

No. 10-15308

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BEATRICE MIRANDA,

Petitioner-Appellee,

v.

TRACY NIELSEN, *et al.*,

Respondents-Appellants,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
(Honorable Paul G. Rosenblatt)

AMICUS CURIAE BRIEF OF TOHONO O'ODHAM NATION IN SUPPORT OF
RESPONDENTS-APPELLANTS URGING REVERSAL

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I. IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Tohono O’odham Nation (“Nation”) is a federally recognized Indian tribe organized under a constitution approved by the United States Secretary of the Interior pursuant to Section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. § 476, under which it exercises sovereign powers over its lands and people.

Nation lands traditionally encompassed a large portion of what is now called the Sonoran Desert, including northern Sonora, Mexico. The Nation has a land base of 2.8 million acres, which is comparable to the size of the state of Connecticut. The Tohono O’odham reservation is the second largest Indian reservation in the United States. The Nation has approximately 28,000 enrolled members. Of those members, approximately 13,500 live on Nation land and approximately 1,800 members live on traditional O’odham lands in Mexico. Seventy-five miles of the Nation run along the United States International Border with Mexico.

The Nation is plagued with crime. Not only has the Nation witnessed a growth of intrusions and violence connected to the trafficking of drugs and humans from Mexico, but it also has experienced a spike in gang-related violence. The Nation’s police have identified 28 separate street criminal gangs operating within the Nation, many of whom are involved in the drug trade.

The Nation has an independent court system.¹ Along with the court system, the Nation has established an Advocate's Office staffed with attorneys and tribal court advocates (tribal members versed in tribal law) available to any member of the Nation. The Prosecutor's Office is similarly staffed. The Nation recently completed construction on a new jail to keep inmates close to home.

Consistent with the plain language of the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303 ("ICRA"), and when the interests of justice demand it, the Nation currently engages in the practice of sentencing defendants to up to one year of imprisonment for each separate tribal criminal charge, resulting in a cumulative sentence of more than one year. If the District Court's decision is allowed to stand, the Nation's sentencing practices will be restricted to one year for any and all offenses that arise out of a "single criminal transaction." This type of restriction on sentencing will eviscerate an essential component of the Nation's tribal criminal justice system, and will exacerbate an epidemic made all the more virulent by the failure of the federal government to fulfill its responsibilities to prosecute crime in Indian country. Therefore, the Nation files this *amicus curiae* brief in support of the Respondents-Appellants' position that the District Court's decision must be reversed.

¹ The Nation's Ordinance establishing an independent judiciary is at 6 Tohono O'odham Code, Chapter 1. The Nation's Code is available online at www.tolcnsn.org/tocode.htm.

II. ARGUMENT

A. Well Established Principles Of Tribal Sovereignty and Self-Government Dictate That The District Court Be Reversed.

Indian tribes were independent, self-governing societies long before their contact with European nations. Although most tribes had no written laws, behavior was guided by societal rules of conduct. This traditional, historical self-government forms the basis for the exercise of modern powers. Indian tribes have been recognized as “distinct, independent political communities.” *Worcester v. Georgia*, 31 U.S. 515, 559 (1832). As such, tribes are qualified to exercise powers of self-government, not by virtue of any delegation of powers, but rather based on their original tribal sovereignty. *United States v. Wheeler*, 435 U.S. 313 (1978).

Exercise of sovereignty is critical when applied to crimes committed by tribal members on tribal land. A sovereign has both the right and the obligation to keep its residents safe. The United States Supreme Court repeatedly has stated that tribal sovereignty demands tribal governments be able to police and punish their own members. *Id.* at 328; *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); *Ex parte Crow Dog*, 109 U.S. 556 (1883).

The ability to sentence a defendant to one year per tribal offense is an important tool for tribes. As discussed *infra*, crime is plaguing tribes. Additionally, the federal government simply does not currently prosecute an acceptable number of violent crimes on Indian country, with a declination rate

nearly three times the rate for all crimes occurring outside Indian country. U.S. Dept. of Justice, *Compendium of Federal Justice Statistics*, Publication No. NCJ213476 (2006) at 29. The Nation's sentencing practices compensate for this dearth of federal prosecutions for violent criminals in Indian country.

The power to administer adequate justice is an important aspect of self-government. The United States has a duty to protect tribes' right to "self-government ... [and] the maintenance of order and peace among their own members." *Ex Parte Crow Dog*, 109 U.S. 556, 558 (1883). Persistent concerns regarding crime in Indian country will only be compounded if tribes' ability to fairly and justly sentence defendants in accordance with ICRA is constrained.

