



Terry Rambler
Chairman

SAN CARLOS APACHE TRIBE

P.O. Box 0, San Carlos, Arizona 85550
Phone (928) 475-1600 ❖ Fax (928) 475-2567

Tao Etpisor
Vice-Chairman

Testimony of Alejandro Benally, Sr., Chief of Police, San Carlos Apache Police Department Before the House Natural Resources Committee – Subcommittee for Indigenous Peoples Legislative Hearing on H.R. 958, the Native Youth and Tribal Officer Protection Act

Wednesday, July 22, 2020

Good morning Chairman Gallego, Ranking Member Cook and Members of the Subcommittee. I am Alejandro Benally, Sr., Chief of Police of the San Carlos Apache Police Department (“SCAPD”).

I am a member of the San Carlos Apache Tribe (“Tribe”) and have over 28 years of experience in law enforcement, all with SCAPD. I graduated from the Arizona Academy in 1993, joined SCAPD in 1995, and have served as Chief of Police since 2004. In addition, I was certified by the BIA in 1995, served as an instructor at a State of Arizona police academy and as an adjunct instructor at Eastern Arizona College in Thatcher, Arizona, teaching courses in the Administration of Criminal Justice.

The San Carlos Apache Reservation spans 1.8 million acres in rural southeast Arizona, approximately ninety-five miles from Phoenix, Arizona. We are deeply connected to our traditions and our lands. The San Carlos Apache Tribal Government serves 17,000 enrolled members, hundreds of non-Native residents, and thousands of individuals who choose to visit our Reservation annually.

The Tribe thanks Congressman Tom O’Halloran for his leadership and friendship. We fully support his bill H.R. 958, the Native Youth and Tribal Officer Protection Act (“NYTOPA”). This bill will add to the accomplishments of the Violence Against Women Reauthorization Act of 2013 by further recognizing and affirming the inherent sovereign power of Tribes to criminally prosecute non-Indians for conduct against Tribal citizens. NYTOPA will ensure that all acts of violence against children and our police on our Reservation will be investigated, and, where the evidence is found, prosecuted in our local justice system where victims and their families will see justice done. We respectfully ask all Members of the Subcommittee to work with your House colleagues, House Leadership and your Senate colleagues to ensure that H.R. 958 is enacted into law this year.

Overview

SCAPD is doing incredible work on a shoestring budget. However, we are up against steep odds. Our Department is understaffed, under-resourced, and, like many tribal justice systems throughout Indian Country, faces high rates of violence—due in large part to the system of justice that has been imposed on Indian lands.

Regarding resources, SCAPD currently has 44 dedicated individuals on our law enforcement team. This includes only 22 officers assigned to patrol our 1.8 million acre Reservation. In 2019, SCAPD responded to 31,543 calls for service resulting in 2,731 arrests. SCAPD officers patrolled a total of 323,654 miles in 2019. Our officers often respond to these calls for service without backup, traveling to the many areas of the Reservation that lack communications coverage.

Adding to the inherent dangers of the job, our primary workspace is unsafe. From 2008 to 2015, SCAPD and our Tribal Courts were forced to work out of a building that the BIA condemned as unsafe for our employees and the public.

Since 2015, we have worked out of temporary modulars. While they offered a temporary upgrade over the crumbling Building 86, the modulars are rapidly deteriorating. They were intended to serve as temporary classrooms and housing. They are simply not safe or secure for public safety functions. Structural issues include: a crack in the wall in my office; a generator that routinely malfunctions, causing AC to fail throughout the unit; intermittent water service; and the lack of space for evidence storage; among other deficiencies.

Our community has consistently logged some of the highest rates of violent crime in the nation on a per capita basis.

- The Bureau of Justice Statistics reported that San Carlos suffered 318 violent crimes in 2013, the third highest in Indian Country—a rate several times the national average for a community of 16,500 citizens.
- According to the BIA, the Tribe's violent crime rate in 2009 was more than 6 times the national average. Since then, the rate has increased.
- The Reservation faced an alarming spike in violence (December 2010 – January 2011), including several homicides and a significant increase in violent crimes. Last year, there were 2 homicides on the Reservation. To date, this year, there have been 2 homicides, and we are waiting on the results of another death.

The unnecessarily complex system of justice in place throughout Indian Country feeds into all of these pressures on SCAPD and our entire San Carlos Apache Justice Department.

