IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

No. 07-6061

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

v e r s u s

SHAN GACHOT,

Defendant/Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
THE HONORABLE RONALD A. WHITE
(sitting by designation)
CASE NO. CR-06-178-RAW

BRIEF OF PLAINTIFF/APPELLEE

ORAL ARGUMENT IS NOT REQUESTED

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August 20, 2007

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There are no prior or related appeals.

STATEMENT OF JURISDICTION

The Plaintiff/Appellee concurs with the Defendant/Appellant's Statement of Jurisdiction.

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

No. 07-6061

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SHAN GACHOT,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Oklahoma

BRIEF OF PLAINTIFF/APPELLEE

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. DID THE DISTRICT COURT HAVE JURISDICTION TO ACCEPT DEFENDANT'S GUILTY PLEA TO AN INFORMATION ALLEGING A VIOLATION OF 18 U. S. C. SECTION 1955?

II. DID THE DEFENDANT ABANDON HIS ABILITY TO APPEAL A PRE-TRIAL RULING RELATING THE ORIGINAL INDICTMENT BY PLEADING GUILTY TO AN INFORMATION?

III. DID THE DISTRICT COURT PROPERLY DENY THE DEFENDANT'S PRE-TRIAL MOTION TO DISMISS THE INDICTMENT FOR LACK OF JURISDICTION?

STATEMENT OF THE CASE

The United States adopts the Defendant/Appellant's Statement of the Case, with the addition of a brief explanation of the oral plea agreement. The government did not require Mr. Gachot to waive his appellate rights in pleading to the Information. He remained able, therefore, to challenge the entry of his plea or the sentence imposed. There was no express agreement, however, to allow the defendant to appeal matters relating to the original Indictment and no Rule 11 agreement to allow withdrawal of the plea should his jurisdictional argument on the underlying indictment be successful on appeal.

STATEMENT OF FACTS

A. The raid of the T. F. C. Cockfighting Facility

This case involves the operation of a cockfighting pit located in Indian Country in Caddo County, Oklahoma. Following an investigation which began in November 2005, law enforcement agents executed a search warrant on July 22, 2006, at the T.F.C. cockfighting facility, located on a rural piece of land known as Oscar Tsoodle property. (App. 12-31).

The parties do not dispute that the land, currently held by the United States in Trust for the heirs and/or successors of Kiowa Allottee 1245, KAUTONEPAHHOODLE, constitutes Indian Country under the definitions contained in 18 U.S.C. §1151. The current listed owners, who each hold an

undivided 1/3 interest, are: William Tsoodle, Thomascina Leader and Jenelle Tsoodle. The defendant is the son of Thomascina Leader. (App. 13, 46).

All persons present at the cockfight on July 22, 2006, with the exception of a few minor children, were issued citations for Being a Spectator at a Cockfight, in violation 18 U.S.C. §13, 1151, 1152, and 21 Ok.Stat. §1692.2. Of the seventy-odd persons cited as spectators, eleven also claimed to have brought fighting cocks to the facility. These eleven persons were also cited for Transporting Animals for Participation in an Animal Fighting Venture, in violation of 7 U.S.C. §2156(a) and (b). (App. 96). Shan Gachot, a Kiowa Indian, was arrested on a felony Complaint which alleging that he did "Sponsor & Exhibit Fighting Cocks Transported in Interstate Commerce and Instigate & Provide a Pit for Cockfighting", in violation of 7 U. S. C. §2156; 18 U. S. C. §113, 1151, 1152, and 21 Okla. Stat. §1692. (App. 96; Doc. 9).

During the raid, officers seized several thousand dollars in cash and a trove of cockfighting paraphernalia. Numerous membership cards issued by the T.F.C. facility, the Kiowa Association for the Preservation of Rural and Cultural Lifestyles, the Oklahoma Game Breeder's Association, and cockfighting pits in other states were also confiscated from the attendees. (App. 96).

Fifteen illegal aliens were taken into custody by Immigration and Customs

Enforcement Agents from the Department of Homeland Security. With the exception of a handful of attendees and the staff, all those present at the cockfight were non-Indian. Of the attendees who later professed some Indian blood, only one or two were part Kiowa Indian. (App. 73-74).

