 U.S. Code Cong. and Adm. News, p. 1801.

§ 2246. Definitions for chapter

As used in this chapter—

(1) the term "prison" means a correctional, detention, or penal facility;

(2) the term "sexual act" means—

(A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however, slight;

(B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;

(C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or

(D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;

(3) the term "sexual contact" means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;

(4) the term "serious bodily injury" means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty;

(5) the term "official detention" means—

(A) detention by a Federal officer or employee, or under the direction of a Federal officer or employee, following arrest for an offense; following surrender in lieu of arrest for an offense; following a charge or conviction of an offense, or an allegation or finding of juvenile delinquency; following commitment as a material witness; following civil commitment in lieu of criminal proceedings or pending resumption of criminal proceedings that are being held in abeyance, or pending extradition, deportation, or exclusion; or

(B) custody by a Federal officer or employee, or under the direction of a Federal officer or employee, for purposes incident to any detention described in subparagraph (A) of this paragraph, including transportation, medical diagnosis or treatment, court appearance, work, and recreation;

but does not include supervision or other control (other than custody during specified hours or days) after release on bail, probation, or parole, or after release following a finding of juvenile delinquency.

(Added Pub.L. 99–646, § 87(b), Nov. 10, 1986, 100 Stat. 3622, § 2245, renumbered § 2246 and amended Pub.L. 103–322, Title IV, § 40502, Title VI, § 60010(a)(1), Sept. 13, 1994, 108 Stat. 1945, 1972.)

HISTORICAL AND STATUTORY NOTES

Codification

Identical provision was enacted by Pub.L. 99–654, § 2, Nov. 14, 1986, 100 Stat. 3662.

Effective Date

Section effective 30 days after Nov. 10, 1986, see section 87(e) of Pub.L. 99–646, set out as a note under section 2241 of this title.

Legislative History

For legislative history and purpose of Pub.L. 99–646, see 1986 U.S.Code Cong. and Adm.News, p. 6139. See, also, Pub.L. 103–322, 1994 U.S. Code Cong. and Adm. News, p. 1801.

§ 2247. Repeat offenders

Any person who violates a provision of this chapter, after one or more prior convictions for an offense punishable under this chapter, or after one or more prior convictions under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual contact have become final, is punishable by a term of imprisonment up to twice that otherwise authorized.

(Added Pub.L. 103–322, Title IV, § 40111(a), Sept. 13, 1994, 108 Stat. 1903.)

HISTORICAL AND STATUTORY NOTES

Legislative History

For legislative history and purpose of Pub.L. 103–322, see 1994 U.S. Code Cong. and Adm. News, p. 1801.

§ 2248. Mandatory restitution

(a) In general.—Notwithstanding section 3663 or 3663A, and in addition to any other civil or criminal penalty authorized by law, the court shall order restitution for any offense under this chapter.

(b) Scope and nature of order.—

(1) Directions.—The order of restitution under this section shall direct the defendant to pay to the victim (through the appropriate court mechanism) the full amount of the victim's losses as determined by the court pursuant to paragraph (2).

(2) Enforcement.—An order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an order under section 3663A.

(3) Definition.—For purposes of this subsection, the term "full amount of the victim's losses" includes any costs incurred by the victim for—

(A) medical services relating to physical, psychiatric, or psychological care;

(B) physical and occupational therapy or rehabilitation;

(C) necessary transportation, temporary housing, and child care expenses;

(D) lost income;

(E) attorneys' fees, plus any costs incurred in obtaining a civil protection order; and

(F) any other losses suffered by the victim as a proximate result of the offense.

(4) Order mandatory.—(A) The issuance of a restitution order under this section is mandatory.

(B) A court may not decline to issue an order under this section because of—

(i) the economic circumstances of the defendant; or

(ii) the fact that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance or any other source.

[(C) and (D) Repealed. Pub.L. 104–132, Title II, § 205(b)(2)(C), Apr. 24, 1996, 110 Stat. 1231]

[(5) to (10) Repealed. Pub.L. 104–132, Title II, § 205(b)(2)(D), Apr. 24, 1996, 110 Stat. 1231]

(c) Definition.—For purposes of this section, the term "victim" means the individual harmed as a result of a commission of a crime under this chapter, including, in the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, but in no event shall the defendant be named as such representative or guardian.

[(d) and (e) Repealed. Pub.L. 104–132, Title II, § 205(b)(3), Apr. 24, 1996, 110 Stat. 1231]

[(f) Redesignated (c)]

(Added Pub.L. 103–322, Title IV, § 40113(a)(1), Sept. 13, 1994, 108 Stat. 1904, and amended Pub.L. 104–132, Title II, § 205(b), Apr. 24, 1996, 110 Stat. 1231.)

HISTORICAL AND STATUTORY NOTES

Effective Date of 1996 Amendments

Section 211 of Pub.L. 104–132 provided that: "The amendments made by this subtitle [enacting sections 3613A and 3663A of this title, amending this section and sections 2259, 2264, 2327, 3013, 3556, 3563, 3572, 3611, 3612, 3613, 3614, 3663, and 3664 of this title and Rule 32 of the Federal Rules of Criminal Procedure, and enacting provisions set out as notes under this section, section 3551 of this title, and section 994 of Title 28, Judiciary and Judicial Procedure] shall, to the extent constitutionally permissible, be effective for sentencing proceedings in cases in which the defendant is convicted on or after the date of enactment of this Act [Apr. 24, 1996]."

Legislative History

For legislative history and purpose of Pub.L. 103–322, see 1994 U.S. Code Cong. and Adm. News, p. 1801. See, also, Pub.L. 104–132, 1996 U.S. Code Cong. and Adm. News, p. 924.

CHAPTER 110—SEXUAL EXPLOITATION AND OTHER ABUSE OF CHILDREN

§ 2251. Sexual exploitation of children

(a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct, shall be punished as provided under subsection (d), if such person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed, or if such visual depiction has actually been transported in interstate or foreign commerce or mailed.

(b) Any parent, legal guardian, or person having custody or control of a minor who knowingly permits such minor to engage in, or to assist any other person to engage in, sexually explicit conduct for the purpose of producing any visual depiction of such conduct shall be punished as provided under subsection (d) of this section, if such parent, legal guardian, or person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed or if such visual depiction has actually been transported in interstate or foreign commerce or mailed.

(c)(1) Any person who, in a circumstance described in paragraph (2), knowingly makes, prints, or publishes, or causes to be made, printed, or published, any notice or advertisement seeking or offering—

(A) to receive, exchange, buy, produce, display, distribute, or reproduce, any visual depiction, if the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct and such visual depiction is of such conduct; or

(B) participation in any act of sexually explicit conduct by or with any minor for the purpose of producing a visual depiction of such conduct:

shall be punished as provided under subsection (d).

(2) The circumstance referred to in paragraph (1) is that—

(A) such person knows or has reason to know that such notice or advertisement will be transport-

identical to those otherwise provided for assaults involving an official victim; when no assault is involved, the offense level is 6.

Historical Note: Effective October 15, 1988 (see Appendix C, amendment 64). Amended effective November 1, 1989 (see Appendix C, amendments 89 and 90); November 1, 1992 (see Appendix C, amendment 443); November 1, 1997 (see Appendix C, amendment 550).

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3. CRIMINAL SEXUAL ABUSE

§2A3.1. Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse

(a) Base Offense Level: 27

(b) Specific Offense Characteristics

(1) If the offense was committed by the means set forth in 18 U.S.C. § 2241(a) or (b) (including, but not limited to, the use or display of any dangerous weapon), increase by 4 levels.

(2) (A) If the victim had not attained the age of twelve years, increase by 4 levels; or (B) if the victim had attained the age of twelve years but had not attained the age of sixteen years, increase by 2 levels.

(3) If the victim was (A) in the custody, care, or supervisory control of the defendant; or (B) a person held in the custody of a correctional facility, increase by 2 levels.

(4) (A) If the victim sustained permanent or life-threatening bodily injury, increase by 4 levels; (B) if the victim sustained serious bodily injury, increase by 2 levels; or (C) if the degree of injury is between that specified in subdivisions (A) and (B), increase by 3 levels.

(5) If the victim was abducted, increase by 4 levels.

(c) Cross Reference

(1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder).

(d) Special Instruction

(1) If the offense occurred in a correctional facility and the victim was a corrections employee, the offense shall be deemed to have an official victim for purposes of subsection (a) of §3A1.2 (Official Victim).

Commentary

Statutory Provisions: 18 U.S.C. §§ 2241, 2242. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. *For purposes of this guideline—*

"Permanent or life-threatening bodily injury," "serious bodily injury," and "abducted" are defined in the Commentary to §1B1.1 (Application Instructions). However, for purposes of this guideline, "serious bodily injury" means conduct other than criminal sexual abuse, which already is taken into account in the base offense level under subsection (a).

"The means set forth in 18 U.S.C. § 2241(a) or (b)" are: by using force against the victim; by threatening or placing the victim in fear that any person will be subject to death, serious bodily injury, or kidnaping; by rendering the victim unconscious; or by administering by force or threat of force, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the victim to appraise or control conduct. This provision would apply, for example, where any dangerous weapon was used, brandished, or displayed to intimidate the victim.

2. *Subsection (b)(3), as it pertains to a victim in the custody, care, or supervisory control of the defendant, is intended to have broad application and is to be applied whenever the victim is entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the victim and not simply to the legal status of the defendant-victim relationship.*

3. *If the adjustment in subsection (b)(3) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).*

4. *If the defendant was convicted (A) of more than one act of criminal sexual abuse and the counts are grouped under §3D1.2 (Groups of Closely Related Counts), or (B) of only one such act but the court determines that the offense involved multiple acts of criminal sexual abuse of the same victim or different victims, an upward departure would be warranted.*

5. *If a victim was sexually abused by more than one participant, an upward departure may be warranted. See §5K2.8 (Extreme Conduct).*

6. If the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted.

Background: Sexual offenses addressed in this section are crimes of violence. Because of their dangerousness, attempts are treated the same as completed acts of criminal sexual abuse. The maximum term of imprisonment authorized by statute is life imprisonment. The base offense level represents sexual abuse as set forth in 18 U.S.C. § 2242. An enhancement is provided for use of force; threat of death, serious bodily injury, or kidnapping; or certain other means as defined in 18 U.S.C. § 2241. This includes any use or threatened use of a dangerous weapon.

An enhancement is provided when the victim is less than sixteen years of age. An additional enhancement is provided where the victim is less than twelve years of age. Any criminal sexual abuse with a child less than twelve years of age, regardless of "consent," is governed by §2A3.1 (Criminal Sexual Abuse).

An enhancement for a custodial relationship between defendant and victim is also provided. Whether the custodial relationship is temporary or permanent, the defendant in such a case is a person the victim trusts or to whom the victim is entrusted. This represents the potential for greater and prolonged psychological damage. Also, an enhancement is provided where the victim was an inmate of, or a person employed in, a correctional facility. Finally, enhancements are provided for permanent, life-threatening, or serious bodily injury and abduction.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 91 and 92); November 1, 1991 (see Appendix C, amendment 392); November 1, 1992 (see Appendix C, amendment 444); November 1, 1993 (see Appendix C, amendment 477); November 1, 1995 (see Appendix C, amendment 511); November 1, 1997 (see Appendix C, amendment 545).

§2A3.2. Criminal Sexual Abuse of a Minor (Statutory Rape) or Attempt to Commit Such Acts

(a) Base Offense Level: 15

(b) Specific Offense Characteristic

(1) If the victim was in the custody, care, or supervisory control of the defendant, increase by 2 levels.

(c) Cross Reference

(1) If the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse (as defined in 18 U.S.C. § 2241 or § 2242), apply §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

Commentary

Statutory Provision: 18 U.S.C. § 2243(a). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. *If the defendant committed the criminal sexual act in furtherance of a commercial scheme such as pandering, transporting persons for the purpose of prostitution, or the production of pornography, an upward departure may be warranted. See Chapter Five, Part K (Departures).*

2. *Subsection (b)(1) is intended to have broad application and is to be applied whenever the victim is entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the victim and not simply to the legal status of the defendant-victim relationship.*

3. *If the adjustment in subsection (b)(1) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).*

4. *If the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted.*

Background: This section applies to sexual acts that would be lawful but for the age of the victim. It is assumed that at least a four-year age difference exists between the victim and the defendant, as specified in 18 U.S.C. § 2243(a). An enhancement is provided for a defendant who victimizes a minor under his supervision or care.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 93); November 1, 1991 (see Appendix C, amendment 392); November 1, 1992 (see Appendix C, amendment 444); November 1, 1995 (see Appendix C, amendment 511).

§2A3.3. Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts

(a) Base Offense Level: 9

Commentary

Statutory Provision: 18 U.S.C. § 2243(b). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. *A ward is a person in official detention under the custodial, supervisory, or disciplinary authority of the defendant.*

2. *If the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted.*

Background: The offense covered by this section is a misdemeanor. The maximum term of imprisonment authorized by statute is one year.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 94); November 1, 1995 (see Appendix C, amendment 511).

§2A3.4. Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact

(a) Base Offense Level:

(1) 16, if the offense was committed by the means set forth in 18 U.S.C. § 2241(a) or (b);

(2) 12, if the offense was committed by the means set forth in 18 U.S.C. § 2242;

(3) 10, otherwise.

(b) Specific Offense Characteristics

(1) If the victim had not attained the age of twelve years, increase by 4 levels; but if the resulting offense level is less than 16, increase to level 16.

(2) If the base offense level is determined under subsection (a)(1) or (2), and the victim had attained the age of twelve years but had not attained the age of sixteen years, increase by 2 levels.

(3) If the victim was in the custody, care, or supervisory control of the defendant, increase by 2 levels.

(c) Cross References

(1) If the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse (as defined in 18 U.S.C. § 2241 or § 2242), apply §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

(2) If the offense involved criminal sexual abuse of a minor or attempt to commit criminal sexual abuse of a minor (as defined in 18 U.S.C. § 2243(a)), apply §2A3.2 (Criminal Sexual Abuse of a Minor (Statutory Rape) or Attempt to Commit Such Acts), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. § 2244(a)(1),(2),(3). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. *"The means set forth in 18 U.S.C. § 2241(a) or (b)" are by using force against the victim; by threatening or placing the victim in fear that any person will be subjected to death, serious bodily injury, or kidnapping; by rendering the victim unconscious; or by administering by force or threat of force, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the victim to appraise or control conduct.*

2. *"The means set forth in 18 U.S.C. § 2242" are by threatening or placing the victim in fear (other than by threatening or placing the victim in fear that any person will be subjected to death, serious bodily injury, or kidnapping); or by victimizing an individual who is incapable of appraising the nature of the conduct or physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act.*

3. *Subsection (b)(3) is intended to have broad application and is to be applied whenever the victim is entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the victim and not simply to the legal status of the defendant-victim relationship.*

4. *If the adjustment in subsection (b)(3) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).*

5. *If the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted.*

Background: This section covers abusive sexual contact not amounting to criminal sexual abuse (criminal sexual abuse is covered under §§2A3.1-3.3). Alternative base offense levels are provided to take account of the different means used to commit the offense. Enhancements are provided for victimizing children or minors. The enhancement under subsection (b)(2) does not apply, however, where the base offense level is determined under subsection (a)(3) because an element of the offense to which that offense level applies is that the victim had attained the age of twelve years but had not attained the age of sixteen years. For cases involving consensual sexual contact involving victims that have achieved the age of 12 but are under age 16, the offense level assumes a substantial difference in sexual experience between the defendant and the victim. If the defendant and the victim are similar in sexual experience, a downward departure may be warranted. For such cases, the Commission recommends a downward departure to the equivalent of an offense level of 6.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 95); November 1, 1991 (see Appendix C, amendment 392); November 1, 1992 (see Appendix C, amendment 444); November 1, 1995 (see Appendix C, amendment 511).

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Background: The offense covered by this section is a misdemeanor. The maximum term of imprisonment authorized by statute is one year.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 94); November 1, 1995 (see Appendix C, amendment 511).

§2A3.4. Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact

(a) Base Offense Level:

(1) **16**, if the offense was committed by the means set forth in 18 U.S.C. § 2241(a) or (b);

(2) **12**, if the offense was committed by the means set forth in 18 U.S.C. § 2242;

(3) **10**, otherwise.

(b) Specific Offense Characteristics

(1) If the victim had not attained the age of twelve years, increase by 4 levels; but if the resulting offense level is less than **16**, increase to level **16**.

(2) If the base offense level is determined under subsection (a)(1) or (2), and the victim had attained the age of twelve years but had not attained the age of sixteen years, increase by 2 levels.

(3) If the victim was in the custody, care, or supervisory control of the defendant, increase by 2 levels.

(c) Cross References

(1) If the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse (as defined in 18 U.S.C. § 2241 or § 2242), apply §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

(2) If the offense involved criminal sexual abuse of a minor or attempt to commit criminal sexual abuse of a minor (as defined in 18 U.S.C. § 2243(a)), apply §2A3.2 (Criminal Sexual Abuse of a Minor (Statutory Rape) or Attempt to Commit Such Acts), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. § 2244(a)(1),(2),(3). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. *"The means set forth in 18 U.S.C. § 2241(a) or (b)" are by using force against the victim; by threatening or placing the victim in fear that any person will be subjected to death, serious bodily injury, or kidnapping; by rendering the victim unconscious; or by administering by force or threat of force, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the victim to appraise or control conduct.*

2. *"The means set forth in 18 U.S.C. § 2242" are by threatening or placing the victim in fear (other than by threatening or placing the victim in fear that any person will be subjected to death, serious bodily injury, or kidnapping); or by victimizing an individual who is incapable of appraising the nature of the conduct or physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act.*

3. *Subsection (b)(3) is intended to have broad application and is to be applied whenever the victim is entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the victim and not simply to the legal status of the defendant-victim relationship.*

4. *If the adjustment in subsection (b)(3) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).*

5. *If the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted.*

Background: This section covers abusive sexual contact not amounting to criminal sexual abuse (criminal sexual abuse is covered under §§2A3.1-3.3). Alternative base offense levels are provided to take account of the different means used to commit the offense. Enhancements are provided for victimizing children or minors. The enhancement under subsection (b)(2) does not apply, however, where the base offense level is determined under subsection (a)(3) because an element of the offense to which that offense level applies is that the victim had attained the age of twelve years but had not attained the age of sixteen years. For cases involving consensual sexual contact involving victims that have achieved the age of 12 but are under age 16, the offense level assumes a substantial difference in sexual experience between the defendant and the victim. If the defendant and the victim are similar in sexual experience, a downward departure may be warranted. For such cases, the Commission recommends a downward departure to the equivalent of an offense level of 6.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 95); November 1, 1991 (see Appendix C, amendment 392); November 1, 1992 (see Appendix C, amendment 444); November 1, 1995 (see Appendix C, amendment 511).

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identical to those otherwise provided for assaults involving an official victim; when no assault is involved, the offense level is 6.

Historical Note: Effective October 15, 1988 (see Appendix C, amendment 64). Amended effective November 1, 1989 (see Appendix C, amendments 89 and 90); November 1, 1992 (see Appendix C, amendment 443); November 1, 1997 (see Appendix C, amendment 550).

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3. CRIMINAL SEXUAL ABUSE

§2A3.1. Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse

(a) Base Offense Level: **27**

(b) Specific Offense Characteristics

(1) If the offense was committed by the means set forth in 18 U.S.C. § 2241(a) or (b) (including, but not limited to, the use or display of any dangerous weapon), increase by **4** levels.

(2) (A) If the victim had not attained the age of twelve years, increase by **4** levels; or (B) if the victim had attained the age of twelve years but had not attained the age of sixteen years, increase by **2** levels.

(3) If the victim was (A) in the custody, care, or supervisory control of the defendant; or (B) a person held in the custody of a correctional facility, increase by **2** levels.

(4) (A) If the victim sustained permanent or life-threatening bodily injury, increase by **4** levels; (B) if the victim sustained serious bodily injury, increase by **2** levels; or (C) if the degree of injury is between that specified in subdivisions (A) and (B), increase by **3** levels.

(5) If the victim was abducted, increase by **4** levels.

(c) Cross Reference

(1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder).

(d) Special Instruction

(1) If the offense occurred in a correctional facility and the victim was a corrections employee, the offense shall be deemed to have an official victim for purposes of subsection (a) of §3A1.2 (Official Victim).

Commentary

Statutory Provisions: 18 U.S.C. §§ 2241, 2242. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. *For purposes of this guideline—*

"Permanent or life-threatening bodily injury," "serious bodily injury," and "abducted" are defined in the Commentary to §1B1.1 (Application Instructions). However, for purposes of this guideline, "serious bodily injury" means conduct other than criminal sexual abuse, which already is taken into account in the base offense level under subsection (a).

"The means set forth in 18 U.S.C. § 2241(a) or (b)" are: by using force against the victim; by threatening or placing the victim in fear that any person will be subject to death, serious bodily injury, or kidnaping; by rendering the victim unconscious; or by administering by force or threat of force, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the victim to appraise or control conduct. This provision would apply, for example, where any dangerous weapon was used, brandished, or displayed to intimidate the victim.

2. *Subsection (b)(3), as it pertains to a victim in the custody, care, or supervisory control of the defendant, is intended to have broad application and is to be applied whenever the victim is entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the victim and not simply to the legal status of the defendant-victim relationship.*

3. *If the adjustment in subsection (b)(3) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).*

4. *If the defendant was convicted (A) of more than one act of criminal sexual abuse and the counts are grouped under §3D1.2 (Groups of Closely Related Counts), or (B) of only one such act but the court determines that the offense involved multiple acts of criminal sexual abuse of the same victim or different victims, an upward departure would be warranted.*

5. *If a victim was sexually abused by more than one participant, an upward departure may be warranted. See §5K2.8 (Extreme Conduct).*

6. *If the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted.*

Background: Sexual offenses addressed in this section are crimes of violence. Because of their dangerousness, attempts are treated the same as completed acts of criminal sexual abuse. The maximum term of imprisonment authorized by statute is life imprisonment. The base offense level represents sexual abuse as set forth in 18 U.S.C. § 2242. An enhancement is provided for use of force; threat of death, serious bodily injury, or kidnapping; or certain other means as defined in 18 U.S.C. § 2241. This includes any use or threatened use of a dangerous weapon.

An enhancement is provided when the victim is less than sixteen years of age. An additional enhancement is provided where the victim is less than twelve years of age. Any criminal sexual abuse with a child less than twelve years of age, regardless of "consent," is governed by §2A3.1 (Criminal Sexual Abuse).

An enhancement for a custodial relationship between defendant and victim is also provided. Whether the custodial relationship is temporary or permanent, the defendant in such a case is a person the victim trusts or to whom the victim is entrusted. This represents the potential for greater and prolonged psychological damage. Also, an enhancement is provided where the victim was an inmate of, or a person employed in, a correctional facility. Finally, enhancements are provided for permanent, life-threatening, or serious bodily injury and abduction.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 91 and 92); November 1, 1991 (see Appendix C, amendment 392); November 1, 1992 (see Appendix C, amendment 444); November 1, 1993 (see Appendix C, amendment 477); November 1, 1995 (see Appendix C, amendment 511); November 1, 1997 (see Appendix C, amendment 545).

§2A3.2. Criminal Sexual Abuse of a Minor (Statutory Rape) or Attempt to Commit Such Acts

(a) Base Offense Level: **15**

(b) Specific Offense Characteristic

(1) If the victim was in the custody, care, or supervisory control of the defendant, increase by **2** levels.

(c) Cross Reference

(1) If the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse (as defined in 18 U.S.C. § 2241 or § 2242), apply §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

Commentary

Statutory Provision: 18 U.S.C. § 2243(a). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. *If the defendant committed the criminal sexual act in furtherance of a commercial scheme such as pandering, transporting persons for the purpose of prostitution, or the production of pornography, an upward departure may be warranted. See Chapter Five, Part K (Departures).*

2. *Subsection (b)(1) is intended to have broad application and is to be applied whenever the victim is entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the victim and not simply to the legal status of the defendant-victim relationship.*

3. *If the adjustment in subsection (b)(1) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).*

4. *If the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted.*

Background: This section applies to sexual acts that would be lawful but for the age of the victim. It is assumed that at least a four-year age difference exists between the victim and the defendant, as specified in 18 U.S.C. § 2243(a). An enhancement is provided for a defendant who victimizes a minor under his supervision or care.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 93); November 1, 1991 (see Appendix C, amendment 392); November 1, 1992 (see Appendix C, amendment 444); November 1, 1995 (see Appendix C, amendment 511).

§2A3.3. Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts

(a) Base Offense Level: 9

Commentary

Statutory Provision: 18 U.S.C. § 2243(b). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. *A ward is a person in official detention under the custodial, supervisory, or disciplinary authority of the defendant.*

2. *If the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted.*

Background: The offense covered by this section is a misdemeanor. The maximum term of imprisonment authorized by statute is one year.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 94); November 1, 1995 (see Appendix C, amendment 511).

§2A3.4. Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact

(a) Base Offense Level:

(1) **16**, if the offense was committed by the means set forth in 18 U.S.C. § 2241(a) or (b);

(2) **12**, if the offense was committed by the means set forth in 18 U.S.C. § 2242;

(3) **10**, otherwise.

(b) Specific Offense Characteristics

(1) If the victim had not attained the age of twelve years, increase by **4** levels; but if the resulting offense level is less than **16**, increase to level **16**.

(2) If the base offense level is determined under subsection (a)(1) or (2), and the victim had attained the age of twelve years but had not attained the age of sixteen years, increase by **2** levels.

(3) If the victim was in the custody, care, or supervisory control of the defendant, increase by **2** levels.

(c) Cross References

(1) If the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse (as defined in 18 U.S.C. § 2241 or § 2242), apply §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

(2) If the offense involved criminal sexual abuse of a minor or attempt to commit criminal sexual abuse of a minor (as defined in 18 U.S.C. § 2243(a)), apply §2A3.2 (Criminal Sexual Abuse of a Minor (Statutory Rape) or Attempt to Commit Such Acts), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. § 2244(a)(1),(2),(3). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. *"The means set forth in 18 U.S.C. § 2241(a) or (b)" are by using force against the victim; by threatening or placing the victim in fear that any person will be subjected to death, serious bodily injury, or kidnapping; by rendering the victim unconscious; or by administering by force or threat of force, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the victim to appraise or control conduct.*

2. *"The means set forth in 18 U.S.C. § 2242" are by threatening or placing the victim in fear (other than by threatening or placing the victim in fear that any person will be subjected to death, serious bodily injury, or kidnapping); or by victimizing an individual who is incapable of appraising the nature of the conduct or physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act.*

3. *Subsection (b)(3) is intended to have broad application and is to be applied whenever the victim is entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the victim and not simply to the legal status of the defendant-victim relationship.*

4. *If the adjustment in subsection (b)(3) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).*

5. *If the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted.*

Background: This section covers abusive sexual contact not amounting to criminal sexual abuse (criminal sexual abuse is covered under §§2A3.1-3.3). Alternative base offense levels are provided to take account of the different means used to commit the offense. Enhancements are provided for victimizing children or minors. The enhancement under subsection (b)(2) does not apply, however, where the base offense level is determined under subsection (a)(3) because an element of the offense to which that offense level applies is that the victim had attained the age of twelve years but had not attained the age of sixteen years. For cases involving consensual sexual contact involving victims that have achieved the age of 12 but are under age 16, the offense level assumes a substantial difference in sexual experience between the defendant and the victim. If the defendant and the victim are similar in sexual experience, a downward departure may be warranted. For such cases, the Commission recommends a downward departure to the equivalent of an offense level of 6.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 95); November 1, 1991 (see Appendix C, amendment 392); November 1, 1992 (see Appendix C, amendment 444); November 1, 1995 (see Appendix C, amendment 511).

* * * * *

SENTENCING TABLE
(in months of imprisonment)

	Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
	1	0-6	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	0-6	2-8	3-9
	4	0-6	0-6	0-6	2-8	4-10	6-12
Zone A	5	0-6	0-6	1-7	4-10	6-12	9-15
	6	0-6	1-7	2-8	6-12	9-15	12-18
	7	0-6	2-8	4-10	8-14	12-18	15-21
	8	0-6	4-10	6-12	10-16	15-21	18-24
	9	4-10	6-12	8-14	12-18	18-24	21-27
Zone B							
	10	6-12	8-14	10-16	15-21	21-27	24-30
Zone C	11	8-14	10-16	12-18	18-24	24-30	27-33
	12	10-16	12-18	15-21	21-27	27-33	30-37
	13	12-18	15-21	18-24	24-30	30-37	33-41
	14	15-21	18-24	21-27	27-33	33-41	37-46
	15	18-24	21-27	24-30	30-37	37-46	41-51
	16	21-27	24-30	27-33	33-41	41-51	46-57
	17	24-30	27-33	30-37	37-46	46-57	51-63
	18	27-33	30-37	33-41	41-51	51-63	57-71
	19	30-37	33-41	37-46	46-57	57-71	63-78
	20	33-41	37-46	41-51	51-63	63-78	70-87
	21	37-46	41-51	46-57	57-71	70-87	77-96
	22	41-51	46-57	51-63	63-78	77-96	84-105
	23	46-57	51-63	57-71	70-87	84-105	92-115
	24	51-63	57-71	63-78	77-96	92-115	100-125
	25	57-71	63-78	70-87	84-105	100-125	110-137
	26	63-78	70-87	78-97	92-115	110-137	120-150
	27	70-87	78-97	87-108	100-125	120-150	130-162
Zone D							
	28	78-97	87-108	97-121	110-137	130-162	140-175
	29	87-108	97-121	108-135	121-151	140-175	151-188
	30	97-121	108-135	121-151	135-168	151-188	168-210
	31	108-135	121-151	135-168	151-188	168-210	188-235
	32	121-151	135-168	151-188	168-210	188-235	210-262
	33	135-168	151-188	168-210	188-235	210-262	235-293
	34	151-188	168-210	188-235	210-262	235-293	262-327
	35	168-210	188-235	210-262	235-293	262-327	292-365
	36	188-235	210-262	235-293	262-327	292-365	324-405
	37	210-262	235-293	262-327	292-365	324-405	360-life
	38	235-293	262-327	292-365	324-405	360-life	360-life
	39	262-327	292-365	324-405	360-life	360-life	360-life
	40	292-365	324-405	360-life	360-life	360-life	360-life
	41	324-405	360-life	360-life	360-life	360-life	360-life
	42	360-life	360-life	360-life	360-life	360-life	360-life
	43	life	life	life	life	life	life

REFERRALS FOR PHYSICAL AND SEXUAL ABUSE AGAINST CHILDREN

UNITED STATES ATTORNEY'S OFFICE
DISTRICT OF NORTH DAKOTA

Year	Physical Abuse	Sexual Abuse
1993	6	29
1994	7	27
1995	9	43
1996	10	45
1997	7	30
1998 (1/1 to 9/15)	11	30

Chart reflects matters, cases, and immediate declinations by victim

ATTACHMENT "C"

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INTRODUCTION

If you are a victim of or a witness to a crime, the Victim-Witness Assistance Program is designed to provide you with services while you are involved in the criminal justice system.

As a victim of a crime, you may be experiencing feelings of confusion, frustration, fear, and anger. Our staff can help you deal with these feelings. We also will explain your rights as a victim or witness, and help you better understand how the criminal justice system works.

One of the responsibilities of citizenship for those who have knowledge about the commission of a crime is to serve as witnesses at the criminal trial or one of the other hearings held in connection with the criminal prosecution. The federal criminal justice system cannot function without the participation of witnesses. The complete cooperation and truthful testimony of all witnesses are essential to the proper determination of guilt or innocence in a criminal case.

Our office is concerned that victims and witnesses of crime are treated fairly throughout their contact with the criminal justice system.

The United States Department of Justice and the United States Attorney's Office have taken several steps to make the participation by victims of crime and witnesses more effective and meaningful. One of these steps is the preparation of this handbook. We hope that it will provide the answers to many of your questions and will give you sufficient general information to understand your rights and responsibilities.

Thank you for your cooperation with our office and for your service as a witness. We appreciate the sacrifice of time that being a witness requires.

GENERAL INFORMATION FOR VICTIMS AND WITNESSES

The United States Attorney is the chief prosecutor of crimes against the laws of the United States. There is a United States Attorney's Office for each federal judicial district.

You are either a victim of a crime or are being asked to serve as a witness for the United States in a particular case.

This handbook is designed to help you understand the federal criminal justice system.

1. YOU ARE ENTITLED TO UNDERSTAND WHAT IS HAPPENING IN THE CASE IN WHICH YOU ARE INVOLVED

If you have questions about the case in which you are involved, you should feel free to call the Assistant United States Attorney who is handling the case and ask questions. Also, the Assistant United States Attorney may be contacting you throughout the case regarding various stages of the proceeding.

2. YOU ARE ENTITLED TO A WITNESS FEE FOR EVERY DAY THAT YOU APPEAR IN COURT IN CONNECTION WITH THE CASE

If you are not a federal government employee, you will receive a witness fee for each day that you are required to attend court in connection with the case, including time spent waiting to testify. Out-of-town witnesses receive reimbursement for certain travel expenses in addition to their daily witness fee.

At the conclusion of your testimony, you will be assisted in completing a witness voucher to make a claim for your fees. Generally, a check for all fees will be provided to you when the case is over.

If you are a federal government employee, the United States Attorney's Office will submit a "Certificate of Attendance" that will enable you to receive your regular salary, notwithstanding your absence from your job. You will not collect a witness fee in addition to that salary.

3. YOU HAVE THE RIGHT TO BE FREE FROM ANY THREATS

If anyone threatens you, or you feel that you're being harassed because of your contribution to the case being tried, you should immediately notify the United States Attorney's Office, the Federal Bureau of Investigation (FBI), or the law enforcement agency conducting the investigation. It is a federal offense to threaten, intimidate, harass, or mislead a witness in a criminal proceeding. Victims or witnesses have the right to be free of harassment or intimidation by the defendant or others.

The court may release the defendant while (s)he is awaiting trial under conditions that satisfy the court that the defendant will appear in court for all hearings and for trial. The court may require the defendant to post a money or property bond, or it may simply require the defendant to promise to appear. Since most federal criminal defendants are released on bond pending trial, you should not be surprised if you happen to see the defendant on release prior to trial. Nevertheless, if you have any concerns about the conditions of the defendant's release, please discuss them with the Assistant United States Attorney handling the case.

Of course, if you are threatened or harassed while you are attending court proceedings, you should report that fact immediately to the Assistant United States Attorney.

4. DISCUSSING THE CASE WITH OTHERS

United States Attorneys' Offices often receive calls from witnesses asking about their rights if a defense attorney or a defense investigator contacts them. Witnesses do not belong to either side of a criminal case. Thus, even though you may first be subpoenaed by the prosecution or by the defense, it is proper for the other side to try to talk to you. While it is the prosecution that is asking for your cooperation in this case, you may be contacted by the defense lawyer or an investigator for the defendant for an interview. While you may discuss the case with them if you wish to do so, you also have the right not to talk to them. The choice is entirely yours. If you do agree to an interview with a representative of the government or defense, here are some suggestions on how to deal with it:

First and foremost, you should always tell "the truth, the whole truth, and nothing but the truth."

If you give a statement to a lawyer or an investigator for the government or the defense, you do not have to sign the statement. However, any statement that you make during an interview, even if not signed, may be used to try to challenge or discredit your testimony in court if your testimony differs from that statement. This applies even to oral statements that are not reduced to writing at all.

If you decide to sign a statement, make sure you read it over very carefully beforehand and correct any mistakes.

Ask to have a copy of any statement that you make. Whether you sign the statement or not, you may tell the lawyer or investigator that you will refuse to give a statement unless you receive a copy of it.

When you have an interview with the defendant's lawyer or investigator, please let the United States Attorney's Office know about the interview. If you elect to have an interview with the defendant's lawyer or investigator, you may want to have present an additional person chosen by you to witness the interview.

You may discuss the case with anyone you wish. The choice is yours. Be sure you know to whom you are talking when you discuss the case. We encourage you not to discuss the case with members of the press, since you are a potential witness in a criminal case and the rights of the government and the defendant to a fair trial could be jeopardized by pre-trial publicity.

After a witness has testified in court, (s)he may not tell other witnesses what was said during the testimony until after the case is over. Thus, do not ask other witnesses about their testimony and do not volunteer information about your own.

The Assistant United States Attorney may discuss various aspects of the case with you to inform you and to prepare you for testimony if that is necessary. However, the Federal Rules for Criminal Procedure prevent an Assistant United States Attorney from disclosing to anyone, with limited exceptions, what has occurred in the grand jury. The purpose of this secrecy rule is to protect grand jurors and persons involved in the investigation and to make sure that no one tampers with the investigation or flees from the jurisdiction. For those reasons, an Assistant United States Attorney may be prevented from fully answering some of your questions about the results of the investigation or the decision of whether to file criminal charges.

5. SCHEDULING YOUR APPEARANCE IN COURT

There are several kinds of court hearings in a case in which you might be asked to testify. These include a preliminary hearing, a grand jury appearance, a motion hearing, and an appearance in court for trial or sentencing. It is difficult to schedule court hearings at a time convenient for everyone involved. Any court hearing requires the presence of witnesses, law enforcement officers, the defendant's lawyer, an Assistant United States Attorney, and the judge, as well as the defendant.

Therefore, WHEN THE COURT SETS A TIME AND PLACE FOR A HEARING IN THE CASE YOU ARE INVOLVED IN, YOU MUST BE THERE PROMPTLY, unless an emergency prevents it. And if you have been sent a subpoena -- a formal order to appear -- you should know that there are serious penalties for those who do not obey that order.

If you know in advance anything that might keep you from making a court appearance, let the United States Attorney's Office know immediately so that an adjustment may be made to adjust the schedule. However, scheduling is at the discretion of the court.

Despite the best efforts of everyone concerned, court hearings do not always take place on schedule -- the hearing or trial is sometimes postponed or continued to a new date. When possible, the Assistant United States Attorney handling the case in which you are involved will discuss with you any proposed scheduling change. Also, the United States Attorney's Office will notify you of any postponements in advance of your appearance at court.

6. PLANNING YOUR TRIP TO COURT

As a victim or witness, you may have questions about transportation, the location of the courthouse, food service, or where to go and what time to appear. The United States Attorney's Office has assembled information on these subjects. You should feel free to ask either the case agent, the Assistant United States Attorney, or the Victim-Witness Coordinator about them.

7. HOW CASES TURN OUT

Many criminal cases are concluded without a trial being held. In many cases, the evidence of the defendant's guilt is so strong that (s)he pleads guilty to the crime. Guilty pleas and other ways the case may end without a trial are discussed below:

a. Guilty Plea

The defendant may choose to plead guilty. By pleading guilty, the defendant waives his or her right to a trial. Generally, the guilty plea constitutes a conviction.

b. Plea Agreement

The Assistant United States Attorney may enter into an agreement with the defendant whereby if the defendant pleads guilty to certain charges, the government will ask the court to dismiss other charges, or will take another position with respect to the sentence imposed or some other action. Sometimes, the defendant will agree to plead guilty to one or more of the charges or to a less serious or related offense. This process of obtaining a defendant's agreement to plead is recognized by the courts as a proper way of disposing of criminal cases. In fact, the United States Supreme Court held that agreed-upon pleas are to be encouraged.

The government usually benefits in several ways by entering into an agreement for a guilty plea to certain charges rather than going to trial against a defendant on all charges. One benefit is the guarantee of a conviction. Criminal cases always involve risks and uncertainties. Even a case that appears to be very strong may not result in a conviction if there is a trial. And in many cases, there is a possibility that certain evidence may not be admitted. The Assistant United States Attorney will consider this in deciding to agree to a plea to certain charges. Another benefit of plea agreements is the prompt and certain imposition of sentence, which is a major goal of the criminal justice system. A third benefit is that they help to obtain pleas and convictions of other defendants. Often, the Assistant United States Attorney will require, as a condition of a plea, cooperation of the defendant in further investigation or prosecutions of others. Also, since there is no trial and no witnesses are called to testify, the identity of informants and witnesses can remain undisclosed. This preserves an informant's usefulness in other investigations, and prevents inconvenience and emotional stress that witnesses might experience when they have to testify.

In deciding to accept certain pleas, the Assistant United States Attorney considers the effect of the criminal offense on the victims, the criminal history of the defendant, the seriousness of the offense, and the interest of society in seeing all crimes punished with certainty. The Assistant United States Attorney will also consider whether the proposed plea will expose the defendant to a maximum punishment that is appropriate even though the defendant may not plead guilty to all charges.

c. Declination and Dismissal

A case referred to the United States Attorney may not be acted upon, which is called a declination, or may be dismissed after it has been filed with the court. There are several reasons why cases may be declined or dismissed.

An Assistant United States Attorney has discretion to decline to prosecute a case based on several considerations. The Assistant United States Attorney must decline if the evidence is too weak. The Assistant United States Attorney is ethically bound not to bring criminal charges unless the admissible evidence will probably be sufficient to obtain a conviction. However, even when the evidence is sufficient, the Assistant United States Attorney may consider that there is not a sufficient federal interest served by prosecution, but that the defendant is subject to prosecution in another state or local court (including a state court for the prosecution of juvenile delinquents).

A dismissal may occur when the Assistant United States Attorney asks the court to do so. The Assistant United States Attorney may do so because the court has excluded critical evidence or witnesses have become unavailable. In other situations, evidence which weakens the case may come to light after the case has started. The court may dismiss a case over the objection of the Assistant United States Attorney when it determines that the evidence is insufficient to find the defendant guilty.

d. Pre-Trial Diversion

In selected cases, an Assistant United States Attorney may decide not to try a defendant right away or to bring charges immediately. Instead, the defendant is placed in a Pre-Trial Diversion Program. Under this program, the United States and the defendant enter into a contract in which the defendant agrees to comply with certain conditions and to be supervised by the United States Probation Office for a period of time, usually one year. One of the conditions may be to make restitution to the victims of a crime. If the defendant successfully complies with all of the conditions, no charges will be brought. If, however, the defendant fails to meet a condition, charges may be filed.