B. THE EPIDEMIC OF CRIME PRESENT IN INDIAN COUNTRY GENERALLY, AND ON THE TOHONO O'ODHAM NATION IN PARTICULAR, DICTATES THAT THE DISTRICT COURT BE REVERSED.

Crime levels on some Indian reservations are reaching epidemic proportions. Indian reservations are some of the poorest and most crime-plagued communities in America. The decision of the District Court, if upheld by this Court, threatens to turn Indian reservations into virtually lawless lands.

1. Crime in Indian Country Generally

Native Americans experience a per capita rate of violence twice that of the U.S. resident population. U.S. Dept. Of Justice, *A BJS Statistical Profile 1992-2002: American Indians and Crime*, Publication No. NCJ 203097 (2004) at 4. On average, Native Americans experience an estimated one violent crime for every ten

residents age twelve or older. *Id.* The rate of violent crime victimization among Native American females is two and one-half times the rate for all females. *Id.* Domestic and sexual violence against Native Americans has reached particularly distressing levels – 34 percent of Native American women will be raped in their lifetimes and 39 percent of Native American women will be subject to domestic violence. *Id.* Even these shocking levels may be low. Only 46 percent of Native American victims of violent crime ever report the offense to law enforcement.² *Id.* at 4-5.

Substance abuse in Indian Country intensifies criminal activity. Native Americans are more likely than members of other racial/ethnic groups to be addicted to alcohol or drugs. Substance Abuse and Mental Health Services Administration, *Results from the 2008 National Survey on Drug Use and Health: National Findings*, HHS Publication No. SMA 09-4434 (2009) at 79. The rate of methamphetamine addiction in tribal communities is three times the national average. Tribal Law and Order Act of 2009, S.797, 111th Cong., § 2(a)(16). Levels of drug and alcohol use compound crimes as alcohol (48%) or drug use (9%) or both (14%) is a factor in 51 percent of violent crimes. U.S. Dept. Of

² Further compounding crimes on Indian country, is the fact that tribes have relatively fewer officers compared to non-Indian communities. U.S. Dept. of Justice, *Policing on Indian Reservations*, Publication No. NCJ188095 (2001) at vi.

Justice, *A BJS Statistical Profile 1992-2002: American Indians and Crime*, Publication No. NCJ 203097 (2004) at 10.

2. Crime on the Tohono O’odham Nation

While crime is a serious issue in Indian country, it is a problem of epic proportions on the Nation. Criminal activity is on the rise: homicides, rapes, and kidnappings within the Nation’s reservation have all increased by more than 30 percent in Fiscal Year 2009 over Fiscal Year 2008. Domestic violence and assaults are also experiencing increases. On average, 158 inmates are under the control of the Tohono O’odham Corrections Department. Thus, at any given time, nearly 12 percent of the on-Nation population is incarcerated. The Nation must be able to sentence criminals in accordance with the severity of their crimes in order to assure the safety of its communities.

a. International Border Issues Compound Criminal Issues On The Tohono O’odham Nation

Crime on the Nation is compounded due to the proximity of the international border with Mexico. As security has been tightened along the border to the east and west, more smuggling traffic is being forced through the Nation. The Nation now lies in the heart of the second-biggest trafficking corridor for drugs and illegal immigrants on the U.S. – Mexico border, second only to Nogales. This year, law enforcement agencies expect to seize as much as 800,000 pounds of marijuana crossing through the Tohono O’odham Nation. This staggering quantity

of drugs has a street value of \$1 billion, and yet amounts to only 20 percent of the total volume of marijuana coming across the border of the Nation. Ted Robbins, *Border Tribe in Midst of Drug Smuggling 'Crisis'*, www.npr.org (May 19, 2009) < <http://www.npr.org/templates/story/story.php?storyId=104255061>>. An estimated 5 to 10 percent of all marijuana produced in Mexico is transported each year through the Nation. U.S. Dept. of Justice, *National Drug Threat Assessment 2010*, No. 2010-Q317-001 (2010) at 18.

Although the majority of the drug smugglers are not Indian, and thus would not be subject to the Nation's criminal jurisdiction, an alarming number of Nation members are getting involved in the drug trade. Some Nation members are now working with Mexican drug cartels. Smugglers routinely approach members, looking for help shipping drugs north to major cities. With unemployment hovering around 42 percent, and with 40 percent of O'odham living in poverty, the monetary temptation for members can be overwhelming. Over the past five years, tribal members have been involved in 30 percent of all drug cases presented to the U.S. Attorney in the region. Ted Robbins, *Border Tribe in Midst of Drug Smuggling 'Crisis'*, www.npr.org (May 19, 2009) <<http://www.npr.org/templates/story/story.php?storyId=104255061>>. Smuggling has impacted nearly every O'odham family. John Dougherty, *One Nation Under Fire*, High Country News (February 19, 2007) < <http://www.hcn.org/issues/340/16834>>

If these cases are declined by the federal prosecutor (and, as described further below, such declination is frustratingly common), the only other choice is tribal prosecution. If, in turn, tribal prosecutors are limited to seeking a single, one year sentence, so long as the offenses occur as part of a “single criminal transaction,” the effectiveness of these prosecutions will be stymied and the Nation’s reservation will become a more dangerous place than it already is.

b. Two Case Studies On The Tohono O’odham Nation.