B. The Prosecutions Following the Raid

Shan Gachot, William Tsoodle and Michael Daugherty were indicted by a Grand Jury and arraigned on felony charges. (App. 32-34; Doc. 5). United States District Judge Ronald A. White, sitting in the Western District of Oklahoma by special designation after the recusal of the Oklahoma City federal judiciary, conducted pretrial hearings and presided over a jury trial. (Doc. 10). In pre-trial motions, both Gachot and Tsoodle challenged the federal government's jurisdiction. (Doc. 58).

Judge White held oral argument on the jurisdictional motion and, ruling from the bench, denied the motions to dismiss and explained his reasoning for the ruling. (Doc. 72). The District Court held that the federal government possessed jurisdiction to enforce the provisions of Oklahoma's anti-cockfighting law in Indian Country against both Indians and non-Indians. The Court later entered a written order addressing all the pre-trial motions, including the jurisdictional

motion, but the written order does not expound on the Court's reasoning.[1] (Doc. 73).

On the morning of trial, Gachot announced his intent to accept a plea offered by the United States.[2] During the noon recess on the first day of the Tsoodle jury trial, Gachot entered a guilty plea before the Honorable Stephen P. Friot, United States District Judge, to the felony charge Operating an Illegal Gambling Business, in violation of 18 U.S.C. §1955. (Doc. 82-84). Co-defendant Daugherty entered a guilty plea to Count Three of the Indictment charging the misdemeanor offense of Sponsoring or Exhibiting an Animal in an Animal Fighting Venture, in violation of 7 U.S.C. §2156. (Doc. 85-86).

Co-Defenant Tsoodle proceeded to jury trial on a charge of Keeping a Place for Cockfighting, in violation of 18 U.S.C. §§13, 1151, 1152 and 21 O.S.A. §1692.3. (Doc. 87). At the conclusion of the government's case, Judge White granted Tsoodle's Motion for Acquital, pursuant to Rule 29, holding that Tsoodle's

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[1]The undersigned, in preparing this response, was reminded that the Minute Order does not reflect the District Court's reasoning. Consequently, the undersigned has ordered a transcript of the pre-trial motion hearing and will move to supplement the appellate record upon receipt.

[2]Although he never filed a formal motion to withdraw, Mr. Bucholtz notifed co-counsel and the undersigned over the weekend before the scheduled Monday jury trial that he had to withdraw due to a clear conflict of interest. As a result, Mr. Pasquali entered an appearance and assisted the defendant in entering his guilty plea. (Doc. 81). Counsel for the undersigned was not officially notified by Mr. Buchholz of the specific nature of the conflict of interest nor has she been told how Mr. Buchholz resolved the conflict sufficiently to allow his representation in this appeal.

mere knowledge that his land was being used for cockfighting and failure to report the crime was not enough (even in light of his longtime job as a Deputy United States Marshal) - some affirmative action was required by §1692.3. (Doc. 88-89).

The seventy-odd misdemeanor cases proceeded before United States Magistrate Judge Shawn Erwin in Lawton, Oklahoma. After several hearings and docket calls, four of the misdemeanor defendants refused to enter pleas to reduced charges and pay a nominal fine. All four were convicted of Being a Spectator at an Illegal Cockfight in Indian Country in January 2007. All four were sentenced to probation and ordered to pay fines ranging from $1,000 to $3,000. Charges against two misdemeanor defendants were dismissed without prejudice after they insisted on trials before a United States District Judge. The decision of whether to re-file misdemeanor charges or present these to cases to a Grand Jury has been deferred pending the ruling on this appeal.

SUMMARY OF ARGUMENT

The District Court properly overruled the Motion to Dismiss the Indictment and exercised jurisdiction. When the defendant entered a plea to an Information charging violation of a wholly different statute, he forfeited his ability to challenge the Court's jurisdiction over the initial Indictment.