The Pre-Trial Diversion Program is designed for those defendants who do not appear likely to engage in further criminal conduct and who appear to be susceptible to rehabilitation. Overall, the objectives of the program are to prevent future criminal activity by certain defendants who would benefit by diversion from traditional punishment into community supervision and services. The program also helps to make criminal sanctions more appropriate to the individual offenders, and it saves judicial and prosecutive resources for concentration on major crimes.

Several factors may be considered in deciding upon diversion, including the criminal record of the defendant, the willingness of the defendant to make restitution, and the likelihood that the defendant may engage in further criminal conduct. Additionally, before a defendant may enter into a diversion program, the United States Probation Office must agree to supervise the defendant, and the defendant usually must admit that he or she committed the wrongdoing.

8. WHAT IF YOUR PROPERTY IS BEING HELD AS EVIDENCE?

Sometimes law enforcement officers take and store property belonging to witnesses as evidence in a trial. This might be property that was taken by law enforcement officers at the crime scene or that was stolen. If your property is being held as evidence by law enforcement officers and you would like to regain your property before the case is over, you should notify the law enforcement officer or Assistant United States Attorney who is handling the case in which you are involved. Many times arrangements can be made for early release of property. That is a determination to be made considering the value of the property as evidence at trial. In any event, at the conclusion of the case you should be able to have your property returned to you promptly. The prompt return of your property will always be sought. In those instances where this cannot be achieved, the Assistant United States Attorney will explain the reasons for retaining the property.

9. RECOVERING FINANCIAL LOSSES

Often, crime means a real financial loss for the victim. Perhaps you have had cash or valuable property stolen (and not recovered), have experienced damaged property, medical expenses, or a loss of income because you could not work, or the nature of the crime may be that you have been defrauded of money belonging to you. If any of these things have happened to you, please check to see if you have insurance which will cover the loss.

If you have no insurance or only partial coverage, there are three possible ways of trying to recover your losses. Unfortunately these three ways, discussed below, are not always effective in many cases.

a. Compensation

Crime victims' compensation programs, administered by the states, provide financial assistance to victims and survivors of victims of criminal violence. Payments are made for medical expenses, including expenses for mental health counseling and care; loss of wages attributable to a physical injury; and funeral expenses attributable to a death resulting from a compensable crime. Other compensable expenses include eyeglasses or other corrective lenses, dental services and devices, and prosthetic devices. Each state establishes its own instructions for applying for crime victims compensation, procedures to be used in processing applications, approval authority, and dollar limits for awards to victims.

b. Restitution

When an offender gives back the things (s)he stole from a victim, or otherwise makes good the losses (s)he has caused, (s)he has given restitution to the victim.

From the point of view of effective law enforcement, the time to seek restitution is when the defendant is found guilty or pleads guilty. If that is the final result of the case -- which is never a sure thing -- the trial judge must consider, by law, restitution as part of the offender's sentence. The decision, however, is the judge's. The judge might determine that the defendant does not have enough money to repay the debt to the victim, or the judge may decide to sentence the offender to jail or prison, in which case the defendant may not be able to earn money to pay back the victim.

You should discuss restitution with the Assistant United States Attorney. You should cooperate fully with the United States Attorney's Office and the United States Probation Office by giving them information regarding the impact that the crime had on you, as the victim. Without this information, the judge cannot make an informed decision on your need for restitution.

c. Civil Damages

A victim may try to recover his or her losses by a civil lawsuit against the defendant. Such a private lawsuit is completely separate from the criminal case. In fact, the jury in a civil case may find that the defendant owes the victim money, even though a different jury in the criminal case may find the defendant not guilty because the burden of proof is higher in a criminal case.

The difficulty in trying to obtain civil damages from the defendant is the same as in trying to get restitution; whatever money the defendant once had may now be gone. You may need a lawyer to bring such a suit. If you qualify, you may be able to get help free of charge from legal aid services. On the other hand, if your total losses are small, then you may not need a lawyer at all. You may be able to bring your own lawsuit without the assistance of a lawyer.

WHAT HAPPENS IN A FELONY CASE?

Any offense punishable by death or imprisonment exceeding one year is called a felony. Felonies are the most serious crimes. The prosecutors and the courts handle felony cases differently from misdemeanor cases (cases that have shorter possible sentences).

This part of the handbook is intended to explain the way a felony case moves through the court system. Each step is explained in the sections below. WITNESSES ARE NOT NEEDED AT EVERY STEP IN THE PROCESS. Most witnesses are asked to come to court only for a preliminary hearing, a grand jury hearing, a witness conference, or a trial.

Not every step is taken in every case. In fact, many cases end before they reach trial. Even so, you may wish to know all the steps that the case in which you are involved might go through.

1. INITIATING CHARGES BY COMPLAINTS

Some felony cases begin when the United States Attorney (or usually an Assistant United States Attorney), working with a law enforcement officer, files a criminal complaint before a United States Magistrate. This complaint is a statement, under oath, of facts sufficient to support probable cause to believe that an offense against the laws of the United States has been committed by a defendant. If the Magistrate accepts the complaint, a summons or arrest warrant will be issued for the defendant. In some cases, the defendant may have been arrested without a warrant, in which case the defendant is presented to the Magistrate at the time the complaint is filed.

Victims and witnesses of federal offenses may be interviewed by a law enforcement officer prior to the filing of a complaint. In those situations, the law enforcement officer will report the statements of the victim or witness to the Assistant United States Attorney assigned to the case. Sometimes the Assistant United States Attorney may wish to interview the witness in person.

2. THE INITIAL APPEARANCE

This is the defendant's first hearing after arrest. It takes place before a United States Magistrate, usually the same day the defendant is arrested. Witnesses are not needed for testimony at this hearing. The hearing has three purposes. First, the defendant is told his or her rights and the charges are explained. Second, the defendant is assisted in making arrangements for legal representation, by appointment of an attorney by the court, if necessary. Third, the court determines if the defendant can be safely released on bail.

Many defendants charged with a felony are released at the end of this hearing -- either they have posted money to guarantee their return for trial and other hearings, or they have been released on conditions which include their promise to return for future hearings or the trial. Those conditions may include the requirement that they not personally contact witnesses in the case. In some cases, the defendant will be detained without bail.

3. PRELIMINARY HEARING

The purpose of this hearing is to determine whether there is evidence to find probable cause to believe that the defendant has committed the offense charged. The burden is on the United States Attorney to produce sufficient evidence to support this finding. The United States Attorney does not have to prove at this hearing that the defendant is guilty, but must present evidence to show that there is good reason to proceed with the charges against the defendant. The date for this hearing will be set at the initial appearance.

Usually the law enforcement officer alone can give sufficient evidence that there is probable cause that the defendant has committed the offense. Occasionally, witnesses may be subpoenaed to testify; if you receive such a subpoena, you should get in touch with the Assistant United States Attorney who is handling the case as soon as possible.

4. GRAND JURY HEARINGS

A grand jury is a group of twenty-three (23) citizens from the same judicial district who meet to examine the evidence against people who may be charged with a crime. The work is done in complete secrecy. Only an Assistant United States Attorney and a stenographer meet with them -- plus those witnesses that are subpoenaed to give evidence before a grand jury.

Although a grand jury is not a trial, it is a serious matter. Witnesses are put under oath. Their testimony is recorded and may later be used during the trial. It is important to review carefully what

remember about the crime before you testify before the grand jury. You must tell the truth. Prior to testifying before the grand jury, you will probably meet with the case agent or the Assistant United States Attorney. This will help you get ready for your grand jury appearance.

After hearing the evidence presented by the Assistant United States Attorney, the grand jury will decide whether the case should be prosecuted. Grand jury charges against a defendant are called "indictments." If the grand jury finds that the case should not be prosecuted, they will return a "no true bill."

Not every witness in a serious crime is called to testify by the grand jury. Sometimes the grand jury will issue indictments on the basis of an officer's testimony alone. If you are called to testify, the Assistant United States Attorney should be able to give you an approximate time when your testimony will be heard.

Unfortunately, it is not always possible to schedule testimony to the minute. Your appearance may involve some waiting to be called before the grand jury itself, so we recommend that you bring some reading material along with you.

All witnesses who testify before the grand jury, except federal employees, are entitled to the same witness fee and expenses which are available for testifying in court at trial.

5. ARRAIGNMENT ON THE INDICTMENT

The defendant in this hearing is read the charges which are contained in an indictment, and his or her bail conditions are reviewed. Witnesses are usually not needed at this hearing. Usually at this hearing the date is set for the case to be heard at trial.

6. HEARINGS ON MOTIONS

Before the trial, the court may hear "motions" made by the defendant or the United States. These may include motions to suppress evidence, to compel discovery, or to resolve other legal questions. In most cases, witnesses are not needed at the motions hearing. If a witness is needed at this hearing, (s)he will receive a notice from the United States Attorney's Office.

7. THE WITNESS CONFERENCE

At some time before the trial date, the Assistant United States Attorney in charge of the case may contact you by letter or phone asking you to appear at a witness conference to prepare you for trial. The purpose of this witness conference is to review the evidence you will be testifying about with the Assistant United States Attorney who will be trying the case. You are entitled to a witness fee for attending this conference.

8. TRIAL

In many felony cases, the only contact witnesses have with the prosecutors comes at the witness conference and at the trial. Normally, when the trial date has been set, you will be notified by a subpoena -- a formal written order from the court to appear.

You should be aware that a subpoena is an order of the court, and you may face serious penalties for failing to appear as directed on that subpoena. Check your subpoena for the exact time at which you should appear. If for any reason you are unable to appear as the subpoena directs, you should immediately notify the Assistant United States Attorney who is working on the case.

Usually felony trials go on as scheduled; however, this is not always the case. Sometimes the defendant may plead guilty at the last minute, and the trial is therefore canceled. At other times, the defendant asks for and is granted a continuance. Sometimes the trial has to be postponed a day or more because earlier cases being heard by the court have taken longer than expected. When possible, the Assistant United States Attorney handling the case or the Victim-Witness Coordinator will discuss with you any proposed

scheduling change. Also, the United States Attorney's Office will do everything it can to notify you of any postponement in advance of your appearance at court.

Although all of the witnesses for trial appear early in the day, most must wait for some period of time to be called to the courtroom to give their testimony. For this reason, it is a good idea to bring some reading material or handwork to occupy your waiting time. If you are waiting in a courtroom, you should remember that it may be against the rules to read in court.

A felony trial follows the same pattern as the trial of any other criminal case before the court. The prosecution and the defense have an opportunity to make an opening statement, then the Assistant United States Attorney will present the case for the United States. Each witness that is called for the United States may be cross-examined by the defendant or the defendant's counsel. When the prosecution has rested its case, the defense then has an opportunity to present its side of the case. The United States may then cross-examine the defendant's witnesses. When both sides have rested, the prosecution and the defense have an opportunity to argue the merits of the case to the court or, in a case which is being heard by a jury, to the jury, in what is called a "closing argument." The court or the jury will then make its findings and deliver a verdict of guilty or not guilty of the offense charged.

After you have testified in court, you should not tell other witnesses what was said during the testimony until after the case is over. Thus, you should not ask other witnesses about their testimony, and you should not volunteer information about your own.

9. SENTENCING

In a criminal case, if the defendant is convicted, the judge will set a date for sentencing. The time between conviction and sentencing is most often used in the preparation of a pre-sentence investigation report. This report is prepared by the United States Probation Office. At the time of sentencing, the judge will consider both favorable and unfavorable facts about the defendant before determining the appropriate sentence to impose.

The function of imposing sentence is exclusively that of the judge. In some cases, (s)he has a wide range of alternatives to consider and may place the defendant on probation (in which the defendant is released in the community under supervision of the court for a period of years), or place the defendant in jail for a specific period of time, or impose a fine, or formulate a sentence involving a combination of these sanctions.

The court will also consider requiring the defendant to make restitution to victims who have suffered physical or financial damage as a result of the crime. If you are a victim, you should cooperate fully with the United States Attorney's Office and the Unite States Probation Office on preparing a Victim Im Statement regarding the impact of the crime and need for restitution. A Victim Impact Statement is a written description of your physical, psychological, emotional, and financial injuries that occurred as a direct result of the crime. A Victim Impact Statement is read by the judge who will be sentencing the defendant.

Victims and witnesses may attend the sentencing proceedings and also may have the opportunity to address the court at this time. The Assistant United States Attorney will tell you if such an opportunity exists for you and will talk to you about such a presentation.

WHAT HAPPENS IN A MISDEMEANOR CASE?

Any criminal offense punishable by imprisonment for a term not exceeding one year is a misdemeanor. Any misdemeanor that carries a penalty of imprisonment for not more than six months, a fine of not more than five hundred dollars ($500), or both, is a petty offense.

Misdemeanors include such offenses as minor assaults, simple possession of controlled substances, some tax law violations, and other offenses. Petty offenses include offenses against traffic laws as well as many regulations enacted by the agencies of the United States.

1. CRIMINAL INFORMATIONS OR COMPLAINTS

A misdemeanor case can be initiated in several ways. The United States Attorney may file a criminal information or a complaint with the court charging a misdemeanor. This is usually done after review of the evidence by an Assistant United States Attorney with a law enforcement officer's assistance. It is the United States Attorney's task to decide whether a case will be brought, and how that case will be charged. That review may involve the Assistant United States Attorney speaking to witnesses and victims, or it may be that the law enforcement officer will report the statements of victims and witnesses to the United States Attorney.

Once the complaint or information is filed, a date is set for the defendant to appear before the United States Magistrate for arraignment. In cases where an arrest has been made prior to the filing of a complaint or information, the arraignment takes place immediately.

2. ARRAIGNMENT

The arraignment before the United States Magistrate is a hearing during which the defendant is advised of his or her rights against self-incrimination and to the assistance of counsel, of his or her right to have the case heard before a United States District Court Judge or before a United States Magistrate, and of the dates for further proceedings in the case.

The Magistrate will review facts presented by the United States Attorney and by the defendant and set conditions of bail release. Those conditions may include a promise to appear on the date set for trial of the case, and/or the promise of a money bond to be forfeited if the defendant fails to appear, or other such conditions of release as seem fair and just to the Magistrate. The purpose of bond is to ensure that the defendant will be present when the case is heard for final disposition. It is not necessary for victims or witnesses to appear at this arraignment, unless they have been specifically instructed to do so by the case agent or the Assistant United States Attorney.

3. PETTY OFFENSES

Petty offenses are most often initiated by the issuance of a traffic violation notice (TVN). A TVN is issued to defendants by the law enforcement officer at the time of the offense. They command the defendant either to pay a collateral fine to dispose of the matter or to appear before the United States Magistrate on the date written on the ticket. Most often the case will be heard for trial before the United States Magistrate on that date, if the collateral is not paid. If you are a victim or a witness in one of these petty offense cases, the United States Attorney's Office may request that you attend a witness conference prior to trial.

4. TRIAL

A trial of a misdemeanor case follows the same pattern as the trial of any other criminal case before the court. The prosecution and the defense have an opportunity to make an opening statement, then the Assistant United States Attorney will present the case for the United States. Each witness called for the United States may be cross-examined by the defendant or the defendant's counsel. When the prosecution has rested its case, the defense then has an opportunity to present its side of the case. The United States may then cross-examine the defendant's witnesses. When both sides have rested, the prosecution and the defense have an opportunity to argue the merits of the case to the court or, in a case which is being heard by a jury, to the jury in what is called a "closing argument." (Some serious misdemeanor cases are heard with a jury, either before the Magistrate or before the United States District Court Judge.)

The court or the jury will then make its findings and deliver a verdict of guilty or not guilty of the offense charged.

5. SENTENCING

In petty offense cases, the court may proceed immediately after the verdict to sentencing. The defendant and the United States each has an opportunity to speak to the issue of sentencing. In misdemeanor cases, the court may request a pre-sentence investigation and report from the United States Probation Office. If such a report is ordered, sentencing will be suspended for a period of time to permit the report to be prepared. If the case before the court involves financial or physical injury to a victim of the crime, the court must consider restitution (repayment of damages to the victim as part of the sentence imposed).

A Victim Impact Statement, prepared by the victim, can be used to establish this element of damage. In cases in which damage has been suffered as a result of a misdemeanor offense, the victim should bring that damage to the attention of the Assistant United States Attorney handling the case, to ensure that the damage is set before the court. The victim should cooperate fully with the Assistant United States Attorney and the United States Probation Officer to determine the extent of the impact of the crime.

The function of imposing sentence is exclusively that of the judge, who has a wide range of alternatives to consider and, depending upon the case, may place the defendant on probation (the defendant is released into the community under the supervision of the court for a period of time), or place the defendant in jail for a specific period of time, or impose a fine. Victims and witnesses may attend the sentencing proceedings and also may have the opportunity to address the court at this time. The Assistant United States Attorney handling the case will tell you if such an opportunity exists for you and will talk to you about such a presentation.

CONCLUSION

We hope that this handbook has answered many of your questions as to how the federal criminal justice system operates and what is expected of you in your role as a potential witness. As explained in this handbook, witnesses have important responsibilities in this process, and their full cooperation is essential if the system is to operate effectively. Your contribution, in time and energy, is very much appreciated by everyone in the United States Attorney's Office.

If you have any other questions or problems related to the case, please contact the Victim-Witness Coordinator or the Assistant United States Attorney assigned to the case.

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NOTES

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STATE OF SOUTH DAKOTA
CRIME VICTIMS' COMPENSATION PROGRAM

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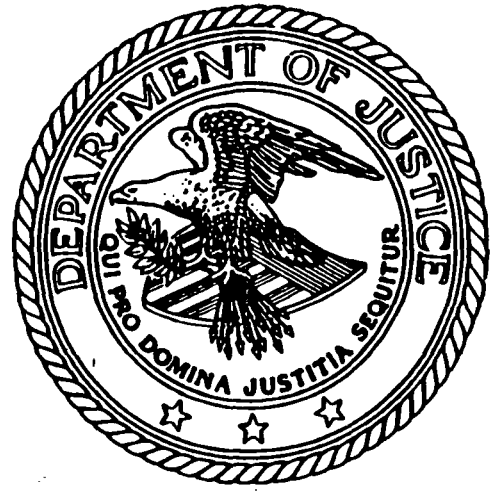
605-773-6317 (Out-of-state)

U.S. Department of Justice
United States Attorney's Office
District of South Dakota

Preparing to Testify



INTRODUCTION

One of the responsibilities of citizenship for those who have knowledge about the commission of a crime is to serve as witnesses at the criminal trial, or at one of the other hearings held in connection with the criminal prosecution. The federal criminal justice system cannot function without the participation of witnesses. The complete cooperation and truthful testimony of all witnesses are essential to the proper determination of guilt or innocence in a criminal case.

The United States Department of Justice and the United States Attorney's Office have taken several steps to make the participation by witnesses more effective and meaningful. One of these steps is the preparation of this pamphlet. We hope that it will provide the answers to many of your questions and will give you sufficient general information to understand your rights and responsibilities.

Thank you for your cooperation with our office and for your service as a witness. We appreciate the sacrifice of time that being a witness requires.

TESTIFYING IN FEDERAL COURT

1. Before you testify, try to picture the crime scene— the objects there, the distances, and exactly what happened, so that you can recall the facts more accurately when you are asked. If the question is about distances or time, and if your answer is only an estimate, be sure you say it is only an estimate. Beware of suggestions by attorneys as to distances or times when you do not recall the actual time or distance. Do not agree with their estimate unless you independently arrive at the same estimate.

2. **SPEAK IN YOUR OWN WORDS.** Don't try to memorize what you are going to say. Be yourself. Prior to trial, go over in your own mind those matters about which you will be questioned.

3. There is no dress code in a courtroom; however, it is important to dress in a manner that shows respect for the courtroom proceedings.

4. Avoid distracting mannerisms such as chewing gum while testifying. Smoking is not allowed in federal courtrooms.

5. From the moment you enter the courtroom or courthouse, your behavior should be appropriate to the seriousness of the proceedings.

6. When you are called into court for any reason, be serious and avoid saying anything about the case until you are actually on the witness stand. Also, do not read in the courtroom unless asked to do so by the judge or the attorneys.

7. When you are called to testify, you will first be sworn in or affirmed. When you take the oath or affirmation say, "I do" clearly.

8. Most important of all, you are sworn to **TELL THE TRUTH**. Every true fact should be readily admitted. Do not stop to figure out whether your answer will help or hurt either side. Just answer the questions to the best of your memory. If you don't understand the question, say so. Don't make up an answer.

9. Do not exaggerate. Don't make overly broad statements that you may have to correct. Be particularly careful in responding to a question that begins, "Wouldn't you agree that...?" The explanation should be in your own words. Do not allow an attorney to put words in your mouth.

10. When a witness gives testimony, (s)he is first asked some questions by the lawyer who called the witness to the stand; in this case, it is an Assistant United States Attorney. This is called the "direct examination." The witness is then questioned by the defense lawyer in "cross-examination." Sometimes the process is repeated two or three times to help clear up any confusion. The basic purpose of direct examination is for you to tell the judge and jury what you know about the case. The basic purpose of cross-examination is to raise doubts about the accuracy of your testimony. If you feel you are being doubted in cross-examination, remember that to raise doubt is the defense counsel's job. Do not lose your temper. Always be courteous even if the lawyer questioning you appears discourteous.

11. Jurors are the ones who decide the facts of the case. Always speak clearly and loudly so that every juror can easily hear you.

12. DO NOT nod your head for a "yes" or "no" answer. Speak so that the court reporter (or recording device) can hear the answer.

13. If you don't understand the question asked by any of the attorneys, ask the attorney to repeat or rephrase the question so that you understand exactly what is being asked.

14. Give the answer in your own words, and if a question can't be truthfully answered with a simple "yes" or "no," ask to explain your answer.

15. Answer ONLY the question asked you. Do not volunteer information not actually asked for.

16. If your answer was not correctly stated, correct it immediately. If your answer was not clear, clarify it immediately. If you realize you have answered incorrectly, say, "May I correct something I said earlier?"

17. The judge and the jury are interested in the facts that you have observed or personally know about. Therefore, don't give your conclusions and opinions, and don't state what someone else told you, unless you are specifically asked.

18. Unless certain, don't say, "That's all of the conversation" or "Nothing else happened." Instead, you might say, "That's all I recall" or "That's all I remember happening." It may be that after more thought or another question, you will remember something important.

19. Sometimes, witnesses give inconsistent testimony — something they said before doesn't agree with something they said later. If this happens to you, don't get flustered. Just explain honestly why you were mistaken. The jury, like the rest of us, understands that people make honest mistakes.

20. Stop instantly when the judge interrupts you or when an attorney objects to a question. Wait for the judge to tell you to continue.

21. Give positive, definite answers when at all possible. Avoid saying, "I think," "I believe," or "In my opinion." If you do not remember certain details, it is best to say that you don't remember.

22. Sometimes an attorney may ask this question: "Have you talked to anyone about this case?" It is perfectly proper for you to have talked with the prosecutor, police, or family members before you testify, and you should respond truthfully to this question. Say very frankly that you have talked with whomever you have talked with — the Assistant United States Attorney, the victim, relatives, or anyone else. **ALL THAT WE WANT YOU TO DO IS TO TELL THE TRUTH.**

23. After a witness has testified in court, (s)he should not tell other witnesses what was said during the testimony until after the case is over. Thus, do not ask other witnesses about their testimony and do not volunteer information about your own.

If you have questions or problems related to the case, please contact the Victim-Witness Coordinator or the Assistant United States Attorney assigned to the case.

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Criminal Jurisdiction in Indian Country
Northern Plains Tribal Judicial Training Institute

B. J. Jones
Grand Forks, North Dakota

CRIMINAL JURISDICTION IN INDIAN COUNTRY

NORTHERN PLAINS TRIBAL JUDICIAL TRAINING INSTITUTE

OVERVIEW: Criminal jurisdiction in Indian country involves a mixture of federal, state and tribal law with jurisdiction dependent upon such factors as the race of the perpetrator and victim, as well as the situs of the crime. This outline reviews some of the pertinent issues relative to the question of who possesses jurisdiction over a perpetrator of a crime in Indian country.

I. Definition of Indian country - 18 U.S.C. 1151

Indian country is legislatively defined by the United States Congress at 18 U.S.C. 1151 as:

A. all lands within the limits of any Indian reservation notwithstanding the issuance of any patent, and including rights-of way running through Indian allotments This definition encompasses all lands within the exterior boundaries of a reservation even if the land is held in fee simple by a non-Indian entity or person. See Solem v. Bartlett, 465 U.S. 463(1984). Thus, if an Indian commits an offense within the exterior boundaries of the reservation tribal and federal jurisdiction would lie even if the crime occurred on fee land.

B. all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof. A dependent Indian community is defined in the case law based upon four inquiries. See United States v. South Dakota, 665 F.2d 837, 839 (8th Cir. 1981); United States v Driver, 945 F.2d 1410 (8th Cir. 1991)

1. Whether U.S. retains title to land and the authority to regulate in area. Those communities located on trust land outside the reservation boundaries are considered dependent communities.

2. The nature of the area and the relationship of the inhabitants to an Indian tribe or to the federal government. A majority population of a particular Tribe residing in Indian Housing authority housing would be considered a dependent Indian community.

3. Cohesiveness of the community and its reliance upon federal services.

4. Whether the area has been set aside for the use of Indians. For example, the Sisseton Tribal Court has ruled that a county road that connects the town of Sisseton with the seat of tribal government is a dependent Indian community.

C. Rights of way running through Indian allotments - this includes state, county and unmaintained roads that run through

Indian allotments even if the highway runs outside the exterior boundaries of the reservation.

II. Definition of Indian

A In General - In most cases, in order for either a tribal or federal court to exercise jurisdiction over a person in a criminal matter two conditions have to be met.

1. Possess some Indian blood;

2. Be regarded as Indian by his or her community.

B. Other Tests

1. Enrolled in federally-recognized tribe or other indicia of membership. See United States v. Broncheau, 597 F.2d 1260, 1263 (9th Cir. 1979)(enrollment not required for Indian to be considered member of Tribe.)

2. Adoption into Tribe is generally not sufficient to create Indian status. See United States v. Rogers, 45 U.S. (4How.) 567 (1846); but see Matter of Dependency and Neglect of A.L., 442 N.W.2d 233 (S.D. 1989)(Tribe's enrollment of white child sufficient to trigger application of Indian Child Welfare Act).

C. St. Cloud Test
Under this test, adopted by the United States Court of Appeals for the Eighth Circuit in U.S. v. Lawrence, 51 F.3d 150 (8th Cir. 1995), the Court adopted the standard set out in St. Cloud v. United States, 702 F. Supp. 1456 (D.S.D. 1988) for a determination of who is an Indian (perpetrator and victim).

1.Tribal enrollment - generally is dispositive of issue.

2. Government recognition through receipt of benefits (IHS, BIA GA, commodities, etc.).

3. Enjoyment of the benefits of tribal affiliation.

4. Special recognition as Indian through residence on reservation and participation in social life.

These criteria should be examined in the totality to make the determination of whether a perpetrator or victim is Indian. However, even if the perpetrator meets the definition of Indian under these criteria, if he is a member of a terminated tribe, he is generally not considered "Indian" for purposes of federal jurisdiction. See St. Cloud; US v. Heath, 509 F.2d 16 (9th Cir. 1974).

D. Duro v. Reina, 495 U.S. 676(1990) - Duro had held that tribal courts do not have the inherent authority to exercise

criminal jurisdiction over non-member Indians. Congress legislatively repealed Duro in 1991 vesting tribal courts with the authority to prosecute non-member Indians to the same extent the federal courts exercise jurisdiction over Indians under the Major Crimes Act.

III. TYPES OF CRIMES

In general, federal courts exercise jurisdiction over offenses committed in Indian country by Indians and against Indians under several federal statutes, including the Major Crimes Act, 18 U.S.C. 1153, the Indian Country Crimes Act, 18 U.S.C. 1152, and the Assimilative Crimes Act, 18 U.S.C. 13, which the Supreme Court has held applies to crimes that occur in Indian country. Williams v. United States, 327 U.S. 711 (1946). Tribal courts exercise concurrent jurisdiction over crimes prosecuted by the United States, except those crimes where the perpetrator is non-Indian, and other crimes defined by tribal code or the Code of Indian Offenses. State Courts can only exercise jurisdiction over crimes committed by one non-Indian against another in Indian country or a victimless crime committed by a non-Indian, except in Public Law 280 reservations where states exercise jurisdiction over violations of prohibitory statutes, not regulatory ones. See 18 U.S.C. 1162; 25 U.S.C. 1322.

A. Federal Court Jurisdiction

1. Major Crimes Act - 18 U.S.C. 1153 - As the result of Ex parte Crow Dog, 109 US 556 (1883), the United States enacted the Major Crimes Act to criminalize federally certain major crimes. Those crimes now include: murder, manslaughter, kidnapping, maiming, kidnapping, rape, involuntary sodomy, carnal knowledge of any female who has not attained age of 16, assault with intent to commit rape, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burgarly and robbery.

2. Concurrent jurisdiction of tribal courts - Tribal courts retain concurrent criminal jurisdiction over offenses covered by Major Crimes Act and double jeopardy does not apply to bar prosecution by federal court after tribal court prosecution. US v. Wheeler, 453 U.S. 313 (1978). The same rule also may apply to a subseqent federal prosecution after a CFR court prosecution, but no case law on this. Nor does the United States' Attorney's internal Petite policy, directing the United States not to prosecute a person already prosecuted by another sovereign, bar the prosecution of an Indian in federal court for the same offense prosecuted in tribal court. See United States v. Lester, 992 F.2d 124 (8th Cir. 1993).

a. Uncounselled guilty plea in tribal court generally cannot be used as admission against interest in federal court prosecution, but counselled ones can. United States v. Ant, 882 F.2d 13 (9th Cir. 1991).

b. Time served on tribal court sentence not necessarily credited on federal sentence, but discretionary with Attorney General.

c. Tribal Court convictions not used under federal sentencing guidelines to determine category of offender, but can be used to enhance sentence. See US v. Gallaher, 29 F.3d 635 (9th Cir. 1994).

3. Assimilative Crimes Act, 18 U.S.C. 13 - permits federal prosecutions by assimilating state substantive law. See United States v. Norquay, 905 F.2d 1157 (8th Cir. 1990)(although burglary is to be punished under state law, federal courts are still permitted to apply the federal sentencing guidelines to determine appropriate sentence).

4. Indian Country Crimes Act, 18 U.S.C. 1152 - general laws of the United States applicable to federal enclaves apply in Indian country. This includes the Assimilative Crimes Act. Williams v. United States , 327 U.S. 711 (1946).

5. Death Penalty - Death penalty inapplicable to Indians committing criminal offense subject to death penalty in Indian country unless Tribe opts in to death penalty. 18 U.S.C. 3598. Indians, however, are subject to the death penalty for other federal offenses that carry the death penalty (assasination, espionage, etc.) Nor are recent legislative enactments expanding federal penalties for federal offenses applicable to Indian country unless Tribes opt in. See 18 U.S.C. 3559(c)(6) (three strikes law); 18 U.S.C. 5032 (juveniles under 13 tried as adults.)

6. Special federal criminal statutes - Some statutes, for example, 18 U.S.C. 1165(illegal for non-Indian to enter on Indian land for unauthorized hunting and fishing); 18 U.S.C. 1164 (destruction of reservation boundary); 25 U.S.C. 171(enter into land transaction without federal authority) apply specifically to non-Indians who enter Indian country.

B. State Court Jurisdiction - turns on question of whether state has been vested with criminal jurisdiction under federal law, such as Pub. L. 280, or other special criminal federal statute, and on race of perpetrator and victim.

1. General - Absent some act of Congress, states have no jurisdiction to prosecute Indians for criminal offenses committed within Indian country or to prosecute non-Indians for criminal offenses committed against Indian victim in Indian country. Washington v. Confederated Bands of Yakima Nation, 439 U.S. 463 (1979); State v. Kuntz, 66 N.W.2d 531 (N.D. 1954); State v. Greenwalt, 663 P.2d 1178 (Mont. 1983); State v. Larson, 455 N.W.2d 600 (S.D. 1990).

2. Liquor offenses - one court has held that because Congress gave states and tribes the concurrent authority to regulate the introduction of liquor into Indian country, states can exercise criminal jurisdiction over criminal "liquor violations." Fort Belknap Indian Community v. Mazurek, 43 F.3d 428 (9th Cir. 1994). Tribes have civil authority to regulate liquor sales throughout Indian country, but no criminal jurisdiction to prosecute non-Indian violators. See City of Timber Lake v. Cheyenne River Sioux Tribe, 10 F.3d 554 (8th Cir. 1993). Luke v. Mellette County, 508 N.W.2d 6 (S.D. 1993).

3. Non-Indian v. Non-Indian - State courts have jurisdiction to prosecute this crime that occurs in Indian country or non-Indian victimless crime.

4. Pub. L. 280- 18 U.S.C. 1162; as amended, 25 U.S.C. 1322 et seq.- gave certain states mandatory criminal jurisdiction over crimes occuring in Indian country and gave other states option to exercise jurisdiction.

a. Mandatory states - California, Oregon, Nebraska(except Winnebagos and Omahas have been retroceded jurisdiction), Minnesota(with exception of Red lake),Wisconsisn, and Alaska.

b. Optional states must comply with Pub. L. 280 and amend their state constitutions to accept jurisdiction. After enactment of Indian Civil Rights Act, 25 U.S.C. 1301 et seq., Tribes must affirmatively accept jurisdiction by tribal election. See Kennerly v. District Court, 400 U.S. 423 (1971). State cannot overrule prior state court precedent if effect is to vest state with jurisdiction after 1968 without tribal consent. See Rosebud Sioux Tribe v. State of South Dakota, 900 F.2d 1164 (8th Cir. 1990).

c. Tribal courts retain concurrent jurisdiction over criminal offenses with state courts.

d. States only obtained authority to enforce prohibitory laws in Indian country, not regulatory laws, such as gaming laws. See California v. Cabazon Band of Indians, 480 U.S. 202(1987); Confederated Tribes of Colville Reservation v. Washington, 938 F.2d 146 (9th Cir. 1991)(states have no authority to impose state regulatory traffic laws upon reservation-domiciled Indians). States cannot enforce mandatory insurance laws, et al, upon reservation Indians even in Pub. L. 280 states. Nor can states impose hunting and fishing regulatory laws upon reservation Indians.

e. Retrocession - Under Pub. L. 280, as amended, there is a provision found at 25 U.S.C. 1323 allowing a state to petition the United States to retrocede, or restore, tribal criminal or civil jurisdiction.

f. Special statutes - Congress has enacted special statutes, applicable to only certain tribes, vesting state courts with criminal jurisdiction over Indian country. See State v. Hook, 476 N.W.2d 565 (N.D. 1991)(North Dakota vested with criminal misdemeanor jurisdiction over Fort Totten Indian reservation).

C. Tribal Court Jurisdiction - Tribal Courts have criminal jurisdiction over all Indians who commit criminal offenses within Indian country. This jurisdiction is concurrent with federal courts in non-Pub. L. 280 states and with state courts in Pub. L. 280 states. Tribal courts have exclusive criminal jurisdiction to prosecute violations of regulatory statutes in Pub. L. 280 states.

1. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)(Tribal courts have been necessarily divested of criminal jurisdiction over non-Indians). Note that Oliphant does not divest tribal court of authority over quasi-criminal actions such as protection order proceedings or mental commitments.

2. Indian Civil Rights Act - 25 U.S.C. 1301 et seq.- governs the rights of criminal defendants in tribal courts.

a. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)(exclusive remedy for violation of Indian Civil Rights Act in federal court is writ of habeas corpus challenging detention).

b. Several Tribal Courts have held that ICRA waives immunity of tribal officials for suits in tribal court alleging violations of ICRA.

c. Federal Tort Claims remedy available for person aggrieved by tribal entity operating under 638 contract who violates ICRA.

d. No right to court-appointed counsel, but right to counsel of Defendant's choice if he pays. Tribe can require counsel to be member of tribal bar.

e. Punishment under ICRA now limited to one year and $5,000.00 fine for each offense. 25 U.S.C. 1302 (7).

UNITED STATES COURT OF APPEALS DECISIONS REGARDING CHILD SEXUAL ABUSE

1. ***United States of America v. Lonnie Horse Looking***, 1998 U.S. App. LEXIS 2185, September 9, 1998 (In a case off the Rosebud reservation involving despicably severe sexual and physical abuse of a six month child, Court rejects Defendant's argument that the admission of statements made to law enforcement was in error on ground that Defendant had been properly Mirandized and that the Defendant failed to properly allege involuntariness of statements even after being given second chance by magistrate. Court also rejects argument that trial court committed error by permitting government to interview defense witness before trial on ground issue not preserved for appeal and witness' testimony not exculpatory. Trial court did not err in denying admission of a calendar prepared by defendant and his family on ground that calendar was hearsay and was not a contemporaneous recitation of facts but prepared later. Lastly, sufficient evidence existed to sustain convictions on all counts)

2. ***United States of America v. Weaselhead,*** 1998 U.S. App. LEXIS 21880, September 9, 1998 (Court holds that the federal prosecution of a Blackfeet Indian for sexual abuse of a minor barred by double jeopardy because Defendant had already been prosecuted for same conduct underlying federal prosecution in the Winnebago Tribal Court. Court holds that in light of Duro v. Reina's holding that Indian tribes lack the inherent sovereign authority to prosecute non-member Indians, the Winnebago Tribal Court was exercising authority under a federal delegation and thus the subsequent federal prosecution was barred. Decision may cause some problems with initial tribal prosecution when federal prosecution is sought later.)

3. ***United States v. Rouse***, 111 F.3d 561 (8th Cir. 1997), reconsidering 100 F.3d 560 (8th Cir. 1996) (In case off the Yankton Sioux reservation involving several defendants and victims the Court reverses its earlier panel decision reversing several convictions of sexual abuse of minors on grounds that the district court erred in excluding certain expert opinion testimony and in denying defendants' motion for independent pretrial psychological examinations of the abused children. Court holds that defendants failed to preserve argument that State DSS denied defense

counsel adequate access to children for investigation and that government did not contribute to such denial. Court reverses itself on whether the Defendants displayed a need for further physical and psychological examination of the children by holding that the physical examinations conducted were adequate and that psychological evaluations on competency of children were not requested to the district court and that thus the children were presumed competent to testify. Court also strongly endorses the notion that children should be not further traumatized by court proceedings by holding that: *Of course, the court must protect a criminal defendant's right to a fair trial, but it must also protect the State's paramount interest in the welfare of the child. Making court-ordered adversarial examinations routinely available would raise a barrier to the prosecution of this kind of crime by maximizing the trauma that its victims must endure. At a minimum, therefore, the court should heed a custodial agency's opinion that pretrial access to the child for investigative or adversarial purposes is unnecessary or unwise. Given the difficulty of balancing these important interests, we conclude that, if the custodian of a child witness opposes access as not in the child's best interest, defendant must show that denial of access would likely result in an absence of "fundamental fairness essential to the very concept of justice" before the trial court need reach the question whether some type of access may appropriately be ordered.*
Court also denies the Defendants' claims that permitting three of the victims to testify via closed circuit television violated the confrontation rights of the Defendants on ground that: *Accordingly,"where necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, at least where such trauma would impair the child's ability to communicate, the Confrontation Clause does not prohibit use of a procedure" which preserves "the essence of effective confrontation" -- testimony by a competent witness, under oath, subject to contemporaneous cross-examination, and observable by the judge, jury,and defendant. Before invoking such a procedure, the district court must find that the child "would be traumatized, not by the courtroom generally,but by the presence of the defendant.*

Court also affirms trial court's denial of testimony regarding sexual activity of child victims on ground that defendants failed to timely notify government of intent to use as required by Rule 412.

Court rejects Defendants' argument that admission of statements made by

children at initial interview with FBI was hearsay on ground that the statements met the requirements of the residual hearsay exception, Fed. R. Evid. 803(24), because they had indicia of reliability and the children were also available for cross-examination.

Court affirms the lower court's decision rejecting the testimony of defendants' psychological expert who intended to testify that children's testimony was unreliable because it had been implanted in them by multiple inappropriate interrogations because such testimony invaded the province of the jury and did not satisfy the Daubert standard for expert testimony. Court also, in a closer call, upheld the Court's rejection of an offer of proof made by the expert on the ground that it was harmless error because the jury heard substantial evidence from the expert on the suggestibility of the methods of interrogation used.

Lastly, the Court upheld the denial of a new trial motion based on juror misconduct finding that a challenged juror was not a racist and affirmed the trial court's decision to allow the government to reopen its case after resting to better establish crimes occurred in Indian country.

4. ***United States v. LeCompte***, 99 F.3d 274 (8th Cir. 1996) Court reverses conviction for sexual contact with minor on ground that trial court committed error in permitting in other incidents of sexual contact between defendant and other children on theory that it demonstrated modus operandi of the defendant with children he allegedly molested. In dicta Court also cautions the trial court about deviating upward in sentence calculation on ground not listed in the sentencing guidelines.