The Maze of Criminal Jurisdiction on Indian Lands

The criminal justice system in place on Indian lands was established through a piecemeal series of federal laws and U.S. Supreme Court decisions enacted and handed down since the 1885 Major Crimes Act. The Justice Department developed a 2-page chart to help police and prosecutors understand the system. They must ask questions about the status of the offender and victim as Native American, cross-reference that with the type of crime involved, and then determine whether the tribal, federal or state court has exclusive or concurrent jurisdiction to

prosecute.¹ In short, these federal laws and court decisions limit tribal government authority to combat reservation crime at the local level, often forcing us to rely upon federal or state officials to investigate and prosecute Reservation crimes.

In testimony before the Senate Committee on Indian Affairs, Troy Eid, the former U.S. Attorney from Colorado, explained these difficulties:

In some investigations, it can be difficult or even impossible to determine at the crime scene whether the victim, the suspect, or both is an ‘Indian’ or a ‘non-Indian’ for purposes of deciding which jurisdiction—federal and/or tribal, or state—has responsibility and which criminal laws apply. In those crucial first hours of an investigation, this can raise a fundamental question—which agency is really in charge? This is the antithesis of effective government.²

In a separate hearing, Thomas Heffelfinger, the former U.S. Attorney from Minnesota, made the following statement:

One hundred and twenty-plus years of court decisions and stop-gap legislation have created a jurisdictional mess, which means that law enforcement is difficult, delay is normal and respect for law enforcement and judicial process is low. The losers are the people of Indian Country.³

The result makes prosecuting crimes committed in Indian Country unnecessarily and prohibitively difficult.

Oliphant v. Suquamish Indian Tribe: Rooted in Racism and Mistrust

Of the dozens of federal laws and court decisions that have contributed to the problems with public safety and justice on Indian lands, none compare to the damage inflicted by the U.S. Supreme Court’s 1978 decision in *Oliphant v. Suquamish Indian Tribe*.

Oliphant involved criminal acts committed by two non-Indians, Mark David Oliphant and Daniel Belgarde, on the Port Madison Reservation during the Suquamish Indian Tribe’s annual celebration. Tribal police arrested both men in separate incidents. Oliphant was charged with assaulting a tribal officer and resisting arrest. Belgarde was charged with reckless endangerment and injury to tribal property after he led tribal police on a high-speed chase that ended when he crashed into a tribal police car. Both men sought a writ of habeas corpus in federal district court, claiming that tribal courts had no jurisdiction over non-Indians. The district court denied the petitions, the Ninth Circuit affirmed the denial in Oliphant’s case, and the U.S. Supreme Court took the cases on review.

The *Oliphant* Court went to great lengths to ignore its own precedent. For nearly two centuries, federal Indian law and prior Court decisions were based on legal view that Tribal Governments retain authority over actions on Indian lands as a matter of inherent sovereignty, absent an express abrogation of such authority in treaty or federal law.⁴ However, the Court

¹ See Indian Country Jurisdictional Chart, <https://www.justice.gov/sites/default/files/usao-wdok/legacy/2014/03/25/Indian%20Country%20Criminal%20Jurisdiction%20ChartColor2010.pdf> (2010).

² S. Rept. 111-93, Examining S. 797, the Tribal Law and Order Act of 2009: Hearing Before the Senate Committee on Indian Affairs, 111th Congress, at 4 (Oct. 29, 2009).

³ *Id.*

⁴ See *id.* at 212 (Justice Marshall and Chief Justice Burger dissenting).

ignored this canon, deciding instead to unilaterally divest Tribal Governments of inherent criminal jurisdiction over non-Indians who commit crimes on Indian lands.⁵

Writing for the majority, Justice Rehnquist acknowledged that the decision would create gaps in jurisdiction, and lead to increased violence on Indian lands.

“[W]e are not unaware of the prevalence of non-Indian crime on today's reservations which the tribes forcefully argue requires the ability to try non-Indians. But these are considerations for Congress to weigh in deciding whether Indian tribes should finally be authorized to try non-Indians.”⁶

More than 42 years later, Indian Country continues to wait for Congress to act to fully reverse the damage inflicted on Indian Country by the *Oliphant* decision.

In one fell swoop, the *Oliphant* decision removed a critical tool of local Tribal justice systems to stop violent crime, and forced victims, their families, and our entire community to rely on federal investigators and U.S. Attorneys to serve justice in federal courts hundreds of miles from the Reservation. Too often, when non-Indians commit crimes on Indian lands, the case is declined for prosecution.⁷ This has led to a general loss of trust in the justice system, with fewer cases even being reported, and a cycle of violence that is proving difficult to break.