ISSUE I: THE DISTRICT COURT PROPERLY EXERCISED JURISDICTION TO ACCEPT DEFENDANT'S GUILTY

PLEA TO AN INFORMATION ALLEGING A VIOLATION OF 18 U. S. C. SECTION 1955.

A. Standard of Review

This Court reviews the district court's exercise of jurisdiction under *de novo* standard. *United States v. Roberts*, 185 F.3d 1125, 1129 (10th Cir. 1999); *United States v. Brown*, 164 F.3d 518, 520 (10th Cir. 1998) (citing *United States v. Blackwell*, 81 F.3d 945, 947 (10th Cir. 1996)); *United States v. Cuch*, 79 F.3d 987, 990 (10th Cir. 1996).

B. Argument

The Defendant's brief does not assert that the federal court lacks jurisdiction to prosecute violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U. S. C. §1951, et. seq., against Indians in Indian Country. The Defendant knowingly entered a voluntary plea to a One Count Information charging him with the RICO offense of Operating an Illegal Gambling Business in violation of 18 U. S. C. §1951. This appeal does not, therefore, challenge the Court's jurisdiction to impose the Judgment and Sentence entered in this case. Even if such an argument had been advanced, the District Court properly accepted the plea. Long-standing precedence indicates that where state law prohibits a gambling business, Congress has extended §1955 even to Indians in Indian Country who might otherwise be immune from state prosecution. *United States v.*

Menominee Indian Tribe of Wisconsin, 694 F. Supp. 1373, 1375 (E.D.Wis. 1988); *United States v. Farris*, 624 F.2d 890 (9th Cir. 1980) *(other portions of case now invalidated by statute)*. Even if the Kiowa Tribe had knowingly permitted or authorized the cockfights at the T. F. C. Cockfighting Facility, engaging in a gambling activity which is contrary to state law would still be subject to prosecution in federal court. *See United States v. Dakota*, 666 F. Supp. 989 (W.D. Mich. 1985).

Accordingly, the District Court had jurisdiction to accept the Defendant's plea to a §1955 violation and the Judgement and Sentence should be affirmed.

ISSUE II: THE DEFENDANT ABANDONED HIS ABILITY TO APPEAL A PRE-TRIAL RULING ON THE ORIGINAL INDICTMENT BY PLEADING GUILTY TO AN INFORMATION ALLEGING A DIFFERENT CRIME.

A. Standard of Review

Even if this plea were a properly-executed conditional plea under Fed. R. Crim. P. 11(a)(2), only those issues specifically preserved for review, such as specific rulings on specific pre-trial motions, would be considered on appeal. ***United States v. Ryan***, 894 F.2d 355, 360 (10th Cir. 1990). The only exception to this rule is for jurisdictional challenges. However, any jurisdictional exception here would be directed at the trial court's power to accept a §1955 plea, as

discussed above, not the Court's jurisdiction over an Indictment which was dismissed.

B. Argument

The Defendant abandoned his right to appeal any pre-trial issues relating to the charges alleged in the original indictment by agreeing to that indictment's dismissal and pleading guilty to a wholly different crime. While the record does reflect that a waiver of appellate rights was not involved in the plea, the record is also void of any agreement to allow the defendant to assert abandoned issues in any appeal of his Judgment and Sentence. He retained the right to challenge the Court's jurisdiction to accept his plea, conduct in taking his plea or imposition of sentence following his plea. This appeal, however, does not purport to raise any of those issues.

Rather, the Defendant asks this tribunal to delve into a pre-trial ruling concerning an Indictment which has been dismissed. In deference to the nature and importance of plea bargaining in the functioning of the judicial system, the Rules of Criminal Procedure provide a mechanism for entering a plea while still retaining the right to appeal certain pre-trial matters. Rule 11(a)(2) provides:

(2) *Conditional Plea.*

> With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.

Rule 11 offers no such avenue for this Defendant. There was no Rule 11(a)(2) written agreement. Neither the Government nor the Court agreed to a possible withdrawl of the plea under Rule 11(a)(2). Therefore, no Rule 11 conditional plea was entered in this case. The Defendant abandoned his ability to question pre-trial matters related to the charges in the dismissed Indictment. His Judgement and Sentence should be affirmed.