5. ***United States v. Butler***, 56 F.3d 941 (8th Cir. 1995) Court affirms conviction for aggravated sexual abuse and one count of engaging in sexual contact in Indian country. Court rejects argument that child witness was subjected to leading direct examination on ground that there was only one leading question objected to and that leeway can be given in the direct examination of child victims. Court also upholds trial court's decision to permit in prior uncharged sexual act committed by the Defendant on same victim on ground that count of sexual contact is an intent crime and that the prior bad act shows intent and also it shows identity of the Defendant. Court also rejects a challenge to a witness credibility jury instruction which allegedly gave more credence to the testimony of child witnesses on ground it substantially advised the jury of its obligation to weigh all

witness testimony adequately.

4. ***United States v. Lawrence,*** 51 F.3d 150 (8th Cir. 1995) Court upholds a dismissal of an indictment charging the Defendant, a non-Indian, with sexual contact of a minor on ground that the victim in question, although meeting the requirement of having some degree of Indian blood, was not considered Indian by her community under the test laid out in St. Cloud v. United States, 702 F. Supp. 1456 (D.S.D. 1988). Those factors, which the Court considered in declining order of importance, are: 1) tribal enrollment; 2) government recognition formally and informally through receipt of assistance reserved only to Indians; 3) enjoyment of the benefits of tribal affiliation; and 4) social recognition as an Indian through residence on a reservation and participation in Indian social life. Id. at 1461.

5. ***United States v. Whitted,*** 11 F.3d 782 (8th Cir. 1993) Court reverses the conviction of the Defendant who was convicted of several counts of aggravated sexual abuse and contact on ground that the trial court erred in permitting the doctor who performed medical evaluations on the child victim to testify: *My final diagnosis was that [L.] had suffered repeated child sexual abuse. "Dr. Likness testified he recommended that L. not be exposed to her father in the near future.* The Court held that: *Because jurors are equally capable of considering the evidence and passing on the ultimate issue of sexual abuse, however, a doctor's opinion that sexual abuse has in fact occurred is ordinarily neither useful to the jury nor admissible.* Court also holds that issue could be raised on appeal even though Whitted did not make timely objection because the error was manifest and prejudiced the Defendant.

7. ***United States v. Knife***, 9 F.3d 705 (8th Cir.1993) Court upholds trial court's determination for sentencing purposes that crime of aggravated sexual contact had been committed by force because Defendant had laid on victim and threatened her if she told anyone. See also United States v. Shoulders, 1993 U.S. App. LEXIS 21660.

8. ***United States v. Eagle Thunder***, 893 F.2d 250 (8th Cir. 1990) Court affirms conviction of Defendant for aggravated sexual abuse denying his claim that he was prejudiced by the Court's failure to severe trial from

co-defendant's who was convicted of kidnapping child victim and that Court erred in denying admissibility of prior sexual activity testimony regarding child victim on ground that the Defendant failed to properly offer it.

9. ***United States v. St. Pierre***, 812 F.2d 417 (8th Cir. 1987)Court affirms conviction of unlawful carnal knowledge of Defendant's stepdaughter and rejects argument that Court's refusal to permit testimony regarding the minor child's maintenance of pornographic material and other statements regarding her alleged sexual promiscuity was in error, that the Defendant's right to due process was denied by Court's refusal to appoint another expert to evaluate the child and him to determine whether he met the profile of a sex offender. Court also upheld the government's use of prior sexual acts committed by the Defendant upon the child victim on ground that it tended to show motive, opportunity and intent.

10. ***United States v. Denoyer***, 811 F.2d 436 (8th Cir. 1987) Court upholds conviction under Assimilative Crimes Act for involuntary sodomy of Defendant's son and rejects argument that statements made by the son to a doctor were inadmissible hearsay. Court also upholds trial court's refusal to suppress statements made by the Defendant to a law enforcement officer to the effect that the Defendant suspected that child was victim of sexual abuse. Court also rejects the Defendant's argument that he should have been permitted to demonstrate to the jury that the community he lived in was replete with sexual abuse and that others could have committed the crime.

11. ***United States v. Azure***, 801 F.2d 336 (8th Cir. 1996)Court reverses conviction of Indian for carnal knowledge of a female under 16 on ground that the Court erred in allowing pediatrician to vouch for credibility of child sexual abuse victim, holding that the Court erred in allowing the pediatrician to testify that she saw no reason why the child's testimony would be untrue.

12. ***United States v. Renville,*** 779 F.2d 430 (8th Cir. 1984) Court upholds trial court's finding that court had jurisdiction under Assimilitative Crimes Act to prosecute Indian for forcible rape against daughter in Indian country because incest under Major Crimes Act referred to state law which did not define incest as including forcible rape. Court

also upholds statements made by minor to medical professionals as statements made to assist diagnosis.

13. ***United States v. Clark,*** 1998 U.S. App. LEXIS 22373 Court upholds conviction of person for committing aggravated sexual abuse on Red Lake Indian reservation and rejects argument that Red Lake reservation is not Indian country because Tribe had never ceded land to United States for allotment on ground that the reservation need not be ceded to US for Indian country status to apply.

14. ***United States v. Crow***, 148 F.3d 1048 (8th Cir. 1998) Court reverses the Defendant's sentence and remands on ground that base offense level was improperly determined because there was insufficient evidence to demonstrate force in conviction for aggravated sexual contact when only force was the removal of victim's clothing and threat made after the crime.

15. ***United States v. A.W.L.***, 1997 U.S. App. LEXIS 17916 Court upholds adjudication of juvenile as sexual offender finding that he was an Indian under the commonly-accepted definition of Indian laid out in United States v. Lawrence.

16. ***United States v. Jones,*** 104 F.3d 193 (8th Cir. 1997) Court holds that a tribal law enforcement officer need not notify a Defendant of possible federal charges when interrogating for tribal crime.

17. ***United States v. Gregor***, 98 F.3d 1080 (8th Cir. 1996) Court upholds conviction of resident of Wagner for statutory rape on ground that Wagner is within Indian country. (Note that this case may or may not be good law dependent upon the fate of federal court decisions regarding what exactly is the Yankton Sioux Indian reservation)

18. ***United States v. Cavanaugh***, 1996 U.S. App. LEXIS 10923 Court vacates sentence on conviction of aggravated sexual contact on ground that trial court did not adequately find that threats or force had been used by the Defendant in the commission of offense and that base offense level had not been established.

19. ***Nazarenus v. United States,*** 69 F.3d 1391 (8th Cir. 1995) Court affirms denial of habeas corpus application of defendant convicted of

aggravated sexual abuse claiming ineffective assistance of counsel because counsel had not objected to government continuance requests that permitted DNA exams which showed that he was a liar when he denied having sex with victim.

20. ***United States v. R.E.J.***, 29 F.3d 375 (8th Cir. 1994)Court affirms trial court's adjudication of juvenile as delinquent for committing two counts of sexual abuse of minor.

21. ***Shaw v. United States,*** 24 F.3d 1040 (8th Cir. 1996) Court reverses denial of evidentiary hearing on habeas corpus of Defendant convicted of several counts of aggravated sexual abuse on ground that Defendant was entitled to hearing on claim that trial counsel was ineffective by not offering evidence of prior sexual activity of minor victim to demonstrate source of venereal disease as well as alternative theory on torn hymen.

22. ***United States v. Yellow***, 18 F.3d 1438 (8th Cir. 1994) Court upholds conviction of Defendant for raping his disabled brother and minor sister on Red Lake reservation finding that the trial court did not err in admitting evidence of prior acts of sexual abuse against the victims on ground that it tended to show identity, motive and intent. Court also finds that the other acts were demonstrated by a preponderance of the evidence. Court also upholds the admission of statements made to a psychologist as statements made to assist in diagnosis under Fed. R. Evid. 803(4), rejecting the argument that such statements cannot be made to a psychologist. Court also upholds departure upward in sentence on ground that the victims suffered severe psychological harm based upon judge's observations and expert records.

23. ***United States v. Clown***, 925 F.2d 270 (8th Cir. 1991) Court affirms sentence for incest under ACA finding that sexual abuse was most analogous federal crime for application of federal sentencing guidelines.

24. ***United States v. Demarrias***, 876 F.2d 674 (8th Cir. 1989) Court upholds conviction of abusive sexual contact on ground that it is a lesser included offense of aggravated sexual abuse and sexual abuse of a minor. Court also upholds federal jurisdiction over offenses under Major Crimes Act finding that the Sexual Abuse Act amended Major Crimes Act. Court finally holds that the act of the presiding district court judge leaving

town and allowing the magistrate to accept the verdict did not violate the federal magistrate law.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
DECISIONS ON CHILD SEXUAL ABUSE

1. United States v. TSINHNAHIJINNIE, 112 F.3d 998 (9th Cir. 1997)(Conviction for child sexual abuse reversed because of fatal variance between date alleged in indictment and date proven by the United States because date proven may have been off reservation.)

2.United States v. Bighead, 128F.3d 1329 (9th Cir. 1997)(Court upholds the admissibility of the testimony of a forensic director of a Children's Advocacy Center regarding the characterstics of child sexual abuse victims, specifically with regard to the timing of the reporting and recollection of the abuse. Bighead argued that the district court erred in admitting Boychuk's expert testimony about certain characteristics of child sexual abuse victims, because it lacked foundation under Fed. R. Evid. 702 and under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993). He faults Boychuk's opinion as it went beyond her own observations, cf. United States v. Hadley, 918 F.2d 848 (9th Cir. 1990), but lacked the bases required by Fed. R. Crim. P. 16; and he contends that the district court should have determined whether her theories could be tested, were subjected to peer review and publication, had the potential for error, and were generally accepted in the field.

Boychuk was called as a rebuttal witness after the victim's ability to recall and to recount the incidents of sexual abuse vigorously had been challenged on cross-examination. Boychuk did not testify about the facts of this case, or about the particular victim, whom she had never examined. Rather, she testified about "delayed [**4] disclosure" and "script memory," which are typical characteristics she has observed among the more than 1300 persons she has interviewed who say they are victims of child abuse. As such, her testimony falls within Hadley. It holds that where an expert testifies to "general behavioral characteristics" based upon the expert's "professional experience" and does not rely on "novel scientific technique" or employ "any special techniques or models," Frye v. United States, 54 App. D.C. 46, 293 F. 1013 (D.C. Cir. 1923) is not implicated. 918 F.2d at 853. Daubert has supplanted the Frye test that had previously beenfollowed uniformly. However, we have already indicated that Daubert's tests for the admissibility of expert scientific testimony

do not require exclusion of expert testimony that involves specialized knowledge rather than scientific theory. United States v. Cordoba, 104 F.3d 225 (9th Cir. 1996). Boychuk's testimony consisted of her observations of typical characteristics drawn from many years experience interviewing many, many persons, interviewed because they were purported victims of child abuse.

3. United States v. Rivera, 43 F.3d 1291 (9th Cir. 1995)Court upholds aggravated sexual abuse conviction and concludes that the statements made by a fifteen year old victim to her mother that the Defendant had just raped here were excited utterances and thus exceptions to hearsay. Court also upholds testimony of doctor that the victim's story was consistent with medical examination as not being violative of the rule that a witness cannot bolster another's testimony).

4. United States v. Hadley, 918 F.2d 848 (9th Cir. 1990)(In notorious case involving former BIA teacher on the Navajo reservation, the Court upholds convictions for aggravated sexual abuse and abusive sexual contact. Court upholds the use of other instances of sexual abuse committed by the Defendant on ground that it demonstrated modus operandi and intent. Court also upholds the use of expert testimony regarding the characteristics of child sexual abuse victims.)

5. United States v. LOMAYAOMA, 86 F3d 142 (9th Cir. 1996)(Court holds that the amendments to the Major Crimes Act to include child sexual abuse does not violate the Constitution because Congress has plenary authority to address Indian affairs).

6, United States v. Frederick, 78 F.3d 1370 (9th Cir. 1996)Court reverses conviction for aggravated sexual abuse because of cumulative impact of numerous errors involving the admission of testimony regarding prior bad acts by Defendant and inadmissible hearsay.)

7.United States v. Chatlin, 51 F.3d 869 (9th Cir. 1996)(Court vacates sentence under Federal Sentencing Guidelines because of upward departure based upon use of acts that were dismissed in plea agreement).

UNRESOLVED ISSUES IN OKLAHOMA TRIBAL JURISDICTION

by C. Steven Hager
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"Indian Land" in Oklahoma is difficult to define. It is generally agreed that the only Oklahoma reservation, per se, lies underground in Osage county.[1] Trust property, held by the United States on behalf of a particular person, is clearly Oklahoma Indian land. Restricted property, as held by members of the Five Civilized Tribes, is also Indian land. Housing cluster units built and serviced by the tribal housing authorities used to be Indian land, but are no longer under current case law.

Because of the sometimes interpretive nature of Indian land in Oklahoma, Tribal and Federal Judges face threshold determinations of jurisdiction in almost every criminal case brought before them. A variety of issues then branch off from that initial determination of jurisdiction.

Overview of the Jurisdictional Boundaries of Tribal Courts

Tribal criminal jurisdiction begins with a determination of who was involved in the crime and and where it occurred. It must be determined if the site of the crime falls within the federal definition of "Indian Country" This is defined at 18 U.S.C.A. § 1151, which states:

> "Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country" , as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory

1 See attachment 1, Map of Oklahoma.

thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same."

Under §1151, Indian country in Oklahoma must fit within one of these three categories in order for tribal or federal courts to have jurisdiction. It is generally assumed that "reservations" per se do not apply in Oklahoma, with the exception of mineral interests in Osage county. Under the rulings of Alaska v. Native Village of Venetie, 118 S.Ct. 948 (1998) and United States v. Adair, 111 F.3d 770 (10th Circuit 1998), it is questionable as to whether dependent Indian communities exist in Oklahoma. This leave §1151 (c) as the sole basis for tribal jurisdiction.

It is clear that tribes hold jurisdiction over tribal members who reside within the boundaries of Indian country.[2] It is just as clear that tribes hold no criminal jurisdiction over non-Indians.[3] Beyond that, personal jurisdiction becomes somewhat ambiguous.[4] The Supreme Court, in Duro v. Reina, ruled that tribes did not have authority over non-member Indians for crimes that occurred on tribal land.[5] This was promptly overruled by Congress, which gave tribes criminal jurisdiction over all Indians for crimes that occurred on tribal land.[6]

Tribal courts have exclusive jurisdiction over non-major crimes committed by Indians against other Indians in Indian country, and over victimless crimes committed by Indians in Indian country. Tribal courts share jurisdiction with federal courts over non-major crimes committed by Indians against non-Indians in Indian

2 Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); State v. Littlechief, 573 P.2d 263 (Okl. Crm. 1978).

3 Duro v. Reina, 495 U.S. 676 (1990); Ross v. Neff, 905 F.2d 1349 (10th Circuit 1990).

4 See attachment 2, Table of Jurisdiction.

5 Duro v. Reina, 495 U.S. 676 (1990).

6 See 25 U.S.C. § 1301 (2). What Congress gives, however, Congress can take away.

country. Under the General Crimes Act, the federal court may prosecute such a crime, but Indians who have been punished by the tribe are excluded from the Act's coverage.[7]

At present, tribal criminal jurisdiction over Indians in Indian country is complete, unless federal statute limits it. These limitations include major crimes as defined in the Major Crimes Act, 18 U.S.C.A. § 1153.[8] The Major Crimes Act applies to the crimes if committed by an Indian, whether or not the victim is an Indian or a non-Indian. It is also likely that tribes have concurrent jurisdiction over Indian perpetrators of these crimes.[9] Double jeopardy would not apply to dual prosecutions, in that jurisdiction comes from a different sovereignty.[10]

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7 18 U.S.C.A. § 1152 states: "Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except in the District of Columbia, shall extend to Indian Country."

This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offenses in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively."

8 18 U.S.C.A. § 1153 states: "(a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

(b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense."

9 Wetsit v. Stafne, 44 F.3d 823 (9th Circuit 1995); See also Clinton, Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze, 18 Ariz. L. Rev. 503 (1976).

See also Patootas v. Colville Conferderated Tribes, 24 Ind. L. Rep. 6025 (Colv. Ct. App. 1997), which held that a criminal defendant convicted of crimes in both federal and tribal court could not receive time served in federal custody for his tribal sentence, since the tribal sentence came from an independent sovereign.

10 United States v. Wheeler, 435 U.S. 313 (1978); see also State v. Marek, 736 P.2d 1314 (Idaho 1987); Canby, William. American Indian Law; Page 160, 3rd Edition, West Publishing Group, 1999.

The Potential of Jurisdictional Problems

A. Restricted Land Titles

Oklahoma poses numerous traps in the prosecution of some cases that extend beyond the obvious. The first is one unique to eastern Oklahoma: is restricted land always Indian country?

Under the Act of August 4, 1947, Congress placed the restricted property held by full-blooded allottees of the Five Civilized Tribes under state law.[11] The types of issues under the law include sale of restricted property, partition, tax sales, and probate issues. For example, should a full-blooded Indian parent wish to disinherit a child, the will must be approved by an Oklahoma District Court judge in order for the will to be valid. For a variety of reasons, the quagmire of restricted land rules has resulted in restricted land that may be held by any number of people in an undivided interest. However, for the land to remain in restriction, the owner must be of one-half blood or greater.[12] Should an inheriting person be of less than one-half blood, that undivided interest will lose its restricted status and be fee land, which is taxable and can be sold without court approval. This results in an undivided land interest held in restriction by tribal members of one-half blood or greater, held without restriction by tribal members of less than one-half blood, and held in fee by non-Indians who have purchased their interest from tax sale, or from non-restricted descendents, or through a court-approved sale from restricted interests.[13]

The potential is great, then, for having restricted tracts of Indian land which are not actually totally restricted. If an Indian commits a major crime on this tract of

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11 See Act of August 4, 1947; 25 U.S.C.A. § 355 - 357; 25 U.S.C.A § 375; 58 O.S. § 901 et seq.

12 Id.

13 58 O.S. § 901.

land, who holds jurisdiction? What if it is a non-Indian perpetrator against an Indian victim? Would it matter if the Indian was of one-half blood or greater? Section 1151 (c) establishes that if the Indian title has not been extinguished, the land is Indian country. However, how much of the title must be extinguished before the land ceases to be Indian country? Land held in restricted and non-restricted undivided interest carries a concurrent level of ownership. Can one characteristic be raised above all others? Furthermore, does the characterization of the land as restricted become an invidious racial classification?

This case has only been addressed one time in Oklahoma. In Cravatt v. State, a Choctaw man committed a major crime on restricted country. When the state brought charges, the man and the United States argued that jurisdiction lay exclusively in federal court. The Court of Criminal appeals agreed, noting that only one seventh of an undivided interest was out of restriction.[14] However, the Court is silent as to the result if the inverse were before them.

There is a similar question regarding the adverse possession of restricted lands. Under Oklahoma law, open and notorious possession of land for fifteen years results in adverse possession. Because restricted property can be adversely possessed,[15] the question arises as to criminal jurisdiction thereon. If the land has been adversely possessed, but title has not changed, does the land retain Indian country status?

B. The Jurisdiction of "Extinguished" Reservations

Some argue that the restricted land issue is moot, because all of eastern Oklahoma remains Indian country. Unlike the western tribal land,[16] the question

14 Cravatt v. State, 825 P.2d 277, 1992 OK CR 6 (Ct. Cr. 1992). Under 25 U.S.C.A. § 355, land partitioned to a full-blooded Indian remains restricted, but land sold at partition loses all restrictions. See also Brown v. Stufflebean, 187 F.2d 347 10th Cir. 1951).

15 United States v. Fuston, 143 F.2d 76 (10th Circuit, 1944).

of extinguishment of the reservations of the five civilized tribes has never been clearly addressed; indeed, the issue was the Native American Law Student's Association's (NALSA) national moot court competition question in 1999. Usually, a termination or extinguishment occurs only if Congress makes a clear statement ending the reservation status of the land.[17] There has been no clear statement ending the reservation status of eastern Oklahoma. If there is no other basis for termination, then the Choctaw, Cherokee, Creek, Chickasaw and Seminole reservation lands remain "Indian country."

Solem v. Bartlett provides the best review to determine extinguishment.[18] Under Solem, the Court first looked to the language of the statute, for "explicit reference to cession or other language evidencing the present and total surrender of all tribal interests."[19] The Court stated that if such language existed, and if there was a commitment to compensate the tribe for the opened land, an almost insurmountable presumption favored extinguishment.[20] If such explicit language was not present, it was still possible to find extinguishment, although such an implication would not be easily found. Those factors included the manner in which the transaction was arranged at the time, the the subsequent treatment of the area by the respective governments, and the demographic consequences of the opening.

16 See Tooisgah v. United States, 186 F.2d 93 at 97, (10th Circuit 1950), addressing Apache lands; Ellis v. State, 386 P.2d 326 (Okl.Cr. 1963), dealing with Cheyenne lands; Ex Parte Wallace, 162 P.2d 205 (Okl.Cr. 1945), dealing with Comnache land; and Williams v. State, 393 P.2d 887 (Okl.Cr. 1964), dealing with an unknown tribe.

17 Seymour v. Superintendent, 368 U.S. 351 (1962); Mattz v. Arnett, 412 U.S. 481 (1973); DeCoteau v. District County Court, 420 U.S. 425 (1975); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977); and Solem v. Bartlett, 465 U.S. 463 (1984).

18 Solem v. Bartlett, 465 U.S. 463 (1984).

19 Solem v. Bartlett, 465 U.S. 463 at 470 - 471 (1984).

20 Solem v. Bartlett, 465 U.S. 463 at 470 - 471 (1984).

While there has been no explicit language in Oklahoma, the language of Solem provides pause to litigators wishing to pursue this argument. It states:[21]

> "We have recognized that who actually moved onto opened reservation lands is also relevant to deciding whether a surplus land Act diminished a reservation. Where non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, we have acknowledged that *de facto*, if not *de jure*, diminishment may have occurred."

While no *de jure* diminishment has occurred, it would be relatively difficult, when considering the entire region of the state, to demonstrate that the majority non-Indian population has not created a *de facto* loss of Indian character to the area.

While the Oklahoma courts have not directly addressed this issue, a recent case may well demonstrate how their decision would go.[22] In Hanes v. State, Cherokee Indian Stephen Hanes was fined for catching two blue catfish in a city park bordering the Neosho (Grand) River in Miami, Oklahoma. The facts of the case were undisputed: Hanes is a member of the Cherokee Nation; the the city park in Miami was a former part of the Cherokee reservation; the land had been allotted to a member of the Cherokee Nation, and the Allottee had then conveyed the land in fee simple to the city of Miami.

Mr. Hanes's argument centered on whether or not the river remained Indian country. The key subpoint of this argument was the navigatability of the river. If the river was non-navigable, then the city of Miami would own the river along the land to the center of the stream.[23] If the river is navigable, however, the conveyance of

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21 Solem v. Bartlett, 465 U.S. 463 at 471 (1984).

22 Hanes v. State, 1998 OK CR 74, 973 P.2d 330 (Okl. Cr. 1999).

23 Hanes v. State, 1998 OK CR 74 at ¶ 7, 973 P.2d 330 (Okl. Cr. 1999), citing St. Paul & P.R. Co. v. Schurmeir, 19 L.Ed. 74 (1868) and Brown v. Huger, 16 L.Ed. 125 (1858).

the river would not be assumed and it would remain Cherokee property.[24]

This issue would initially appear to be easily resolved, as both parties stipulated that the Neosho River, at the point of the arrest, was navigable.[25] Since the navigability of the River was agreed upon, it would appear that the river was Indian country. However, the Court of Criminal Appeals chose not to accept that stipulation, and began a fact-finding de novo review that led inexorably to a determination that the river was not navigable and that the title had passed.[26] What is interesting in this opinion, besides that sudden grant of authority as a finder of fact that the Court gives itself, is that the question of extinguishment is never raised, but rather, assumed.[27]

The Court does not approach the issue of whether the land remains Cherokee jurisdiction regardless of the navigability of the river.[28] Granted, the issue is not raised. However, in the Court's new-found ability for de novo review, the absence of this issue is troubling in light of the extensive history examined in the opinion.[29]

The dissent by Justice Lumpkin is strongly worded. He is particularly troubled by two issues: first, the ability of the Court to justify its de novo review ("... a cancer

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24 Hanes v. State, 1998 OK CR 74 at ¶ 7, 973 P.2d 330 (Okl. Cr. 1999), citing U.S. v. Holt State Bank, 270 U.S. 49 (1922).

25 Hanes v. State, 1998 OK CR 74 at ¶ 3, 973 P.2d 330 (Okl. Cr. 1999). On appeal, realizing the error of the stipulation, the State asked to be relieved of the stipulation.

26 Hanes v. State, 1998 OK CR 74 at Dissent, ¶¶ 2 - 8 , 973 P.2d 330 (Okl. Cr. 1999).

27 Hanes v. State, 1998 OK CR 74 at ¶¶ 22 - 25, 973 P.2d 330 (Okl. Cr. 1999). "We do not address state regulation of fishing within (emphasis from the Court) Indian country, for those facts are not before us."

28 Hanes at ¶ 25, ¶ 27.

29 Hanes v. State, 1998 OK CR 74 at ¶¶ 22 - 27, 973 P.2d 330 (Okl. Cr. 1999).

which has metastasized in this opinion."),[30] and second, by the Court's conjoining of tribal history.[31] The problem with *Hanes,* unfortunately, is what is not addressed, as well as what is.[32]

C. Dependent Indian Communities: A Lost Cause?

Dependent Indian Communities have a long history in Oklahoma, primarily as housing clusters for Mutual Help and Occupancy (MHO) homes.[33] However, the issue of tribal criminal jurisdiction over the housing units has been destroyed by three cases from three different courts. The cases, Eaves, Adair, and Venetie,[34] restricted the definition of Dependent Indian Communities. The combined effect has been to practically eliminate the Dependent Indian Community in Oklahoma.

By far the most devastating ruling is Alaska v. Native Village of Venetie Tribal Government, 118 S.Ct. 948 (1998). Venetie established two conditions over any interpretation of a dependent Indian community. First, the land must be set aside for

30 Hanes v. State, 1998 OK CR 74 at Dissent, ¶ 5 (Okl. Cr. 1999).

31 Hanes v. State, 1998 OK CR 74 at Dissent, ¶¶ 6 - 7 (Okl. Cr. 1999). "In addition, the land at issue in that case (Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970)) was never allotted to tribe members by the Cherokees prior to the Act of April 27, 1906... The land at issue here was allotted." The issue of extinguishment is not raised by the dissent.

32 It is an interesting aside to note that the attorney for Mr. Hanes was Chadwick Smith, who has just been elected the Principal Chief of the Cherokee Nation of Oklahoma, the second-largest tribe in the nation. If attorney Smith is willing to pursue an appeal when the penalty was a total of $20.00 in fines, Chief Smith may well prove to be a strong advocate for tribal rights. This case may be a harbinger of issues yet to be decided.

33 As examples, see Lewis v. Sac and Fox Housing Authority, 1994 OK 20, 896 P.2d 503 (Okl. 1994); Housing Authority of the Seminole Nation v. Harjo, 790 P.2d 1098 (Okl. 1990); Eaves v. State, 1990 OK CR 42, 795 P.2d 1060 (Okl. Cr. 1990); Ahboah v. Housing Authority of the Kiowa Tribe, 660 P.2d 625 (Okl. 1983); and Housing Authority of the Choctaw Nation v. Craytor, 600 P.2d 314 (Okl. 1979).

34 Eaves v. State, 1990 OK CR 42, 795 P.2d 1060 (Okl. Cr. 1990);Alaska v. Native Village of Venetie, 118 S.Ct. 948 (1998); and United States v. Adair, 111 F.3d 770 (10th Circuit 1998).

the use of Indians by the Federal government, and, second, the land must be under the superintendence of the Federal government.[35] The Supreme Court found that neither of these conditions were fulfilled in the Alaskan village, and, as such, the land was not § 1151 Indian country.[36]

In Oklahoma, two cases had reached the same conclusion prior to Venetie. In Adair, the Tenth Circuit found that a federal criminal prosecution improper of a Cherokee living in a Mutual Help and Occupancy home on a tract with three other homes, in a traditional Cherokee area, surrounded by restricted land. The Court did not really reach the level of analysis in Venetie, in that the Adair decision found that no community existed, in that the area had no stores, schools, or other elements of a town.[37] The absence of an obvious community was sufficient to defeat the federal charges.

The Eaves case was decided in 1990, and, until the Oklahoma Supreme Court issued its Lewis decision, represented a split in the way civil and criminal jurisdictions were considered in Mutual Housing clusters.[38] The Court of Criminal Appeals found that the Osage housing authority cluster was not a dependent Indian community because the tribal housing authority was incorporated as a state agency.[39] Because the underlying land was owned by a state agency, there was no tribal interest directly involved.[40]

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35 Alaska v. Native Village of Venetie, 118 S.Ct. 948 at 955 (1998).

36 Alaska v. Native Village of Venetie, 118 S.Ct. 948 at 955 - 956 (1998).

37 United States v. Adair, 111 F.3d 770 (10th Circuit 1998).

38 Shortly after the Eaves decision, the Oklahoma Supreme Court ruled in Housing Authority of the Seminole Nation v. Harjo, 790 P.2d 1098 (Okl. 1990) that Mutual Help and Occupancy homes could be dependent Indian communities. In Lewis v. Sac and Fox Housing Authority, 1994 OK 20, 896 P.2d 503 (Okl. 1994, the Court called the language of Harjo "plainly overbroad," and held that state courts had concurrent jurisdiction at a minimum over MHO homes.

39 Eaves v. State, 1990 OK CR 42 at ¶¶ 7 - 8, 795 P.2d 1060 (Okl. Cr. 1990).

40 Eaves v. State, 1990 OK CR 42 at ¶ 7, 795 P.2d 1060 (Okl. Cr. 1990). A strong dissent by Justice

Any one of these cases eliminates the general proposition of dependent Indian communities in Oklahoma. Taken as a group, it is highly unlikely that such an argument can be raised successfully.[41]

D. Jurisdictional Border Disputes

Jurisdictional disputes in Oklahoma are not limited to state - tribal disputes. Tribes have also challenged each other's jurisdiction in areas where boundaries are unclear. In particular, Shawnee, Oklahoma, is a location where tribal frictions sometimes come to bear. Absentee Shawnee, Citizens Band Pottawatomie, Kickapoo, and Sac and Fox jurisdictions, housing units, and tribal members all coexist in Shawnee, and tribal jurisdiction have been challenged by other tribal governments.[42] These conflicts have the potential to challenge tribal jurisdiction for all tribes, not just the tribes in dispute.

A possible solution to these challenges has been suggested: cross-deputization of tribal law officers between the tribes. After the Tenth Circuit issued its Ross v. Neff decision,[43] a valid concern existed about Indian country becoming a new "no man's land," much as the Cherokee Outlet was in the 19th century. To avoid this problems, most tribes entered into cooperative cross-deputization agreements between tribal officers and county or city law enforcement. This eliminated the concern about lawlessness, and also served to increase ties between tribal and local government.

Lane pointed out that the tribal housing authorities, while incorporated under state law, is designed as an arm of tribal empowerment. (Dissent at ¶ 4).

41 However, some tribal courts, among them the Kaw and the Absentee Shawnee, have held that they have exclusive jurisdiction over MHO housing cases.

42 Similar shared areas of jurisdiction exist in Anadarko, the Ponca City area, and Miami, Oklahoma.

43 Ross v. Neff, 905 F.2d 1349 (10th Circuit 1990).

Cross - deputization between tribes would solve the immediate challenge of shared jurisdiction, and might serve to limit tribal friction in this area.

E. Court of Indian Jurisdiction - Double Jeopardy?

As noted, it is likely that tribes have concurrent jurisdiction over Indian perpetrators of crimes that the federal government could prosecute under the Major Crimes Act.[44] In this situation, double jeopardy would not apply to dual prosecutions, in that jurisdiction for each would come from a different sovereignty.[45]

As tribal prosecutors become more aggressive about this type of prosecution, an issue has been suggested that may subject some prosecutions to the double jeopardy rule of the United States Constitution. Oklahoma is an amalgam of true tribal courts and Courts of Indian Offenses. The latter, also called "CFR Courts," are operated by Bureau of Indian Affairs funds and personnel. Because the funding and court rules come from the Department of Interior, is the spectre of double jeopardy raised in a dual prosecution?

Although this particular issue has not been litigated, Federal courts have agreed that Courts of Indian Offenses, while possessing federal administration, operated based on the sovereignty of the tribe.[46] The Court in Tillet v. Lujan stated that CFR

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44 Wetsit v. Stafne, 44 F.3d 823 (9th Circuit 1995); See also Clinton, Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze, 18 Ariz. L. Rev. 503 (1976).

See also Patootas v. Colville Conferderated Tribes, 24 Ind. L. Rep. 6025 (Colv. Ct. App. 1997), which held that a criminal defendant convicted of crimes in both federal and tribal court could not receive time served in federal custody for his tribal sentence, since the tribal sentence came from an independent sovereign.

45 United States v. Wheeler, 435 U.S. 313 (1978); see also State v. Marek, 736 P.2d 1314 (Idaho 1987); Canby, William. American Indian Law; Page 160, 3rd Edition, West Publishing Group, 1999.

46 Williams v. Lee, 358 U.S. 217 (1959); Tillet v. Lujan, 931 F.2d 636 (10th Circuit 1991); Collifflower

Courts, while having some characteristics of an agency of the federal government, "also function as tribal courts; they constitute the judicial forum through which the tribe can exercise its jurisdiction..."[47] If the court is an arm of the tribe, its sovereignty originates with the tribe, not the federal administration.[48] It would appear that an argument claiming double jeopardy would be unlikely to prevail, but the issue has not been addressed by a court.[49]

Conclusion

Criminal jurisdiction in Indian country is difficult to determine at best. Oklahoma's unique Indian structure and status add layers of nuance to the challenges that normally face tribal and Federal Indian law judges. The issues discussed in this paper are by no means resolved or certain. Jurisdiction remains a sword of Damocles in many cases before tribal and federal courts.

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v. Garland, 342 F.2d 369 (9th Circuit 1965); Tillet v. Hodel, 730 F. Supp. 381 (W.D. Okl. 1990); Learned v. Cheyenne-Arapaho Tribe, 596 F. Supp. 537 (W.D. Okl. 1984); U.S. v. Clapox,35 F. Supp. 575 (D. Ore. 1888).

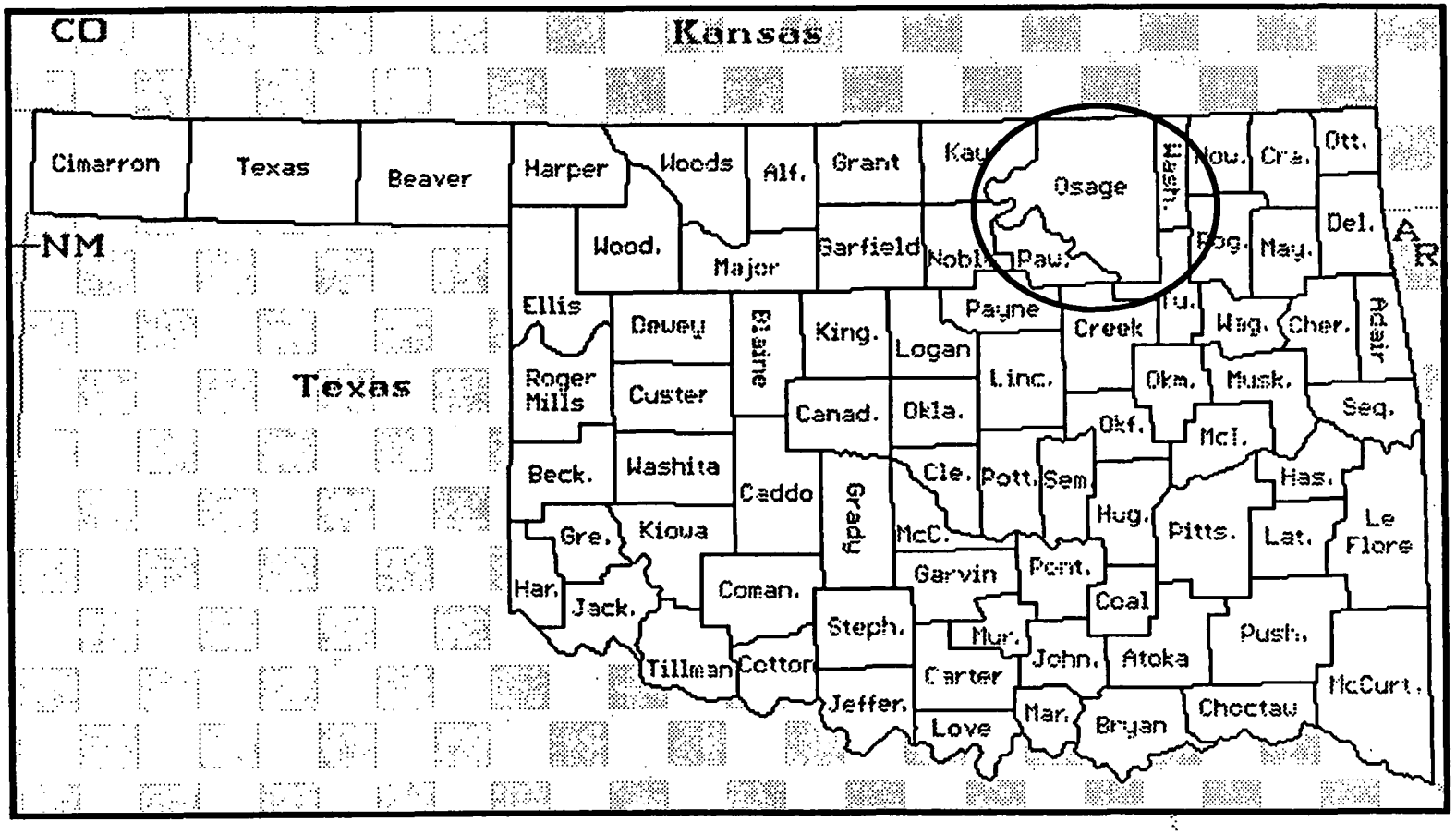
See also U.S. v. Wheeler, 435 U.S. 313 (1978) and Takes Gun v. Crow Tribe of Indians, 448 F. Supp. 1222 (D. Montana 1978).

47 Tillet v. Lujan, 931 F.2d 636 at 645 - 646 (10th Circuit 1991).

48 Id.

49 See Tillet v. Hodel, 730 F. Supp. 381 at 382 - 383 (W.D. Okl. 1990), cited with approval in Tillet v. Lujan, 931 F.2d 636 (10th Circuit 1991), finding that the establishment of CFR Courts are valid exercises of federal authority, and that federal courts should not, as a matter of comity, intervene unless tribal court remedies have been exhausted.

CRIMINAL JURISDICTION IN INDIAN COUNTRY			
DEFENDANT/VICTIM	TYPE OF CRIME	JURISDICTION	JURISDICTIONAL AUTHORITY
INDIAN/INDIAN	MAJOR	FEDERAL/TRIBAL	18 U.S.C. § 1153
INDIAN/INDIAN	NON-MAJOR	TRIBAL	INHERENT TRIBAL SOVEREIGNTY
INDIAN/VICTIMLESS	VICTIMLESS	TRIBAL	INHERENT TRIBAL SOVEREIGNTY
INDIAN/NON-INDIAN	MAJOR	FEDERAL/TRIBAL	18 U.S.C. § 1153
INDIAN/NON-INDIAN	NON-MAJOR	FEDERAL/TRIBAL	18 U.S.C. § 1152
NON-INDIAN/INDIAN	MAJOR, NON-MAJOR	FEDERAL	18 U.S.C. § 1152
NON-INDIAN/NON-INDIAN	MAJOR, NON-MAJOR	STATE	10TH AMENDMENT
NON-INDIAN/VICTIMLESS	VICTIMLESS	STATE	10TH AMENDMENT



Indian Reservations in Oklahoma

While the entire state was at one time "Indian Territory," the land runs of the late 1800's opened vast tracts of the land to non-Indian settlement. At present time, Tribal jurisdiction is scattered throughout Oklahoma in the form of trust, tribal, and restricted lands. The only reservation recognized as such is a mineral reservation underlying Osage County in the Northeast quadrant of the state. This land is held in reservation status on behalf of the "headright" owners of the Osage Nation of Oklahoma.

INDIAN COUNTRY - JURISDICTIONAL ISSUES

(A) Reservation Land:

I No formal reservations in Oklahoma;

II Lands held in Trust for Tribal use;

Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe, 498 U.S. 505, 111 S.Ct. 905 (1991).
United States v. John, 437 U.S. 634, 98 S.Ct. 2451 (1978).
Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 115 S.Ct. 2214 (1995).
Cheyenne-Arapaho Tribes v. State of Oklahoma, 618 F.2d 665 (10th Cir. 1980).
Langley v. Ryder, 778 F.2d 1092 (5th Cir. 1985).
United States v. Azure, 801 F.2d 336 (8th Cir. 1986).

(B) Dependent Indian Communities:

District Court decision in *United States v. Adair,* CR-95-03-S (Eastern District Oklahoma) and, *United States v. Blair,* CR-95-14-S (Eastern District of Oklahoma).

(C) Allotments:

Oklahoma Indian Land Titles Annotated, Semple.

FILED
United States Court of Appeals
Tenth Circuit

AUG 3 1999

PATRICK FISHER
Clerk

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

HOLLIS EARL ROBERTS,

Defendant-Appellant.

No. 98-7057

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA
(D.C. No. 95-CR-35-S)**

Susan G. James, Susan G. James & Associates, Montgomery, Alabama, for Defendant-Appellant.

Sheldon J. Sperling (Bruce Green, United States Attorney, and Linda A. Epperley, Assistant United States Attorney, with him on the briefs), First Assistant United States Attorney, Muskogee, Oklahoma, for Plaintiff-Appellee.