The two case studies discussed below provide examples of cases that could potentially be impacted should this Court uphold the decision of the District Court. Each of the defendants in the case studies below committed crimes that would apparently constitute “the same criminal transaction” as interpreted by the District Court. Despite the severity of the multiple crimes at issue, these defendants would almost certainly have their sentences drastically reduced if this Court upholds the ruling of the District Court.

Such a result would not serve the interests of justice for the Nation. In fact, two defendants would get away with taking another’s life with only one year of imprisonment as punishment. Such a result cannot be what Congress intended when it passed ICRA.

(1) Case Study No. 1

On May 22, 2007, after observing suspicious activity on the part of the defendant motorist, U.S. Customs and Border Protection Agents uncovered 274.7 pounds of marijuana in the defendant's van. The defendant admitted that he was delivering the marijuana to Tucson for distribution, that the passenger in the van was his minor sister, and that this was not the first time that he had transported marijuana. Despite this, and despite the large quantity of drugs, the U.S. Drug Enforcement Agency, Immigration and Customs Enforcement, and the United States Attorney all declined the case for prosecution. The Nation prosecuted the case.

The defendant was sentenced to 540 days for the separate offenses of Unlawful Possession of Marijuana with Intent to Deliver for Sale and Contributing to the Delinquency of a Minor.

Despite the fact that the defendant in this case was sentenced for two separate and distinct crimes, and despite the seriousness of these crimes, the defendant would very likely only be subject to one year of imprisonment under the District Court's ruling.

(2) Case Study No. 2

On August 8, 2006, the two defendants were sitting outside of a private residence drinking beer. Three people were walking by the residence when words were exchanged between the two groups and a fight erupted. As the defendants and the other group were fighting, the two defendants began firing a .22 caliber rifle at the victims.

The rifle was passed back and forth between the two defendants, while both continued firing and reloading the weapon. During the incident, one victim was struck in the side by a bullet causing serious physical injury. The second victim was struck in the back of the head with a bullet and died the next day as a result of his injuries. The defendants fled the scene.

The first defendant was sentenced to 720 days for the charges of Aggravated Assault - Complicity (two counts). The second defendant was sentenced to 2,580 days in jail for the charges of Aggravated Assault-Complicity, Threatening-Complicity, Misuse of a Weapon and/or Dangerous Instrument, Unlawful Possession of Liquor by Consumption and Conspiracy.

Each of the defendants in the above case study would only be subject to one year of imprisonment, despite having committed numerous crimes. This result would certainly not be in the interests of justice, considering a life was taken.

C. The Federal Government Has Consistently Failed to Adequately Prosecute Crimes On Indian Lands.

When, in a criminal case, the defendant is an Indian and the crime is one that falls within the purview of the Major Crimes Act, the federal government may charge the defendant in federal court.³ The Major Crimes Act was passed in response to the Supreme Court's decision in *Ex Parte Crow Dog*, which held that, under the then-existing statutory scheme, neither the federal courts nor the territorial courts had jurisdiction to try an Indian for the murder of another Indian on the reservation. *Ex Parte Crow Dog*, 109 U.S. 556 (1883).

Although the Major Crimes Act and Indian Country Crimes Act –its partner addressing largely non-Indian crimes– set out a rigorous scheme to ensure the prosecution of serious crimes in Indian country, in practice the results are lacking. During the calendar year 2004 through 2007, Federal officials declined to prosecute 62 percent of violent crimes alleged to have occurred in Indian country. Tribal Law and Order Act of 2009, S.797, 111th Cong., § 2(a)(10). Outside of Indian country, the average declination rate for U.S. Attorneys across all crimes is 22 percent, for violent crimes in particular, the declination rate is 32 percent. U.S.

³ The specific crimes enumerated under the Major Crimes Act are: “murder, manslaughter, kidnapping, 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), as assault against an individual who has not attained the age of 16 years, arson, burglary, robbery, and a felony under section 661 [embezzlement and theft] of this title.” 18 U.S.C. § 1153(a).