ISSUE III: EVEN IF THE ISSUE WERE BEFORE THIS COURT, THE DISTRICT COURT PROPERLY DENIED THE DEFENDANT'S PRE-TRIAL JURISDICTION MOTION.

A. Standard of Review

This Court reviews the district court's exercise of jurisdiction under *de novo* standard. ***United States v. Roberts***, 185 F.3d 1125, 1129 (10th Cir. 1999); ***United States v. Brown***, 164 F.3d 518, 520 (10th Cir. 1998) (citing ***United States v. Blackwell***, 81 F.3d 945, 947 (10th Cir. 1996)); ***United States v. Cuch***, 79 F.3d 987, 990 (10th Cir. 1996).

B. Argument

In summary, the Defendant argues that the District Court lacked jurisdiction over the offenses alleged in the Indictment because the federal government is barred from assimilating the Oklahoma state law against cockfighting and applying that law in Indian Country against an Indian defendant. The Defendant bases his argument on allegations that cockfighting is a victimless crime and that the Kiowa Tribe retains sole jurisdiction to punish the defendant for such crimes. The District Court disagreed with the Defendant's conclusions and held that jurisdiction was properly based on 18 U.S.C. §13, 1151, 1152 and 21 Ok.Stat. §1692 *et. seq*. Moreover, this Court has expressly recognized the federal government's authority to assimilate such crimes.

1. *General Principles of Indian Law*

Gachot's brief at pages 10-16 sets forth general principles of federal Indian law to which the government has no objection. However, this Court should note that the public outcry over the result reached in *Ex Parte Crow Dog*, 109 U.S. 556 (1883)(dismissing a federal prosecution of an Indian who murdered another Indian), discussed at page 12 of Gachot's brief, was the event which prompted Congress in 1885 to pass the Indian Major Crimes Act, 18 U.S.C. §1153, providing the federal courts with exclusive jurisdiction over certain "major" crimes involving

Indians in Indian Country. *See United States v. Wadena*, 152 F.3d 831, 840 (8th Cir. 1998).

2. *Jurisdiction based upon the Indian Country Crimes Act, 18 U.S.C. §1152*

Despite the numerous judicial opinions cited in Gachot's brief recognizing the unique status of Indian tribes in American, Congress in 1817 infringed upon those notions of sovereignty by passing the Indian Country Crimes Act (ICCA), now codified at 18 U.S.C. §1152, which made federal laws, known as enclave laws, applicable to crimes committed in areas "within the sole and exclusive jurisdiction of the United States", including Indian Country. The ICCA excluded crimes committed by one Indian against the person or property of another Indian. (Such Indian-on-Indian crimes are now prosecuted under 18 U.S.C. §1153).
The real issue in this case is whether, and to what extent, a specific federal statute, namely the Assimilative Crimes Act, codified at 18 U.S.C. §13, is included as one of those enclave laws applicable to Indians in Indian Country. The United States asserts that the application of state law, through the Assimilative Crimes Act, to Indian Country is not nearly as novel as the defendant suggests. Even in so-called "victimless crimes", prosecutions involving public order and morals, traffic violations, and gambling have been viewed with favor. *See, e.g., Quechan Indian Tribe v. McMullen*, 984 F.2d 304 (1993)(fireworks); *United States v. Marcyes*, 557

F.2d 1361 (9th Cir. 1977)(fireworks); *United States v. Sosseur*, 181 F.2d 873 (7th Cir.1950)(gambling)[3]; *United States v. Pino*, 606 F.2d 908, 915 (10th Cir. 1979)(traffic offenses).