Before **PORFILIO, MCWILLIAMS,** and **BALDOCK,** Circuit Judges.

PORFILIO, Circuit Judge.

On June 9, 1995, Hollis Earl Roberts was charged in the United States District Court for the Eastern District of Oklahoma with two counts of aggravated sexual abuse in violation of 18 U.S.C. § 2241; one count of sexual abuse, in violation of 18 U.S.C. § 2242, and five counts of abusive sexual contact, in violation of 18 U.S.C. § 2244. At all relevant times, Mr. Roberts was Principal Chief of the Choctaw Nation of Oklahoma, as well as a member of the tribe, and the three victims were employees and members of the Choctaw Nation. A jury trial began on June 2, 1997, and four days later, the jury found Mr. Roberts guilty on three counts. The district court ordered Mr. Roberts detained pending sentencing, and later sentenced him to three concurrent prison terms. Mr. Roberts' motion in the district court challenging jurisdiction under 28 U.S.C. § 2255, as well as his motion with this court seeking to stay this appeal, have been denied. On appeal, Mr. Roberts argues the district court lacked subject matter jurisdiction because the alleged offenses did not occur in Indian Country; the government failed to prove an essential element of the offense, namely, that the offense occurred in Indian Country; the district court improperly admitted testimonial evidence; the prosecutor engaged in improper conduct; and the district court improperly applied the sentencing guidelines. Exercising jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, we affirm all aspects of the conviction and sentence.

I.

Mr. Roberts served as Principal Chief of the Choctaw Nation of Oklahoma for 19 years, holding "the supreme executive power of this Nation." Constitution of the Choctaw Nation of Oklahoma, art. VI, § 1. The Constitution further provides the Chief "shall fix and prescribe salaries and allowances for all elected or appointed officials and employees of the Choctaw Nation except the members of the Tribal Council and the Tribal Court," *id.* at art. VII, § 3, and "shall have the power to remove any official appointed by him except for members of the Tribal Court and the Tribal Council." *Id.* at art. VII, § 8. Trial testimony established the Choctaw Nation payroll was $22 million per annum; the total annual income of the tribe was $125 million; and the Chief's salary was $120,000 plus benefits in 1995.

At trial, more than ten women, all members and employees of the Choctaw Nation, described how, during his tenure as Principal Chief, Mr. Roberts forced unwanted sexual acts on them, usually in his office at the Tribal Complex. Angella Jean Gilbert, Misty Grammar, and Kobi Dawn Russ testified to specific acts of abusive sexual contact and aggravated sexual assault, and the other women testified to extrinsic acts. The defense presented seven witnesses, all tribal employees, to support the defendant's theories the women had engaged in consensual sex with Mr. Roberts or their allegations were part of a political ploy to unseat him as Principal Chief. The jury returned guilty verdicts on Count I, abusive sexual contact against Angella Jean Gilbert, in violation of 18 U.S.C. § 2244; Count II, aggravated sexual abuse against Angella Jean Gilbert, in violation of

8 U.S.C. § 2241(a)(1); and Count VI, abusive sexual contact against Kobi Dawn Russ, n violation of 18 U.S.C. § 2244; and not guilty verdicts on the other four counts.

II.

The charged conduct occurred at the Choctaw Nation Tribal Complex, a property which is owned by the United States in trust for the Choctaw Nation. The Major Crimes Act, 18 U.S.C. § 1153, confers on the United States exclusive jurisdiction over certain offenses, including those alleged against Mr. Roberts, committed in Indian Country, and the district court accordingly premised jurisdiction in this case on its finding the alleged criminal acts occurred within Indian Country. Although his counsel acknowledged at oral argument the United States owns the Tribal Complex property, Mr. Roberts contends trust status does not suffice to establish Indian Country; certain irregularities invalidated the process by which the Department of the Interior attempted to take the land into trust; and the Secretary of the Interior (Secretary) lacks authority to take this, or any land, into trust for an Indian tribe. The district court found these arguments unpersuasive, as do we.

We review *de novo* Mr. Roberts' several challenges to the district court's exercise of jurisdiction, *see* ***United States v. Brown***, 164 F.3d 518, 521 (10th Cir. 1998), and first consider his most fervent argument that the property's trust status does not establish Indian Country. With exceptions not relevant to this case, 18 U.S.C. § 1151 defines Indian Country as:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Mr. Roberts argues here, as he did below, the Tribal Complex satisfies none of the three categorical definitions of Indian Country. Following Mr. Roberts' motion to dismiss for lack of subject matter jurisdiction, the district court held a hearing. The government presented the testimony of Tom Williams, Director of Real Estate Services for the Choctaw Nation; Glendel Rushing, Bryan County Assessor; and Mary Downing, Realty Specialist for the Bureau of Indian Affairs (BIA). Mr. Roberts presented the testimony of Dennis Springwater, Acting Deputy Area Director for the BIA. Based on their testimony, the district court derived the facts summarized here.

The Choctaw Nation Tribal Complex serves as headquarters of the Nation, and between sixty and seventy employees work there. In addition to the various administrative functions conducted at the headquarters, the Choctaw Nation operates bingo games on the Tribal Complex property. The building is located in Durant, Oklahoma, and formerly housed the Oklahoma Presbyterian College for girls. In 1976, the property was deeded to the United States of America in trust for the Choctaw Nation of Oklahoma so long as the premises are used for the purposes of the Choctaw Nation.

See United States v. Roberts, 904 F. Supp. 1262, 1264-65 (E.D. Okla. 1995) (conducting an extensive review of the chain of title). The Red River Valley Historical Association operates its headquarters and museum in buildings located at the Tribal Complex pursuant to a lease with the Choctaw Nation. Since 1976, both the BIA and Choctaw Nation have treated the property as trust land, as has the State of Oklahoma which considers it beyond the state's taxation jurisdiction and does not list it on the state ad valorem tax rolls. ***See id.*** Based on the evidence and the Indian Country case law, the district court held this trust land, even though not a formally declared reservation, was Indian Country. ***See id.*** at 1265-68. We believe the court's conclusion was well-founded in precedent.

The United States' acquisition of the Tribal Complex property in trust for the Choctaw Nation occurred pursuant to the Indian Reorganization Act (IRA) which provides, in part:

> The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments . . . for the purpose of providing land for Indians.
>
> . . . .
>
> Title to any lands or rights acquired pursuant to sections . . . 465 [and others] shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

25 U.S.C. § 465. The Supreme Court has had several occasions to comment on the jurisdictional status of tribal trust land. In ***Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe***, 498 U.S. 505, 511, 111 S. Ct. 905, 910 (1991), the Supreme Court held the tribe's sovereign immunity from state taxes applied to cigarette sales on tribal trust land, even though that land did not constitute a "formally designated 'reservation.'" The Court explained:

> The State contends that the Potawatomis' cigarette sales do not, in fact, occur on a "reservation." . . . [No] precedent of this Court has ever drawn the distinction between tribal trust land and reservations that Oklahoma urges. . . . We [have] stated that the test for determining whether land is Indian country does not turn upon whether that land is denominated "trust land" or "reservation." Rather, we ask whether the area has been " 'validly set apart for the use of the Indians as such, under the superintendence of the Government.'"

Id. (citing ***United States v. John***, 437 U.S. 634, 650, 98 S. Ct. 2451 (1978) (Major Crimes Act provides a proper basis for federal prosecution of a crime occurring on lands held in trust by the federal government for the benefit of the Mississippi Choctaw Indians))[1]; ***see also Oklahoma Tax Comm'n v. Chickasaw Nation***, 515 U.S. 450, 453 n.2, 115 S. Ct. 2214 (1995) (Oklahoma may not apply its motor fuels tax to fuel sold by the tribe in Indian Country and "'Indian country' as Congress comprehends that term, ***see*** 18 U.S.C. § 1151, includes formal reservations and informal reservations, dependent

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[1] In ***United States v. John***, 437 U.S. 634, 649, 98 S. Ct. 2451 (1978), the land in question had been proclaimed a reservation at the time of suit rendering this discussion of the status of land held in trust dicta.

Indian communities, and Indian allotments, whether restricted or held in trust by the United States."); ***Oklahoma Tax Comm'n v. Sac and Fox Nation***, 508 U.S. 114, 123, 113 S. Ct. 1985 (1993) ("Our cases make clear that a tribal member need not live on a formal reservation to be outside the State's taxing jurisdiction; it is enough that the member live in Indian Country. Congress has defined Indian country broadly to include formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States.").

Applying these Supreme Court cases, we believe official "reservation" status is not dispositive and lands owned by the federal government in trust for Indian tribes are Indian Country pursuant to 25 U.S.C. § 1151. ***See Cheyenne-Arapaho Tribes v. State of Oklahoma***, 618 F.2d 665, 668 (10th Cir. 1980) (state hunting and fishing laws do not apply on trust lands located within a disestablished reservation because "lands held in trust by the United States for the Tribes are Indian Country within the meaning of § 1151(a)")[2]; ***Langley v. Ryder***, 778 F.2d 1092, 1095 (5th Cir. 1985) (affirming the district court's exercise of federal criminal jurisdiction because "whether lands are merely held in trust for the Indians or whether the lands have been officially proclaimed a reservation, the lands are clearly Indian country"); ***United States v. Azure***, 801 F.2d 336,

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[2] In ***Cheyenne-Arapaho Tribes v. State of Oklahoma***, 618 F.2d 665, 668 (10th Cir. 1980), we observed, "the Solicitor for the Interior Department ruled that land acquired for the Cheyenne-Arapaho Tribes under the Oklahoma Indian Welfare Act had reservation status," but we did not state the Solicitor's ruling was necessary to our holding the trust lands were Indian Country.

339 (8th Cir. 1986) ("Indian trust land, although not within the boundaries of the Turtle Mountain Reservation, can be classified as a de facto reservation, at least for purposes of federal criminal jurisdiction.");[3] *see also Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 666 (9th Cir. 1975) ("We are confident that when Congress in 1934 authorized the Secretary to purchase and hold title to lands for the purpose of providing lands for Indians, it understood and intended such lands to be held in the legal manner and condition in which trust lands were held under the applicable court decisions free of state regulation.").

In *Buzzard v. Oklahoma Tax Comm'n*, 992 F.2d 1073, 1076-77 (10th Cir. 1993) (affirming the district court's decision land the United Keetoowah Band purchased and owned in fee simple with a restriction against alienation was not Indian Country), referenced by both the government and Mr. Roberts, we discussed how trust status can demonstrate both federal set aside and superintendence. Relying on the holding in *United States v. McGowan*, 302 U.S. 535, 539, 58 S. Ct. 286 (1938), that Reno Indian Colony

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[3] The Eighth Circuit also observed, "[i]t is well established that the actions of the federal government in its treatment of Indian land can create a de facto reservation, even though the reservation was not created by a specific treaty, statute, or executive order." *United States v. Azure*, 801 F.2d 336, 338 (8th Cir. 1986). The Eighth Circuit has not always followed *Azure*, although it recognizes the precedent. *See United States v. Stands*, 105 F.3d 1565, 1575 & n.3 (8th Cir. 1997) ("For jurisdictional purposes, tribal trust land beyond the boundaries of a reservation is ordinarily not Indian country. . . . In some instances, off-reservation tribal trust land may be considered Indian country (citing *Azure*).").

had been set aside by the government for the use of Indians because it was purchased by the United States for the purpose of providing lands for needy Indians, we explained:

> Similarly, trust land is set apart for the use of Indians by the federal government because it can be obtained only by filing a request with the Secretary of the Interior, 25 C.F.R. § 151.9 (1992), who must consider, among other things, the Indian's need for the land, *id.* § 151.10(b), and the purposes for which the land will be used, *id.* § 151.10(c). If the request is approved, the United States holds the land as trustee. *Id.* § 151.2(d). Thus, land is "validly set apart for the use of Indians as such" only if the federal government takes some action indicating that the land is designated for use by Indians.

Buzzard, 992 F.2d at 1076. We believed trust status could also meet *McGowan's* superintendency requirement:

> Superintendency over the land requires the active involvement of the federal government. This involvement was shown in *McGowan* by the federal government's retention of title to the land and its regulation of activities in the Colony. 302 U.S. at 538-39, 58 S. Ct. at 287-88. The United States also holds title to trust land, although only as trustee. In addition, before agreeing to acquire trust land, the Secretary must consider several factors including the authority for the transactions, *id.* § 151.10(a), the impact on the state resulting from the removal of the land from the tax rolls, *id.* § 151.10(3), and jurisdictional problems that might arise, *id.* § 151.10(f). These requirements show that, when the federal government agrees to hold land in trust, it is prepared to exert jurisdiction over the land.

Id.

Notwithstanding these Supreme Court and Tenth Circuit precedents, Mr. Roberts cites *State of Alaska v. Native Village of Venetie*, 522 U.S. 520, 118 S. Ct. 948 (1998), in support of his position trust lands are not Indian Country. In *Venetie*, the Court had to decide whether former reservation lands, conveyed to a Native corporation and then to the

Native Village of Venetie in communal fee simple pursuant to the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1601, could be considered Indian Country under 18 U.S.C. § 1151, thereby permitting the tribe to tax non-Indians doing business on the lands. *See id.* at 951-52. Because the lands were neither a reservation nor allotment, the question was whether they constituted a dependent Indian community. *See id.* at 953. The Court announced for the first time a two-part test for dependent Indian community, stating, "[we] must . . . conclude that in enacting § 1151(b), Congress indicated that a federal set-aside and a federal superintendence requirement must be satisfied for a finding of a 'dependent Indian community.'" *Id.* at 954. According to the Court, the language of the ANCSA clearly showed Congress had no intention to set aside or superintend the lands at issue; therefore, Venetie was not a dependent Indian community. *See id.* at 955-56.

We must first observe the factual differences distinguishing *Venetie* from the present case. Whereas the Choctaw Tribal Complex is owned by the federal government in trust for the Choctaw Nation pursuant to the IRA, the disputed land in *Venetie* was owned in communal fee simple by an Indian tribe pursuant to the ANCSA. In *Venetie*, there was no possibility the lands could qualify as a reservation under 25 U.S.C. § 1151(a) because the ANCSA had explicitly abrogated its reservation status, *see id.* at 953, whereas here the IRA authorizes the Secretary to acquire lands in trust for tribes,

and contemplates the Secretary may officially declare them to be reservations. *See* 25 U.S.C. § 467.[4]

Further, we find in *Venetie* neither a declaration that tribal trust lands are not Indian Country for purposes of criminal jurisdiction, nor a repudiation of the Court's prior discussions of "informal" reservations. The test Justice Thomas announced for 25 U.S.C. § 1151(b) Indian Country (dependent Indian community) in *Venetie* does correspond with the factors Chief Justice Rehnquist articulated in ***Potawatomi*** as establishing Indian Country under 25 U.S.C. § 1151(a) (reservation) when there is no formal reservation. In both instances, the Court looked for federal set aside and superintendence. *See Venetie*, 118 S. Ct. at 953;[5] *Potawatomi*, 498 U.S. at 511. Thus, the relationship between informal reservations and dependent Indian communities is not entirely clear under current case law. But based on Justice Thomas' holding,

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[4] As discussed above, however, official declaration of reservation status is not necessary for the property to be treated as Indian Country under 25 U.S.C. § 1151. Rather, as the Supreme Court has said, it is enough that the property has been validly set apart for the use of the Indians, under federal superintendence. ***See Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe***, 498 U.S. 505, 111 S. Ct. 905 (1991).

[5] Although the facts supporting "set-aside" and "superintendence" appear to be case sensitive, Justice Thomas further explained, "the federal set-aside requirement ensures that the land in question is occupied by an 'Indian community'; the federal superintendence requirement guarantees that the Indian community is sufficiently 'dependent' on the Federal Government that the Federal Government and the Indians involved, rather than the States, are to exercise primary jurisdiction over the land in question." ***See State of Alaska v. Native Village of Venetie***, 522 U.S. 520, 118 S. Ct. 948, 955 (1998).

"[dependent Indian community] refers to a limited category of Indian lands that are neither reservations nor allotments," ***Venetie***, 118 S. Ct. at 953, and the Court's earlier pronouncements such as, "Congress has defined Indian country broadly to include formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States," ***Sac & Fox***, 508 U.S. at 123, we believe both dependent Indian communities and reservations, whether formal or informal, continue to exist under 25 U.S.C. § 1151 and Supreme Court jurisprudence.

We need not further expound on the Supreme Court's cases in this area because, no matter which categorical label we choose to affix, the property in this case, owned by the United States in trust for the Choctaw Nation, is Indian Country, particularly in light of the district court's findings the Tribal Complex property was validly set-aside for the tribe under the superintendence of the federal government. We will now turn to these findings as we address Mr. Robert's contentions the trust process was improperly executed and the Secretary lacks authority to take lands into trust for tribes.

As the district court noted, when trust land is acquired, the federal government must take "some action indicating that the land is designated for use by Indians." ***Roberts***, 904 F. Supp. at 1266 (citing ***Buzzard***, 992 F.2d at 1076). In ***Buzzard***, we outlined the procedure the Secretary uses to acquire land in trust. Although the regulations discussed in ***Buzzard*** were not in effect in 1976 when the federal government acquired the Tribal Complex property in trust for the Choctaw Nation, the testimony of

Mary Downing, Realty Specialist for the BIA[6] revealed that in 1976 the BIA followed substantially the same procedures as those currently codified at 25 C.F.R. §§ 151.1-151.14. *See Roberts*, 904 F. Supp. at 1268. Claiming the government failed to follow even the informal procedures when the Tribal Complex property was purchased in trust in 1976, Mr. Roberts points to various deficiencies -- for example, the transaction was approved after the deed had been executed and filed of record, the approved warranty deed was never filed and returned to the BIA, and the transaction was completed before the BIA ordered a title opinion.

The district court, however, engaged in a detailed review of the process by which the land was taken into trust, and found:

> On August 8, 1976, the Superintendent for the Talihina office of the BIA received a request from the Chief of the Choctaw Nation to accept the tribal complex property in trust. Enclosed with this request were a current abstract, a title opinion from a private attorney, a contract for sale and proposed lease, the Choctaw Nation's statement of the reasons for the acquisition, and other documents related to the transaction. These documents, as well as a title opinion from the field solicitor, were forwarded to the Area Director, who approved the purchase of the tribal complex property in trust for the Choctaw Nation on August 25, 1976.

Id. The court also agreed with the government, "it is doubtful that informal policies or procedures confer substantive rights which may be enforced by defendants in criminal actions." *Id.* at 1268 n.8 (citing *United States v. Thompson*, 579 F.2d 1184, 1189 (10th

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[6] Springwater testified that in 1976 there were no procedures for taking land in trust. He stated the Area Director had "pretty broad discretionary authority."

Cir. 1978) (*en banc*) (Justice Department's *Petite* policy regarding no federal prosecution following a state prosecution for same transaction is a "housekeeping" provision that is at most a guide for federal prosecutors and it does not confer an enforceable right upon a criminal defendant)).[7] Therefore, "[e]ven assuming that strict compliance with informal policies and procedures was necessary for a valid acquisition of trust property, and Roberts' standing to assert such compliance argument, the testimony at the hearing thus revealed that the federal government substantially complied with the applicable policies

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[7] The district court further supported its rejection of Mr. Roberts' compliance argument with ***State of Florida Dep't of Business Regulation v. United States Dep't of Interior***, 768 F.2d 1248, 1252-57 (11th Cir. 1985) ("the decision to acquire land is one within the Secretary's discretion," and neither the statute nor regulations provided law on which the court could base review of the decision), a case which we have since expressly rejected. ***See McAlpine v. United States***, 112 F.3d 1429, 1433-35 (10th Cir. 1997). In ***McAlpine***, we held the regulations "provide 'law to apply' in evaluating the Secretary's exercise of his discretion. . . . While the regulation [25 C.F.R. § 151.10] does not provide guidance on how the Secretary is to 'weigh' or 'balance' the factors, it does provide a list of objective criteria that the decisionmaker is required to consider in evaluating trust land acquisition requests." ***Id.*** at 1434. We also left open the possibility the statute itself provided for judicial review. ***See id.*** at 1432 & n.3. Pursuant to the Administrative Procedure Act, 5 U.S.C. § 702, therefore, "the proper standard for reviewing an agency's discretionary action, such as the Secretary's decision in this case, is to determine whether the agency acted in a manner that was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" ***Id.*** at 1436. While we note ***McAlpine*** expressly rejects ***Florida***, it does not change the outcome in this case because, at the time of the transaction, the formal regulations now governing trust acquisitions under 25 U.S.C. § 465 did not exist. Further, we have already indicated our agreement with the district court the Secretary substantially complied with the informal procedures and, in any event, it is unlikely the informal procedures in place in 1976 create substantive rights enforceable by Mr. Roberts.

and procedures." *Id.* at 1268. As a result, the Secretary and his delegates acquired the property for the United States in trust for the Choctaw Nation.

Beyond procedural validity, the government's actions in 1976 demonstrated its intent to treat the property as Indian Country:

> *[The government's actions] provided concrete evidence of the active involvement of the federal government in designating the tribal complex property as property for the use of the Choctaw Nation under the superintendence of the federal government.* Evidence of post-execution approval by the Area Director and a failure to file and return the approved deed constitute only incidental non-compliance with procedures not affecting the validity of an otherwise proper designation of trust property.

Roberts, 904 F. Supp. at 1268 (emphasis added). Unlike ***Buzzard***, for example, where the government had taken no action to set aside the land, and the tribe unilaterally acquired and owned the land in fee simple like any other property owner, *see* 992 F.2d at 1076, here the Secretary followed procedures, albeit informal at the time, to acquire the property for the government in trust for the Choctaw Nation. *See* ***Roberts***, 904 F. Supp. at 1267-68. Further, in ***Buzzard***, there was no federal superintendence:

> [T]he federal government has not retained title to this land or indicated that it is prepared to exert jurisdiction over this land. At most it has agreed to approve transactions disposing the land. But the ability to veto a sale does not require the sort of active involvement that can be described as superintendence of the land.

992 F.2d at 1076. Here, the United States retains title to the property; the state considers the property to be beyond its taxation jurisdiction; the BIA Area Director approved the land acquisition; the government continues to oversee the Tribal Complex property, as

when it participated in a 1991 lease dispute between the Choctaw Nation and the Historical Association; and the BIA and Choctaw Nation treat the Complex as trust property. *See Roberts*, 904 F. Supp. at 1265-67. For all of these reasons, we agree with the district court the property in the present case is, unlike the land in *Buzzard*, Indian Country.

Mr. Roberts next argues that the future interest held by the Chamber of Commerce operates to defeat the trust status designation of the property. The warranty deed which conveyed title to the United States in trust for the Choctaw Nation contains a provision that title to the subject property is conveyed only for "so long as said premises are used for purposes of the Choctaw Nation of Oklahoma." Further:

> In the event the property is no longer used by the Choctaw Nation and upon the filing of a Declaration by the Secretary of the Interior that said premises are no longer used by Choctaw Nation, the title shall revert to the Chamber of Commerce of the City of Durant to hold title in trust for the use and benefit of the Red River Valley Historical Society or other designee of the Chamber of Commerce of the City of Durant.

Mr. Roberts claims this future interest prevents the United States from exerting superintending control or jurisdiction over the Tribal Complex property. In support of this argument, Mr. Roberts again relies on *Buzzard*. While *Buzzard* reaffirmed the well-settled rule that "Indian country includes . . . land held in trust by the United States for the use of an Indian tribe," *id.* at 1076 (citing *Potawatomi*, 498 U.S. at 511), the case has no bearing on the future interest contained in the warranty deed in this case.

Moreover, we completely agree with the district court, "the inclusion of a future interest which allows the Chamber of Commerce to take title to the tribal complex property upon the fulfillment of a contingency does not alter the trust status of the property." ***Roberts***, 904 F. Supp. at 1267.

> By its very wording, this future interest is contingent in nature-- contingent on the land not being used by the Choctaw Nation and contingent on the filing of a declaration by the Secretary of Interior that the premises are not being used by the Choctaw Nation--and it cannot operate to defeat an otherwise valid exercise of superintending responsibility by the federal government as established by its approval of an acquisition in trust for the benefit of the Choctaw Nation. *The proper focus is on the federal government's superintending role and actions, not on the existence of a contingent property interest possessed by a third party. Any de minimus effect this future interest may have on the federal government's fee ownership in trust is more than overcome by the federal government's undeniable supervisory role as evidenced by the Area Director's approval of the acquisition, the federal government's continued oversight of the tribal complex property, i.e, participation in the 1991 lease dispute between the Choctaw Nation and the Historical Association, and the continued treatment of the tribal complex property as trust property by the BIA and the Choctaw Nation.*

Id. (emphasis added). For all of these reasons the district court appropriately "reject[ed] Mr. Roberts' tortuous interpretation of ***Buzzard*** and f[ound] that the inclusion of the subject future interest on behalf of the Chamber of Commerce does not defeat the trust status of the tribal complex property, title to which is held by the United States in trust for the Choctaw Nation." ***Id.***

Mr. Roberts finally argues the Secretary of the Interior lacks authority to take tribal lands into trust as a general matter because 25 U.S.C. § 465 unconstitutionally delegates standardless authority to the Secretary. The statute provides:

> The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased, for the purpose of providing land for Indians.
>
> For the acquisition of such lands . . . , there is authorized to be appropriated, a sum not to exceed $2,000,000 in any one fiscal year: Provided, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation . . . in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation . . . becomes law.
>
> . . . .
>
> Title to any lands or rights acquired pursuant to [the various sections] of this title shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

25 U.S.C. § 465. Mr. Roberts cites in support of his constitutional argument, ***South Dakota v. United States Dep't of the Interior***, 69 F.3d 878 (8th Cir. 1995). In ***South Dakota***, the Eighth Circuit held the section of the IRA authorizing the Secretary to acquire land in trust for Indians unconstitutional because it violated the nondelegation doctrine by providing no legislative standards governing the Secretary's acquisition, and therefore the Secretary lacked authority to acquire land in trust for the tribe. ***Id.*** at 885. However, the Supreme Court vacated that decision in ***United States Dep't of the Interior***

v. South Dakota, 519 U.S. 919, 117 S. Ct. 286 (1996) (granting certiorari, vacating and remanding to the Secretary of the Interior for reconsideration of his administrative decision); thus it has no precedential value to us.[8]

The Supreme Court did not publish a majority opinion when it granted, vacated and remanded *South Dakota*; thus, we do not know the Court's reasoning on the issue of 25 U.S.C. § 465's standards. However, we have previously acknowledged the statute itself places limits on the Secretary's discretion. *See McAlpine*, 112 F.3d at 1432 n.3 (citing *South Dakota*, 69 F.3d at 887-88 (Murphy, J. dissenting)). For our discussion, it is helpful to recall the statutory standards observed by Judge Murphy. For example, the statute provides any land must be acquired for Indians as defined in 25 U.S.C. § 479 and funds appropriated for the acquisitions may not be used to provide land for Navajos outside their reservation boundaries. *See South Dakota*, 69 F.3d at 887-88 (Murphy, J., dissenting). And, the legislative history identifies goals of "rehabilitating the Indian's economic life" and "developing the initiative destroyed by . . . oppression and paternalism," of the prior allotment policy and indicates the Secretary must assure

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[8] In the alternative, Mr. Roberts argues even if the trust process can now survive a delegation challenge, it is only by virtue of the regulations enacted in 1980, and subsequently amended, which place additional limits on the Secretary's discretion and facilitate judicial review. *Cf. McAlpine*, 112 F.3d at 1432 n.3 (discussing amended regulations). He believes the process remained constitutionally flawed in 1976 when the Tribal Complex property was taken into trust. While his position finds some support in Justice Scalia's dissenting opinion in *Department of the Interior v. South Dakota*, 519 U.S. 919, 117 S. Ct. 286, 287 (1996), we disagree based on our belief the statute itself provides standards for the Secretary's exercise of discretion.

continued "beneficial use by the Indian occupant and his heirs." *Id.*[9] Mr. Roberts has not argued the Secretary abused his discretion by transgressing any of these standards.

We agree with the district court Congress properly delegated to the Secretary of the Interior authority to make such acquisitions, *see* 25 U.S.C. § 465, and the Secretary then granted a delegation of general authority to the Commissioner of Indian Affairs, *see* 39 Fed. Reg. 32166-67, who redelegated his authority to the Bureau of Indian Affairs Area Directors. *See* 34 Fed. Reg. 637-38. Consequently, "the Area Director possessed the delegated authority to take title to the tribal complex property in trust for the Choctaw Nation in 1976." *Roberts*, 904 F. Supp. at 1269.

Mr. Roberts' many arguments about the invalidity of the trust process, in this instance and in general, must finally be put to rest. In sum, we believe the Secretary properly exercised his discretion to acquire the Tribal Complex property in trust for the Choctaw Nation pursuant to 25 U.S.C. § 465, and there is evidence of federal set-aside and superintendence. We reject the delegation argument and are equally unpersuaded the Secretary's actions merit reversal. As a result, the property is Indian Country for purposes of the Major Crimes Act, and no procedural or administrative defect nullifies

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[9] Moreover, the Supreme Court has only twice in its history, and not since 1935, invalidated a statute on the ground of excessive delegation of legislative authority; since 1935, the "Court has consistently upheld statutes involving broad delegations of authority." *South Dakota v. United States Dep't of the Interior*, 69 F.3d 878, 886 (8th Cir. 1995) (and citations therein) (Murphy, J., dissenting).

this status. The district court did not err in asserting jurisdiction over the alleged offenses in this case.

III.

Mr. Roberts next argues the jury, not the judge, should have decided whether the Tribal Complex was Indian Country, and, in the alternative, the evidence was insufficient to support a jury finding the offenses occurred in Indian Country. We address these arguments in turn.

The statutes under which Mr. Roberts was charged, 18 U.S.C. § 2241 (aggravated sexual abuse); 18 U.S.C. § 2242 (sexual abuse); and 18 U.S.C. § 2244 (abusive sexual contact), all require the offenses have occurred "in the special maritime and territorial jurisdiction of the United States." The Major Crimes Act provides:

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnaping, maiming, a felony under chapter 109A [sexual abuse], incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title), an assault against an individual who has not attained the age of 16 years, arson, burglary, robbery, and a felony under section 661 of this title [embezzlement and theft] within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

18 U.S.C. § 1153(a). As we have already described, when Mr. Roberts moved to dismiss for lack of subject matter jurisdiction, the court held a hearing and decided the Tribal Complex, site of some of the alleged offenses, was Indian Country, and therefore the

court had jurisdiction over the case. At trial, the government sought to call witnesses to prove the Indian Country status of the land, and the court disallowed the testimony, stating:

> Well, you know, we have had a hearing on that and I have found that it is Indian Country, and it was necessary that it be Indian Country before we even could – before I would even let you proceed. . . . And that's a legal issue and not a factual issue. And I will so instruct the jury.

At the close of arguments, the court instructed the jury, in part:

> The Government must prove each essential element of each offense beyond a reasonable doubt . . . .
>
> Each count requires proof of the commission of the offense within the territorial jurisdiction of the United States. In this case, the Court has determined that the Choctaw Nation Tribal Complex property located in Durant, Oklahoma, is in Indian Country, which is considered to be within the territorial jurisdiction of the United States. Consequently, no other proof or evidence is necessary to support the Government's claim that the alleged acts which allegedly took place on the Choctaw Nation's Tribal Complex property in Durant, Oklahoma, are within the territorial jurisdiction of the United States with respect to each of the counts of the indictment. The Court makes no such finding, however with respect to other locations you have heard discussed in this trial.

The court then reiterated "the defendant is charged in Counts 1, 3, 6 and 7 with abusive sexual contact in violation of 18 U.S.C. §§ 2242(1) and 2244(a)(2), which provide that *whoever in the territorial jurisdiction of the United States* engages in or causes sexual contact with or by another person by threatening or placing that other person in fear will be guilty of the offense of abusive sexual contact." (emphasis added). Instructing on the remaining counts, the court again articulated the "*whoever in the territorial jurisdiction of*

the United States" requirement of 18 U.S.C. 2241(a)(1) (attempting aggravated sexual abuse) (Counts 2 and 4) and 18 U.S.C. § 2242(1) (attempted sexual abuse) (Count 5). The court also stated to the jury that it was the ultimate judge of the facts and ordered, "You must consider these instructions as a whole and not just a part of them to the exclusion of the rest."

When the instructions were proposed by the court, defense counsel objected, "There is one [instruction] . . . that refers to Indian Country where you advise the jurors that that element of the offense has been decided by the Court. And we object to that on the grounds that we regard it as a mixed question of law and fact and the material elements of the offense which the jury should have the right to adjudicate." Before the jury received the instructions, the defense renewed its Indian Country objection. The court overruled the objections.

Mr. Roberts contends the instructions relieved the government of its burden of proving an essential element of the crime by failing to provide evidence at trial the Tribal Complex was Indian Country. ***See In re Winship***, 397 U.S. 358, 364, 90 S. Ct. 1068 (1970) (the government must prove every element of an alleged crime beyond reasonable doubt). But the government maintains the trial court's instruction the Tribal Complex was, as a matter of law, Indian Country did not improperly remove from the province of the jury any factual inquiry. Further, the court appropriately explained the law and left

the jury to determine the essential element of whether the alleged offenses occurred at the Tribal Complex.

We have previously explained, "an error in jury instructions will mandate reversal of a judgment only if the error is determined to have been prejudicial, based on a review of the record as a whole." ***See Big Horn Coal Co. v. Commonwealth Edison Co.***, 852 F.2d 1259, 1271 n.19 (10th Cir. 1988) (citing ***Durflinger v. Artiles***, 727 F.2d 888, 895 (10th Cir. 1984). Reviewing the entire record, we determine whether the instructions "state[d] the law which governs and provided the jury with an ample understanding of the issues and the standards applicable." ***Ramsey v. Culpepper***, 738 F.2d 1092, 1098 (10th Cir. 1984). We "consider all that the jury heard and, from the standpoint of the jury, decide not whether the charge was faultless in every particular but whether the jury was misled in any way and whether it had understanding of the issues and its duty to determine these issues." ***Durflinger***, 727 F.2d at 895 (internal quotations omitted).

We agree with Mr. Roberts that a jury verdict, if based on an instruction allowing it to convict without properly finding the facts supporting each element of the crime, is error, *see* ***Sandstrom v. Montana***, 442 U.S. 510, 523, 99 S. Ct. 2450 (1979), and the facts essential to conviction must be proven beyond the jury's reasonable doubt, not the court's. *See* ***Connecticut v. Johnson***, 460 U.S. 73, 86, 103 S. Ct. 969 (1983). However, we believe Mr. Roberts confuses the legal issue of jurisdiction with the factual question of locus of the offense.

As a general matter, the trial court decides the jurisdictional status of a particular property or area and then leaves to the jury the factual determination of whether the alleged crime occurred at the site. *See United States v. Hernandez-Fundora*, 58 F.3d 802, 812 (2d Cir. 1995) (district court may determine a federal prison falls within the special maritime and territorial jurisdiction of the United States and remove that matter from the jury); *United States v. Warren*, 984 F.2d 325, 327 (9th Cir. 1993) (district court may determine a military base satisfies federal jurisdictional requirements); *United States v. Bridges*, 43 F.3d 1468 (table), 1994 WL 687301, *1 (4th Cir. 1994) (In a trial for robbery within the special maritime and territorial jurisdiction of the United States, "it is well established that a court may determine, as a matter of law, the existence of federal jurisdiction over the geographic area, but the locus of the offense within that area is for the trier of fact.").

Similarly, a trial court also acts appropriately when it makes the jurisdictional ruling a particular tract of land or geographic area is Indian Country, and then instructs the jury to determine whether the alleged offense occurred there. In *United States v. Deon*, 656 F.2d 354 (8th Cir. 1981), the defendant challenged the jury instruction, "the Court has found as a matter of law that Pine Ridge, South Dakota, the site of the alleged offense, is in Indian Country. You are therefore instructed that this Court's jurisdiction has been established." *Id.* at 357. The Eighth Circuit held, *Nunnas*

> The jury was not told, as a matter of law that an offense had occurred, only that the site of the alleged offense, Pine Ridge, South Dakota, was in Indian Country. This instruction, reduced to its essentials, finds as a matter of law only that Pine Ridge is in Indian country.

Id. Similarly, in *United States v. Sohappy*, 770 F.2d 816 (9th Cir. 1985), the Ninth Circuit reviewed the trial court's instruction the jury determine whether violations of Lacey Act prohibitions against transporting, selling, or acquiring fish taken in violation of tribal law occurred at two sites. *Id.* at 822. Because "the issue of what constitutes Indian country is a matter for the judge and not the jury," and the trial judge "was apparently satisfied the two sites were Indian country," there was no plain error in instructing the jury only that it must find whether the violations occurred at the sites. *Id.* at 822 & n.6. In *United States v. Cook*, 922 F.2d 1026 (2d Cir. 1991), an appeal from conviction for criminal use and possession of gambling devices, the defendants challenged the court's ruling from the bench a certain area was Indian Country. *Id.* at 1031-32. The Second Circuit held, "the question of whether the St. Regis territory is Indian country was one properly decided by [the trial] [j]udge . . . without submission of the issue to the jury." *Id.*

Several circuits have had the opportunity to state, in dicta, the trial court should *not* submit to the jury the question of whether a particular tract of land or geographic area is Indian Country. In *United States v. Stands*, 105 F.3d 1565 (8th Cir. 1997), the defendant argued the court had erroneously required the jury to determine whether the alleged site

was Indian Country when it convicted him of charges arising out of a kidnaping and assault. *See id.* at 1575-76. The court agreed, "given a particular piece of land, it is for the court, not the jury, to determine whether that land is in Indian country." *Id.* at 1575. Therefore, "[i]t may have been error [albeit nonreversible] for the District Court to submit to the jury the narrow question of whether the alleged site of the offense was Indian country." *Id.* at 1576. Similarly, in *United States v. Levesque*, 681 F.2d 75 (1st Cir. 1982), the First Circuit considered the defendant's contention it was error to submit to the jury the question of whether or not the locus of an alleged assault was in Indian Country. *Id.* at 78. Whether the geographic area satisfied the dependent Indian community category of Indian Country, the court explained, was "a jurisdictional fact susceptible of determination without reference to any of the facts involved in determining defendants' guilt or innocence," but any error in submitting to the jury this jurisdictional question did not provide cause for reversal. *Id.*

We agree with our sister circuits the district court can find, as a matter of law, a geographic area or particular location is Indian Country, and then instruct the jury to determine factually whether the offense occurred there. In Mr. Roberts' case, the jury instructions neither diminished the government's burden of proof, nor relieved the jury of its responsibility to find all essential elements of the offenses.

Mr. Roberts argues that in any case, the jury had insufficient evidence to find the alleged offenses occurred at the Tribal Complex. We review *de novo* all evidence, both

direct and circumstantial, together with all reasonable inferences in the light most favorable to the prosecution, to determine whether a reasonable jury could find the essential elements of a crime beyond a reasonable doubt. ***See United States v. Gonzales***, 58 F.3d 506, 508-09 (10th Cir. 1995). We also presume the jury resolved evidentiary conflicts in favor of the prosecution, and we defer to the jury's resolution. ***See Messer v. Roberts***, 74 F.3d 1009, 1013 (10th Cir. 1996).

The jury heard numerous alleged victims and witnesses testify most of the offenses occurred in Mr. Roberts' office at the Tribal Complex; it also heard evidence about alleged offenses that may have transpired elsewhere. The jury appears to have carefully weighed the evidence in light of the judge's legal instructions on jurisdiction. On Counts I, II, and VI, alleging acts occurring at the Tribal Complex, the jury returned guilty verdicts, but on Count VII, for example, where the testimony was conflicting as to whether the incident occurred at the Tribal Complex or in Hugo, Oklahoma, the jury resolved the question in favor of the defendant. We believe the jury had sufficient evidence to make the factual determination several alleged offenses occurred at the Tribal Complex which the court had properly instructed as a matter of law to be Indian Country.

IV.

Mr. Roberts contests the district court's decision to admit, as evidence of extrinsic acts, the testimony of women who were not the victims of charged offenses. Originally the district court conducted the required balancing inquiry of Fed. R. Evid. 403, and

excluded the evidence on the ground its potential prejudice substantially outweighed its probative value. In an interlocutory appeal to this court, the government challenged the exclusion.

We "remand[ed] the Fed. R. Evid. 404(b) issue concerning the nine additional women to the district court for an appropriate hearing to determine whether the government has established that Mr. Roberts engaged in a common scheme to abuse sexually women subject to his authority and whether each woman's testimony fits this pattern." ***United States v. Roberts***, 88 F.3d 872, 875 (10th Cir. 1996).[10] We opined:

> [t]he government must produce additional information about the details of each of the nine women's proposed testimony before a firm conclusion on this issue is possible. The district court must make this determination in the first instance on remand after holding an appropriate pretrial hearing.

Id. at 881. Mr. Roberts argues the district court improperly followed our remand order, and rather took our decision as authorization to automatically admit the testimony under Rule 404(b).

On remand, the district court held an *in camera* hearing where the government presented the testimony of the three women named in the indictment and seven other women who alleged Mr. Roberts sexually abused them. The government relied on its proffer and an FBI 302 statement as to an eighth woman's testimony. Noting the

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[10] On other grounds, not relevant to this issue, ***United States v. Roberts***, 88 F.3d 872 (10th Cir. 1996), was superceded by statute as stated in ***United States v. Meacham***, 115 F.3d 1488 (10th Cir. 1997).

evidence established a steady stream of similar conduct occurring between 1977 and 1993, the district court decided to allow testimony showing Mr. Roberts' conduct toward tribal employees under his authority was "strikingly similar" to the charged acts.