Overturing Oliphant: 2013 VAWA Reauthorization

The most glaring example of *Oliphant's* damage is the violence inflicted on Native women. One in three Native American women will be sexually assaulted in their lifetimes—two-and-a-half times the national average. According to one report, in 86 percent of these cases, the assailant is non-Indian.⁸ In 2011, the U.S. Justice Department declined to prosecute 65 percent of rape cases reported on reservations.⁹

After 35 years of damage, Congress enacted the first partial overturn of the Supreme Court's *Oliphant* decision on March 7, 2013 with passage of the Violence Against Women Reauthorization Act of 2013 (“2013 VAWA Reauthorization”).

The 2013 VAWA Reauthorization included a provision that amended the Indian Civil Rights Act of 1968 by clarifying that Indian tribes retain authority to investigate and prosecute protection order violations and crimes of domestic or dating violence against Indian victims on tribal lands committed by non-Indians who have significant ties to the Reservation and the victim. This provision, known as Special Domestic Violence Criminal Jurisdiction (“SDVCJ”), created a framework for tribal courts to prosecute non-Indians.

In order to exercise SDVCJ, tribes must comply with a series of federal statutory and procedural requirements, including: providing indigent defendants with a licensed public

⁵ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 204 (1978).

⁶ *Id.* at 212.

⁷ See GAO Report on U.S. Attorney Declination Rates 2005-2009, <https://www.gao.gov/new.items/d11167r.pdf> (2010)(Finding that federal prosecutors declined to prosecute, on average, 50% of Indian Country criminal case referrals, including 67% of sexual assaults).

⁸ See <https://www.ncjrs.gov/pdffiles1/nij/249736.pdf> (May 2016).

⁹ New York Times, “Higher Crime, Fewer Charges on Indian Land”, <https://www.nytimes.com/2012/02/21/us/on-indian-reservations-higher-crime-and-fewer-prosecutions.html> (2012); see also <https://www.amnestyusa.org/pdfs/mazeofinjustice.pdf>; <https://www.theatlantic.com/national/archive/2013/02/on-indian-land-criminals-can-get-away-with-almost-anything/273391/>.

defender; ensuring that a law-trained judge presides over the trial; publish all criminal laws and procedures; maintain a recording of the criminal proceeding; among other requirements.

Fundamental Fairness

As of 2018, the 18 Tribes implementing SDVCJ reported 143 arrests of 128 non-Indian abusers, which led to 74 convictions and 5 acquittals.¹⁰ In an important nod to the fundamental fairness provided to all persons before Tribal justice systems, no non-Indian defendant charged under the SDVCJ provision has filed a petition for habeas corpus review in federal court, as is their right under the law.¹¹

These findings are not surprising to anyone familiar with Tribal justice systems. While our systems of justice do weave in Native culture and tradition, they are similar to other justice systems in state and federal courtrooms throughout the nation in that they offer due process to all persons subject to Tribal jurisdiction, and hold as their primary charge doling out equal justice to all under the law.

Resources Needed to Implement SDVCJ

Implementation of SDVCJ has revealed that additional resources are necessary in order for the benefits of the law to expand to more reservations. According to the U.S. Commission on Civil Rights, “[t]ribal justice systems have been underfunded for decades.”

In addition to the direct costs associated with complying with the regulatory requirements of SDVCJ, Tribal justice systems that seek to implement SDVCJ will expect to take on a larger case load. Tribes will also be subject to a number of indirect costs to administer the new system, including: ensuring ongoing compliance with U.S. Justice Department regulations; ensuring ongoing training for Tribal police, prosecutors, public defenders, court staff, and judges; increased staffing needs to address the increased case load; increased post-trial costs, including incarceration, probation, treatment, and follow-up services; among other costs.

While SDVCJ is working to improve protections to Native women, more must be done. Tribes implementing SDVCJ have reported frustration with the inability to investigate or prosecute other often-related crimes of violence against women, including stalking, sexual assault by a stranger or acquaintance, and sex trafficking, for example, are not included. The crisis of missing and murdered Native women is reaching staggering proportions. As a result, in addition to supporting NYTOPA, the San Carlos Apache Tribe also fully supports the other legislative proposals to enhance protections for Native women beyond SDVCJ, as well as provide more tools to stop the MMIW crisis.