While 18 U.S.C. § 1152 is most often employed to prosecute inter-racial crimes with an identifiable victim, courts have recognized that the statute also allows the prosecution of "victimless" crimes assimilated from state law. As this Circuit recognized in 1986, federal courts adopt state criminal law for the elements and range of punishment for such crimes:

> The purpose of the Assimilative Crimes Act is to provide a method of punishing a crime committed on government reservations in the way and to the extent that it would have been punishable if committed within the surrounding jurisdiction. *United States v. Dunn*, 545 F.2d 1281, 1282 (10th Cir.1976). The Act fills in gaps in federal criminal law by providing a set of criminal laws for federal enclaves. *United States v. Mayberry*, 774 F.2d 1018, 1020 (10th Cir.1985), *quoting United States v. Prejean*, 494 F.2d 495, 496 (5th Cir.1974). The reason for adopting local laws is not that Congress passed on their merits after examining each individually, but that as a practical matter, Congress had to proceed on a wholesale basis to establish criminal laws for federal enclaves. *United States v. Sharpnack*, 355 U.S. 286, 293, 78 S.Ct. 291, 295, 2 L.Ed.2d 282 (1958).

United States v. Sain, 795 F.2d 888, 890 (10th Cir. 1986).

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[3]The assimilation of state law to prosecute gambling offenses in Indian Country via §1152 is now impacted by ***California v. Cabazon Band of Mission Indians***, 480 U.S. 202 (1987) and the passage of the Indian Gaming Regulatory Act, 25 U.S.C. 2701 *et. seq.*

Defendant Gachot hangs his argument on the case *United States v. Quiver*, 241 U.S. 602 (1916). Noting that the policy of Congress was to permit Indians' "personal and domestic relations" to be dealt with "according to their tribal customs and laws" and the absence of any federal laws condemning "bigamy, polygamy, incest, adultery, or fortification" among Indians, the Supreme Court upheld dismissal of an adultery case based on South Dakota law. *Id*. at 604-05. Even though this laundry list of crimes might have been consider "victimless" in 1916, it is doubtful that bigamy, polygamy or incest would be tolerated in America today - even in Indian country.

Nonetheless, Gachot argues, that he is charged with a victimless crime and that the only victim, if any, is the Kiowa Tribe. He also argues that this Court should not construe the federal statutes broadly in a manner to undercut tribal sovereignty. He also asserts that courts must be sensitive to issues of tribal self-governance and the strong federal interest in protecting tribal self-determination.[4]

[4]The government is unclear of the Defendant's purpose in citing *United States v. Prentiss*, 256 F.3d 971 (10th Cir. 2001), in paragraph 2.13. *Prentiss* involves whether the Indian or non-Indian status of a victim and defendant and the location of Indian Country are essential elements in an arson case under §1152. The decision does not analyze the applicability of §1152 to victimless crimes.

As an initial matter, it should be noted that the Kiowa Business Committee, while it approved a tribal resolution supporting the preservation of its cultural and rural lifestyles generally, later passed a resolution clarifying that the Kiowa Tribe does NOT consider cockfighting to be covered as a part of the Tribe's "cultural and rural lifestyles". In other words, not only is the Kiowa Tribe not a litigant, or even an amicus, herein asserting tribal sovereignty, the Tribe's day-to-day governing body has expressly disclaimed any support for cockfighting.

The United States does not deny that the federal government has an interest in protecting tribal self-determination, but other federal interests are at play here as well. For example, after the United States developed a clear federal interest in regulating Indian gaming after the decision in ***California v. Cabazon Band of Mission Indians***, 480 U.S. 202 (1987), the Tenth Circuit held that state gambling laws should no longer be assimilated because "Congress has restricted state jurisdiction over Indian gaming to that defined by a tribal-state compact". ***United Keetoowah Band of Cherokee Indians v. Moss***, 927 F.2d 1170, 1181 (1991). Here, although the federal government has certainly expressed an interest in the interstate transportation of fighting animals in recent years, the United States has not chosen to completely pre-empt state laws on animal fighting. Rather the

statutory scheme adopted by Congress in 7 U.S.C. § 2156 appears to envision a dual system of prosecution with the states.

Often, where areas of federal interest are implicated, "victimless" crimes are prosecuted under the Assimilative Crimes Act in Indian Country. First, under the Supreme Court opinion in *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978), tribal courts do not have jurisdiction over non-Indians and necessitating federal prosecution in many cases. The misdemeanor cockfighting cases prosecuted in Lawton fall under this category.