We review a decision to admit evidence under Fed. R. Evid. 404(b) for abuse of discretion. ***United States v. Deninno***, 29 F.3d 572, 577 (10th Cir. 1994). Rule 404(b) prohibits the government from offering evidence of other crimes, wrongs, or acts to demonstrate the bad character, moral turpitude, or criminal disposition of a defendant to prove he acted in conformity with the prior acts or events. However, the rule permits the introduction of such evidence for other approved purposes, including to demonstrate a defendant's identity or intent to commit a crime by demonstrating a common scheme or plan. ***See United States v. McGuire***, 27 F.3d 457, 460-61 (10th Cir. 1994). Following the Supreme Court's decision in ***Huddleston v. United States***, 485 U.S. 681, 691-92, 108 S. Ct. 1496 (1988) (outlining the four procedural safeguards governing admission decisions under Rule 404(b)), we have adopted an "inclusive approach" to admitting evidence under this rule. ***United States v. Record***, 873 F.2d 1363, 1375 (10th Cir.1989), 485 U.S. 681 (1988). We have listed the requirements as:

> (1) the evidence must be offered for a proper purpose; (2) the evidence must be relevant; (3) the trial court must make a Rule 403 determination of whether the probative value of the similar acts is substantially outweighed by its potential for unfair prejudice; and (4) pursuant to Fed. R. Evid. 105, the trial court shall, upon request, instruct the jury that evidence of similar acts is to be considered only for the proper purpose for which it was admitted.

United States v. Jefferson, 925 F.2d 1242, 1258 (10th Cir. 1991); *see also United States v. Wacker*, 72 F.3d 1453, 1468 (10th Cir. 1995); *Huddleston*, 485 U.S. at 691-92.

Contrary to Mr. Roberts' contention, the district court did follow our order by holding a hearing, making findings about the probative value of the evidence, and excluding testimony that did not show common plan or intent. Consistent with our direction, the court issued an order evaluating the proposed testimony of seven women under Rule 404(b). The court recalled the government's rationale was to show a common scheme of sexually abusive behavior committed against female employees of the Choctaw Nation, and the defendant's knowledge he could, by virtue of his position, abuse young female employees without fear of reprisal. It concluded "with respect to six of the . . . women, th[e] probative value of their proposed testimony is not substantially outweighed by its potential for unfair prejudice." The court made detailed findings:

> The court makes this finding as to witnesses Maddux, Ward, Byrd, McWilliams, Cole and Knight. Each witness was employed by the Choctaw Nation when the sexually abusive behavior by Roberts was directed toward them. Roberts was in a position of authority over each of them. He was the Chief of the Choctaw Nation and he represented the ultimate hiring and firing authority for the Choctaw Nation. According to the testimony, he utilized his influence and control over these women in such fashion that they were constantly subjected to his advances as part of their employment. Most, if not all of these incidents, took place with no witnesses and in areas not visible to other individuals. Each encounter was apparently prompted by a request by Roberts for a one-on-one meeting. ***The testimony of these seven women regarding Roberts' conduct is strikingly similar to the testimony of the three individuals named in the indictment – Russ, Gilbert, and Grammar.***

(emphasis added). For these reasons, the court allowed the jury to hear the testimony of the six women under Rule 404(b). However, it disallowed the testimony of a seventh woman, Ms. Hughes, because:

> Hughes never worked for the Choctaw Nation and was never under the control of Roberts or subject to his authority in any respect related to employment with the Choctaw Nation. The testimony of Hughes does not fit within the stated rationale of the government in introducing such testimony to establish Roberts' scheme to sexually abuse those women under his authority. Consequently, Hughes' testimony is not admissible.

The court also disallowed Ms. Maddux's proposed testimony about an event that took place before she was employed by the Choctaw Nation.

We believe the district court followed our remand order and decided correctly, under ***Huddleston***, ***Jefferson,*** and ***Wacker,*** the six women's testimony was admissible to show a common scheme. Addressing Mr. Roberts' contention the six women would testify to events too remote in time from the charged offenses, the court appropriately disagreed because "the testimony presented tends to establish a long-standing pattern of sexually abusive behavior on the part of Roberts from 1977 continuing up until the time of the charges contained in the indictment." ***See United States v. Cuch***, 842 F.2d 1173, 1178 (10th Cir. 1988) (When considering the prejudicial effect of other bad acts which are temporally remote, we follow "no absolute rule regarding the number of years that can separate offenses. Rather, the court applies a reasonableness standard and examines the facts and circumstances of each case"); ***see also Wacker***, 72 F.3d at 1469 (testimony

showing a long-standing pattern of drug activity from the late 1970's until the time of defendants' arrest in 1990 was evidence integrally related to the charges and not too remote).

In the alternative, the government tells us the evidence was admissible under Rule 413 allowing evidence of uncharged sexual crimes for "its bearing on any matter to which it is relevant." Although we previously held that rule inapplicable to Mr. Roberts' case under its original effective date language, ***see Roberts***, 88 F.3d at 875, Congress has subsequently overruled our narrow interpretation of the effective date language. ***See United States v. Enjady***, 134 F.3d 1427, 1429-30 (10th Cir. 1998).[11] Whether under Rule

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[11] ***United States v. Enjady***, 134 F.3d 1427, 1429 (10th Cir. 1998), describes:

> [W]e held in ***United States v. Roberts***, 88 F.3d 872, 879 (10th Cir.1996), that "rule [413] was not intended to apply to criminal cases already pending as of the rule's effective date." We declined to apply Rule 413 to an indictment filed before July 1995. In September 1996 Congress responded to ***Roberts***, calling it an "erroneously restrictive interpretation of the effective date language for the new rules." 142 Cong. Rec. H12051-04 (1996). Congress amended the effective date language to provide that new Rules 413- 415 "shall apply to proceedings commenced on or after the effective date of such amendments, including all trials commenced on or after the effective date of such amendments." Pub.L. No. 104-208, Div. A, Tit. I, § 101(a). Thus Congress overruled that part of ***Roberts*** that had narrowly interpreted the original effective date language. The purpose and effect of this amendment was for Rules 413- 415 to apply to all trials commenced after July 10, 1995. Fed.R.Evid. 413(e).

404(b) or Rule 413, therefore, the district court did not abuse its discretion in holding two evidentiary hearings consistent with our remand order and making findings supporting the admissibility of some of the women's testimony, while excluding others'.

V.

Mr. Roberts next complains that in opening and closing arguments the prosecutor improperly vouched for witness credibility and referred to evidence not in the record. Although he did not object at trial, he now contends the remarks were improper and prejudicially affected his substantial rights, therefore, amounting to prosecutorial misconduct. ***See United States v. Eyster***, 948 F.2d 1196, 1206 (11th Cir. 1991). Where, as here, a defendant does not make a contemporaneous objection to the prosecutor's argument, the standard of review on appeal is for plain error. ***See United States v. Russell***, 109 F.3d 1503, 1514 (10th Cir. 1997).

Mr. Roberts draws our attention to several statements:

> (A) The prosecution's case against the defendant will center in large measure around the direct, first-hand and forth-right testimony of those courageous women, all of whom will present shockingly and strikingly similar testimony of sexual attacks committed over a number of years by this powerful and influential man, Hollis Earl Roberts.
>
> (B) Words can't really express our appreciation for your consideration of the testimony of the ten women.
>
> (C) If the United States Attorney's Office were after the defendant, why wouldn't we have indicted him on that charged [sic]? We had a grand jury investigation. If this was a kangaroo kind of a deal, why not charge him with it?

(D) It's tough to prove that beyond a reasonable doubt, isn't it? So what did we do? Did we go after him? Did we scour the country in 1990? No. We waited until . . . . We did nothing until more evidence was presented to the United States Attorney's Office, . . . and only then did the United States Attorney's Office move into action. There is not one piece of evidence in this case that John Raley, Linda Epperly, or Shelly Sperling has one interest whatever in intervening in the political affairs of the Choctaw Nation of Oklahoma, not one piece of evidence. He says that pretty eloquently. It sounded good, but the evidence didn't establish that.

(E) Hollis called next Monday. What did he do? He apologized, "sorry for raping you or sorry for attempting to rape you, in effect. Hollis resigned."

(F) Why were these women here – Angie Gilbert, Kobi Russ, Misty Grammar, Kathy Cole, Mary Watson, Tanya Parker, Jana Byrd, Micah Knight, Kristina Hughes, Kim Maddox, they are here for one thing. They want you to believe them.

The government responds the prosecutor's statements were proper if viewed in context. *See Darden v. Wainwright*, 477 U.S. 168, 179, 106 S. Ct. 2464 (1986). Statement A, the government argues, was an "appropriate prediction of testimony" borne out at trial and Statement B, "a proper prosecutorial expression of thanks to the jury for its time and attention." In Statements C and D the government explained how it had to rebut Mr. Roberts' argument the charges against him were "part of a political conspiracy masterminded by Doug Dry," and that its questioning of government witnesses revealed nothing improper in their motives for testifying. Statement E was "an accurate reflection of what Mr. Roberts, *in effect*, told [Ms. Parker]," and is supported in the record. And Statement F was "made in response to defense arguments that the testimony of the

uncharged offense victims should be ignored as 'piling on' in an 'over-prosecuted case.'"

Further, the prosecutor explicitly disclaimed any ability to vouch for witness credibility, and the judge's instructions to the jury cured any error. ***See Donnelly v. DeChristoforo***, 416 U.S. 637, 644, 94 S. Ct. 1868 (1974). In rebuttal, the prosecutor said, "I can't vouch for things that didn't appear in the record. And if anything that I say appears to be such, please discard it. If anything I say appears to be inconsistent with your honest recollection of the facts, I expect and I encourage you to follow your individual and your collective recollection of the evidence and the testimony in this case." After closing arguments, the court charged the jury, "the statements and arguments of these lawyers are not evidence." Given the context of the statements, curative instructions, and abundance of testimonial evidence on which the jury could have based its verdict, we do not believe the prosecutor's comments merit reversal of Mr. Roberts' conviction; at most, the comments were harmless error. ***See United States v. Hasting***, 461 U.S. 499, 507-09, 103 S. Ct. 1974 (1983).

VI.

Finally, Mr. Roberts argues he should not have received a sentencing enhancement for abuse of a position of trust pursuant to U.S.S.G. § 3B1.3. We review the district court's factual findings under the clearly erroneous standard and review its applications of the Sentencing Guidelines de novo. ***See United States v. Roberts***, 14 F.3d 502, 522-23 (10th Cir. 1993).

Based on his Criminal History Level of I, Mr. Roberts was sentenced to 26 months' imprisonment on Counts 1 and 6, served concurrently with a 135-month sentence on Count 2. The sentence included a two-level enhancement for abuse of public trust. The Guidelines provide, "if the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, increase by 2 levels." U.S.S.G. § 3B1.3 (1995). The application notes to the Guidelines further explain:

> "Public or private trust" refers to a position of public or private trust characterized by professional or managerial discretion (*i.e.*, substantial discretionary judgment that is ordinarily given considerable deference. Persons holding such positions ordinarily are subject to significantly less supervision than employees whose responsibilities are primarily non-discretionary in nature. For this adjustment to apply, the position of trust must have contributed in some significant way to facilitating the commission or concealment of the offense (*e.g.*, by making the detection of the offense or the defendant's responsibility for the offense more difficult).

Id. at n.1. Mr. Roberts does not believe he abused a position of public trust. He attempts to bolster this argument with ***United States v. Brunson***, 54 F.3d 673, 677-78 (10th Cir. 1995) (in a fraudulent, but otherwise "normal arms-length commercial relationship," abuse of trust enhancement was improperly applied because no fiduciary or personal trust relationship existed between the two principals), and ***United States v. Custodio***, 39 F.3d 1121, 1125-26 (10th Cir. 1994) (requiring something more than a business partnership for an abuse of a position of trust enhancement).

These cases are inapposite and do not obscure that Mr. Roberts was the longtime

tribal Chief who could, and did, call subordinate female employees to his private office at the tribal headquarters where he then sexually abused them, secure in the knowledge the power and influence of his position would allow him to engage in these repeated attacks, over the course of many years, without oversight. Several women testified they did not initially report him out of fear he would use his power and influence to retaliate, either by terminating their employment, denying family members tribal benefits, or causing physical harm to them. When this case became public, family members of several victims acknowledged Mr. Roberts' behavior, but urged the women not to participate. Because she agreed to testify, at least one woman no longer has contact with her parents, and others maintain strained relationships with family members. Beyond the victims and their families, Mr. Roberts appears to have exerted significant influence over employment, economics, politics, and daily life of all members of the Choctaw Nation and the entire town of Durant, Oklahoma. As a result, even after acknowledging the abuse and assaults, many individuals were wary of supporting the victims of the offenses, and, in fact, strongly encouraged the women to maintain their silence.

The evidence clearly reveals "more than a mere showing that the victim had confidence in the defendant," ***see Brunson***, 54 F.3d at 678; and "the position . . . allow[ed] him to make the wrongs more difficult to detect." ***See Custodio***, 39 F.3d at 1126. We see no reason to disturb the enhancement for abusing a position of public trust that significantly facilitated the commission or concealment of the offense.

Next Mr. Roberts argues the more lenient 1992 version of the guideline, which provides, "the position of trust must have contributed in some substantial way to facilitating the crime and not merely have provided an opportunity that could as easily have been afforded to other persons," U.S.S.G. § 3B1.3 n.1, should have been applied instead of the 1995 version which omitted this language. But the district court ruled the sentence enhancement applicable under either the 1992 or 1995 version of the Guidelines. *See United States v. Underwood*, 938 F.2d 1086, 1088 (10th Cir. 1991) ("The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence.") (quoting 18 U.S.C. § 3553(c)). We need not resolve the question of which Guideline applies if the sentence falls within either Guideline range or the sentencing judge holds the same sentence could have been imposed under either Guideline. *Cf. United States v. Urbanek*, 930 F.2d 1512, 1516 (10th Cir. 1991) ("Unless the district court makes it clear during the sentencing proceeding that the sentence would be the same under either of the applicable Guideline ranges, we are compelled to remand for resentencing when we find, as we do here, that an improper offense level was applied.") (following *United States v. Bermingham*, 855 F.2d 925, 931-35 (2d Cir. 1988) (dispute about applicable Guidelines need not be resolved where the sentence falls within either of two arguably applicable Guideline ranges and the same sentence would have been imposed under either). Finding no error, we affirm the district court's application of the enhancement for abusing a position of public trust.

VII.

We believe the district court properly premised jurisdiction on its legal conclusion the locus of the alleged criminal offenses, the Tribal Complex, was Indian Country for purposes of 18 U.S.C. § 1153. It then properly instructed the jury the Tribal Complex was Indian Country and left to the jury the factual question of whether the offenses occurred at the Tribal Complex. The district court did not misinterpret our remand instructions when it held an evidentiary hearing and admitted testimony. Finally, neither prosecutorial conduct nor sentencing merits reversal. For these reasons, we **AFFIRM**.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

FILED

OCT 10 1995

WILLIAM B. GUTHRIE
Clerk, U.S. District Court
By _____ Deputy Clerk

UNITED STATES OF AMERICA, Plaintiff	)	
v.	)	No. CR-95-003-S
RANDALL D. ADAIR, Defendant	)	
UNITED STATES OF AMERICA Plaintiff	)	
v.	)	No. CR-95-014-S
DAVID LEE BLAIR, Defendant	)	

ORDER

Granting Defendants' Motions to Dismiss for Lack of Jurisdiction

I. FACTUAL BACKGROUND

These two criminal cases, arising out of substantially similar facts, have been consolidated for the sole purpose of hearing evidence and ruling on the defendants' motions to dismiss, both of which challenge the jurisdiction of this court.

In the Adair case (CR-95-003-S), the defendant was indicted in this district on January 4, 1995, on four counts of aggravated sexual abuse in violation of 18 U.S.C. §2241(a). Both the defendant Adair and Evelyn K. Adair, the alleged victim, are members of the Cherokee Indian tribe. The location where the alleged offenses took place is a house in which Evelyn Adair and her daughter were residing. The house is not within the limits of an Indian reservation, and the real property is a former Indian allotment which is no longer restricted, title to the property having been conveyed to the Cherokee Nation Housing Authority (CNHA), a state agency.

The house is located in an area the government calls "Rocky Mountain" in Adair County, Oklahoma. Federal jurisdiction, pursuant to 18 U.S.C. §1153, is based upon the allegation in each of those counts that the defendant Adair committed the alleged criminal act in Adair County, Oklahoma, in the Eastern District of Oklahoma, within "Indian Country".[1]

In the Blair case (CR-95-014-S), the defendant, a non-Indian, was indicted in a three-count indictment on February 15, 1995, two counts alleging violations of 18 U.S.C. §2241(c), for aggravated sexual abuse, and one count of attempted escape from lawful custody. The location where the alleged aggravated sexual abuse counts took place is a house in which the alleged Indian victim, her mother, and the defendant were residing. The house is located in the same "Rocky Mountain" area in Adair County, Oklahoma. This property is not on an Indian reservation, and it is not an Indian allotment, but a former allotment, no longer restricted, title to the property having been conveyed to the CNHA, a state agency. The government alleges jurisdiction, pursuant to 18 U.S.C. §1152, by claiming the alleged crimes were committed in "Indian country", pursuant to §1151(b).

Thus, in both of these cases, jurisdiction is based upon the alleged offenses having occurred in Indian country or a "dependent Indian community." Both defendants have moved to dismiss, alleging the locations of the offenses in both of these cases are not in a "dependent Indian community." On May 16, 1995, a hearing was held on these motions, the defendants and their attorneys were present, and the government was represented by Linda Epperley, Assistant United States Attorney. In accepting the burden of proving federal jurisdiction, or that Rocky

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[1] "Indian Country" is basically defined in 18 U.S.C. §1151 as:

(a) all land within the limits of any Indian reservation;
(b) all dependent Indian communities; and
(c) all Indian allotments, the Indian title to which have not been extinguished.

Mountain is a "dependent Indian community," the government presented a number of witnesses. The defendants presented one witness.

II. EVIDENTIARY HEARING

Steve Woodall, Director of Research & Analysis for the Cherokee Nation of Oklahoma, testified that he collects and disseminates information about the Cherokee Nation. At the request of William Patrick Ragsdale, Director of the Cherokee Nation Marshal's Service, Mr. Woodall's office prepared plaintiff's exhibits Nos. 1 and 3. (Tr. pp. 7-14). Plaintiff's Exhibit No. 1 is a map, based on 1990 census figures, showing Indian population in the fourteen northeastern counties of Oklahoma which were the original lands allotted to the Indians of the Cherokee Nation of Oklahoma by the United States Government. The area designated "A" on plaintiff's exhibit No. 1 is a census tract in Adair County, Oklahoma. The area designated "B" on plaintiff's exhibit No. 1 is "Block Group 3" within that census tract. Woodall testified that, according to 1990 census figures, Block Group 3 contained 434 Indians and 413 non-Indians. (Tr. p. 25). The area designated "C" on plaintiff's exhibit No. 1 is his and Marshal Ragsdale's estimate of what comprises the "Rocky Mountain community." He testified that the Indian and non-Indian population in area "C" is unknown. (Tr. pp. 40-41). Although Woodall's own estimate of what comprises the "Rocky Mountain community" is an area two to three miles north and south by eight to ten miles east and west, or sixteen to thirty square miles, he does not know of any boundaries, as such, for the "Rocky Mountain community," and he did not know anyone who did. (Tr. p. 41). That area designated "C" on plaintiff's exhibit No. 1 is shown to scale in plaintiff's exhibit No. 3, and comprises a fifteen square mile area which the government proposes is the "Rocky Mountain community."

Plaintiff's exhibit No. 3 also purports to identify all Cherokee restricted allotment lands in orange. However, Annette Jenkins, Director of Real Estate Services for the Cherokee Nation, testified that the information on which the Cherokee restricted allotment lands was based came from Bureau of Indian Affairs

(BIA) files which had not been updated and could be two or three or more years old. (Tr. pp. 48-50). Thus, although this is the maximum amount of restricted allotment lands which might be located in this fifteen square mile area, the present amount of restricted allotment lands could be smaller. Ms. Jenkins testified that the blue areas on plaintiff's exhibit No. 3 are the subject properties which are the locations of the alleged criminal offenses in these two cases. Subject property # 1 is the property which is the subject of the Adair indictment. Subject property # 2 is the property which is the subject of the Blair indictment. She testified that the current property records show the title to these properties, at the times of the alleged offenses, were held by the CNHA, an agency of the State of Oklahoma, operated by the Cherokee Nation of Oklahoma, to provide housing to needy Cherokee Indians within a fourteen county area of northeastern Oklahoma. (Tr. pp. 70-71).

Brad Rutherford, Assessor for Adair County, Oklahoma, testified and verified this title information on the two subject properties. He testified that he was not asked to check the Adair County records on any other properties, other than the two subject properties.

Joel Thompson, Executive Director of the CNHA, testified that the CNHA provides housing for members of the Cherokee Nation of Oklahoma in need of housing. (Plaintiff's exhibits 5 and 8). He testified that the two properties which are the subjects of these two indictments are owned in fee simple by the CNHA, and that they were so owned at the time of the alleged offenses. (Plaintiff's exhibits Nos. 13-32 and 37-54). The CNHA is a state agency created pursuant to state law under the Oklahoma Housing Authorities Act, 63 O.S. §§1051, et.seq. Mr. Thompson testified that CNHA units are provided to tribal members on an application-need basis within the fourteen county area recognized as the Cherokee Nation of Oklahoma. He testified that, although the units on the two subject properties are within the fifteen square mile area designated in plaintiff's exhibit No. 3 as the Rocky Mountain community, those units were not provided because they were located in that area or for that area, but because of individual need. He was

unable to testify as to how many CNHA units were located in the area designated in plaintiff's exhibit No. 3 as the Rocky Mountain community or in any one county. (Tr. p. 130). Mr. Thompson testified that CNHA uses county or city water, sewer, and electric facilities or services. For units in the Rocky Mountain area, water is provided by individual wells or Adair County Rural Water District # 2, and electricity is provided by Ozark Electric. Both are public utilities. (Tr. pp. 132-134). Further, Mr. Thompson testified that some participants in the CNHA program may not be Indian and may not be members of the Cherokee Nation of Oklahoma. Also, in cases of death or divorce a non-Indian may end up with the CNHA unit, and in such cases the CNHA follows the Oklahoma state law. (Tr. p. 107, 135-136). Further, if the CNHA repossesses a unit, it does not necessarily go to another family member, but the next needy tribal applicant for housing on their list. Mr. Thompson agreed that, because the CNHA owns the property in fee and the occupant pays them for using the property until it is paid off, CNHA occupants are more like tenants than homeowners. (Tr. pp. 137-140).

Duane King qualified and testified as an expert on Cherokee Indian history and culture. He testified that, by the end of the 19th century, churches had generally replaced townhouses as the central meeting places for Cherokee communities. He testified that he had been in the Rocky Mountain area as depicted in plaintiff's exhibit No. 3. He testified that within that area there was what he described as an Indian church, Echota Church, an Indian cemetery, Echota Cemetery, and an Indian stomp ground. However, he only observed what he perceived to be the Indian culture of the area, and he did not talk to any non-Indians. Although there are non-Indian churches and cemeteries in the area, he did not find them or seek them out. He did not know the makeup of the membership of the Echota Church. He testified that a Cherokee community cannot be defined by geographical boundaries, but is determined by the social feelings of the people who live, and have lived, in a particular area. Mr. King believed the Cherokee Indian population to be approximately one-half the population of the entire area, and that there were a number of those who spoke the Cherokee language. It was

his opinion that, in comparison to other communities in the area, the Rocky Mountain area was a more traditional Cherokee community. (Tr. p. 161).

Julie Moss testified that she had been a resident of the Rocky Mountain area since 1983. She testified that she lived near the Indian stomp ground where regular religious and dance ceremonies were held. She believed that the stomp ground had been there about thirty-five years. She stated that the gathering places in the community are the Echota Church, the stomp ground, the two or three small convenience stores in the area, and the Rocky Mountain school, grades one through eight. (Tr. p. 178). She testified that most people who live in the area work outside the area in Stilwell, Oklahoma, the county seat of Adair County, about two to five miles southeast, or at a landscape nursery about five miles west in the adjoining Cherokee County. She testified that most people in the community travel to Stilwell or to Tahlequah, in Cherokee County, Oklahoma, about twenty miles northwest, for their health care and to do their major grocery shopping. (Tr. pp. 182-186).

Imogene Alexander, Coordinator of the Education Department of the Cherokee Nation, testified that her department provides funds from the Bureau of Indian Affairs (BIA) to individual Cherokee Indian applicants to supplement State of Oklahoma school funds. These supplemental tribal funds are provided to individual Cherokee Indian students in the Oklahoma school system throughout the fourteen counties which originally comprised the Cherokee Nation. She testified that only approximately sixty percent (60%) of the students at the Rocky Mountain community school are Indian, and some of those students receive these supplemental funds from the Cherokee Nation. The Rocky Mountain school is a dependant state school district in which the students attend grades one through eight. Thereafter, the students attend high school in Stilwell. She also testified that, if needed, there is a Cherokee language speaker at the Rocky Mountain school to provide bilingual assistance to the Cherokee Indian students, although neither she nor anyone else testified that any student ever required or requested such assistance. (Tr. pp. 191-195).

Joe Kennison, Director of Roads and Transportation of the Cherokee Nation, testified that his department is budgeted approximately $8 million for building or improving roads within the fourteen county Cherokee Nation of Oklahoma area. The Cherokee Nation develops a priority list of locations that identifies road improvements which would most benefit members of the Cherokee Nation. The State of Oklahoma deeds these roads to the Cherokee Nation; the Cherokee Nation improves the road; the Cherokee Nation deeds the road back to the State of Oklahoma; and the counties maintain the roads just like other state highways. Although there is one highway in the Rocky Mountain area which was improved by the BIA, the Cherokee Nation has not built or improved any roads in the Rocky Mountain area or anywhere else in Adair County. (Plaintiff's exhibit No. 2). Mr. Kennison testified that he considered the area around the Rocky Mountain school as the Rocky Mountain community area. (Tr. pp. 203-210).

William Ragsdale testified he is the Director of the Cherokee Nation's Marshal's Service. Marshal Ragsdale said he entered into cross-deputization agreements with the state law enforcement officers in the fourteen counties of the original Cherokee Nation. Also, Marshal Ragsdale claims he has exclusive law enforcement jurisdiction on any "Indian country" lands within those fourteen counties. Marshal Ragsdale was the investigating officer for the offenses in these two criminal cases. (Tr. p. 215). However, because the Cherokee Nation Marshal's Service does not have any dispatching facilities, persons in Adair County and the Rocky Mountain area call the Adair County Sheriff's Office for law enforcement assistance, and the Adair County Sheriff's Office responds to those calls in that area. (Tr. pp. 252-253). He testified that prior to his becoming Director of the Cherokee Nation's Marshal's Service three years ago, these types of criminal cases in this area were filed and prosecuted in the Oklahoma state district courts. (Tr. p. 245). Since becoming Marshal of the Cherokee Nation he has made a determination that at least four areas in Adair County and a number of areas in Cherokee and Delaware Counties are "dependent Indian communities" and subject to exclusive Cherokee Nation law enforcement jurisdiction as "Indian country", although no federal court

has made any such determination of any area in the Eastern District of Oklahoma. (Tr. pp. 264-267). Marshal Ragsdale testified that he made a determination of the Rocky Mountain community as shown in plaintiff's exhibit No. 3 by talking to people in the area, and although he knows the general area of the Rocky Mountain community, he does not know the boundaries of that area. He said there is no list or designation, such as in a telephone directory, of the residents of the community or area. (Tr. pp/ 256-257). Marshal Ragsdale testified about a number of Cherokee Nation community development programs which are available to Cherokee Indians in the Rocky Mountain community. (Tr. pp. 218-227, 236-239). However, these programs are available to them because they are Cherokee Indians living within the original Cherokee Nation fourteen county area, and not because they are members of the Rocky Mountain area. (Tr. pp. 246-248, 254-256). He further testified that a person does not have to have any Indian blood to be a tribal member in the Cherokee Nation of Oklahoma. (Tr. p. 268). The court found many of Marshal Ragsdale's answers to be unresponsive or evasive. (Tr. p. 248).

Larry Boles, an investigator for the Federal Public Defender's Office, was the only witness for the defendants. He testified he was familiar with the Rocky Mountain area of Adair County, and that he had grown up in the small Adair County community of Baron, located between Stilwell and Westville, approximately ten to twelve miles northeast of the Rocky Mountain area. (Tr. p. 270). Unlike Rocky Mountain, Baron is designated on the state highway map. At the request of the defendants' attorneys, he had made three trips into and around the Rocky Mountain area on virtually every road in the area designated by the government as Rocky Mountain. (Tr. p. 275). He described the area as a rural area with most of its residents scattered out. He testified that there is dairy farming and cattle raising within the area. (Tr. p. 276). He stated that as one approachs the Rocky Mountain area there is nothing to denote this as a separate area or set it apart from the surrounding area. He saw few persons or vehicular traffic. There are no road signs designating the area, except for one sign for the Rocky Mountain school. (Tr. p. 277). He gave the same description of Rocky Mountain school system as the other

witnesses. (Defendant's exhibit No. 2). He testified there is one small gas station/convenience store in the designated area and two others in areas adjoining the designated Rocky Mountain area. Most residents told him they do their major grocery shopping and banking in Stilwell or Tahlequah. He said the nearest employers and health care providers are in Stilwell, and all of the mailing addresses for the Rocky Mountain area are either rural route #1 or rural route #4, Stilwell, Oklahoma. He said the nearest fire department is a rural fire department approximately five miles south of plaintiff's designated area of Rocky Mountain, and all of the utilities in the area are provided by companies outside of the Rocky Mountain area. Mr. Boles testified that within the area there is no local government and no local community organizations. There are three churches in the area, one Indian and two non-Indian. A monthly Indian stomp dance is the only regular activity in the area. On his three trips, Mr. Boles talked, at random, with twenty to twenty-five of the residents, some Indian, some non-Indian, of the immediate and surrounding areas. He found that some of the persons who lived inside the area designated as the Rocky Mountain "community" on plaintiff's exhibit No. 3 believed that they lived in a different named community bordering that area, such as Lyon Switch, Cave Springs, Wauhillau, or Bidding Spring, and some who lived outside that area believed themselves to reside in the Rocky Mountain "community." Mr. Boles testified that he tried to determine the boundaries of the Rocky Mountain "community," but he could not, and neither could the residents of the area. (Tr. pp. 277-293).

III. HISTORICAL LEGAL BACKGROUND

The term "dependent Indian community" derives from, and was included in 18 U.S.C. §1151 as a result of, the United States Supreme Court decisions in the cases of United States v. Sandoval, 231 U.S. 28 (1913) and United States v. McGowan, 302 U.S. 535 (1938). Blatchford v. Sullivan, 904 F.2d 542, 544-545 (10th Cir. 1990), *cert. denied*, 498 U.S. 1035 (1991). Although the areas being considered in the Sandoval and McGowan cases were not technically Indian "reservations", the court found the dependency of the Indians on the government in

those communities was sufficiently similar to the dependency of reservation Indians to include those areas within the meaning of the term Indian country. Thus, the term "dependent Indian community" was included in §1151. This was particularly true in light of the title to the area lands in the Sandoval case being held communally by the pueblo or tribe, rather than individually, and the area lands in the McGowan case being purchased by the government specifically for the purpose of providing land for needy Indians and to equip and supervise those Indians in establishing a permanent settlement, and the title to those lands being in the government in trust for those Indians. The Blatchford court noted that the holding of the pueblos communally rather than in individual ownership was significant to the outcome in the Sandoval case. Blatchford, 904 F.2d at 545. In contrast, it is well documented that the whole thrust of allotment of Indian land among the Five Civilized Tribes (Cherokee, Choctaw, Creek, Seminole, and Chickasaw), after their removal from their homeland in the southeastern United States to Oklahoma, involved individual ownership.

> This process culminated in the allotting of sixteen million acres of tribal lands to the individual members of the Tribes, to intermarried whites, and to African-American freedmen . . . Today, approximately 20,000 tracts of allotted Indian land held by members of the Five Tribes in eastern Oklahoma-covering over 400,000 acres-remain subject to federal statutory restrictions on their alienation.

"Fatally Flawed": State Court Approval of Conveyances by Indians of the Five Civilized Tribes-Time for Legislative Reform, 25 Tulsa L.J. 1, 3 (1989).

The court finds it noteworthy that the same philosophy, i.e., being sufficiently similar to the dependency of reservation Indians, was prevalent in the case of United States v. Pelican, 232 U.S. 442 (1913), which is the case that caused part (c), all Indian allotments, the Indian titles to which have not been extinguished, to be included in the definition of Indian country in §1151. Although that case was an allotment case, the nature of the title to the lands and their similarity to reservation lands is significant in considering the nature of the title to the lands in this case and other Indian country cases. In the Pelican case, lands which had been a legally

constituted Indian reservation were being vacated and restored to the public domain, with the exception of certain lands which were expressly reserved and allotted to individual members of the Indians of the Colville Reservation, i.e., Indian allotments. Title to these Indian allotments, carved out of the original Colville Indian Reservation, was held by the government in trust for the Indians.[2] In holding that these Indian allotments were "Indian country", the Pelican court found that the allotments, like the original Colville Reservation, were validly set apart for the use of the Indians under the superintendence of the government, the fundamental consideration being the protection of a dependent [Indian] people. Pelican, 232 U.S. at 449-450. This court notes that, unlike the Indian trust allotments described in Pelican, Oklahoma Indian allottees received fee simple title subject to restriction. Cherokee Treaty of Dec. 29, 1835, 7 Stat. 478 (1836).

> The federal allotment policy with regard to the Five Tribes differed sharply from practices with other tribes allotted under the provisions of the General Allotment Act. That Act authorized the President to allot tribal lands in designated quantities to reservation Indians, title to be held in trust by the United States for twenty-five years or longer. General Allotment Act allottees and their heirs, regardless of blood quantum, hold "trust patents" to their lands, with the legal fee vested in the United States, and the equitable fee vested in the Indians for the period of trust.
>
> In contrast, the Five Tribes had received fee simple title to their tribal lands in Indian Territory, and, therefore, the allotment patents were made by the principal chief of each Tribe to their allottees, conveying all the right, title, and interest of the respective Tribe in the land. Members of the Five Tribes hold "restricted patents" as opposed to "trust patents." The distinction is largely an academic one, however, as the federal government's interest, as guardian of the

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[2] In fact, a close reading of the Pelican case, reveals an intent by the court that these Indian allotment lands were to be considered "Indian country", or within the exclusive jurisdiction of the federal government, only so long as the title to said lands was held by the government in trust for the Indians. Pelican, 232 U.S. at 447-451. Thus, the statute, 18 U.S.C. §1151(c), which only qualifies Indian allotments as to "the Indian titles to which have not been extinguished", is actually more inclusive than the case upon which it was based.

> Indian lands and resources, is virtually identical in both classes of allottees . . . 25 Tulsa L.J. 1, 8 (1989).

Although the author of the law review article concludes that the distinction between the restricted patents held by the Five Civilized Tribes and the trust patents held by the Plains Indians is not significant, this court observes with interest that trust patents had their genesis in reservation land of the Plains Indians held in trust for various Plains tribes, while the restricted patents of the Five Civilized Tribes originated from lands owned in fee simple by the Five Civilized Tribes. Thus, there is a strong question as to whether it is historically correct to suggest that tribal land acquired by the Five Civilized Tribes at the time of their removal to Oklahoma was ever a part of a reservation as we have come to know reservations located in the western United States, such as those associated with the Pueblos and other Plains Indians.

The Cherokees and other five civilized tribes in their treaties with the United States received fee title to land in Oklahoma in exchange for the land they gave up in the southeastern United States. Kapplers Laws and Treaties, Vol. 2, p. 440; 7 Stat. 478; Cherokee Nation v. Journecake, 155 U.S. 197, 39 L.Ed. 120, 15 S.Ct. 55. Unlike the less-cultured nomadic Plains Indians of the western United States, the Five Civilized Tribes Indians were not assigned to specific reservation areas but were assigned land in fee with the intention of allowing development of their agrarian culture.

The Cherokee and Choctaw Indians in particular attempted, following "removal", to transplant their agrarian culture to Oklahoma by continuing southern plantation-type farming. Angie Debo, a well-respected Five Civilized Tribes historian, in her book, And Still the Waters Run gives a graphic description of a successful Choctaw farming operation.

> The richest Choctaw, Wilson N. Jones, was said to hold 17,600 acres under fence, of which 550 acres was under cultivation, and to own 5,000 cattle, 75 horses, several coal mines, a store, and a cotton gin. It was not illegal for a citizen to lease his personal holdings to non-

> citizens, and most of the labor on these great farms was performed by white or Negro tenants.

Angie Debo, And Still the Waters Run 17 (1940). This cross-culturalization is also noted by the court in Morris v. Andrus, 640 F.2d 404 (D.C. Cir. 1980):

> The Creek, Cherokee, Seminole, Choctaw and Chickasaw tribes comprise the group known as the Five Civilized Tribes. These tribes were culturally and politically sophisticated relative to the Plains Indians, who inhabited the Oklahoma area to which the tribes were forcibly removed from their native southeast by the federal Government under the Indian Removal Act of 1830. Harjo, 430 F.Supp. at 1199. See also, Choctaw Nation v. Oklahoma, 397 U.S. 620, 622-26, 90 S. Ct. 1328, 1330-32, 25 L. Ed. 2d 615 (1970).

Historian Debo vividly illustrates that the assimilation of Cherokees and Choctaws into the white man's culture began even before removal.

> One important result of this closer intercourse was the rapidity with which the Indians, especially the Cherokees and Choctaws, began to adopt the white man's institutions. They invited Christian missionaries to their country and established churches and schools, they adopted constitutions and legal codes, and some of their leaders began to operate plantations worked by Negro slaves. The progress of the Cherokees was especially rapid at this time, because Sequoyah, one of the greatest geniuses ever produced by any race, invented a phonetic alphabet that enabled the whole tribe to become within a few months a literate people.

Angie Debo, And Still the Waters Run 1-2 (1940).

Additional historical facts suggest the pronounced distinction between land acquired by the Five Civilized Tribes and "reservations" located in the western United States. From the beginning of the Five Civilized Tribes' occupation of Oklahoma, the cultural constituency was predominantly non-Indian as reflected by:

> The first United States census of the Indian Territory, which was made in 1890, shows the approximate racial composition. It classed the inhabitants according to physical appearance without regard to citizenship, but it reveals in a startling way how the Indians were crowded in their last refuge by the pressure of other races. The statistics are as follows:

NATION	WHITES	NEGROES	INDIANS	TOTAL	PERCENTAGE OF INDIANS
Cherokee	29,166	5,127	22,015	56,309	39.1
Choctaw	28,345	4,406	11,057	43,808	25.24
Chickasaw	48,421	3,676	5,223	57,329	9.11
Creek	3,287	4,621	9,999	17,912	55.82
Seminole	172	806	1,761	2,739	64.29
Total	109,393	18,636	50,055	178,097	28.11

Angie Debo, And Still the Waters Run 13 (1940).

As mentioned herein, as of the year 1989, over 15½ million of the original 16 million acres allotted to the Five Civilized Tribes has through the restriction removal process been assimilated into the Oklahoma culture as taxable state land. Conversion of 98% of all land originally owned by the Five Civilized Tribes to the taxable inventory of the State of Oklahoma is conclusive proof that there are only small parcels of restricted Indian allotment land ownership scattered over more than 30 eastern Oklahoma counties. This restricted Indian allotment ownership, which is graphically demonstrated by the testimony describing the Rocky Mountain Community, does not support the conclusion that the Rocky Mountain area is a dependent community. To the contrary, the testimony in this case simply reflects that the Rocky Mountain area is a typical slice of rural eastern Oklahoma occupied by a mixed culture of people attempting to hold on to their agrarian roots. This court's observations are somewhat similar to Historian Debo.

> The cultural amalgamation of the two races was the most successful. Probably more than any other state in the Union Oklahoma has accepted the cultural heritage of the Indian, and has used it as a background of its own traditions; on the other hand even the most conservative Indians have adopted the clothing and habits and religion and to a certain extent even the language of their white neighbors.
>
> The spiritual union of the two races was accepted from the beginning. The name of the state itself is a Choctaw expression meaning "Red People," and was first suggested by an able and cultured Choctaw Chief during the treaty negotiations of 1866. The Great Seal of the State, designed by young Gabe E. Parker, in the Constitutional Convention, and Dr. A. Grant Evans, is a five-pointed

> star with the seal of Oklahoma Territory in the center and the seal of one of the Civilized Tribes in each of the rays. The Oklahoma Territory seal itself showed a frontiersman and an Indian clasping hands, with an industrial and a hunting scene as their respective backgrounds, and a figure of justice with her scales poised between. If this ideal was not entirely realized, the fact was due to the individual greed of the white man and the individual ineptitude of the red rather than to any general racial discrimination. The constitution, which expressly legalized the segregation of the colored race, defined the term "colored" to apply only to persons of African descent and "white race" to include all other persons. The union of the two races was portrayed in the allegorical wedding of the statehood ceremonies, and Governor Haskell in his inaugural address glorified Oklahoma as a state where the original owners of the soil had not been conquered, but had joined with their white neighbors in forming a new commonwealth, and he found in the red and white stripes of the American flag a new symbolism of the red man and the white united under the azure sky.

Angie Debo, And Still the Waters Run 291-292 (1940).

