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Before the Senate Judiciary Committee on Protecting the Constitutional Right to Counsel of Indigents Charged with Misdemeanors
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Thank you for the opportunity to address the availability of counsel for misdemeanor prosecutions. While it is easy to think of misdemeanor charges as "small," the reality is that there are often significant direct and collateral consequences arising from misdemeanor convictions.

I would like to look the issue through the lens of tribal courts and the interaction of tribal court misdemeanors and federal law. Both jurisdictional issues and practical realities on the ground in Indian Country present real problems for individuals charged with misdemeanors in tribal courts. My observations are driven largely by my own experience as a practitioner in tribal courts while in private practice and now in the Federal Public Defender office for South Dakota and North Dakota where the vast majority of our cases arise from Indian Country.

Due to the overlap of jurisdiction between the United States and tribes over Indian defendants, I frequently see individuals charged initially in tribal courts with misdemeanors arising for the same conduct later giving rise to federal charges. For example, an Indian defendant may be initially arrested and charged with misdemeanor assault by tribal law enforcement and later prosecuted for aggravated assault by the United States Attorney for the same conduct. Where there is not a perfect misdemeanor analogue to the felony offense, charges for tribal liquor violations, public intoxication, disorderly conduct, or similar offenses can often provide an avenue to charge and hold that individual while an investigation of the felony offense proceeds. That investigation can, and often does, include law enforcement interrogation without counsel. Those statements can then be used against the defendant in developing and prosecuting the federal case.

Entering guilty pleas to get out of tribal custody is a disturbing and recurring reality that encounter. Many tribes do not provide counsel and many that allow counsel permit lay advocates rather than law trained ones. When a defendant requests counsel, they often face the reality that due to case backlogs, the lack of readily available counsel given sparse populations, and other practical impediments they will remain in jail longer to obtain counsel and fight a charge than if they simply pleaded guilty and got a sentence of time served. In my experience that is common. In fact, I have spoken with advocates who have dealt with the conflict of advising clients who may want to assert their innocence and use counsel, but would face extended detention to do so and simply plead guilty as a result of not understanding how those admissions may be harmful in the future.

The pressure to plead guilty without counsel can be intensified by the overlapping jurisdiction of tribes and the United States. I frequently work with clients who entered misdemeanor guilty pleas in tribal court with the mistaken belief that doing so would mean that

their case will not "go federal." Without a lawyer, many individuals think that a quick guilty plea in tribal court will get them out of custody and get them double jeopardy protection against federal prosecution. It does not. In fact, due to the increased use of Special Assistant Untied States Attorneys (often referred to as "SAUSA's"), who are tribal prosecutors deputized to the United States Attorney's Office the same individual developing the "tribal" case, is contemporaneously assessing it for federal charges. In the absence of a plea agreement, which is rarely forthcoming or sought without counsel, the defendant will make admissions in tribal court, believing they are protecting themselves, when they in fact are doing the exact opposite.

A second reality is that misdemeanor guilty pleas can have significant consequences down the road through the operation of federal law. Tribal court convictions for certain misdemeanors can result in the loss of financial aid for education and eligibility for low income housing. With six of the ten lowest income per capita counties in the nation being reservation counties in South Dakota and North Dakota, those are huge consequences. In some tribal communities, it may mean the individual is not able to obtain any housing themselves or may place family members at risk of losing their residence if they take that individual in. That impediment may follow the individual off the reservation if they seek employment or education in a larger community outside of Indian Country as well. Some tribes have statutes or ordinances in place that may trigger registration requirements under SORNA. A common example would be consensual sexual relationships between individuals with certain age gaps. In my experience, consensual sexual relationships among teens are common in many communities, but can lead to criminal charges when one individual is below the legal age of consent (even when known and approved by the adults in their life). A conviction for such an age based offense may trigger the SORNA registration requirements. Combined with often itinerant residence patterns, this can expose young men and women to state or federal felony prosecutions for failure to register as a sex offender that they never anticipated or understood at the time of their guilty plea.

I also frequently see prosecution for domestic assault by an habitual offender under 18 U.S.C. § 117 based on tribal misdemeanor assault convictions that are obtained without counsel. While there are clearly many instances of real and troubling domestic abuse in Indian Country and elsewhere, there are also many instances where conduct that would more accurately be described as public intoxication or disorderly conduct results in a guilty plea to domestic violence in tribal court without counsel. Later, those uncounseled tribal court convictions provide the foundation for federal prosecution and enhanced penalties. There is a split of authority among the Courts of Appeals on this issue. *See United States v. Bryant*, 769 F.3d 671 (9th Cir. 2014); *United States v. Cavanaugh*, 643 F.3d 592 (8th Cir. 2011). However, South Dakota has had the largest number of Indian Country prosecutions by a considerable margin in recent years, with North Dakota in third place and it remains the law there. In a very direct way, misdemeanor tribal convictions without counsel, often entered as a perceived "get out of jail free" card become the basis for federal felony prosecution down the road.

Finally, two remaining aspects of the interaction of federal law and tribal court misdemeanor prosecutions must be considered: statutes providing possible protections or remedies for those convicted in tribal court and federal statutes seeking to expand the jurisdiction of tribal courts. Neither does much to effectively address the problems I have discussed so far.

Under the Indian Civil Rights Act, Tribal Law and Order Act, and Violence Against Women Act Reauthorization of 2013 procedural protections for individuals prosecuted in tribal courts are created. However, none of them is self-effectuating. Those protections, including the right to obtain an attorney must be enforced by tribal courts in the first instance. Too often I have heard from colleagues in other Federal Public Defender offices, or private practitioners in tribal courts directly, about denials of counsel in tribal courts. I have heard reports about the failure to appoint counsel; the continued use of lay, rather than law trained counsel; denying counsel access to necessary documents or legal texts; or sentences in excess of jurisdictional limitations. I am not trying to present instances as patterns, they are serious incidents. Prior to seeking federal habeas corpus relief, an individual who suffered such a deprivation of rights would need to exhaust tribal remedies, including of appeal, which can be a long and cumbersome process. Again, a plea to some time-served disposition is often the result.

Under TLOA and VAWA, the sentencing authority of tribal courts has been expanded and jurisdiction over non-Indians for certain offenses has been created. Existing federal avenues of prosecution did, and do, exist for assault (18 U.S.C. § 113), domestic violence (18 U.S.C. § 2261), and other offenses under the General Crime Act, 18 U.S.C. § 1152, and the Assimilative Crimes Act, 18 U.S.C. § 13. Expansions of jurisdiction carry the expanded risk of violations of the right to counsel. In my portion of the world tribal governments lack the resources to reliably provide counsel in misdemeanor cases irrespective of expanded jurisdiction. Even if expanded financial resources are provided, the reality remains that most portions of Indian Country are exceptionally rural and sparsely populated making obtaining counsel an issue of supply as well as demand–there simply may not be lawyers available.

In closing, not all of the issues I have discussed are unique to Indian Country. Nor should my comments be taken as criticism of many dedicated and capable employees of tribal courts. They are, however, my observations of real problems that presently exist in the system of misdemeanor prosecutions in tribal courts and the very real way in which those problems spread quickly and significantly into prosecutions in the courts of the United States.

Thank you again for the opportunity to address the Committee and for your interest in this important issue. Please let me know if I can provide additional information to the Committee.