Second, some victimless crimes still adversely affect the tribal community. These consensual crimes are committed by non-Indian offenders with Indian participants, where the participant, although willing, is within the class of persons which a particular state or federal statute is specifically designed to protect. Thus, there is federal jurisdiction under 18 U.S.C. § 1152 and Chapter 109A for the statutory rape of an Indian girl, and over a charge of contributing to the delinquency of a minor where assimilated into federal law pursuant to 18 U.S.C. §§ 1152 and 13. Here as well, the vast majority of participants were non-Indian cockfighting enthusiasts seeking a "safe haven" from Oklahoma's ban.

Finally, some conduct generally prohibited because of its ill effects on society at large and not because it represents a particularized threat to specific

individuals, may nevertheless so specifically threaten or endanger Indian persons or property that federal jurisdiction is asserted. Thus, speeding in the vicinity of an Indian school may be seen as sufficiently serious to warrant federal prosecution. Cockfighting constitutes such a case. Running the T.F.C. cockfight brought numerous non-Indians and illegal aliens into Indian Country. The participants were engaged in illegal gambling on the site. Given the threat of avian flu, storing and fighting such fowl exposes those in Indian Country to a potentially-fatal disease and could wreak havoc on nearby Indians who may now raise farm chickens for personal consumption. Both the federal government and all fifty states seem, based upon the passage of recent statutes, to view animal fighting as a threat to the moral, psychological and emotional fabric of society as a whole. Under such circumstances, prosecution under the Assimilative Crimes Act is warranted.

3. *The Kiowa Tribe's jurisdiction over Gachot is NOT exclusive*

If the Tribe had a statutory code addressing cockfighting, the Tribe would certainly have jurisdiction to prosecute Gachot. However, no such tribal code provision exists. At any rate, the issue before the District Court was not whether the tribe could prosecute, but whether the federal government also possessed jurisdiction to prosecute the Defendant.

Gachot's final argument relies upon, *United States v. Blue*, 722 F.2d 383 (8th Cir. 1983). Yet, the opinion in *Blue* actually supports the government's assertion of jurisdiction. The Eighth Circuit[5] noted that the issue before it was not whether the Turtle Mountain tribe possessed power to prosecute a drug offense, but that "the district court also possesses subject matter jurisdiction over the federal offense charged." *Id*. at 386. The *Blue* court upheld the enforcement of federal enclave laws on the reservation. *Id.* at 385. The Court also noted that ***Quiver*** "has not been read to preclude federal prosecutions under general criminal federal statutes" not involving "merely the relations of Indians among themselves." *Id.* at 386.

As the Tenth Circuit noted in *United States v. Sain*, 795 F.2d 888, 890 (10th Cir. 1986), federal courts in the Tenth Circuit routinely assimilate state law in enclave cases. There are limits to this practice where such an assimilation would be inconsistent with federal policies. For example, after finding that Congress has "consistently protected the hunting and fishing rights of Indians" the Tenth Circuit concluded that state laws governing hunting and fishing could not be assimilated

[5]The decision illustrates a split among several circuits regarding the enforcement of the Assimilated Crimes Act in Indian Country. The Sixth, Eighth and Ninth Circuits allow federal prosecution for statutes of general applicability even over crimes committed by Indians against Indians in Indian Country. The Fourth Circuit finds no jurisdiction in such cases unless the crime is specifically enumerated in the Indian Major Crimes Act. The Second and Seventh Circuits allow non-enumerated Indian-on-Indian crimes only when federal law seeks to protect a particular federal interest. ***See generally***, Raymond, "Balancing 'Peculiarly Federal Interests' and Indian Sovereignty in Crimes By and Against Indians in Indian Country, 78 Was.U.L.Q. 347, 347-48 (2000).

against members of the Cheyenne-Arapaho Tribe on allotments and trust properties. *Cheyenne-Arapaho Tribes of Oklahoma v. State of Oklahoma*, 618 F.2d 665, 668-69 (10th Cir. 1980).

No such federal policy protecting treaty rights exists in this case however. Neither the 1867 Treaty nor the Jerome Agreement of 1892 purport to protect cockfighting. (App. 61-71). The history of the Kiowa people explains at least one reason for such an omission.