The McGowan court, in describing the land purchased by the government for the Indians, used the identical language of the Pelican case: "The fundamental consideration of both Congress and the Department of the Interior in establishing this colony has been the protection of a dependent people. Indians in this colony have been afforded the same protection by the government as that given Indians in other settlements known as 'reservations'." McGowan, 302 U.S. at 538. Notice the McGowan court equated the protection of dependent people [Indians] in its case to the protection of reservation Indians.

It is pertinent, and the court finds, the dates of the Sandoval, McGowan and Pelican decisions, 1913, 1938 and 1913 respectively, to be significant, because at those times Indian tribes, communities, and peoples were, and had been historically, almost totally dependent upon the federal government. In fact, the dependency of Indians and Indian tribes seems to have been a given factor in an era that even questioned the Indians' citizenship in the United States. In referring to Indians and Indian tribes, those decisions made, what would be considered today, derogatory

and demeaning remarks and characterizations.[3] Certainly today's society, including the government, judiciary and the public, no longer maintain such attitudes or beliefs toward Indians or Indian tribes. All Indians and Indian tribes are no longer nineteenth century dependent wards of the government, requiring protection from an alien citizenry or other Indian tribes, as exemplified by "Indian Self-Determination Act", 25 U.S.C. § 450, et seq. Further, Congress at 25 U.S.C. § 450(a)(b) in 1994 amendments to the Indian Self Determination Act stated:

> The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.

Finally, incorporating the concept of assimilation into its most recent opinion on racial discrimination, the Supreme Court stated, "In the eyes of government, we are just one race here. It is American." Adarand Constructors, Inc. v. Pena, Secretary of Transportation, et al., ___ U.S. ___, 115 S.Ct. 2097, 132 L. Ed. 2d 158 (1995).

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[3] "The people of the pueblos, . . . are nevertheless Indians in race, customs and domestic government. Always living in separate and isolated communities, adhering to primitive modes of life, largely influenced by superstition and fetichism, and chiefly governed according to the crude customs inherited from their ancestors, they are essentially a simple, uninformed and inferior people. [I]t remains an open question whether they have become citizens of the United States." Sandoval, 231 U.S. at 39.

"These Indians are yet wards of the Nation, in a condition of pupilage or dependency, and have not been discharged from that condition. They occupy these lands [by an agreement that] is part of the national policy by which the Indians are to be maintained as well as prepared for assuming the habits of civilized life, and ultimately the privileges of citizenship." Pelican, 232 U.S. at 450.

IV. THE "DEPENDENT INDIAN COMMUNITY" STANDARDS

Until recently, the Blatchford case set the guideline standards in this circuit for a district court's determination of what constitutes a "dependent Indian community" as set out in 18 U.S.C. §1151(b). Noting in United States v. Martine, 442 F.2d 1022, 1024 (10th Cir. 1971), that the test for such a determination is not simple, the Blatchford court implicitly adopted the Eighth Circuit's test and held that the trial court, in determining whether or not a particular area or community is a "dependent Indian community", should consider (1) the nature of the area in question, (2) the relationship of the inhabitants of the area to Indian Tribes and to the federal government, and (3) the established practice of government agencies toward the area. The court noted that any other relevant factors should also be considered. Blatchford, 904 F.2d at 545. In discussing several Eighth Circuit cases concerning "dependent Indian community" status, the Blatchford court noted that a crucial consideration was whether the community had been set apart for the use, occupancy and [federal governmental] protection of dependent Indian peoples. Blatchford, 904 F.2d at 546 and 548-549. The Rocky Mountain area of Adair County, Oklahoma, has not been set aside or apart for the use, occupancy and federal protection of the Indians who live in that area. The mere presence of a group of Indians who constitute the bulk of the population living in that area or community, and who give that area or community a distinctly Indian character, does not make that area or community a "dependent Indian community" as contemplated by §1151. Here, at most, only fifty percent of the population is Indian. Blatchford, 904 F.2d at 549, citing Martine, 442 F.2d at 1024. The Blatchford court also noted that in all three of the Eighth Circuit cases in which a "dependent Indian community" status was found to exist, the lands in question were tribal trust lands or lands titled in the United States Government in trust for an Indian tribe. Blatchford, 904 F.2d at 548.

Now, the Eighth Circuit has added to and refined the Blatchford test, and the Tenth Circuit has, in Pittsburg & Midway Coal Mining Company v. Watchman, 52 F.3rd 1531, 1545 (10th Cir. 1995), explicitly adopted the Eighth Circuit's four-

prong test for determining what constitutes a "dependent Indian community" under 18 U.S.C. §1151(b). Whether a particular geographical area is a "dependent Indian community" depends on a consideration of several factors, including: (1) whether the United States has retained title to the lands which it permits the Indians to occupy and authority to enact regulations and protective laws respecting that territory; (2) the nature of the area in question, the relationship of the inhabitants in the area to Indian tribes and to the federal government, and the established practice of government agencies toward the area;[4] (3) whether there is an element of cohesiveness manifested either by economic pursuits in the area, common interests, or needs of the inhabitants as supplied by that locality; and (4) whether such lands have been set apart for the use, occupancy and protection of dependent Indian peoples. *id.* The court noted that before considering these factors, it was necessary to determine the community of reference by examining the status of the area in question as a community and the surrounding area. Pittsburg & Midway Coal Mining v. Watchman, 52 F.3rd at 1543-1545.

A. The Status of Rocky Mountain as a Community and the Surrounding Area

As hereinbefore described, the "Rocky Mountain area" in west, central Adair County, Oklahoma, is not on any maps, and it does not have any definite or definable geographical boundaries. Although the government's estimates of the size of this community or area vary from fifteen to thirty square miles, the factual evidence of the general nature and character of the "Rocky Mountain area" in Adair County, Oklahoma, is essentially undisputed. It is a typical, without regard to racial population, rural community in a rural county, whose county seat of Stilwell, approximately two to five miles southeast of the area, has a population of approximately 2,700. There are other similar "local communities or areas" in the vicinity, some of which overlap the Rocky Mountain area. There are many such

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[4] These three factors in the second prong of the Watchman test are the guideline factors from the Blatchford case.

areas in practically every county in the state, particularly rural counties. Based upon the 1990 census information of "Block Group 3", the general population of the Rocky Mountain area and the immediate surrounding area is probably less than 400 persons, and approximately one-half Indian[5], predominately Cherokee, and is one of the more dense Indian populations in eastern Oklahoma. The area surrounding Stilwell, has only one-half the density of Indian population as the Rocky Mountain area, or approximately one-fourth Indian. (Plaintiff's exhibit No. 1). There is a dependent state school district, Rocky Mountain school, grades one through eight, from which the area gets its name, and two or three churches in the immediate area. There are no businesses, banks, post offices, utilities, or local governmental units within the fifteen to thirty square mile area. Utilities are provided by rural county services, generally out of Stilwell. Except for the area of, and immediately surrounding, the county seat town of Stilwell, which gives Rocky Mountain its economic base, the area surrounding the Rocky Mountain community for twenty miles is the same sparsely populated rural area without any cities or towns, and is undifferentiated from the Rocky Mountain area.

The court finds from all the evidence that Rocky Mountain, the community of reference, is not a community in the traditional Indian or non-Indian meaning of the word, but is a rural area approximately six to twelve square miles in size surrounding the rural state school known as Rocky Mountain. The court finds there are no definite, definable boundaries for the area referred to as the Rocky Mountain community. Even if the Rocky Mountain area was a definitive community, the court could not find that it is an "Indian" community as contemplated by §1151(b), as the population of the area is only approximately one-half Indian. Nevertheless, the court will apply the Watchman factors to the Rocky Mountain area.

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[5]Marshal Ragsdale's testimony reflects one can be a member of the Cherokee Tribe with little, or perhaps no, Indian blood (Tr. p. 268).

B. Applying the *Watchman* Factors to The Rocky Mountain Area

As recognized by the Watchman case, the first factor, i.e., the nature of the title to the land in the area or community in question, is a critical starting point in the determination of whether or not an area or community is sufficiently similar to Indian reservation land and in considering the fourth factor, i.e., whether that community has been set apart or provided land for the use, occupancy and federal protection of dependent Indian peoples, in order to qualify as a "dependent Indian community" as contemplated by §1151(b). Although the government's retention of title to the lands which it permits the Indians to occupy, or government title in trust for an Indian tribe, does not in and of itself establish an area as a "dependent Indian community" for §1151 purposes, Blatchford, 904 F.2d at 548-549, without such title, consideration of the other Watchman factors should be unnecessary. However, in this case, the court has considered all of the Watchman factors.

(1) United States Title to Lands and Retention of Authority to Enact Law

The court finds that title to the land in the general Rocky Mountain area is held by individuals, approximately one-half of whom are Indian, and not by an Indian tribe or by the government in trust for the Indians. The government has not retained title to the lands in this area and just permitted the Indians to occupy it. The government has not retained any authority to enact regulations or protective laws with respect to the area. There are no Indian reservation lands in the area or in Oklahoma, and although a maximum of 14%-15% of the Rocky Mountain area may be restricted Indian allotment lands, that fact alone does not make the area a dependent Indian community, and it would not, even if 100% of the land in the area was restricted Indian allotment land. If the land or area in question was an Indian reservation or all restricted Indian allotment lands, a dependent Indian community determination would be moot and not necessary. Although an Indian reservation might also be considered a dependent Indian community, restricted Indian allotment lands do not so easily equate with a dependent Indian community. In fact allotment lands, even though restricted, were created for the purpose of eventually ending the Indians' dependency upon the United States Government..

(2) Nature of Area and Relationship of Inhabitants to Tribes and Government and Government Practice Toward Area

In considering the nature of the area, the court adopts its above comments and findings concerning the status of the community. Although approximately one-half of the residents living in this area are some degree Cherokee Indian, they do not live in any kind of communal or traditional tribal life style. The headquarters of the Cherokee Nation of Oklahoma is located in the adjoining County of Cherokee, in Tahlequah, Oklahoma. The Indians live in individual homes scattered out among non-Indian residences in a rural area. There is no tribal government or local government of any kind in the Rocky Mountain community. The Indian people in the area do not have communal gardens or work projects. The only activity in the area peculiar to Indians is a monthly stomp dance, which is attended by Indians from inside and outside of the area. The State of Oklahoma and the County of Adair builds and maintains the roads in the area. The State of Oklahoma provides and maintains the only public school in the area. The Cherokee Nation does provide a bilingual Cherokee speaker for Cherokee Indian students in that school, if that service is ever needed, and there was no testimony that it is needed. The Adair County Sheriff's Office responds to area residents' calls for law enforcement assistance. The Cherokee Nation does provide some housing for Cherokee Indians in the area through the CNHA, an agency of the State of Oklahoma. However, such housing is not exclusively Indian, and it is not exclusively for the Rocky Mountain area. Utilities are provided by public utility companies outside the area, with the exception of water, which is provided by a rural county water district, a state service. The court finds that neither the life styles, the government, nor the welfare or needs of the Indians living in the Rocky Mountain community or area are in any way similar to those of reservation or dependent Indians.

(3) Element of Cohesiveness of Inhabitants Supplied by the Community

The court finds that there is little cohesiveness between the inhabitants of the Rocky Mountain area due to economic pursuits, common interests, or needs of its residents. Probably the most significant cohesive factor in the area is the Rocky

Mountain school, supplied by the State of Oklahoma for the area. The only element of cohesiveness for the Indian inhabitants of the area would be a common interest in the stomp ground and Indian church, and there is no evidence as to what percentage of area Indians partake of these facilities. The court finds that there is no element of cohesiveness manifested by any economic pursuits in the area, as almost all employment, business, and economic opportunities are outside of the Rocky Mountain area.

(4) Use, Occupancy and Protection of Dependent Indian People

The court finds that the Rocky Mountain area has not been set apart for the use, occupancy and protection of dependent Indian peoples, with the possible exception of the 14%-15% of restricted allotment lands scattered throughout the area. However, since restricted allotments were created to eventually end dependency, the court finds that this percentage of restricted allotment lands scattered throughout the area does not make the area a dependent Indian community. As to this factor, the court also adopts its above comments and findings concerning the factor on title to the lands in the area.

It appears to this court that the fourth Watchman factor should emphasize a critically important factor in this determination, that being, if there is found to be an Indian community, is that Indian community in fact dependent upon the federal government. In this context, "Dependent" means the Indian community needs for its existence the support and protection of the federal government, such that the federal government created or provided that community for the Indians for their support and protection. There is no evidence that the government or anyone else considers the Indians who live in this area to be dependent, or at least any more or less dependent than non-Indians living in the area, nor are they. Although the Cherokee Indians living within the Rocky Mountain area receive benefits from the Cherokee Nation of Oklahoma, it is because they are Cherokees living within the original allotment boundaries of the Cherokee Nation of Oklahoma and not because they are living in the Rocky Mountain community or area.

In conclusion, the court finds that the area known as Rocky Mountain in Adair County, Oklahoma, is not a "community" as intended by 18 U.S.C. §1151(b). The court also finds that same Rocky Mountain area is not an "Indian" community. The court further finds that this Rocky Mountain area is not a "dependent" Indian community as contemplated by §1151(b). Accordingly, the court finds that the locations of the offenses alleged in these two indictments are not within "Indian country" pursuant to 18 U.S.C. §§1151, 1152, and 1153, and this court is without jurisdiction in these two cases. Thus, the defendants' motions to dismiss for lack of jurisdiction are granted, and these two cases are dismissed.

IT IS SO ORDERED this 10 day of October 1995.

FRANK H. SEAY
United States District Judge

"Wellness - An Indigenous Perspective"

By: Gene D. Thin Elk (Lakota)

Wellness is the harmonious interaction of our whole being through the spiritual and physical realm. We Indigenous Peoples must realize the gift of life from the Creator, the opportunity of creation through free will and privilege to be a relative on mother earth. We return this acknowledgment through acts of humility and sacrifice. Giving all of this back to the Creator. This completes our circle of existence.

1. Connection with the Creator, lifegiver;
2. Knowingness of the creative process in nonphysical form, life-force;
3. Knowingness of the interconnection of all life; (Mitakuye)
4. Knowingness of the interdependence of all of life; (Oysin)
5. Knowing and understanding the appropriate usage of our native tongue, our language is a physical exercise of our spiritual knowingness and connection;
6. Knowing that our spirit is our true essence;
7. Knowing our cultural values and traditions are intergenerational connection to and from the creator; (Wakan)
8. Knowing that this life force is always constant and our human conception and cognition of this life force is interpreted and reinterpreted through earth experiences;
9. Knowing and understand our relationships and addressing each relative in appropriateness and respect;
10. Knowing our position within our societies, the purpose of each society and how each society relates to the larger society;
11. Knowing our position in the intergenerational relationships, to use the appropriate language, tone of voice, infliction of words and use of the appropriate word(s);
12. Knowing that there are things of which we need to know and equally important, there are things of which we must grow into, earn or become in harmony with and there are things we need not know;
13. Knowing that sacred instruments, indigenous concepts, spiritual teachings are to be shared only in appropriate settings, matters and ceremonies. They must never be used out of context or for personal benefit.
14. Knowing the responsibility and privilege of each stage of development, learning how to be a child, how to be a youth, a young adult and an elder;
15. Knowing that you belong to this universe, this earth, your family, your People and they are a part of the whole of life;
16. Knowing in which way you are related and fulfilling the relationship with respect and honor;
17. Understand that as a individual keeping the constant reciprocal effort back to the Lifegiver, Creator, through peace and gratitude which lead to a life of humility;
18. Committing to treat oneself as a conduit of this relationship with the Lifegiver, Creator, for others;
19. Having respect and honor for all relations, to their appropriate degree interact with them to enhance the creative flow in the universe and personal experiences;
20. Accept that all events are and our action or reaction is a learning for discernment in the spirit, mental, physical and emotional understanding;
21. Knowing that this earth time is temporal, iciye wicasa, means, existing in the domains of the physical laws within the spirit laws;

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Medico-legal Issues in the Evaluation of Child Sexual Abuse

Rich Kaplan, MD
Medical Director
Center on Child Abuse and Neglect
South Dakota Children's Hospital

What constitutes an appropriate medical evaluation of an allegedly sexually abused child?

Guiding Principles

- Patient Centered
- Medically Oriented
- Evidence Based

Patient Centered

- Independent
- Humane

Medically Oriented

- Diagnosis and Treatment
  - Undiagnosed conditions
  - Signs of other maltreatment
  - S.T.D.'s
  - Psychotherapy
  - Safety-Protection

Evidence Based

- An Abuse Epistemology
  - Refereed Journals
  - Relevant Clinical Experience
  - Not Theories
  - Daubert

The Exam

- History/Interview
- Laboratory/x-ray

History/Interview

- Focal vs. Suggestive
- Dolls?
- The Healing Starts

Physical Exam

- Developmental Assessment
- Growth Parameters
- Complete Head To Toe
- Genital Exam/Colposcopy

Lab and X-ray

- GC
- Chlamydia
- HSV
- HPV
- PCR vs Culture
- Serology
- Skeletal Series

The Examiners

- The Interviewer
- The Practitioner

Diagnostic Formulation

- History
- Behavioral Changes
- Physical Findings
- Lab/X-ray

Documentation

- To Tape or Not to Tape

Ethical Medical Testimony

- Science and experience --not theory
- Don't take sides
- The truth will set you free

AMERICAN ACADEMY OF PEDIATRICS

Committee on Child Abuse and Neglect

Guidelines for the Evaluation of Sexual Abuse of Children: Subject Review

ABSTRACT. This statement serves to update guidelines for the evaluation of child sexual abuse first published in 1991. The role of the physician is outlined with respect to obtaining a history, physical examination, and appropriate laboratory data and in determining the need to report sexual abuse.

ABBREVIATIONS. AAP, American Academy of Pediatrics; STDs, sexually transmitted diseases; HIV, human immunodeficiency virus.

Few areas of pediatrics have expanded so rapidly in clinical importance in recent years as that of sexual abuse of children. What Kempe called a "hidden pediatric problem"[1] in 1977 is certainly less hidden at present. In 1996, more than 3 million children were reported as having been abused to child protective service agencies in the United States, and almost 1 million children were confirmed by child protective service agencies as victims of child maltreatment.[2] According to a 1996 survey, physical abuse represented 23% of confirmed cases, sexual abuse 9%, neglect 60%, emotional maltreatment 4%, and other forms of maltreatment 5%.[2] Other studies have suggested that approximately 1% of children experience some form of sexual abuse each year, resulting in the sexual victimization of 12% to 25% of girls and 8% to 10% of boys by age 18.[3] Children may be sexually abused by family members or nonfamily members and are more frequently abused by males. Boys may be victimized nearly as often as girls, but may not be as likely to disclose the abuse. Adolescents are perpetrators in at least 20% of reported cases; women may be perpetrators, but only a small minority of sexual abuse allegations involve women. The child care setting, an otherwise uncommon setting for abuse, may be the site for women offenders. Pediatricians may encounter sexually abused children in their practices and may be asked by parents and other professionals for consultation. These guidelines are intended for use by all health professionals caring for children. In addition, specific guidelines published by the American Academy of Pediatrics (AAP) for the evaluation of sexual assault of the adolescent by age group should be used.[5]

This statement has been approved by the Council on Child and Adolescent Health.

The recommendations in this statement do not indicate an exclusive course of treatment or serve as a standard of medical care. Variations, taking into account individual circumstances, may be appropriate.

Because pediatricians have trusted relationships with patients and families, they are often able to provide essential support and gain information that may not be readily available to others involved in the investigation, evaluation, or treatment processes. However, some pediatricians may not feel adequately prepared at present to perform a medical evaluation of a sexually abused child without obstructing the collection of essential evidence. Pediatricians need to be knowledgeable about the available resources in the community, including consultants with special expertise in evaluating or treating sexually abused children.

DEFINITION

Sexual abuse occurs when a child is engaged in sexual activities that the child cannot comprehend, for which the child is developmentally unprepared and cannot give consent, and/or that violate the law or social taboos of society. The sexual activities may include all forms of oral-genital, genital, or anal contact by or to the child, or nontouching abuses, such as exhibitionism, voyeurism, or using the child in the production of pornography.[1] Sexual abuse includes a spectrum of activities ranging from rape to physically less intrusive sexual abuse.

Sexual abuse can be differentiated from "sexual play" by determining whether there is a developmental asymmetry among the participants and by assessing the coercive nature of the behavior.[6] Thus, when young children at the same developmental stage are looking at or touching each other's genitalia because of mutual interest, without coercion or intrusion of the body, this is considered normal (ie, nonabusive) behavior. However, a 6-year-old who tries to coerce a 3-year-old to engage in anal intercourse is displaying abnormal behavior, and the health and child protective systems should be contacted although the incident may not be legally considered an assault. Children or adolescents who exhibit inappropriate sexual behavior may be reacting to their own victimization.

PRESENTATION

Sexually abused children are seen by pediatricians in a variety of circumstances: 1) They may be seen for a routine physical examination or for care of a medical illness, behavioral condition, or physical finding that would include child sexual abuse as part of the differential diagnosis. 2) They have been or are thought to have been sexually abused and are brought by a parent to the pediatrician for evalua-

tion. 3) They are brought to the pediatrician by social service or law enforcement professionals for a medical evaluation for possible sexual abuse as part of an investigation. 4) They are brought to an emergency department after a suspected episode of sexual abuse for evaluation, evidence collection, and crisis management.

The diagnosis of sexual abuse and the protection of the child from further harm depends in part on the pediatrician's willingness to consider abuse as a possibility. Sexual abuse presents in many ways,[7] and because children who are sexually abused generally are coerced into secrecy, a high level of suspicion may be required to recognize the problem. The presenting symptoms may be so general (eg, sleep disturbances, abdominal pain, enuresis, encopresis, or phobias) that caution must be exercised when the pediatrician considers sexual abuse, because the symptoms may indicate physical or emotional abuse or other nonabuse-related stressors. Among the more specific signs and symptoms of sexual abuse are rectal or genital bleeding, sexually transmitted diseases, and developmentally unusual sexual behavior.[8] Pediatricians evaluating children who have these signs and symptoms should at least consider the possibility of abuse and, therefore, should make a report to child welfare personnel if no other diagnosis is apparent to explain the findings.

Pediatricians who suspect sexual abuse has occurred or is a possibility are urged to inform the parents of their concerns in a calm, nonaccusatory manner. The individual accompanying the child may have no knowledge of, or involvement in, the sexual abuse of the child. A complete history, including behavioral symptoms and associated signs of sexual abuse, should be sought. The primary responsibility of the pediatrician is the protection of the child, sometimes requiring a delay in informing the parent(s) while a report is made and an expedited investigation by law enforcement and/or child protective services can be conducted.

TAKING A HISTORY/INTERVIEWING THE CHILD

In many states, the suspicion of child sexual abuse as a possible diagnosis requires a report both to the appropriate law enforcement and child protective services agencies. All physicians need to know their state law requirements and where and when to file a written report. The diagnosis of sexual abuse has civil (protective) and criminal ramifications. Investigative interviews should be conducted by the designated agency or individual in the community to minimize repetitive questioning of the child. This does not preclude physicians asking relevant questions to obtain a detailed pediatric history and to obtain a review of systems. The courts have allowed physicians to testify regarding specific details of the child's statements obtained in the course of taking a medical history to provide a diagnosis and treatment. Occasionally, children spontaneously describe their abuse and indicate who abused them. When asking young children about abuse, the use of line drawings,[9] dolls,[10] or other aids[11] are generally used only by professionals trained in interviewing young children. The American Academy of Child and Adolescent Psychiatry and American Professional Society on the Abuse of Children have published guidelines for interviewing sexually abused children.[12,13] Children may also describe their abuse during the course of the physical examination. It is desirable for those conducting the interview to use nonleading questions; avoid showing strong emotions such as shock or disbelief; and maintain a "tell me more" or "and then what happened" approach. If possible, the child should be interviewed alone. Written notes in the medical record or audiotape or videotape should be used to document the questions asked and the child's responses. Most expert interviewers do not interview children younger than 3 years.

A behavioral history may reveal events or behaviors relevant to sexual abuse, even in the absence of a clear history of abuse in the child.[7] The parent(s) may be defensive or unwilling to accept the possibility of sexual abuse, which does not necessarily negate the need for investigation.

When children are brought for evaluation by protective personnel, little or no history may be available other than that provided by the child. The pediatrician should try to obtain an appropriate history in all cases before performing a medical examination. The child may spontaneously give additional information during the physical examination, particularly as the mouth, genitalia, and anus are examined. History taking should focus on whether the symptoms are explained by sexual abuse, physical abuse to the genital area, or other medical conditions.[14]

PHYSICAL EXAMINATION

The physical examination of sexually abused children should not result in additional emotional trauma. The examination should be explained to the child before it is performed. It is advisable to have a chaperone present—a supportive adult not suspected of involvement in the abuse.[15] Children may be anxious about giving a history, being examined, or having procedures performed. Time must be allotted to relieve the child's anxiety.

When the alleged sexual abuse has occurred within 72 hours, or there is bleeding or acute injury, the examination should be performed immediately. In this situation, protocols for child sexual assault victims should be followed to secure biological trace evidence such as epithelial cells, semen, and blood, as well as to maintain a "chain of evidence." When more than 72 hours has passed and no acute injuries are present, an emergency examination usually is not necessary. An evaluation therefore should be scheduled at the earliest convenient time for the child, physician, and investigative team.[5]

The child should have a thorough pediatric examination, including brief assessments of developmental, behavioral, mental, and emotional status. Special attention should be paid to the growth parameters and sexual development of the child. In the rare instance when the child is unable to cooperate and the examination must be performed because of the likelihood of trauma, infection, and/or the need to collect forensic samples, consideration should be

given to using sedation with careful monitoring. Instruments that magnify and illuminate the genital and rectal areas should be used.[16,17] Signs of trauma should be carefully documented by detailed diagrams illustrating the findings or photographically. Specific attention should be given to the areas involved in sexual activity—the mouth, breasts, genitals, perineal region, buttocks, and anus. Any abnormalities should be noted.

In female children, the genital examination should include inspection of the medial aspects of the thighs, labia majora and minora, clitoris, urethra, periurethral tissue, hymen, hymenal opening, fossa navicularis, and posterior fourchette.

Various methods for visualizing the hymenal opening in prepubertal children have been described. Many factors will influence the size of the orifice and the exposure of the hymen and its internal structures. These include the degree of relaxation of the child, the amount of traction (gentle, moderate) on the labia majora, and the position of the child (supine, lateral, or knee to chest).[17,18] The technique used is less important than maximizing the view and recording the method and results (see below for discussion of significance of findings). Speculum or digital examinations should not be performed on the prepubertal child.

In male children, the thighs, penis, and scrotum should be examined for bruises, scars, chafing, bite marks, and discharge.

In both sexes, the anus can be examined in the supine, lateral, or knee to chest position. As with the vaginal examination, the child's position may influence the appearance of anatomy. The presence of bruises around the anus, scars, anal tears (especially those that extend into the surrounding perianal skin), and anal dilation are important to note. Laxity of the sphincter, if present, should be noted, but digital examination is not usually necessary (see below for discussion of significance of findings). Note the child's behavior during the examination, and ask the child to demonstrate any events that may have occurred to the areas of the body being examined. Care should be taken not to suggest answers to the questions.

LABORATORY DATA

Forensic studies should be performed when the examination occurs within 72 hours of acute sexual assault or sexual abuse. The yield of positive cultures is very low in asymptomatic prepubertal children, especially those whose history indicates fondling only.[19] The examiner should consider the following factors when deciding whether to obtain cultures and perform serologic tests for sexually transmitted diseases (STDs): the possibility of oral, genital, or rectal contact; the local incidence of STDs; and whether the child is symptomatic. The Centers for Disease Control and Prevention and the AAP also provide recommendations on laboratory evaluation.[20,21] The implications of the diagnosis of an STD for the reporting of child sexual abuse are listed in Table 1. Pregnancy prevention guidelines have been published by the AAP.[5]

TABLE 1. Implications of Commonly Encountered Sexually Transmitted Diseases (STDs) for the Diagnosis and Reporting of Sexual Abuse of Infants and Prepubertal Children

STD Confirmed	Sexual Abuse	Suggested Action
Gonorrhea*	Diagnostic†	Report‡
Syphilis*	Diagnostic	Report
HIV§	Diagnostic	Report
*Chlamydia**	Diagnostic†	Report
Trichomonas vaginalis	Highly suspicious	Report
Condylomata acuminata* (anogenital warts)	Suspicious	Report
Herpes (genital location)	Suspicious	Report‖
Bacterial vaginosis	Inconclusive	Medical follow-up

* If not perinatally acquired.
† Use definitive diagnostic methods such as culture or DNA probes.
‡ To agency mandated in community to receive reports of suspected sexual abuse.
§ If not perinatally or transfusion acquired.
‖ Unless there is a clear history of autoinoculation. Herpes 1 and 2 are difficult to differentiate by current techniques.

DIAGNOSTIC CONSIDERATIONS

The diagnosis of child sexual abuse often can be made based on a child's history. Physical examination alone is infrequently diagnostic in the absence of a history and/or specific laboratory findings. Physical findings are often absent even when the perpetrator admits to penetration of the child's genitalia.[22–24] Many types of abuse leave no physical evidence, and mucosal injuries often heal rapidly.[25–27] Occasionally, a child presents with clear evidence of anogenital trauma without an adequate history. Abused children may deny abuse. Findings that are concerning, but in isolation are not diagnostic of sexual abuse include: 1) abrasions or bruising of the inner thighs and genitalia; 2) scarring or tears of the labia minora; and 3) enlargement of the hymenal opening. Findings that are more concerning include: 1) scarring, tears, or distortion of the hymen; 2) a decreased amount of or absent hymenal tissue; 3) scarring of the fossa navicularis; 4) injury to or scarring of the posterior fourchette; and 5) anal lacerations.[18,26–28] The physician, the multidisciplinary team evaluating the child, and the courts must establish a level of certainty about whether a child has been sexually abused. Table 2 provides suggested guidelines for making the decision to report sexual abuse of children based on currently available information. The presence of semen, sperm, or acid phosphatase; a positive culture for gonorrhea; or a positive serologic test for syphilis or human immunodeficiency virus (HIV) infection makes the diagnosis of sexual abuse a medical certainty, even in the absence of a positive history, when congenital forms of gonorrhea, syphilis, and congenital or transfusion-acquired HIV (as well as needle sharing) are excluded.

Other physical signs or laboratory findings that are suspicious for sexual abuse require a complete history from the child and caregivers. If the child does not disclose abuse, the physician may wish to observe the child closely to monitor changes in behavior or physical findings. If the history is positive, a report should be made to the agency authorized to receive reports of sexual abuse.

TABLE 2. Guidelines for Making the Decision to Report Sexual Abuse of Children

Data Available			Response	
History	Physical Examination	Laboratory Findings	Level of Concern About Sexual Abuse	Report Decision
None	Normal	None	None	No report
Behavioral changes†	Normal	None	Variable depending upon behavior	Possible report*; follow closely (possible mental health referral)
None	Nonspecific findings	None	Low (worry)	Possible report*; follow closely
Nonspecific history by child or history by parent only	Nonspecific findings	None	Intermediate	Possible report*; follow closely
None	Specific findings‡	None	High	Report
Clear statement	Normal	None	High	Report
Clear statement	Specific findings	None	High	Report
None	Normal, nonspecific or specific findings	Positive culture for gonorrhea; positive serologic test for HIV; syphilis; presence of semen, sperm acid phosphatase	Very high	Report
Behavior changes	Nonspecific findings	Other sexually transmitted diseases	High	Report

* A report may or may not be indicated. The decision to report should be based on discussion with local or regional experts and/or child protective services agencies.
† Some behavioral changes are nonspecific, and others are more worrisome.[7]
‡ Other reasons for findings ruled out.[13]

The differential diagnosis of genital trauma also includes accidental injury and physical abuse. This differentiation may be difficult and may require a careful history and multidisciplinary approach. Because many congenital malformations and infections or other causes of anal-genital abnormalities may be confused with abuse, familiarity with these other causes is important.[14,18]

Physicians should be aware that child sexual abuse often occurs in the context of other family problems including physical abuse, emotional maltreatment, substance abuse, and family violence. If these problems are suspected, referral for a more comprehensive evaluation is imperative. In difficult cases, pediatricians may find consultation with a regional child abuse specialist or assessment center helpful.

After the examination, the physician should provide appropriate feedback and reassurance to the child and family.

RECORDS

Because the likelihood of civil or criminal court action is high, detailed records, drawings, and/or photographs should be kept. The submission of written reports to county agencies and law enforcement departments is encouraged. Physicians required to testify in court are better prepared and may feel more comfortable if their records are complete and accurate. The more detailed the reports and the more explicit the physician's opinion, the less likely the physician may need to testify in civil court proceedings. Testimony will be likely, however, in criminal court, where records alone are not a substitute for a personal appearance. In general, the ability to protect a child may often depend on the quality of the physician's records.[28]

TREATMENT

All children who have been sexually abused should be evaluated by the pediatrician or mental health provider to assess the need for treatment and to measure the level of parental support. Unfortunately, treatment services for sexually abused children are not universally available. The need for treatment varies depending on the type of sexual molestation (whether the perpetrator is a family member or nonfamily member), the duration of the molestation, and the age and symptoms of the child. Poor prognostic signs include more intrusive forms of abuse, more violent assaults, longer periods of sexual molestation, and closer relationship of the perpetrator to the victim. The parents of the victim may also need treatment and support to cope with the emotional trauma of their child's abuse.

LEGAL ISSUES

The legal issues confronting pediatricians in evaluating sexually abused children include mandatory reporting with penalties for failure to report; involvement in the civil, juvenile, or family court systems; involvement in divorce or custody proceedings in divorce courts; and involvement in criminal prosecution of defendants in criminal court. In addition, there are medical liability risks for pediatricians who fail to diagnose abuse or who misdiagnose other conditions as abuse.

All pediatricians in the United States are required under the laws of each state to report suspected as well as known cases of child sexual abuse. These guidelines do not suggest that a pediatrician who evaluates a child with an isolated behavioral finding (nightmares, enuresis, phobias, etc) or an isolated physical finding (erythema or an abrasion of the

labia or traumatic separation of labial adhesions) is obligated to report these cases as suspicious. If additional historical, physical, or laboratory findings suggestive of sexual abuse are present, the physician may have an increased level of suspicion and should report the case. Pediatricians are encouraged to discuss cases with their local or regional child abuse consultants and their local child protective services agency. In this way, agencies may be protected from being overburdened with high numbers of vague reports, and physicians may be protected from potential prosecution for failure to report.

Increasing numbers of cases of alleged sexual abuse involve parents who are in the process of separation or divorce and who allege that their child is being sexually abused by the other parent during custodial visits. Although these cases are generally more difficult and time-consuming for the pediatrician, the child protective services system, and law enforcement agencies, they should not be dismissed because a custody dispute exists. Allegations of abuse that occur in the context of divorce proceedings should either be reported to the child protective services agency or followed closely. A juvenile court proceeding may ensue to determine if the child needs protection. The pediatrician should act as an advocate for the child in these situations and encourage the appointment of a guardian ad litem by the court to represent the child's best interests. The American Bar Association indicates that the majority of divorces do not involve custody disputes, and relatively few custody disputes involve allegations of sexual abuse.[28]

In both criminal and civil proceedings, physicians must testify to their findings "to a reasonable degree of medical certainty."[27] For many physicians, this level of certainty may be a focus of concern because in criminal trials the pediatrician's testimony is part of the information used to ascertain the guilt or innocence of an alleged abuser.

Pediatricians may find themselves involved in civil malpractice litigation. The failure of a physician to recognize and diagnose sexual abuse in a timely manner may lead to a liability suit if a child has been brought repeatedly to the physician and/or a flagrant case has been misdiagnosed. The possibility of a suit being filed against a physician for an alleged "false report" exists; however, to our knowledge there has been no successful "false report" suit against a physician as of this writing. Statutes generally provide immunity as long as the report is done in good faith.

Civil litigation suits may be filed by parents against individuals or against institutions in which their child may have been sexually abused. The physician may be asked to testify in these cases. In civil litigation cases, the legal standard of proof in almost all states is "a preponderance of the evidence."

CONCLUSION

The evaluation of sexually abused children is increasingly a part of general pediatric practice. Pediatricians are part of a multidisciplinary approach to prevent, investigate, and treat the problem and need to be competent in the basic skills of history taking, physical examination, selection of laboratory tests, and differential diagnosis. An expanding clinical consultation network is available to assist the primary care physician with the assessment of difficult cases.[29]

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(Publication page references are not available for this document.)

CARLAS ANN SEXTON FOLSE
v.
DARRYL GERARD FOLSE

No. 98-C-1976

Supreme Court of Louisiana

On Writ of Certiorari to the Court of Appeal, First Circuit, Parish of East Baton Rouge

KNOLL, Justice [FN*]

FN*. Lemmon, J., not on panel. Rule IV, Part 2, § 3.

This case involves a custody proceeding awarding the plaintiff mother sole custody of her two children, a daughter C.F., born December 6, 1990, and a son, K.F., born in 1988, on grounds that the father sexually abused C.F. The father's visitation rights were suspended until he could show that he had successfully completed a treatment program designed for sexual abusers. The correctness of the family court's ruling turns on whether the hearsay statements of C.F. were admissible since the minor child did not testify. The First Circuit Court of Appeal reversed the family court, [FN1] finding C.F.'s hearsay statements were not admissible. For the following reasons, we reverse the court of appeal, finding that under the circumstances of this case, the relaxed evidentiary standards used to determine custody, as expressed in La.Code Evid. art. 1101, are applicable to custody determinations under the Post-Separation Family Violence Relief Act ("PSFVRA") embodied in La.R.S. 9:361-369.

FN1. Folse v. Folse, 97-0952 (La.App. 1 Cir. 5/15/98), 714 So.2d 224.

Facts and Procedural History

On July 15, 1995, while bathing her four-year-old daughter, plaintiff (C.F.'s mother) observed that C.F., who was sprawled on her back in the bathtub, had positioned her feet by her hips and was rubbing her hand back and forth on her private parts. C.F.'s mother asked her daughter what she was doing and C.F. replied that she was "playing a game." When she was asked who showed her how to play the game, C.F. responded: "Daddy, my Daddy."

C.F.'s mother immediately took C.F. to her sister Nicole's home and told her to ask C.F. about the "game" without giving any other details. After discussing the game with C.F. alone, Nicole announced to C.F.'s mother: "I think there's a problem." The three then went to C.F.'s grandmother's home where Nicole and the grandmother spoke with C.F. about the "game." As a result, Nicole called the sheriff's office, and a deputy conducted an interview in the grandmother's home that same day. The deputy advised C.F.'s mother not to return home and to seek a divorce.

The next day, C.F. was interviewed at the Sheriff's Office. Following the interview, deputies advised C.F.'s mother that a warrant would be issued for the father for child molestation. C.F.'s mother filed for divorce the following day, July 17, 1995. On July 18, 1995, the court granted the mother ex-parte custody and ordered no visitation between C.F. and her father. A stipulated judgment followed on September 6, 1995, whereby the mother was granted "provisional" custody and the father was granted no visitation.

At the August, 1996 custody hearing, the mother called C.F. as a witness and requested that testimony be taken in chambers. The court agreed, commenting that its usual procedure, followed "hundreds of times," was "to have the child interviewed in chambers on tape out of the presence of parents." However, the court deferred the child's testimony to the end, explaining that "in interviewing young children I always find it better to save them to the end. Let the facts develop which I think makes for a better and usually more productive interview of the child involved." The court also recounted that on many occasions, after all the other testimony was in, both sides agreed that it was unnecessary to put the child through the trauma of testifying. There was no objection to the order of testimony.

Because C.F. was expected to testify, the court allowed the mother to present the testimony of Nicole and the grandmother in addition to her own. The mother testified regarding her daughter's conduct and verbal explanation, her action in presenting the child to Nicole and the grandmother, her lack of prior plans for divorce, and to other significant observations and

events. She testified that when C.F. was two years old, C.F. asked if she could watch the video from the "101 Dalmatians" box that was in the bottom drawer of C.F.'s dresser along with her other videos. When C.F.'s mother inserted what should have been a Disney movie into the VCR in C.F.'s bedroom, two naked people in a bathtub appeared on the screen. The mother removed the tape from the child's bedroom. That night, when C.F.'s father returned from work, the mother confronted him in the kitchen. C.F.'s father took the tape and put it on a high kitchen cabinet shelf, out of the mother's reach. In court, the father admitted that he had hidden the sexually explicit videotape depicting bathtub scenes, masturbation, and oral sex--acts which the child later demonstrated. He attempted to mitigate the damaging evidence by alleging that he had hidden the tape in the child's room before C.F. was born. He denied that the hiding place was inside a Disney video container

The mother testified that before the bathtub incident, C.F. had complained about pain in her private parts. The mother also related that on numerous occasions when she returned home from an errand, she found her son K.F. playing outside while C.F. and her father were in the house alone with all the doors locked. Significantly, the mother explained that the carport door was normally left unlocked for the ingress and egress of the children. The father admitted that while he and C.F. were inside and K.F. was outside, all the doors were locked on occasion.

Nicole testified that on the same day as C.F. told her mother about the "game," C.F. told her that her daddy taught her to tickle her privates. C.F. demonstrated how the "game" was played by lying on her back with her legs spread apart and bent at the knee, and pointed to her privates. Nicole testified that C.F. also told her that she put her mouth on her daddy's private and that he put his mouth on hers. C.F. demonstrated what she did by putting her mouth over the top of the bedpost, and demonstrated what she said her father did by licking the side of the post.

The grandmother testified that C.F. told her about the "game" on the same day as C.F. first told her mother and Nicole. The grandmother's testimony was consistent with that of the other witnesses: C.F. reported that she had put her mouth on her daddy's private and that he had put his mouth on hers. The grandmother asked C.F. questions to test the veracity of C.F.'s statements. C.F. told her grandmother that when she played the game she was a grownup, that she played the game only with her father, and that she was telling the truth.