Dept. of Justice, *Compendium of Federal Justice Statistics*, Publication No. NCJ213476 (2006) at 29. Despite declination rates in Indian country at twice the average, approximately 25 percent of all violent crime cases opened by U.S. Attorney nationally still occur in Indian Country. Tribal Law and Order Act: Hearing on S. 797 Before the Committee on Indian Affairs, 111th Cong. (2009), (statement of Thomas J. Perelli, Associate Attorney General).

This practice of declination, coupled with the general outsourcing of criminal prosecutions of Indians in Indian country to federal authorities, strips tribal governments of their ability to serve their people and runs counter to Congress' stated goal of supporting tribal sovereignty. *See generally Cohen's Handbook of Federal Indian Law* § 1.07 at 97-113 (Nell Jessup Newton et al., eds., 2005). When an unaccountable, outside sovereign places itself in charge of ensuring reservation safety, the authority of the tribal government, the body with the largest stake in protecting Indian tribes, is naturally diminished. When that unaccountable sovereign then shirks that duty, and when the tribal government is constrained from carrying out even the most meager justice left to it, the safety and wellbeing of the tribe itself is imperiled. Tribes should not be forced to choose between their safety and their sovereignty, which if this Court upholds the District Court's decision, tribes will be forced to do.

In practice, the outsourcing of criminal prosecutions of Indians in Indian country is a failure. The Federal Bureau of Investigations ("FBI") generally

handles the more serious crimes, such as felonies, committed under the Major Crimes Act. *U.S. Dept. of Justice, United States Attorney Manual*, n. 129 § 9-675 (“The FBI has investigative jurisdiction over violations of 18 U.S.C. §§ 1152 and 1153 as well as most other crimes in the Indian country.”) However, most investigations of criminal activity commence only after the crime has occurred, while the FBI specializes in prolonged investigations of criminal enterprises, as opposed to quick responses to individual crimes. Additionally, crimes committed within Indian country are considered relatively minor when compared with the class of criminal matters which the FBI is most accustomed, such as counterintelligence, terrorism prevention, and organized crime. As noted by a serving federal prosecutor, “[o]ne criterion that is never on [the priority list of U.S. Attorneys] is Indian Country cases.” Michael Riley, *Principles, Politics Collide*, *Denver Post*, (January 13, 2007)

<http://www.denverpost.com/lawlesslands/ci_744639>.

Additionally, the federal prosecutors charged with enforcing the law are not members of the communities in which they serve. This fact should not be discounted. Prosecutors are forced to choose what cases to prosecute, based on their limited resources. Those decisions are partially based on the mores and values of the community in which the prosecutor serves. However, federal prosecutors are not part of the Indian communities that they serve and indeed, may not even understand the language of the community. In fact, prosecutors are

frequently located hundreds of miles from those they are charged to protect. With this type of relationship, it is not hard to see why there is such a disconnect and a lack of accountability between federal prosecutors and the communities they are charged with keeping safe. *See generally*, Kevin K. Washburn, *American Indians, Crime and the Law*, 104 Mich. L. Rev. 709 (2006).

As a result of all these factors, a shocking number of crimes on Indian country simply go unpunished. In 2006, federal prosecutors filed only 606 criminal cases in all of Indian country. With more than 560 federally recognized tribes, that works out to a little more than one criminal prosecution for each tribe. N. Bruce Duthu, *Broken Justice in Indian Country*, New York Times (August 11, 2008) <http://www.nytimes.com/2008/08/11/opinion/11duthu.html>.

There are few, in any, governmental interests more compelling than justice, including justice for all crime victims and communities. The limitations imposed by the District Court on tribal sentencing will, for all practical purposes, leave these crimes unpunished. This result is not only inconsistent with the plain language of ICRA, but is unfair, unwarranted, and unwise.

III. CONCLUSION

For the foregoing reasons, the Nation respectfully urges that this Court reverse the District Court's decision and hold that the ICRA does not bar a tribal

court from sentencing a defendant separately for each conviction of a separate offense, so long as the sentence for each separate offense does not exceed one year.

DATED: July 19, 2010.

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to FRAP 32(a)(7)(C) and Ninth Circuit Rule 32-1, that the attached Proposed *Amicus Curiae* Brief of the Tohono O’odham Nation is double spaced in 14 point proportionally spaced Times New Roman typeface. The word count, excluding the cover page, table of contents, table of authorities, certificate of service, certificate of compliance and statement of related cases is 3,219.

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of July, 2010, I served the foregoing *Amicus Curiae* Brief of the Tohono O'odham Nation on counsel for all parties by using the Court's ECF electronic filing system:

By: s/ Laura Berglan