The Kiowa were a people whose culture was dominated by the horse and their nomadic lifestyle centered on following the great buffalo herds across the plains. Not until they were forcibly confined to lands near Fort Sill, Oklahoma, did the Kiowa people even begin to adopt a farm-type lifestyle suitable for raising fowl. Even after statehood, the Kiowa people tended to rely upon lease income or ranching and never relied upon large farming operations as did the Five Tribes on the eastern side of the Oklahoma. Domesticated fowl would seem to have been a foreign concept to the Kiowa even in the late 1890s when representatives complaining of insufficient government rations told of seeing tribal members eating **wild** turkey, deer and even dog in an effort to survive. See generally, Sherow, Red Earth: Race and Agriculture in Oklahoma Territory , Chapters 6-7

(Univ. Kansas 2004). If chickens had been readily available, surely they would have been consumed to ward off starvation.

There are no treaty provisions protecting cockfighting. Nor has the "prohibition of and punishment for" cockfighting been traditionally within the exclusive jurisdiction of the Kiowa tribe. *See United States v. Thunder Hawk,* 127 F.3d 705, 709 (8th Cir. 1997)(allowing assimilation of state traffic laws as not under the traditional jurisdiction of the Lakota Tribe). The decision in *Thunder Hawk* relies in part upon the this Court's landmark decision in *Ross v. Neff,* 905 F.2d n1349, 1353 (10th Cir. 1990) which noted as to a drunken altercation at the ballpark: "There is no question but that 18 U.S.C. §13 would allow federal enforcement of the local ordinance against public intoxication involved in this case."

In fact, since the late 1970's, the Tenth Circuit has recognized that crimes such as the charges alleged in Counts One and Two of the now-dismissed Indictment may be assimilated from state criminal laws and utilized in federal prosecutions:

> The Assimilative Crimes Act, 18 U.S.C. Sec. 13, assimilates state traffic laws and others into federal enclave law in order "to fill in the gaps in the Federal Criminal Code, where no action of Congress has been taken to define the missing offense." *United States v. Sosseur*, 181 F.2d 873, 875 (7th Cir.); *See United States v. Pardee,* 368 F.2d 368 (4th Cir.). The Act reaches activities on Indian reservations since

> such areas are "reserved or acquired for the use of the United States, and under the exclusive or concurent jurisdiction thereof." 18 U.S.C. Sec. 7(3). See *Williams v. United States*, 327 U.S. 711, 713, 66 S.Ct. 778, 90 L.Ed. 962; *Acunia v. United States*, 404 F.2d 140, 142 (9th Cir.); *United States v. Sosseur*, *supra*, 181 F.2d at 874.

United States v. Pino, 606 F.2d 908 (10th Cir. 1979). In *Pino*, the this Circuit held that the Assimilated Crimes Act provided a basis for giving a lesser-included offense instruction based upon the state crime of careless driving and that to refuse such an assimilation was prejudicial error. *Id.* at 914-17.

Based upon the foregoing, even if the Defendant had the right to appeal a jurisdictional ruling regarding a now-dismissed Indictment, the District Court's assertion of jurisdiction in this matter was proper and the Defendant's Motion to Dismiss was correctly denied. His Judgement and Sentenced should, therefore, be affirmed.

CONCLUSION

For the reasons stated above, the Defendant's Judgment and Sentence should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT

The government respectfully disagrees with defendant that oral argument would assist in the determination of this appeal and asserts that the briefs sufficiently and succinctly frame the issues for consideration.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(C), I certify that this brief is proportionally spaced and contains 4,669 words. I relied on my word processor to obtain the count and it is in Corel WordPerfect 8, 14 pt., Times New Roman.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

s/Linda Epperley
LINDA A. EPPERLEY
Special Assistant United States Attorney

MAILING CERTIFICATE

I hereby certify that two copies of the foregoing brief were mailed to counsel for defendant-appellant, Robert Buchholz, on the 20th day of August, 2007, as follows:

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s/Linda Epperley
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