The mother also presented testimony from Susan Herrod, who had treated C.F. for sexual abuse beginning October, 1995. Herrod was qualified as an expert in the treatment of abused children and is board certified. Herrod testified that during treatment, C.F.'s statements were consistent. During play therapy, C.F. described her father putting his mouth on her private parts and her putting her mouth over her father's private parts. Herrod referred the child to a physician to check for any physical evidence of sexual abuse, but asserted that lack of physical evidence did not mean that sexual abuse had not occurred.

David Sexton, Jr., the mother's brother, testified that on many occasions prior to July 15, 1995, he had observed Folse lick his child's tongue with his own. C.F.'s father denied licking C.F.'s tongue and denied sexually abusing her. But he did not deny that C.F. had made the statements attested to. In defense, the father alleged that C.F. had been "programmed" because her mother wanted a divorce. C.F.'s father also presented evidence to diminish the credibility of the mother's case and to minimize the impact of the mother's evidence.

Dr. Melvin Murrill, who examined C.F. on July 17, 1995, at his Child Protection Services office, testified that there was no physical evidence that C.F. had been sexually abused. [FN2] However, Dr. Murrill conceded that someone could touch the vaginal area and hurt the child without leaving any evidence. Dr. Cary Rostow, the father's expert psychologist, offered testimony supporting that conclusion. He testified that of those children whom he had treated for sexual abuse and who had undergone physical examinations, only about half evidenced any physical signs of the abuse.

FN2. The father, in attempting to discredit the mother's evidence, endeavored to negate the allegation of abuse because Dr. Murrill, who believed that there would have been evidence of finger penetration had it occurred, found no signs of penetration. However, the mother had not alleged penetration, but merely sexually abusive touching of the vaginal area, which Dr. Murrill conceded might not be accompanied by physical evidence.

The mother expected Dr. Kumari Moturu, the child's psychiatrist, to testify. However, Dr. Moturu was not present at the August, 1996 custody hearing and faxed a message that she was ill. Thereafter, on grounds that the witness was unavailable, the mother attempted to submit Dr. Moturu's sworn discovery deposition that had been taken at the notice of defense counsel. The court sustained the defense counsel's objection to the introduction of the deposition testimony and rescheduled Dr. Moturu and C.F. to testify at a later date, with C.F. to be the last witness. Ultimately, the court did not hear testimony from either witness. Dr. Moturu did not testify because of "poor cooperation." The mother also withdrew her permission for C.F. to testify, based on the recommendation of Susan Herrod that substantial harm could come to C.F. if she were to testify.

The court recognized the dilemma created by presentation of the hearsay evidence of C.F.'s statements in advance of C.F.'s testimony. Unable to go back and correct the order of testimony, the trial judge was forced to change his approach. Since C.F. was no longer going to testify, the judge had to determine whether the hearsay testimony could be considered in deciding the ultimate issues of custody and visitation. The court looked to LA.CODE EVID. art. 1101(B) and LA.CODE EVID. art. 102. Article 102 provides that the Code of Evidence should be interpreted to promote justice and "fairness." Article 1101(B) provides that a relaxed evidentiary standard should be used in custody cases to advance the purposes of the custody proceeding. The court recognized that the rights of both parties must be protected, and noted that the central focus in custody determinations was on the best interests of the child. The court reasoned that initial or other trustworthy complaints of sexually assaultive behavior were not excluded under the "other sufficient cause" provision of LA.CODE EVID. art. 804(A) if the declarant was unavailable as a witness. The court further reasoned that excluding the hearsay evidence "would violate this court's duty to protect the best interest of this child," citing Turner v. Turner, 455 So.2d 1374 (La.1984). Therein the judge's duty was likened to being a "fiduciary on behalf of the child." Id. at 1379. Therefore, the court re-opened the case to take evidence from Ms. Herrod regarding the potential harm to C.F. in order to assess whether C.F. was "unavailable." In advance of the hearing, the court directed that if it ruled that the child was "unavailable," the case would be decided considering the hearsay and that if it ruled that the child was not unavailable, C.F.'s mother would be given an opportunity to call C.F. as a witness.

At the hearing wherein C.F.'s availability was to be determined, Ms. Herrod testified concerning the potential harm to C.F. Herrod testified that objectives of treatment included eliminating symptomatic behavior and allowing the child to move on and put the memories of abuse behind her. Herrod stated that treatment had been successful and that the trauma of testifying could un- do the treatment and usher a return to the pre-treatment symptoms. Herrod also testified that if C.F. were to testify, C.F.'s testimony might be inconsistent with her prior statements. Herrod indicated that near the time of the initial hearing, C.F. had begun to recant her statements regarding the abuse after inquiring about what would happen to her father. C.F.'s statements were also subject to inconsistency because treatment had been successful, because of C.F.'s tender years, and because of the long lapse in time since July 15, 1995.

Based on Herrod's testimony, the trial judge determined that C.F. was "unavailable" pursuant to the "other sufficient cause" provision of LA.CODE EVID. art. 804(A). Thereafter, the judge deemed the hearsay statements admissible regarding the complaints of sexually abusive behavior pursuant to LA.CODE EVID. art. 804(B).

The trial court then went through the fact-finding process by weighing all the evidence. It found "beyond dispute" that C.F. had alleged that her father had sexually abused her. The judge found veritable consistency in the child's statements to her mother, her grandmother, Nicole, and Herrod (whose testimony was admitted because it related to treatment). The court found "bankrupt" the father's claim that C.F. had been "programmed" because the mother wanted a divorce. The couple had not been estranged before the July, 1995 report of sexual abuse, and divorce was filed pursuant to LA.CIV.CODE art. 102. In its written reasons, the court stated: "The bulk of Father's case is an attempt to discredit witnesses to what the child said about the abuse and Father. But, none of that evidence seriously discredits anyone, some is suspect, and none touches Susan Herrod." The court added that

the medical testimony offered by the father was of "no real significance" and that it did not help the father's case. The judge also recognized that cases proving sexual abuse must rely on circumstantial evidence since it was to be expected that there would be no witness to the actual act of sexual abuse.

After weighing all the evidence admissible, the trial judge determined that C.F.'s father had sexually abused her. After finding sexual abuse as a matter of fact, the trial court applied the mandatory custody and visitation provisions of the Post-Separation Family Violence Relief Act ("PSFVRA") embodied in La.R.S. 9:361-369. The trial judge awarded the mother sole custody and denied the father visitation pending his successful completion of the sexual abuse program, as required by the PSFVRA.

The court of appeal reversed. It concluded that the relaxed evidentiary standard of LA.CODE EVID. art. 1101(B)(2) did not apply to PSFVRA custody cases. Thereafter, without giving reasons, the appellate court excluded Herrod's testimony from consideration. It then determined, by rigid application of LA.CODE EVID. art. 804(A), that C.F.'s testimony was available. The appellate court then found that the initial and "otherwise trustworthy" complaints of C.F.'s mother, Nicole and the grandmother were inadmissible hearsay. By rigid application of the rules of evidence, the court of appeal had eliminated from its consideration almost all the evidence. Therefore, the court found insufficient support for a finding of sexual abuse and found it necessary to remand the case for a new custody determination under the ordinary "best interests" standard.

The PSFVRA

The State has a compelling interest in protecting children from sexual abuse. Globe Newspaper Co. v. Superior Ct., 457 U.S. 596 (1982). Protecting children from family violence, including sexual abuse, is the primary purpose of the PSFVRA. La.R.S. 9:361. To effectively protect children, the Legislature has imposed a mandatory suspension of custody and visitation against those parents proven to have sexually abused their children. The PSFVRA provides, in pertinent part:

> If any court finds, by clear and convincing evidence, that a parent has sexually abused his or her child or children, the court shall prohibit all visitation and contact between the abusive parent and the children, until such time, following a contradictory hearing, that the court finds, by a preponderance of the evidence, that the abusive parent has successfully completed a treatment program designed for such sexual abusers, and that supervised visitation is in the children's best interest.
> La.R.S. 9:364(D).

The Legislature enacted the PSFVRA because it recognized that the discretion formerly granted to judges regarding custody and visitation in sexual abuse situations was wholly inadequate in curbing family violence, including sexual abuse of children. La.R.S. 9:361 [FN3]; La.R.S. 46:2131 [FN4]; 1993 La. Acts 261, § 9, repealing La.R.S. 9:574 (wherein a judge had discretion to grant visitation to a parent who had sexually abused his or her child). Through the PSFVRA, therefore, the Legislature has expressed its determination that the best interests of the child would best be served by suspending the abusive parent's visitation pending that parent's completion of the program designed to inhibit further abuse. At issue, then, is not the innocence or guilt of the parent, but the best interests and custody of the child. La.R.S. 9:361; La.R.S. 9:364; In re A.C., 93-1125 (La.10/17/94), 643 So.2d 743, on reh'g, cert. denied sub nom. A.St.P.C. v. B.C., 515 U.S. 1128 (1995).

FN3. La. R.S. 9:361 provides:

> The legislature hereby reiterates its previous findings and statements of purpose set forth in R.S. 46:2121 and 2131 relative to family violence and domestic violence. The legislature further finds that the problems of family violence do not necessarily cease when the victimized family is legally separated or divorced. In fact, the violence often escalates, and child custody and visitation become the new forum for the continuation of the abuse. Because current laws relative to child custody and visitation are based on an assumption that even divorcing parents are in relatively equal positions of power, and that such parents act in the children's best interest, these laws often work against the protection of the children and the abused spouse in families with a history of family violence. Consequently, laws designed to act in the children's best interest may actually effect a contrary result due to the unique dynamics of family violence.

FN4. Section 2131 provides, in pertinent part:

> The legislature finds that existing laws which regulate the dissolution of marriage do not adequately address

> problems of protecting and assisting the victims of domestic abuse.... It is the intent of the legislature to provide a civil remedy for domestic violence which will afford the victim immediate and easily accessible protection.

With respect to the best interests of the child, the Legislature noted that general custody and visitation laws were based on an assumption that divorcing parents acted in their children's best interests. However, it observed that "laws designed to act in the children's best interest may actually effect a contrary result due to the unique dynamics of family violence." La.R.S. 9:361. Moreover, the Legislature was concerned that child custody or visitation provided further opportunities for the family violence, including sexual abuse, to continue following divorce or separation. La.R.S. 9:361. Therefore, once a judge had determined, as a matter of fact, that a parent had sexually abused his or her child, the PSFVRA removed the judge's discretion regarding custody and visitation, and mandated that no visitation occur between the abused child and abusive parent until the parent had successfully completed treatment designed to curb the parent's harmful behavior. La.R.S. 9:364. Because of the harsh results of a judge's finding of abuse, the Legislature raised the standard of proving the abuse from the ordinary "preponderance" standard to "clear and convincing." In re A.C., 643 So.2d at 743. Significantly, the Legislature, while enhancing the burden of proof, did not remove any gate-keeping discretion from the judge regarding admissibility of evidence

It is important to note the distinction between issues of admissibility of evidence and burdens of proof. See generally FRANK L. MARAIST & HARRY T. LEMMON, 1 LOUISIANA CIVIL LAW TREATISE: CIVIL PROCEDURE § 11.7(1) & (7) (1999) (where burden of proof requires a plaintiff to produce evidence in sufficient strength to meet the evidentiary standard, and admissibility concerns relevancy and competency). "Issues of admissibility, based upon foundation, verification and authenticity and bearing on the trustworthiness and reliability of the documents, differ from the sufficiency of proof, which goes to the weight and reliability of the evidence offered to meet the burden of proof." Cole Oil & Tire Co. v. Davis, 567 So.2d 122, 131 (La.App. 2 Cir.1990). The standard applied to each issue may also differ. State v. Lobato, 603 So.2d 739 (La.1992) ("The standard for determining the admissibility of evidence is less than what is required to convict."). A trial court's determinations regarding what evidence is admissible for the trier of fact to consider and whether a plaintiff has sufficiently proven its case will not be overturned absent clear error. Id.; United States v. Taylor, 802 F.2d 1108 (9th Cir.1986), cert. denied, 479 U.S. 1094 (1987).

Applicability of LA.CODE EVID., art. 1101(B)

The Legislature has enacted special rules which provide for a relaxed evidentiary standard to be applied in child custody determinations in order to promote the purposes of the proceeding. [FN5] LA.CODE EVID. art. 1101(B) provides, in pertinent part:

> FN5. One of Appellant's complaints is that LA.CODE EVID. art. 1101(B) should not apply because: "[t]he custody proceeding listed in Subparagraph (B)(2) refers to disputes between competing private parties, for example, custody disputes between parents. It is not intended to include actions to terminate parental rights brought by the State or its agencies." LA.CODE EVID. art. 1101, comt. h. In this case, the matter was brought by the mother as a custody proceeding. No termination proceeding was initiated. Moreover, unlike termination proceedings, custody determinations are not final. See Evans v. Lungrin, 97-0541, 97-0577 (La.2/6/98), 708 So.2d 731, 738.

> [I]n the following proceedings, the principles underlying this Code shall serve as guides to the admissibility of evidence. The specific exclusionary rules and other provisions, however, shall be applied only to the extent that they tend to promote the purposes of the proceeding.....
> (2) Child custody cases.

Clearly, the Legislature has concluded that the best interests of children are not served by strict application of the rules of evidence. To decide whether the relaxed evidentiary standard applicable to custody determinations in general applies to custody determinations pursuant to the PSFVRA, we must first consider the statutory language itself. Touchard v. Williams, 617 So.2d 885 (La.1993).

On its face, the statute manifests an intent that the trial judge not be hamstrung by strict application of the rules of evidence. Instead, it expresses an intent that

the purpose of the determination, in this case custody, is of paramount importance. Thus, the trial judge has been given very broad discretion regarding the admissibility of evidence in order that the intended purpose of the proceeding might be served.

There is no indication that LA.CODE EVID. art. 1101 is inapplicable to certain types of custody determinations. When the Legislature enacted the PSFVRA just four years after enacting article 1101, it did not express an intent that article 1101 evidentiary rules not apply. Nor did the Legislature amend article 1101 to make its provisions inapplicable to PSFVRA custody determinations. It is presumed that the Legislature enacts laws with deliberation and with full knowledge of all existing laws on the same subject. Theriot v. Midland Risk Ins. Co., 95-2895 (La.5/20/97), 694 So.2d 184. Therefore, it must be presumed that the Legislature intended that the evidentiary rules applicable to custody determinations in general be applicable to custody determinations pursuant to the PSFVRA.

Our next consideration is whether the application of article 1101(B) to PSFVRA custody determinations is consistent with legislative intent--that is, to promote the purposes of the custody determination. It is well known and documented that sexual abuse of children is extremely difficult to detect because "the offense often takes place in secret, the victim is young, vulnerable, and reluctant to testify, and there is often no physical or other evidence the abuse took place." State v. Miller, 98-0301 (La.9/9/98), 718 So.2d 960, 962. The evidence is rarely direct, but is circumstantial. Moreover, reports of family violence are exceedingly lower than their actual occurrence. La.R.S. 9:361; La.R.S. 46:2121(C). Thus, the purposes of unearthing the truth under the difficult circumstances of child sexual abuse would be served by permitting a judge to use the rules of evidence as guides rather than blinders because the relaxed standard is responsive to the circumstances in which child abuse occurs and is exposed.

Application of a relaxed evidentiary standard is also consistent with public policy regarding the welfare of children. Moreover, special consideration in matters concerning juveniles is not new. A relaxed evidentiary standard has been applied in considering placement of children. State in the Interest of C.W. v. Womack, 28,310 (La.App. 2 Cir. 2/28/96), 669 So.2d 700, superceded on other grounds by LA.CH.CODE art. 606A(5); LA.CODE EVID. art. 680. Even in the criminal context, a relaxed evidentiary standard is applied in cases involving sex crimes against children. State v. Miller, 98-0301 (La.9/9/98), 718 So.2d 960 (where evidence of uncharged misconduct is admissible to show "lustful disposition"). A relaxed evidentiary standard has also been applied to minimize the effect of the harsh courtroom experience. Maryland v. Craig, 497 U.S. 836 (1990); Michael H. Graham, The Confrontation Clause, the Hearsay Rule, and Child Sexual Abuse Prosecutions: The State of the Relationship, 72 MINN. L. REV. 523, 558--60 (1988) (citing state statutes providing relief). The basis of the relaxation of the rules reflects a state policy favoring the interests of the child. Miller, 718 So.2d at 960; State v. McArthur, 97-2918 (La.10/20/98), 719 So.2d 1037.

The court of appeal in the case sub judice erroneously concluded that LA.CODE EVID. art. 1101(B) did not apply to PSFVRA custody determinations. The appellate court relied on In re A.C., 643 So.2d at 743, which held that mandatory suspension of custody and visitation pursuant to the PSFVRA was effective only when sexual abuse was proven by the elevated clear and convincing standard. [FN6] The appellate court's misplaced reliance on In re A.C. cuts against the clear legislative intent that only the burden of proof be elevated--not the admissibility of evidence. Moreover, the appellate court ignored the fact that there are rarely witnesses to sexual abuse. The First Circuit's ruling, if affirmed, would stand for the proposition that no hearsay evidence would be allowed to prove a case that required proof by clear and convincing evidence. Since that was not the intent of the Legislature, the court of appeal's ruling was in error.

FN6. The appellate court determined that article 1101(B) did not apply to PSFVRA custody cases stating: "The parent found to be a sexual abuser permanently loses all rights to unsupervised visitation." Folse, 714 So.2d at 225 (emphasis added) (citing In re A.C., 643 So.2d at 743). However, the court of appeal failed to note that where A.C. specifically discussed the PSFVRA, the Court concluded that whether, under the Act, loss of custody or unsupervised visitation was permanent was only "arguable." Id. at 746.

Unavailability of Witness

The family court decided, as a matter of fact, that the child who had reported the abuse was unavailable. The determination of unavailability was based on LA.CODE EVID. art. 804(A)(4)'s "unavailability" provisions for reasons of "other sufficient cause." [FN7] While a determination of unavailability has grown around particular recurring fact situations such as refusal to testify, privilege, or lack of memory, "anything which constitutes unavailability in fact ought to be considered adequate." 2 MCCORMICK ON EVIDENCE § 253, at 131 (John W. Strong ed., 4 th ed.1992); see also Official Comments to LA. CODE EVID. 804, n.d "[T]he term 'unavailable' should be broadly construed." GEORGE W. PUGH, ROBERT FORCE, GERARD A. RAULT, JR., & KERRY TRICHE, HANDBOOK ON LOUISIANA EVIDENCE LAW, 507 Authors' Notes to La.Code Evid. art. 804, n.1 (1998).

> FN7. LA.CODE EVID. art. 804(A)(4) provides, in pertinent part:
>
> [A] declarant is 'unavailable as a witness' when the declarant cannot or will not appear in court and testify to the substance of his statement made outside of court. This includes situations in which the declarant:
>
> ...
>
> (4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness, infirmity, or other sufficient cause.

Determining unavailability is a preliminary question under LA.CODE EVID. art. 104(A). The judge may consider otherwise inadmissible evidence in determining the preliminary factual question. PUGH, FORCE, AND RAULT, supra, at 279; Authors' Notes to LA.CODE EVID. art. 104, n.3 (1998); LA.CODE EVID. art. 104, Official Comment (c). Factual questions and credibility determinations are reviewed under a manifest error standard. Rosell v. ESCO, 549 So.2d 840 (La.1989). Credibility determinations are within the sound discretion of the court, and absent a determination that the trial court abused its discretion, the court's decision will not be overturned. Id.; State v. Nall, 439 So.2d 420, 424 (La.1983) (unavailable due to loss of memory).

In the case sub judice, the court took testimony regarding whether the child's testimony was, indeed, unavailable. The court found C.F. unavailable, relying on the testimony of Susan Herrod, who was qualified as an expert in the treatment of sexually abused children, and who had, in fact, treated C.F. following the reports of sexual abuse. The appellate court reversed, concluding that C.F. was not unavailable within the meaning of the statute. The appellate court found insufficient as "other sufficient cause" Herrod's testimony that while C.F. was capable of testifying, she "just d[id]n't think it would be good for her." However, the trial court's written reasons reflect a more serious rationale for finding the testimony of C.F. unavailable within the meaning of the statute.

The trial judge relied on the whole of Ms. Herrod's testimony at the "unavailability" hearing, and specified in its written reasons that it found C.F. unavailable because "requiring C.F. to testify could harm the child by undoing the progress made to alleviate the child's problems for which Mother sought treatment." The court laid out the symptoms alleviated by Herrod's treatment and noted Herrod's testimony that C.F. had begun to recant her previously consistent statements because of the success of C.F.'s treatment, her tender years, and the long lapse of time, and that the inconsistency first appeared when C.F. expressed concern over what would happen to her father.

Children often make poor witnesses because of their age, immaturity, and courtroom intimidation. Charles W. Ehrhardt & Ryon M. McCabe, Child Sexual Abuse Prosecutions: Admitting Out-of-Court Statements of Child Victims and Witnesses in Louisiana, 23.1 S.U. L. REV. 1 (1995). Children like C.F., whose initial complaints were elicited through questioning, are more likely to be traumatized by the courtroom experience and more likely to recant before or during trial. Michael H. Graham, The Confrontation Clause, the Hearsay Rule, and Child Sexual Abuse Prosecutions: The State of the Relationship, 72 MINN. L. REV. 523, 560 n.192 (1988). Moreover, C.F.'s recent recantation based on the totality of the circumstances would make her testimony at a time following the initial hearing completely unhelpful.

The trial court did not make a determination based on the trauma generally experienced by young victims. Instead, its decision that C.F. was unavailable pursuant to the "other sufficient cause" provision of LA.CODE EVID. art. 804(A)(4) was fully grounded in the specific circumstances of the instant case. Such individualized determinations are consistent with sound procedural practice regarding the admission of child

testimony Coy v Iowa, 487 U S 1012 (1988). The court's finding of unavailability is also consistent with the notion of regarding unavailability not in terms of whether a witness is unavailable, but in terms of whether the testimony of a particular witness is unavailable. McCORMICK, supra, § 253, at 130-31. Accordingly, we see no abuse of discretion in the trial court's finding C.F. unavailable for "other sufficient cause."

Admissible Hearsay

When the testimony of a child who alleges sexual abuse is unavailable, the child's initial or otherwise trustworthy complaints are not excluded by the hearsay rule. LA.CODE EVID art. 804(B)(5) [FN8]

FN8. Article 804(B) provides, in pertinent part:
The following are not excluded by the hearsay rule if the declarant is unavailable as a witness

(5) Complaint of sexually assaultive behavior. A statement made by a person under the age of twelve years and the statement is one of initial or otherwise trustworthy complaint of sexually assaultive behavior.

A child's initial complaint often consists of responses to adult questioning, because a child may have no clear understanding of what has been done to her. State v. Garay, 453 So.2d 1003 (La.App. 4 Cir.1984). The responses fall within the rubric of "initial complaint" even if the report is made some time after the incident. State v. Prestridge, 399 So.2d 564, 572 (La.1981); State v. Adams, 394 So.2d 1204, 1212 (La.1981). C.F. first reported the sexual abuse in response to her mother's questions made after she observed C.F.'s uncharacteristic sexual display. The trial court correctly admitted that evidence as an initial complaint pursuant to LA.CODE EVID. art. 804(B)(5).

Other hearsay evidence is admissible when a witness is unavailable if the statements bear an adequate "indicia of reliability" based on a showing of "particularized guarantees of trustworthiness." Ohio v. Roberts, 448 U.S. 56, 66 (1980). In analyzing reliability, the court must examine the probative value of out-of-court statements. White v. Illinois, 502 U.S. 346, 355-58 (1992). Decisions must be made on a case-by-case basis, and must be gleaned from the totality of the circumstances. Maryland v. Craig, 497 U.S. 836, 857-58 (1990). Idaho v. Wright, 497 U.S. 805, 821-22 (1990).

In this case, the issue of admissibility concerns hearsay statements made by C.F. to adults concerning her being the victim of sexual abuse. With respect to the reliability of evidence regarding sexual abuse, important consideration must be given to whether "the child's statement discloses an embarrassing event that a child would not normally relate unless true. . . or describes a sexual act beyond a child's normal experience." Michael H. Graham, The Confrontation Clause, the Hearsay Rule, and Child Sexual Abuse Prosecutions: The State of the Relationship, 72 MINN. L. REV. 523, 532 (1988). Factors relating to reliability also include the "spontaneity and consistent repetition, mental state of the declarant, use of terminology unexpected of a child of similar age, and lack of motivation to fabricate." Wright, 497 U.S. at 821-22.

In the case sub judice, C.F. was only four years of age at the time she reported the sexual abuse. On the same day, July 15, 1995, C.F. reported the sexual abuse to her mother, her grandmother, and Nicole. The child's reports were consistent. In her reporting, C.F. displayed familiarity with fellatio and cunnilingus inconsistent with the experience of children of similar age. There has been no showing of a motive to fabricate; the trial court strongly expressed its finding that the father's allegations of motive were "bankrupt." The court utilized the special evidentiary rules to admit the probative evidence only upon finding the statements reliable and necessary for a just result premised on the child's unavailability to testify. The procedure used by the trial court in admitting the hearsay statements of the child comports with the admonition in Coy v. Iowa that there must be "individualized findings" necessitating deviation from the general rules. 487 U.S. 1012 (1988).

In reading LA.CODE EVID. art. 804(B)(5) in conjunction with LA.CODE EVID. art. 1101(B) and the PSFVRA, it is clear that the Legislature has expressed an overriding interest in protecting child victims of sexual abuse by encouraging the admission of reliable hearsay evidence for the trial judge to weigh. That interest is not subject to being "second-guessed." Craig, 497 U.S. 836, 855 (1990). Under the totality of the circumstances in the case sub judice, the

established by a preponderance of the credible evidence that Father sexually abused their child." (Emphasis added.) Disagreeing with the father's characterization that the trial court made its determination by a mere preponderance of the evidence, plaintiff points to the printed order, also issued on November 8, 1996, which reads as follows: "Having found by clear and convincing evidence that Darryl Gerard Folse has sexually abused [C.F.] within the meaning of La.R.S. 9:361-369, the court issues the following order." (Emphasis added.)

FN9. Section 364(D) provides:
If any court finds, by clear and convincing evidence, that a parent has sexually abused his or her child or children, the court shall prohibit all visitation and contact between the abusive parent and the children, until such time, following a contradictory hearing, that the court finds, by a preponderance of the evidence, that the abusive parent has successfully completed a treatment program designed for such sexual abusers, and that supervised visitation is in the children's best interest.

We have previously held that a judge's "slip of the tongue" is not reversible error. State v. Langendorfer, 389 So.2d 1271,1276 (La.1980) (where judge's instruction regarding the waiver of Fifth Amendment rights might result in commission up to two years instead of twenty did not invalidate the plea); LaFrance v. Bourgeois, 97-376 (La.App. 5 Cir. 10/15/97), 701 So.2d 1026, 1029-30, writ denied, 97-2865 (La.2/13/98), 706 So.2d 993 (mistaken jury instructions).

In determining whether the judge used the incorrect standard or simply made a slip of the tongue, we must

unfamiliar to children of like age. The judge also considered symptoms of abuse and treatment response as expressed by Herrod under the "statements made during treatment" exception to the hearsay rule, LA.CODE EVID. art. 803(4). [FN10] The judge also weighed testimony from Dr. Murrill, the pediatrician who examined C.F. on July 17, 1995, after the report of sexual abuse. Dr. Murrill testified that there was no physical evidence of sexual abuse. The father argued, in part, that the absence of physical evidence of sexual abuse destroyed the mother's case. The father also attempted to discredit the mother's case by mischaracterizing her complaint as stating that penetration was alleged, and, since penetration would have been discovered by the examining physician, no abuse had occurred. It is true that the examining physician, Dr. Murrill, determined that no penetration had occurred. However, C.F. had not reported penetration, but hurtful touching. Dr. Murrill conceded that the touching might very well leave no traces of evidence. Dr. Murrill testified that the absence of physical evidence did not mean that the child had not been abused, and that the child's history was consistent with sexual abuse.

FN10. Article 803 provides, in pertinent part:
The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(4) Statements made for purposes of medical treatment . . . and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to treatment.

Children Need ... *THIS* ?

THE FATHER'S RIGHTS MOVEMENT IN THEIR OWN WORDS

"What Is Parental Alienation Syndrome And Why Is It So Often Used Against Mothers?"

by John E. B. Myers, Professor of Law, University of the Pacific McGeorge School of Law, Sacramento, California.

The following is an excerpt from a forthcoming book titled A Mother's Nightmare: A Practical Legal Guide For Parents And Professionals.

Psychological and medical syndromes play an important role in understanding behavior and providing treatment to victims of abuse. Unfortunately, there is one so-called syndrome that, in my opinion, does tremendous harm to many children and their parents, particularly mothers seeking custody in family court. I speak of psychiatrist Richard Gardner's Parental Alienation Syndrome (1987.) Gardner writes:

> "One outgrowth of this warfare (over custody) was the development in children of what I refer to as the Parental Alienation Syndrome. Typically, the child viciously vilifies one of the parents and idealizes the other. This is not caused simply by parental brainwashing of the child. Rather the children themselves contribute their own scenarios in support of the favored parent. My experience has been that in about 80 to 90 percent of cases the mother is the favored parent and the father the vilified one." (1989, p. 2)

Gardner is an outspoken critic of certain aspects of the child protection system. Apparently, Gardner believes America is in the throes of mass hysteria over child sexual abuse.

He writes that "sex-abuse hysteria is omnipresent" (1992, p. xxv). In his 1991 book titled Sex Abuse Hysteria: Salem Witch Trials Revisited, Gardner is harshly critical of an unspecified portion of the mental health professionals, investigators, and prosecutors trying to protect children. For example, Gardner accuses some prosecutors of gratifying their own sexual urges and sadistic tendencies through involvement in sexual abuse cases. Gardner goes so far as to say that "there is a bit of pedophilia in every one of us" (p. 118). It seem clear that Richard Gardner cannot claim to be balanced or objective when it comes to allegations of child sexual abuse.

Gardner's Parental Alienation Syndrome has not, to my knowledge,

been subjected to empirical study, research, or testing. Nor to my knowledge, has the syndrome been published in peer reviewed medical or scientific journals.

Rather, the syndrome is simply Richard Gardner's opinion, based on his clinical experience. Of course, the fact that Parental Alienation Syndrome is based on one man's experience does not imply there is something wrong with the syndrome. Nevertheless, it is clear that the syndrome is not accepted as a scientifically reliable way of telling whether an allegation of sexual abuse is true or false. **Moreover, in my opinion, much of Gardner's writing, including his Parental Alienation Syndrome, is biased against women. This gender bias infects the syndrome, and makes it a powerful tool to undermine the credibility of women who allege child sexual abuse. Because parental alienation perpetuates and exacerbates gender bias against women, I believe the syndrome sheds much more darkness than light on this difficult issue.**

Another term coined by Richard Gardner is "Sex Abuse Legitimacy Scale." Of this scale, Lucy Berliner and Jon Conte write:

> "A specific and disturbing example of using (behavioral) indicators as determinative of true versus false cases is that of the Sexual Abuse Legitimacy (SAL) Scale. This "scale" claims to be able to discriminate between 'bona fide' and 'fabricated' cases by indicating the presence or absence of a series of characteristics of cases. There are 26 dealing with the alleged victim, 11 dealing with the accuser (usually the mother), and 13 dealing with the accused (usually the father).
>
> The criteria are divided into those which are very valuable (worth 3 points if present), moderately valuable (2 points), and low but potentially valuable (1 point). Separate scores are generated for the child, the accused, and accuser. Scores in the range of 50 percent of the maximum or more are highly suggestive of bonafide sexual abuse and those quite low (below 10 percent) are fabricated. Sample criteria are: for the child, very hesitant to divulge the abuse or if no quality of a litany; for the accuser, appreciates importance of relationship between child and father or initially denies abuse; for the accused, allegation not in the context of divorce or career choice involving children. The SAL Scale suffers many of the problems that all indicator approaches suffer and a number which are unique. It is based entirely on the author's personal observation of an unknown number of cases seen in a specialized forensic practice. Although reference is made to studies carried out "between 1982 and 1987" they are unpublished, not described, and are of unknown value. There are no studies which have determined if the scale can be coded reliably. Many of the criteria are poorly defined. There have been no scientific tests of the ability of the SAL Scale to discriminate among cases. There is no evidence that the numerical scores have

any real meaning. Indeed, to our knowledge, the entire scale and Parent Alienation Syndrome upon which it is based have never been subjected to any kind of peer review or empirical test. In sum, there is no demonstrated ability of this scale to make valid predictions based on the identified criteria (1993, p. 114)."

In 1988, researcher and author Jon Conte wrote that Gardner's Sex Abuse Legitimacy Scale is "probably the most unscientific piece of garbage I've seen in the field in all my time. To base social policy on something as flimsy as this is exceedingly dangerous" (Moss, 1988, p. 26).

If you are a woman and you allege child sexual abuse, expect to be attacked with Richard Gardner's Parental Alienation Syndrome. Gardner's writing is popular among attorney's who represent men accused of abuse, and among some mental health professionals. Your attorney must be prepared to counteract the misleading and destructive effects of Parental Alienation Syndrome and the Sex Abuse Legitimacy Scale.

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Richard Gardner and "Parental Alienation Syndrome"

by Trish Wilson

In the Winter, 1989, issue of "American Fatherhood, The Voice of Responsible and Dedicated Fatherhood" (F.A.I.R. The National Fathers' Organization, Camden, Delaware), Richard Gardner, in his article "Parental Alienation Syndrome," asks "why do some mothers do everything in their power to alienate the children from the father? What can be done?"

WHAT DOES THE APA SAY ABOUT THIS?

"PARENTAL ALIENATION SYNDROME IS NOT A VALID DIAGNOSIS, AND SHOULDN'T BE ADMITTED INTO CHILD CUSTODY CASES."

Mothers are most often labeled with PAS, not fathers. Gardner's description of the mothers behavior under his three PAS categories of severe, moderate, and mild is not only his personal opinion, but it also exposes his sexism and bias against women. PAS is designed to be used during a contested child custody hearing, particularly when allegations of child sexual abuse are made. The ultimate goal is removal of the child from the home and custody of the mother, and award full custody to the allegedly abusive father.

The cards are stacked against the mother from the moment PAS is introduced in the courtroom. PAS is set up in such a manner that the mother is guaranteed to be labeled with this dubious syndrome, and that removal of the child from her care is the only possible outcome. She is guaranteed to lose custody of her children unless her counsel demonstrates the gaping flaws within PAS. The court personnel must not only be made aware that PAS is not recognized as a valid medical syndrome by the AMA and the APA, but that use of this dubious syndrome as a means of removing custody from fit mothers alleging abuse will not be kept quiet.

PAS is designed to work in a court setting, otherwise "treatment of such families" (i.e.; removal of the child permanently from the mother's care) won't be successful. Gardner emphasizes that "in many cases the therapy of these families is not possible without court support. Only the court has the power to order these mothers to stop their manipulations and maneuvering. And it is only the court that has the power to place the children in whichever home would best suit their needs at the particular time. Therapists who embark upon the treatment of such families without such court backing are not likely to be successful. I cannot emphasize this point strongly enough."

The mother is not only prohibited from having fair court representation, she is also prohibited from having fair and even-handed therapy. Gardner finds it imperative that "... the therapist be court ordered and have direct input to the judge. This can often be facilitated by the utilization of a guardian ad litem or a child advocate, who has the opportunity for direct communication with the court. The mother must know that any obstructionism on her part will be immediately reported to the judge, either by the therapist or though the guardian ad litem or child advocate. The court must be willing to impose sanctions such as fines or jail. The threat of loss of primary custody can also help such mothers 'remember to cooperate.'" Mothers in these cases are forced to adhere to prearranged "treatment" regardless of whether or not they agree with any of the

decisions being made. If they voice objections, they will be labeled as uncooperative and/or mentally ill.

Under his category of "severe" PAS, he states that "... the mothers of these children are often fanatic. They will use every mechanism at their disposal (legal and illegal) to prevent visitation. They are obsessed with antagonism towards their husbands. In many cases, they are paranoid. Sometimes the paranoid thoughts and feelings about the husband are isolated to him alone; in other cases this paranoia is just one example of many types of paranoid thinking. Often the paranoia did not exhibit itself prior to the breakup of the marriage and may be a manifestation of the psychiatric deterioration that frequently is seen in the context of disputes, especially custody disputes." Such generalizations are quite common descriptions under PAS, stigmatizing a mother who is attempting to protect her child if she believes that child is being sexually abused.

He continues with the opinion that these mothers project onto their husbands "... many noxious qualities that actually exist within themselves. By projecting these unacceptable qualities onto their husbands they can consider themselves innocent victims. When a sex-abuse allegation becomes part of the package, they may be projecting their own sexual inclinations onto him. In the service of this goal they exaggerate and distort any comment the child makes that might justify the accusation. And this is not difficult to do because children normally will entertain sexual fantasies, often of the most bizarre form. I am in agreement with Freud that children are "polymorphous perverse" and they thereby provide these mothers with an ample supply of material to serve as a nuclei for their projections and accusations." All this from the man who said that there is some pedophilia in every one of us.

Not content with labeling the mother with a dubious mental disorder, Gardner goes as far as labeling the children as "similarly fanatic." These fanatic children apparently "... have joined together with her [the mother] in a relationship in which they share her paranoid fantasies about the father." The way PAS is designed, a child who acts out, discusses what he or she believes is inappropriate sexual behavior coming from the allegedly abusive father, or demonstrates fear when in the presence of the man identified as the abuser will immediately assume to have been coached by the offending mother. These children will not be believed, and will not receive the care and protection they desparately need. Gardner takes legitimate concerns such as a child exhibiting fear over the prospect of visitation with an allegedly abusing father, "blood-curdling shrieks, panicked states, and hostility so severe that visitation is impossible...," and creates the assumption that the child is either lying about the abuse or has been coached by the mother to behave in such a manner.

In "moderate" cases of PAS, Gardner makes more generalized and sexist comments such as "... the rage-of-the-rejected-woman factor is more important than the paranoid projection contribution." He cites the mothers'

"... campaign of denigration and a significant desire to withhold the children from the father as a vengeance maneuver." He states that a major difference between "severe" PAS in mothers as opposed to "moderate" PAS is that the mothers in the "severe" category "... have a sick psychological bond with the children (often a paranoid one)." Mothers suffering from "moderate" PAS are more likely to have a " ... healthy psychological bond that is being compromised by their rage." One wonders if the more likely a mother is to stand by her beliefs and principles and not acquiesce under pressure from her ex and others in the court in order to protect her child, the more likely she is to be labeled within one of the more "severe" PAS categories. If she is fairly easy to manipulate and control, most likely her level of PAS will be on a milder side.

Children are not to be believed according to PAS, and the therapists, judges, lawyers, child advocates, and guardians ad litem who support it will ensure that the children's needs are not met. Gardner goes as far as to compare a child's cries for help regarding sexual abuse to getting a polio shot. The court's therapist "... must have a thick skin and be able to tolerate the shrieks and claims of maltreatment that these children will provide. Doing what children profess they want is not always the same as doing what is best for them. Therapists of the persuasion that they must 'respect' their child patients and accede to their wishes will be doing these children a terrible disservice. These same therapists would not 'respect' a child's wish not to have a polio shot, yet they will respect the child's wish not to see a father who shows no significant evidence of abuse, maltreatment, neglect, etc." The most astounding statement Gardner makes regarding children who are alleging abuse is that "... to take the allegations of maltreatment seriously is a terrible disservice to these children."

Therapy is seen as the only means of treating PAS. However, Gardner states that "therapy for the children ... is most often not possible while the children are still living in the mother's home." Since therapy is the only treatment possible, and Gardner himself has stated that child therapy with "evidence" of PAS will not be successful as long as the child is living with the mother, court-ordered placement with the alleged abuser is 100% guaranteed. He states that "... the first step toward treatment is removal of the children from the mother's home and placement in the home of the father." PAS is set up in advance to remove children from the mother's care. If PAS is introduced by the father, his attorney, his court-appointed and self-selected therapists, so-called child advocates, and the court-appointed guardian ad litem during a contested child custody hearing, the mother is guaranteed to lose custody of her children unless Gardner's "Sex Abuse Legitimacy Scale" is shown to be what University of Washington Professor John Conte has described as "[p]robably the most unscientific piece of garbage I've seen in the field in all my time."

Gardner states that if the mother has her own therapist, "... a mutual

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EXPERT TESTIMONY IN CHILD SEXUAL ABUSE PROSECUTIONS

I. Presentation: Expert Testimony in Child Sexual Abuse Prosecutions

A. Scientific or Technical?

B. What Constitutes "Expertise"

C. Various Categories of Expert Testimony

1. CSAAS

2. Behavior of Sexually Abused Children

3. Diagnosis of Sexual Abuse

4. Suggestibility of Children

5. Use of Anatomical Dolls

6. Credibility of Children

D. Special Considerations in Native American cases

E. The Proposed Amendment to Federal Rule of Evidence 702

F. The Dangers of Expert Testimony in Child Sexual Abuse Prosecutions

II. Materials

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Psychological and Scientific Evidence in Criminal Trials

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Volume 1

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Chapter 8

Child Sexual Abuse Syndrome

I. INTRODUCTION

II. EXPERT TESTIMONY

I. INTRODUCTION

§ 8:1 Overview

By most accounts, reports of child sexual abuse in this country have grown exponentially over the past few decades. Whether the incidence of the crime is actually growing or the reporting of the crime is finally occurring is not clearly understood. What engenders no debate is that the abuse of children—whether physical, sexual, or emotional—is pernicious and damages their physical and mental well-being, often scarring them well into adulthood. Some children, sadly, do not survive the abuse.