San Carlos Apache Tribe will Exercise SDVCJ

Just recently, the San Carlos Council, the Tribe’s governing body, made the decision to implement the exercise of SDVCJ to protect our enrolled members from non-Indian abusers. Our Tribal Court system now meets the requirements of the 2013 VAWA Reauthorization. Our Tribal Court has three judges: the Chief Judge and two Associate Judges. One of our associate judges possesses a law degree and is licensed by the State Bar of Arizona. The Tribe’s Department of Justice has four state-licensed attorneys, with federal district court admission. One of our

¹⁰ See National Congress of American Indians: VAWA 2013 Special Domestic Violence Criminal Jurisdiction Five-Year Report, http://www.ncai.org/resources/ncai-publications/SDVCJ_5_Year_Report.pdf (March 20, 2018).

¹¹ *Id.*

attorneys serves as the Tribe's Chief Prosecutor and as one of the Tribe's two Special Assistant U.S. Attorneys ("SAUSA"). Both of our SAUSA's have assisted with the federal investigation and prosecution of major crimes in federal court. The Tribe also has an Office of the Public Defender. The Chief Public Defender is an enrolled member of the Tribe who has a law degree and is in the process of obtaining a state bar license.

The Tribal Council did not take this decision lightly. We have studied the implementation of SDVCJ by other Tribes over the past seven years and weighed the potential for additional costs that will be incurred. In the end, our Tribal Council made the decision to implement SDVCJ to help restore faith and trust in our justice system for the many victims of non-Indian violence who have lost that faith due to fact that violent crimes were either not timely investigated by the applicable federal investigators or declined to be prosecuted by the U.S. Attorney's Office.

Several incidents have occurred on the San Carlos Apache Indian Reservation involving Native American females and children who were victimized by non-Native offenders. At the time, the Tribe had not exercised SDVCJ, and we relied on federal and state investigators and prosecutors to pursue the cases. In all instances, their systems failed to provide any sense of justice to the victims, their families or our community.

Case in point, a female San Carlos Apache Tribal member was held against her will along with her young children (ages 12 and infant) by her non-Native boyfriend inside her home. The offender kept the girlfriend and her children inside a closet at one time and challenged the 12 year old to a fight after the both attempted to defend his mother. SCAPD arrived on the scene, diffused the situation, and placed the defendant into custody. However, due to what we were informed were "jurisdictional" issues, the State of Arizona refused to take the case to court, and would not allow the defendant to be booked into their jail. The U.S. Attorney's Office in Arizona also refused to pursue the case, as they did not personally witness the physical injury to the female or her children. In the end with no other option, the non-Indian male was transported off the Reservation in a neighboring town and warned not to return. He was later banished from the reservation via San Carlos Tribal Civil court.

Another case involved a call for service to address assault by a non-Indian male towards his Tribal member girlfriend, her young children and neighbors (all enrolled members of the San Carlos Apache Tribe) on the Reservation. Again, the federal and state investigators/prosecutors refused to pursue the case due to what they perceived as jurisdictional issues. In the end, the non-Native male was escorted off the Reservation and warned not to return.

The Need to Extend Protections to Prevent Violence Against Native Youth

As noted above, while the VAWA 2013 SDVCJ has improved protections for Native women, the provision is extremely narrow, and fails to address many violent crimes on Indian lands committed by non-Natives that continue to fall through the cracks, into the gaps created by the *Oliphant* decision.

Many of the Tribes implementing SDVCJ report that children are usually involved as victims or witnesses in SDVCJ cases. The implementing Tribes have reported verbal, physical, and sexual assaults and threats of physical intimidation against Native children. However, SDVCJ currently only applies to crimes committed against romantic or intimate partners or persons covered by a qualifying protection order. An SDVCJ Tribe is only legally able to charge an offender for the times he hit the mother, despite the fact that the incident of abuse involved

multiple assaults on a Native child. The Tribe is forced to refer the crimes against Native children to state or federal authorities, who may or may not pursue the case.¹²

The failure to protect Native children is yet another under-reported crisis of violence in Indian Country. According to the U.S. Department of Justice, Native children suffer exposure to violence at rates higher than any other race in the United States. Native youth are 2.5 times as likely to experience trauma compared to their non-Native peers. The violence has immediate and long-term effects, including: poor physical and mental health, poor school performance, substance abuse, and overrepresentation in the juvenile justice system.¹³ For these reasons, in November of 2014, an advisory committee to the U.S. Attorney General recommended that Congress take action to restore the inherent authority of Indian Tribes over non-Indians who commit crimes against Native youth:

“It is troubling that tribes have no criminal jurisdiction over non-Indians who commit heinous crimes of sexual and physical abuse of AI/AN children in Indian country. Congress has restored criminal jurisdiction over non-Indians who commit domestic violence, commit dating violence, and violate protection orders. Congress should now similarly restore the inherent authority of AI/AN tribes to assert full criminal jurisdiction over all persons who commit crimes against AI/AN children in Indian country including both child sexual abuse and child physical abuse.”¹⁴

Violence Against Tribal Police Officers

While there are no national statistics on of violence against tribal police officers, I can personally share a number of examples of violence against tribal law enforcement officers on the San Carlos Apache Reservation.

SCAPD officers are assaulted on a nearly daily basis. Recently, one of our officers was bit on the ankle while struggling to handcuff a defendant. I too became a victim of a permanent injury to my right hand during an arrest of a suspect. I went thru two operations in attempt to repair broken bones but due to extent of injury, I have lost ability to fully regain use of my finger.

The Tribe’s Chief Prosecutor, Charlene Laplante, has 27 years of experience prosecuting crimes in a major urban county, a rural county on the international border with Mexico, and now at San Carlos. She observed that violence on this Reservation occurs at the highest rates in her years of experience, especially the violence perpetrated on women and children. Viewed from a public health perspective the violence is an epidemic.

Thanks in large part to the determination of Chief Prosecutor Laplante, perpetrators who assault SCAPD officers today are prosecuted to the fullest extent of tribal law. That being said, our inability to prosecute non-Indian perpetrators is a serious problem and creates a significant public safety concern.

¹² *Id.*

¹³ Report of the Attorney General’s Advisory Committee on Native Children Exposed to Violence, https://www.justice.gov/sites/default/files/defendingchildhood/pages/attachments/2015/03/23/ending_violence_so_children_can_thrive.pdf (November 2014)(Citing the fact that “American Indian and Alaska Native Children experience posttraumatic stress disorder at the same rate as veterans returning from Iraq and Afghanistan and triple the rate of the general population.”).

¹⁴ *Id. at 9.*

On our Reservation, non-Indian perpetrators know that there will be no consequence for assaulting a SCAPD officer. As a result, they have become fully empowered to resist law enforcement. In addition to the safety issue for tribal officers, this creates a safety issue for the community at large, especially victims of domestic abuse—which often include violence against Native children. There is nothing more dangerous in the community than an empowered batterer who knows the law either cannot or will not reach him.

The Tribe cannot overemphasize the need to pass H.R. 958 to allow tribes to assert criminal jurisdiction over non-Indians who assault tribal law enforcement officers. Tribal law enforcement officers are first to arrive at an incident. Upon arrival, officers assess the situation and determine the status of those involved as Indian or not. When a non-Indian assaults a tribal law enforcement officer, federal law mandates the federal government to investigate the incident and to prosecute the case in federal court. As a result, unless an SCAPD officer is empowered to enforce federal law pursuant to a Special Law Enforcement Commission (“SLEC”), he or she has no authority to stop the offender.¹⁵

Seven (7) of 22 SCAPD officers possess SLEC cards. We currently have 6 pending and will have more with increased cooperation and assistance from the BIA-OJS via their online SLEC commission card course.

CONCLUSION

The San Carlos Apache Tribe is working to restore faith and trust in the justice system for every individual on our homelands, and the Tribe fully supports H.R. 958, the Native Youth and Tribal Officer Protection Act. The bill will again chip away at the injustice inflicted by the *Oliphant* decision by empowering Tribal Governments to protect the most vulnerable sector of our population: our children. It will also protect our law enforcement officials who risk their lives in the line of duty on a daily basis. We are thankful for the strong, bipartisan support for NYTOPA and for Congressman O’Halloran’s honorable effort to enhance victim resources for Indian Country.

¹⁵ See *United States v. Henderson*, Case No. CR1808112001PCTDJH, 2018 WL 10216422, at *1 (D. Ariz. June 11, 2018); see also *Boney v. Valline*, 597 F. Supp. 2d 1167, 1177 (D. Nev. 2009) (“noncommissioned tribal officers...are not acting under the color of federal law”); *Cabazon Band of Mission Indians v. Smith*, 388 F.3d 691 (9th Cir. 2004).