Among the more discussed aspects of child abuse is child sexual abuse. Long believed by many simply to be fantastic childhood tales, the vast majority of Americans now believe sexual abuse of children occurs and occurs fairly frequently. Some people, however, believe that a witch hunt for sexual abuse has developed in this country, and

that the "experts" and courts have totally lost touch with reality.[1]

> In a recent publication, one group of commentators provided the following statistics: In 1991, an estimated 2.694.000 children were reported to Child Protective Services agencies as victims of . . . abuse or neglect. Of these, approximately 15 percent, or 404,100 were sex abuse cases. . . . The numbers for 1992 are even higher with an estimated 2,936,000 reported cases of . . . abuse and 17 percent, or 499,120 being sex abuse cases. There is also growing evidence that a substantial portion of the allegations are either unsubstantiated . . . or false. . . . Of the 2.7 million reported cases for 1991, an average of only 39 percent were substantiated following investigation.[2]

The prosecution of adults who physically batter children is a generally simpler process than the prosecution of sexual abusers. In physical abuse cases, there is usually ample physical evidence to support the claim of abuse. Additionally, physicians' testimony about the battered child syndrome has uniformly been admitted in courts and is accepted in the medical profession.[3] In sexual abuse cases, however, there is often no physical evidence and reliance on psychological evidence has therefore become more pronounced.

As with most societal issues being played out in the criminal courts, however, the road to prosecuting sexual abuse crimes has been difficult. There has been substantial conflict in these cases about what evidence should be admissible—most prominently in the area of admission of expert testimony. The prosecution has claimed that difficulties encountered inherent in proving sexual abuse has made the introduction of expert testimony a necessity. The defense

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[Section 8:1]

[1] The McMartin sexual abuse case in California and the Kelly Michaels case in New Jersey both underscore the growing belief among many that the allegations of sexual abuse are reaching hysterical proportions. In both cases, preschool teachers were accused by several children of sexual abuse—after numerous suggestive interrogations amid an atmosphere of hysteria. For an account of the McMartin case, see Coleman, Learning from the McMartin Hoax, 1(2) Issues in Child Abuse Accusations 68 (19[illegible] Carlson, Six Years of Trial By Torture, Time Mag, Jan. 29, 1990. Some of the details of the interrogation in the *Michaels* case are contained in the appendix to the New Jersey Supreme Court's opinion. State v. Michaels, 642 A.2d 1372 (N.J. 1994).

[2] Jenkins & Howell, Child Sexual Abuse Examinations: Proposed Guidelines for A Standard of Care, 22 Bull Am Acad Psychiatry & L 5, 6 (1994).

[3] The battered child syndrome is a diagnostic tool used by physicians determining the cause of children's repeated physical injuries.

has claimed that much of the expert testimony results in unfair trials in which innocent people are convicted of crimes they did not commit.

The purpose of this chapter is to provide an overview for the practicing lawyer dealing with the child sexual abuse case. Its primary focus will be to provide an in-depth review of the psychological evidence aspects of the child sexual abuse case.

Specifically addressed will be the various concepts that have become integral to the prosecution and defense of child sexual abuse cases. These concepts include the so-called "child sexual abuse accommodation syndrome," the psychological underpinnings for the claims that "children do not lie about sexual abuse," the behavioral profiles often introduced at trial of sexually abused children, and the growing concern about suggestive interview techniques and anatomical dolls.

Additionally included in this chapter are a review of the various positions taken by the courts on the admission of psychological evidence, a discussion of the problems that arise in the uncovering of alleged abuse, and a step-by-step approach to trying the child sexual abuse case. Furthermore, the special problems of mass declarations of child abuse (where several children allege abuse at the hands of the same person) are reviewed. As in most of the chapters in this book, there are prosecution and defense checklists at the end of the chapter.

§ 8:2 Special problems of child sexual abuse cases

It is hard to imagine a category of criminal cases that presents more problems for both sides (and for the court) than child sexual abuse cases. The whole concept of child sexual abuse is such an affront to our sensibilities and so difficult to comprehend. With the growing awareness of child sexual abuse, many parents have been worried about leaving their child in day care, and many professionals in the day care business are terrified of the possibility of a child making a claim of sexual abuse.

In addition to the difficulties presented in the case of one (or a few) children alleging abuse, there are special difficulties faced by both the prosecution and the defense in cases of mass declarations. The *McMartin* case in California and the *Michaels* case in New Jersey

are perfect examples of the dangers and difficulties in the cases.[1]

§ 8:3 — Prosecution difficulties in child sexual abuse cases

Among the problems faced by prosecutors in these cases are the following:

- There are usually no witnesses to the crime, other than the child victim.
- The vast majority of cases occur where the adult in question has a relationship of trust with the child and the parties are often loathe to bring suit. There is often a great deal of disbelief by one parent when the other parent is accused of the acts, and the child is often pressured to recant the allegation.
- Sexual abuse often leaves no physical evidence as it may consist of improper touching or other acts.
- Children are often unbelievable witnesses and are hampered by an inability to verbalize and explain all the events.
- Children often react in unexpected ways to the abuse, evidencing behaviors that are difficult for jurors to understand.
- The tales of abuse are often too bizarre to be believed and jurors assume that the child must be fabricating the tale.
- Adults who abuse children often lead very respectable, upright lives in society, making it difficult for jurors to believe that the defendant could have committed such a pernicious act.
- Abused children have often been threatened or warned about not telling anyone about the abuse and they are therefore terribly afraid to reveal the abuse for fear that they or their family will be harmed.
- Children are often unable to state when or where the abuse occurred or specifically how many times it occurred, rendering their testimony less than believable.
- Children are often traumatized by testifying in court—both as a result of the public aspect of the proceeding and by the presence

[Section 8:2]

[1] Both of the cases referred to, State v. McMartin, and State v. Michaels, 642 A.2d 1372 (N.J. 1994), involved child sexual abuse claims made by children who were in day care programs run by the defendants. In the *McMartin* case, the jury returned a verdict of not guilty after a year-long trial. In the *Michaels* case, the Superior Court and Supreme Court of New Jersey reversed the conviction (on different issues), with the likely result that the case will not be able to be retried. The subject of mass declarations of child abuse is addressed in this chapter.

of the abusive individual of whom they are afraid and/or whom they still love.

As difficult a job as prosecutors have in these cases, defense counsel (and the courts) are faced with equally difficult challenges in the defense of child sexual abuse cases.

§ 8:4 — Defense difficulties in child sexual abuse cases

Among the difficulties presented in the defense of child sexual abuse cases are the following:

- Children are naturally sympathetic witnesses, whom jurors want to protect when they listen to them. Individuals accused of child sexual abuse crimes, on the other hand, are often not accorded the presumption of innocence by jurors, but are clearly viewed with distrust and suspicion.
- The flood of information on television, newspapers, magazines, and in other areas of the media about child sexual abuse has made the subject much more accessible and believable to the population at large. Many individuals are now convinced that there is an epidemic of child sexual abuse cases.
- It is almost impossible to find witnesses to corroborate the adult's denial of the act(s). How does a defendant prove that the touching did not occur?
- Stepfathers are often defendants and they have a historically "evil" reputation, deservedly or not.
- Most courts have permitted children to testify without reference to specific places, dates, or times, further complicating the availability of alibi and other defenses.
- There is often a lack of witnesses and physical or circumstantial evidence—the defendant has limited tools to construct a defense.
- Courts have become increasingly more lenient with prosecutorial attempts to introduce expert evidence to explain any discrepancies, bolster the child's testimony, and to explain the child's behavior.
- Some courts are not requiring that the child actually testify in court, but are permitting videotape testimony, thus depriving the jury of the right to evaluate the child's testimony in person.

There has recently been a growing awareness of the problems with inaccurate uncovering of child abuse by counselors, police, and pros-

ecutors. Specifically, the use of dolls and certain types of interrogation techniques have become more suspect.

§ 8:5 — Dilemma of courts handling sexual abuse cases

Courts handling these cases must deal with the dynamic of balancing their natural sympathy for the victims of crime with their need to assure the fairness of the proceedings to individuals accused of crimes. Additionally, courts must balance the need for expert testimony against the danger of unfair prejudice it poses.

Another major problem for the courts is in evaluating the science behind the testimony. Many courts are confused in the area of psychological testimony and are unsure of who is or who should be an authority. Additionally, many of the experts are not familiar with the literature and are not aware of the psychologically controversial nature of the testimony they are providing to the court.[1]

II. EXPERT TESTIMONY

§ 8:6 Advent of expert testimony

As the prosecution of sexual abuse cases became more prevalent in the 1980s, prosecutors began to push the courts to permit the introduction of expert testimony to explain why children were changing their stories, recanting tales of abuse, and acting in bizarre and inexplicable fashions. Additionally, prosecutors sought to buttress their cases by introducing expert testimony to explain to the jury that sexually abused children often exhibited certain behavior patterns (profiles) and that these patterns were exhibited by the child in question. Finally, some prosecutors attempted to introduce expert evidence to suggest that victims of child sexual abuse never or very rarely lie about such abuse.

The prosecutors in child sexual abuse cases have argued the following: that the rules of evidence should permit expert psychological testimony; that any difficulties with the expert's testimony went towards its weight and not its admissibility; that the jury's inherent bias against believing such testimony from children required such testimony; and that defendants were not unfairly prejudiced by the introduction of such testimony.

[Section 8:5]

[1] Chapter 2 contains a more complete discussion concerning the credentials of expert witnesses.

Not surprisingly, defense lawyers began seriously challenging this expert evidence on a variety of fronts, including challenges to the relevancy, reliability, and prejudicial effect of such evidence, the invasion of the jury's province to determine credibility, the qualifications of the experts, and the basic unfairness of the testimony.

The result of these arguments for and against expert testimony in child sexual abuse cases has been to create once again a wide divergence among the courts as to whether expert testimony should be admissible and, if so, what specific testimony should be considered by the jury.

To understand the courts' respective positions, it is necessary to understand fully the psychological concepts to which the court and litigants are referring in these cases. To that end, the following sections will contain an explanation of the psychology behind the testimony, along with a review of the current literature and the various difficulties, as understood by the experts.

§ 8:7 — Psychological aspects of child sexual abuse

There are several psychological aspects to child sexual abuse. There are the psychological aspects to why children do not tell people immediately about the abuse. There are the behaviors sexually abused children exhibit, sometimes referred to as behavior profiles. Additionally, there are the psychological issues regarding recantation, secrecy, and changes or discrepancies in the retelling of the abuse. This latter category is most frequently referred to as the child sexual abuse accommodation syndrome (CSAAS). Finally, there is the question of children's memory of and truthfulness about the abuse as well as children's suggestibility.

§ 8:8 — Confusion of the courts

Often, the courts (and litigants) confuse or misapprehend the psychological issues. Unfortunately, experts (or those who purport to be experts) also sometimes confuse these issues themselves, owing to the substantial and complex problems associated with expert testimony concerning child sexual abuse.

Among the areas of dispute are whether children lie about sexual abuse, whether there is an identifiable set of behaviors indicated by victims of sexual abuse, whether psychologists have any special way of discerning whether children are telling the truth, and whether

there is any validity to the child sexual abuse accommodation syndrome.

Further complicating the problem is the courts' leniency with regard to expert credentials. Often, the "experts" who testify do not have sufficient expertise and education to render the opinions they are giving in court. Because there has been a great deal of latitude by the courts with regard to expert witnesses, individuals who are not licensed psychologists or psychiatrists regularly render opinions that are far beyond their ken. The result of this procedure has been to create confusion in the courts.

One of the more pronounced misunderstandings has been the confusion of CSAAS evidence with behavioral profiles and the erroneous belief that CSAAS is a diagnostic syndrome. The following sections clearly explain the differences among the three types of evidence.

§ 8:9 Three possible types of psychological testimony

Generally, there are three different types of testimony that prosecutors have sought to introduce into evidence: behavior profiles of sexually abused children; child sexual abuse accommodation syndrome testimony; and testimony concerning whether children are telling the truth about sexual abuse.

§ 8:10 — Child sexual abuse accommodation syndrome

Psychiatrist Roland C. Summit first introduced a theory to explain how children adjusted, or accommodated to sexual abuse.[1] Termed the child sexual abuse accommodation syndrome (CSAAS), it quickly found its way into the courtroom. CSAAS consists of some or all of five elements often seen in sexually abused children: (1) secrecy, (2) helplessness, (3) entrapment and accommodation, (4) delayed or (5) conflicted disclosure and retraction.

Although the purpose of defining these characteristics as a syndrome was to provide a common language for those working with abused children,[2] the courts began to admit such evidence in sexual abuse prosecutions, often to buttress claims of abuse.

According to Dr. Summit and other professionals, CSAAS is not a diagnostic syndrome. "The syndrome does not detect sexual abuse.

[Section 8:10]

[1] Summit, M.D., The Child Abuse Accommodation Syndrome, 7 Child Abuse & Neglect 177 (1983).

[2] Id. at 191. See also Myers, Expert Testimony in Child Sexual Abuse Litigation, 68 Neb L Rev 1, 67 (1989)(hereinafter Myers, Expert Testimony).

Rather it *assumes* the presence of abuse, and explains the child's reactions to it."[3] In a criminal case, any evidence that *assumes* the existence of a material fact in issue (namely, whether the child was abused) is potentially dangerous testimony.

The method of using CSAAS in courts has often been erroneous, as many courts have admitted such syndrome evidence as if it were a diagnostic syndrome. However, there have been other misuses of the syndrome. One influential commentator has stated:

> If the first error was erroneously equating child sexual abuse accommodation syndrome with a diagnostic device, the second mistake was hardly less serious. Some professionals conflated the reactions described by Summit, which are not probative of abuse, with behaviors that are probative of abuse. This combination of behaviors was then denominated a syndrome, the presence of which was supposedly probative of abuse.[4]

Although Myers refers to "behaviors probative of abuse," the truth is that many experts also testify about behaviors that are not necessarily probative of abuse.[5] In any event, the purpose of CSAAS has often been lost in the courts and inappropriately admitted.

If CSAAS testimony should be admitted (and that is subject to some disagreement), the only appropriate way would appear to be as rebuttal testimony to the issue of delayed or inconsistent reporting and recantation. Some courts have allowed this testimony in for such purpose.[6] The purpose of admitting such testimony is to help rehabilitate the child's testimony after it has been attacked on the grounds of inconsistency, delay, or recantation.

Those who support the admission of such testimony claim that the jury should be educated about the typical method of explaining such methods of reporting to contradict the inference that the child is lying. That is, many people believe that individuals (including children) who recant or delay reporting, or who relate inconsistent stories or stories that change are not being honest. Since such delaying, reporting and recanting behavior is typical of abused children, juries should be advised of this.

Those who oppose the admission of such testimony argue that such evidence invades the province of the jury to determine credibil-

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[3] Myers, Expert Testimony at 67.

[4] Id.

[5] Behavioral profiles are addressed in the next section.

[6] See, e.g., Hosford v. State, 560 So. 2d 163 (Miss. 1990).

ity and that it impermissibly suggests that all child victims are telling the truth when, in fact, some are not. Additionally, arguments have been made that juries are readily able to understand why children are afraid to tell about sexual abuse or why they get confused or recant—namely, that they are children and not adults. Since these issue are within the range of common understanding, they do not need to be explained by expert witnesses. There are jurisdictions that have declined to admit such testimony on these various grounds.

While CSAAS testimony clearly is helpful in proving actual cases of child sexual abuse, it is exceedingly dangerous in cases in which the allegations are not true. In the cases where abuse by the defendant has not occurred, CSAAS testimony often eliminates the only defense the defendant can present. Again, the problem in sexual abuse cases is that in the courts' concern for the welfare of the child, they often lose sight of the fact that in all criminal proceedings defendants enjoy the constitutional presumption of innocence and entitlement to present a defense.

The Supreme Court of Arizona highlighted the problem of appropriate focus in *State v. Moran*,[7] noting that "[g]iven the egregious nature of child molestation, we are tempted to stretch the rules of evidence to their utmost. . . ."[8] That court also noted that child sexual abuse cases are "an evolving area of the law that calls for creative, cautious, and reliable approaches to issues of proof that endeavor *to protect blameless children and give their alleged abusers sufficient due process safeguards*."[9]

§ 8:11 — Behavioral profiles of sexually abused children

According to many psychologists who specialize in the area of child sexual abuse, there are several observable behaviors that are exhibited by the abused child. The admissibility of this evidence, sometimes referred to as a "profile" of the sexually abused child, has generated a lot of disagreement in the courts. Among the behaviors

[7] State v. Moran, 728 P.2d 248 (Ariz. 1986).

[8] Id. at 251 n.2.

[9] Id. Again, the court here seems to have lost sight of the purpose of a criminal trial: for a jury to determine beyond a reasonable doubt whether an individual, presumed to be innocent, has committed the acts with which he is charged. No more and no less is to be accomplished in a criminal case. It is not the appropriate forum to focus on the rights of the child nor is it the place to protect blameless children. The job of protecting children is for the family courts and the department of social services in these cases.

described by experts *in the case law*[1] on sexual abuse are the following characteristics: pre-mature sexual knowledge, anger, depression, low self-esteem, fear of abuse stimuli, sexualized play, aggression, fear, clingyness, withdrawal, overly compliant and eager-to-please behavior, bed wetting, nightmares, excessive masturbation, and drawing figures with exaggerated or missing limbs.

These behaviors do not account for the full range of exhibited behaviors by children who have been abused. In addition, many of these behaviors are exhibited by children who have been exposed to or endured other trauma (divorcing parents, psychologically or physically abusive parents, or death of a parent, among others).[2] Even more significantly, some of these behaviors are exhibited by children without significant traumatic situations.[3]

In the past few years, however, there has been a growing consensus among professionals about the existence of specific, unique behaviors exhibited by children who have either "personal or vicarious sexual experience."[4] Specifically, these behaviors include "age-inappropriate knowledge of sexual acts or anatomy, sexualization of play and behavior in young children, the appearance of genitalia in young children's drawings, and sexually explicit play with anatomically detailed dolls."[5]

Another study that collected the results of various professional dealings with sexually abused children found a high level of agreement that the following factors indicated sexual abuse:

> age-inappropriate sexual knowledge; sexualized play; precocious behavior; excessive masturbation; preoccupation with genitals; indications of pressure or coercion exerted on the child; the child's story remains consistent over time; the child's report indicates an escalating progression of sexual abuse over time; the child describes idiosyncratic details of the abuse; and physical evidence of the

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[1] There is a distinction between what the experts are writing about in scientific publications and what testimony has been admitted in the courtroom. The former is far more specific and exact than the latter.

[2] See, for example, studies collected in Cappy & Moriarty, Child Sexual Abuse Syndrome: Exploring the Limits of Relevant Evidence, 1 Crim Proc L Rev 1 (1991); Myers, Expert Testimony at 62.

[3] Gardner, Sex Abuse Hysteria, Salem Witch Trials Revisited, 60–65 (1991).

[4] Myers, Expert Testimony at 62.

[5] Id.

abuse.[6]

However, these results are by no means conclusive that the abuse has occurred. They simply are probative that abuse may have occurred. What the studies have failed yet to do, however, is to determine the application of these findings, or to ascertain how scientifically controlled these various survey findings were and whether enough children who were not abused are not exhibiting such behaviors. Whether an accurate diagnosis of child sexual abuse can be made by these observations has not yet reached the level of necessary consensus among professionals, however, to be readily admitted by all courts.

For example, numerous important questions have not yet been sufficiently addressed:

- Do children who have watched pornographic movies exhibit these same behaviors?
- Do children exhibit these behaviors if they saw their parents (or babysitter, for example) having sex?
- What is the effect of sexually explicit lyrics in music on children?
- Do children who learn about sexuality at an early age from other children exhibit these behaviors?
- Do children who have looked at pornographic pictures or books exhibit such behaviors?
- Is there any difference exhibited in groups of children from different socio-economic backgrounds and cultures?
- Have the changing mores of our society in the last several years resulted in children learning about sexuality at increasingly younger ages? What has been the effect of the media and television access to sexual information on children's early sexual knowledge?[7]

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[6] Conte, Evaluating Children's Reports of Sexual Abuse: Results From a Survey of Professionals (unpublished), cited in Myers, Expert Testimony at 75.

[7] The highly sexualized rap songs of the last few years seem to emphasize change in sexual knowledge among younger people. Additionally, the proliferation of twelve and thirteen- year-old children having sex suggests that children are being exposed to much more sexual information than previously believed.

Children who are brought up by neglectful parents or substance addicted parents are often exposed to sexual issues at a very young age, as a result of a lack of parental supervision. That does not mean, however, that those children were sexually abused.

In addition to these questions, the courts have addressed the other questions concerning whether the behavior profiles sought to be introduced really are evidence of the type that should be admitted.

§ 8:12 — — Do sexual abuse victims react in an identifiable pattern?

One of the more difficult problems for many of the courts dealing with the question of whether to admit evidence of child sexual abuse is whether abused children react in an identifiable pattern. It appears, at this point, that sexually abused children do not exhibit a specific pattern of symptoms and that it is difficult to accurately diagnose children on the basis of such symptoms.[1] There are, however, individuals who claim to be able to diagnose sexual abuse from behavior patterns.[2]

According to most of the literature on the subject, the reactions to sexual abuse vary with the child, the nature and severity of the abuse, and the age of the child. Additionally, because of each individual's unique makeup, children exposed to the same abuse (for example, two children of an abusive father) may react in totally different fashions. As one commentator notes, there is "great variability in the type and severity of the children's reactions."[3]

In a National Institute of Mental Health study, written up by Lenore Walker,[4] over thirty-five different symptoms were noted in a study of 369 sexually abused children. Although roughly one-third of

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[1] See, e.g., Haugaard & Reppucci, The Sexual Abuse of Children, A Comprehensive Guide to Current Knowledge and Intervention Strategies 177–78 (1988); Gardner, Sex Abuse Hysteria, Salem Witch Trials Revisited (1991); and studies collected in Note, The Unreliability of Expert Testimony on the Typical Characteristics of Sexual Abuse Victims, 74 Geo LJ 429, 440-41 (1985).

[2] Many individuals who testified as experts in sexual abuse cases claim to be able to diagnose child sexual abuse by the behavior patterns of children. See, e.g., Allison v. State, 346 S.E.2d 380 (Ga. App. 1986), in which three expert witnesses testified about child sexual diagnoses based on behaviors exhibited by the child.

[3] Meyers, Expert Testimony in Child Sexual Abuse Litigation, 88 Neb L Rev 1, 55 (1988). This comprehensive article was published as part of a multi-disciplinary group composed of a law professor and several mental health practitioners. It has been widely cited by various courts around the country.

[4] Handbook on Sexual Abuse of Children, Assessment and Treatment Issues (1988).

the children suffered from low self-esteem, there were no symptoms that were exhibited by a majority of the children.[5]

§ 8:13 — — Do sexually abused children act like other children?

Another issue that has arisen in child sexual abuse prosecutions is that sexually abused children exhibit many behaviors that are similar to children who have been subjected to other forms of abuse, such as battering, emotionally abused and neglected. As one commentator has noted:

> [O]ne cannot reliably say that a child exhibiting a certain combination of behaviors has been sexually abused rather than, for instance, physically abused, neglected, or brought up by psychotic parents. Although future research may support identification of victims by their behaviors, such identification is currently not possible.[1]

The behaviors exhibited by sexually abused children are often the behaviors of a child who has been betrayed, treated cruelly, terrified and emotionally damaged. In that sense, those children really are not different from the children whose parents berate them or beat them, starve them, or neglect them. At the most fundamental level, the child is not thriving because of mistreatment. "The problems are not abuse-specific; . . . the common problems all can be tied to the lack of nurturance . . . all [caregivers] failed to provide sensitive, supportive care for their child."[2]

In the courtroom, however, the fact that the behaviors are not truly distinct from one another damages their ability to be relevant, probative evidence. The lack of discriminant ability is often fatal in evidentiary decisions. More than one court has remarked on this issue:

> Suffice it to say, then, that the literature in the area is disparate and contradictory and that the child abuse experts have been unable to agree on a universal symptomology of sexual abuse, especially the precise symptomology that is sufficiently reliable to be used

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[5] A chart containing the symptoms is contained in Cappy & Moriarty, The Child Sexual Abuse Syndrome: Exploring the Limits of Relevant Evidence in Criminal Trials, 1 Crim Prac L Rep 1, 2 (1993).

[Section 8:13]

[1] Haugaard & Reppucci, supra, at 178.

[2] Freidrich, Psychotherapy of Sexually Abused Children and Their Families 25 (1990).

confidently in a forensic setting as a determinant of abuse.[3]

Additionally complicating the issue is the fact that some experts in the field believe that certain of the behaviors ascribed to sexual abuse are actually normal childhood behaviors—such as temper tantrums, bedwetting, and nightmares.[4] Since these behaviors are often not indicative of abuse, there is a further dilution of their probative value.

Despite these problems inherent in the evidence, many courts (as will be fully discussed later in the chapter) have admitted evidence of behaviors exhibited by alleged abused children. In many jurisdictions, it would appear that the analysis performed by the Utah Supreme Court in *Rimmasch* was not undertaken. Rather, several courts have simply reviewed the expert testimony in a cursory fashion and decided to admit such testimony without benefit of much analysis.

§ 8:14 — Do sexually abused children lie about the abuse?

In case after case, prosecutors have introduced (or attempted to introduce) evidence through expert witnesses that victims of sexual abuse simply do not lie about their abuse. According to these experts who testify, children generally do not have sufficiently developed sexual knowledge to fabricate a tale of abuse, nor do they have the motivation to do so. These experts may also claim that children are reluctant to discuss the abuse and find it painfully difficult to relate such tales of abuse.

There are studies to support the claims that children do not lie about sexual abuse.[1] Empirical data would seem to support the claim that small children really would not know enough to fabricate

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[3] State v. Rimmasch, 775 P.2d 388, 401 (Utah 1989).

[4] Gardner, M.D., Sex Abuse Hysteria, Salem Witch Trials Revisited 60–65 (1991).

[Section 8:14]

[1] See, e.g., Berliner & Barbieri, The Testimony of the Child Victim of Sexual Assault, 40 J. Soc. Issues 125, 127 (1984), stating:

> there is little or no evidence indicating that children's reports are unreliable, and none at all to support the fear that children often made false accusations of sexual assault or misunderstand innocent behavior by adults. . . . Not a single study has ever found false accusations of sexual assault a plausible interpretation of a substantial portion of cases. Goodman, Aman & Hirschman report that in their experiments, "children *never* made up false stories of abuse even when asked questions that might foster such reports." (emphasis supplied).

such tales. For example, how would a four-year-old child have any knowledge to create the suggestion that a male adult put his penis in her mouth? Nothing in her realm of experience enables her to make such a statement. And yet, there are other influences on children, such as exposure to sexually explicit material, suggestibility in the interview process and manipulation by a trusted adult, that could affect a child's statements.

In studies addressing when children lie, researchers have identified five motivations for children to be inclined to fabricate. These motivations are "(1) avoiding punishment; (2) sustaining a game; (3) keeping a promise (e.g., protect a loved one); (4) achieving personal gains (e.g. rewards, being accepted into a group); (5) and avoiding embarrassment."[2]

The authors discussed various studies in which children were given one of the above-listed motives to lie. One study involved parents kissing their child while giving them a bath. Another study involved children watching an adult spill ink and then being told by that adult that the adult would be in trouble if the child told anyone about spilling the ink. A sizable percentage (42 percent) of five-year-olds involved in the study claimed to have no knowledge when asked about the spilled ink. In the bathtub experiment, half the children did not tell the truth in response to questions asked of them.

In making the connection between children's willingness and ability to lie in these five scenarios, the authors state as follows:

> Until now, researchers who have claimed that children cannot be coached to distort their testimony appear to have tilted the odds toward finding truthfulness among preschoolers by implicitly using motives that favor a truthful outcome (e.g., Goodman et al., 1990; Saywitz et al., 1991). There were no motives for the child to make false disclosures in these earlier studies.
>
> In sum, the most recent research on lying has attempted to approximate real-life crime contexts by weaving effect and motive into studies of recollection and by using highly familiar contexts such as observing loved ones break toys or being kissed while in the bathtub. Young children will consciously distort their reports of what they witnessed, and they will do so more in response to some motives (e.g., fear of reprisal and avoidance of embarrassment) than others (e.g., to sustain a gain, gain rewards).[3]

[2] Ceci & Bruck, Suggestibility of the Child Witness: A Historical Review and Synthesis, 113 Psychol Bull 403, 426 (1993), referring to the results of numerous studies.

[3] Id. at 426.

Although these studies do not prove that children may lie about abuse, they certainly call into question the studies that claim unequivocally that children do not lie about abuse. For those attorneys who are in jurisdictions which permit testimony about credibility, it would be wise to review the Ceci and Bruck article in its entirety and find out if there are any follow-up articles that have been published subsequently.

§ 8:15 — — Effects of exposure to sexually explicit material

It is conceivable that a four-year-old has heard about sexual incidents or matters from an older sibling, a friend, or from watching the Geraldo show while the babysitter was on the phone. In short, there are many ways that a child could develop sexually precocious knowledge, although it may be difficult to pinpoint such acquisition of knowledge in a specific child.

We live in a world where sexual mores have loosened drastically in the last several years. What was once unheard of is now commonplace. Profanity and sexual messages are everywhere—from advertising to MTV to movies and magazines. This has had an effect on younger children, as mental health professionals will attest. [1]

Often, there are relatively harmless types of exposure to sexually explicit scatological knowledge—children playing doctor, or watching a movie such as Dennis the Menace where one child fools another into kissing a doll's bare bottom. Children are naturally curious, and "private parts" often generate a great deal of curiosity.

When children are eight or nine, it is now more likely that they have been exposed to a fair amount of sexually explicit information on the television, in the movies and in the lyrics of song. [2] Children permitted to "channel surf" at will on the television without supervision will find material to which they should not be exposed. Any child who goes to the movies cannot help but be exposed to sexually explicit material. Even clothing advertisements are sexually

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[1] See, e.g., Gardner, Sex Abuse Hysteria: Salem Witch Trials Revisited, 19-22 (1991).

[2] Lyrics, for instance, such as the one from popular Snoop Doggy Dog song, Gin and Juice — "I'm dialing 187 (murder) with my dick in your mouth."

suggestive.[3]

Clearly, by the time a child is thirteen or fourteen, the child has sufficient sexual knowledge to comprehend and report sexual abuse as well as sufficient knowledge to fabricate sexual abuse. The huge increase in pregnancies among young girls of twelve, thirteen, and fourteen clearly indicates a growing exposure to and engagement in sex at younger and younger ages.

In children of all ages, however, there is always the possibility that they inadvertently observed their parents or babysitters engaging in sexual behavior.

§ 8:16 — — Suggestibility and interrogation of children

In other circumstances, some believe that the nature of the questioning about the abuse can confirm what actually never occurred. Recently, the Supreme Court of New Jersey issued an explosive opinion detailing the suggestive methods by which the police interrogated children in a sexual abuse case. In *State v. Michaels*,[1] the prosecution alleged that Ms. Michaels abused an entire preschool class. Numerous children confirmed the abuse and there were experts to testify about the behavioral effects of the child abuse. The defendant was ultimately convicted of 114 counts of child sexual abuse and sentenced to forty-seven years in jail.

On appeal, the New Jersey Superior Court reversed the conviction on various grounds. The supreme court subsequently heard the case only on the issue of the method of interrogation of the children and affirmed the superior court. In discussing whether the interrogation of children was suggestive, the court stated that "an investigatory interview of a young child can be coercive or suggestive and thus shape the child's responses . . . . If a child's recollection of events has been molded by an interrogation, that influence undermines the reliability of the child's responses as an accurate recollection of actual events."[2]

In the *Michaels* case, the court quoted pieces of the tape-recorded interviews and remarked that numerous children were told that the defendant was in jail because she had hurt children. They were also

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[3] The concern over sexually suggestive advertising, especially with the use of teenage models, became more vocal in the late summer of 1995. See, e.g., Carlson, Where Calvin Crossed the Line, TIME, Sept 11, 1995, at 64.

[Section 8:16]

[1] State v. Michaels, 642 A.2d 1372 (N.J. 1994).

[2] Id. at 1377.

told to keep her in jail and to be the "little detectives" for the police. Mock police badges were given to the children who cooperated. In addition, the children were subjected to mild threats, cajoling, and bribery.

In sum, the court found that "the interviews of the children were highly improper and employed coercive and unduly suggestive methods. As a result, a substantial likelihood exists that the children's recollection of past events was both stimulated and materially influenced by that course of questioning."[3]

The court relied on the various psychological studies to support its finding that there was a substantial likelihood that the children's recollections were tainted.[4]

The dangers of suggestibility were addressed at length in a recent article by researchers Stephen J. Ceci and Maggie Bruck.[5] In that article, the authors review the research and results of studies performed on children's memories and suggestibility over the past several decades. Among the interesting findings made by these researchers were that children have a fragile boundary between reality and fantasy and may be confused about the source of certain memories.[6] Additionally, children are susceptible to adult questioning and often act in a manner that shows that they desire to comply with a respected authority figure.[7]

Thus, when police, social workers, or parents question a child about sexual abuse, they may be unknowingly suggesting the answer to the child in their questions. Apparently, "children some-

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[3] Id. at 1380.

[4] Studies relied upon by the New Jersey Supreme Court include: Poole & White, Effects of Question Repetition on Eyewitness Testimony of Children and Adults, 27 Developmental Psychology, (Nov 1991); Goodman & Hegelson, Child Sexual Assault: Children's Memory and the Law, 40 U Miami L Rev 181 (1985); Younts, Evaluating and Admitting Expert Opinion Testimony In Child Sexual Abuse Prosecutions, 41 Duke LJ 691 (1991); King & Yuille, Suggestibility and the Child Witness, in Children's Eyewitness Memory (Ceci, et al eds 1987); Berger, The Deconstitutionalization of the Confrontation Clause; A Proposal for a Prosecutorial Restraint Model, 76 Minn L Rev 557 (1992); and Ceci, Age Differences in Suggestibility, in Children's Eyewitness Memory (Ceci, et al eds 1987).

[5] Ceci & Bruck, Suggestibility of the Child Witness: A Historical Review and Synthesis, 113 Psychol Bull 403 (1993)(hereinafter Ceci & Bruck).

[6] Id. at 417–18.

[7] Accord Gardner, Sex Abuse Hysteria: The Salem Witch Hunts Revisited 94–95 (1991).

times attempt to make their answers consistent with what they see as the intent of the questioner rather than with their knowledge of the event.[8]

§ 8:17 — — Importance of videotaping interrogation

The United States Supreme Court in *Idaho v. Wright*[1] noted that the failure to use a videotaped interview with children in sexual abuse cases created the potential for elicitation of unreliable information.

The guidelines referred to in this book that detail proper interview techniques, along with the commentators, uniformly support the use of videotaping to make certain there is no coerciveness to the initial allegation.[2]

If there has been no videotaping in your case, urge the court to provide you wide latitude pretrial, and if it gets that far, during trial to fully develop any theory of suggestive or coercive questioning. Make sure you have reviewed the literature of the effects of suggestibility before you proceed with an examination. You will need to know what constitutes inappropriate questioning before you start your case.

§ 8:18 — — Dangers of repetitive questioning

According to the experts, there is a substantial danger that when children are repeatedly questioned, they will begin to mold their answers to the desires of the interrogators. When such interrogators are the prosecution (or their agents), the child's testimony will begin to be molded according to the prosecution's vision. The Supreme Court of New Jersey remarked on this phenomenon in the case of *State v. Michaels,*:[1]

> The use of incessantly repeated questions also adds a manipulative element to an interview. When a child is asked a question and gives an answer, and the question is immediately asked again, the child's

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[8] Ceci & Bruck at 418–22.

[Section 8:17]

[1] Idaho v. Wright, 497 U.S. 805 (1990).

[2] See generally Berger, The Deconstitutionalization of the Confrontation Clause: A Proposal for Prosecutorial Restraint Model, 76 Minn L Rev 557, 608 (1992); Goodman & Hegelson, Child Sexual Assault: Children's Memory and the Law, 40 U Miami L Rev 181, 195, 198–99 (1985).

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[1] State v. Michaels, 642 A.2d 1372 (N.J. 1994).

> normal reaction is to assume that the first answer was wrong or displeasing to the adult questioner. . . . The insidious effects of repeated questioning are even more pronounced when the questions themselves over time suggest information to the children.[2]

In light of the results of these studies, there is a real need for prosecutors to be especially careful about how they conduct their interviews and a special motive for defense lawyers to carefully inquire about such interrogation.

§ 8:19 ——Appropriate interrogation techniques

As discussed earlier, it is critically important in child sexual abuse cases to ascertain that investigation was done properly—whether you are a defense lawyer or a prosecutor. There are guidelines promulgated for the proper interrogation of children, requiring that the interviewer remain "open, neutral and objective," and that the interviewer avoid asking leading questions, never threaten a child or try to force a reluctant child to talk. Additionally, the interviewer should never tell the child what other people have reported.[1]

To learn appropriate techniques for interviewing children, you may want to review the studies and guidelines studies and guidelines available on the subject.[2]

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[2] Id. at 1377 (citing Poole & White, Effects of Question Repetition on Eyewitness Testimony of Children and Adults, 27 Dev Psychol 975 (1991) and Goodman & Helgeson, Child Sexual Assault: Children's Memory and the Law, 40 U Miami L Rev 181, 195 (1985)).

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[1] *Michaels*, 642 A.2d at 1378, quoting American Prosecutors Research Institute, National Center for Prosecution of Child Abuse, Investigation and Prosecution of Child Abuse 7–9, 24 (1987).

[2] Those studies and guidelines include Myers, The Child Witness: Techniques for Direct Examination, Cross-Examination and Impeachment, 18 Pac LJ 801 (1987); American Academy of Child and Adolescent Psychiatry: Guidelines for the Clinical Evaluation of Child and Adolescent Sexual Abuse, 27 Am Acad Child Adolescent Psychiatry 655 (1988); Jenkins & Howell, Child Sexual Abuse Examinations: Proposed Guidelines for a Standard of Care, 22 Bull Am Acad Psychiatry & L 5 (1994).

§ 8:20 — — Anatomical doll debate

Anatomical dolls have been used for many years to help children who are believed to have been abused explain the abuse.[1] According to the experts, many professionals base their opinions on whether children were abused by watching them play with anatomical dolls.[2] There has developed, however, a growing debate about the use of these dolls among professionals.

Specifically, some professionals claim that the dolls are suggestive, simply because they are anatomically correct. For example, a "child may insert a finger into a doll's genitalia simply because of its novelty or 'affordance.'[3] The fact that a child will put two dolls together, simply because they fit together, needs to be considered in these cases.

The second problem alleged with anatomical dolls is that no control studies have been done. In other words, there are no standards for how nonabused children play with these dolls and there is no established protocol addressing the proper manner of how dolls should be used during the interview.

Dr. Richard Gardner, Clinical Professor of Child Psychiatry at the College of Physicians and Surgeons at Columbia University, claims that the exaggeration of the dolls' genitalia renders them overly suggestive:

> The child cannot but be startled and amazed by such a doll. The likelihood of the child's ignoring these unusual genital features is almost at the zero level. Accordingly, the dolls almost demand attention and predictably will bring about the child's talking about sexual issues. Again, the contamination here is so great that the likelihood of differentiating between bona fide and fabricated sex abuse has become reduced considerably by the utilization of these terrible contaminants.
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> If one gives a child a peg and a hole, the child is going to put the peg in the hole unless the child is retarded or psychotic. . . . Give a child one of these female anatomical dolls with wide open mouth, anus, and vagina; the child will inevitably place one or more fingers in one of these conspicuous orifices. For many . . . , such an act is "proof"

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[1] See Boat & Everson, The Use of Anatomical Dolls Among Professionals in Sexual Abuse Evaluations, 12 Child Abuse & Neglect 171 (1988).

[2] Mason, A Judicial Dilemma: Expert Witness Testimony in Child Sex Abuse Trials, 19 J. Psych. & L. 185, 197–204 (1991).

[3] Ceci & Bruck at 423.

that the child has indeed been sexually abused.[4]

According to the review of studies considered by Ceci and Bruck, there are inconsistent results about whether anatomical dolls were probative of sexual abuse. Ceci and Bruck state the following:

> Our reading of the literature suggests that the techniques for using anatomical dolls have not been developed to the level that they allow for a clear differentiation between abused and nonabused children. It seems that for a small number of nonabused children, the dolls are suggestive in that these children engage them in sexual play.[5]

In the event you are handling a case in which anatomical dolls were used, it is important to review the research on these issues and discuss the matter fully with your expert.

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[4] Gardner, M.D., Sex Abuse Hysteria: The Salem Witch Trials Revisited 52 (1991).

[5] Id. at 424–25. Among the anatomical doll studies reviewed in this article are August & Forman, A Comparison of Sexually Abused and Nonabused Children's Behavioral Responses to Anatomically Correct Dolls, 20 Child Psychiatry & Human Dev 39 (1989); White, Interviewing Young Sexual Abuse Victims with Anatomically Correct Dolls, 10 Child Abuse & Neglect 519 (1986); Realmuto, Specificity and Sensitivity of Sexually Anatomically Correct Dolls in Substantiating Abuse: A Pilot Study, 29 J Am Acad Child & Adol Psych 743 (1990); Cohn, Anatomical Doll Play of Preschoolers Referred for Sexual Abuse and Those Not Referred, 15 Child Abuse & Neglect 455 (1991).