SCHOOL OF LAW
UNIVERSITY of WASHINGTON

Native American Law Center

WRITTEN TESTIMONY OF PROF. RON J. WHITENER

September 7, 2011
United States Indian Law and Order Commission
Tulalip, Washington

Hon. Troy Eid, Chair

Mr. Chairman and Members of the Commission, thank you for the opportunity to submit testimony to the Commission on the need for public defense services in tribal courts.

My name is Ron J. Whitener and I am a member of the Squaxin Island Tribe of Indians, whose homelands occupy the southernmost extent of Puget Sound in Washington State. I am the Executive Director of the University of Washington Native American Law Center, where I have directed the Tribal Court Public Defense Clinic since 2000. I am also the Chief Judge of the Chehalis Tribal Court.

The Tribal Court Public Defense Clinic enrolls 16 law students each year, and those students dedicate a minimum of 12 hours each week, for the full academic year, to training for and practicing criminal and dependency defense here at the Tulalip Tribal Court. Our program employs two other faculty and two staff attorneys, and the Clinic also acts as the primary public defense agency for the Squaxin Island, Port Gamble S'Klallam and Sauk-Suiattle Tribes.

Federally-recognized American Indian nations retain inherent sovereign governmental powers to exercise authority over their members and lands, including the ability to pass laws, criminally prosecute Native Americans, provide health care services for tribal members, and pass codes regulating both non-Indian and Indian activity on tribal lands. In addition to a tribe's inherent authority, Congressional acts such as the Self-Determination and Education Assistance Act of 1975 and the Tribal Self-Governance Act allow tribes to take over federal functions in a variety of areas including law enforcement, tribal courts, and juvenile protection. Since passage of these Acts, many tribes have created tribal courts, and most exercise criminal jurisdiction.

Since the inception of the Tribal Court Public Defense Clinic, we have seen a significant increase in the provision of public defense among tribes in Washington State. As the Commission is aware, however, the Sixth Amendment right to appointed counsel does not extend to indigent defendants in tribal courts; and the UW NALC has determined that approximately one third of Washington's tribes still do not provide for public defenders in their tribal courts. Among the tribes who do provide some type of counsel, the appointed representative is often not an attorney, but a "spokesperson" or "lay advocate." These lay advocacy models often include little or no formal training, and lay advocates can be seriously overmatched if, as in the vast majority of cases, the tribal prosecutor is a licensed attorney.

WRITTEN TESTIMONY OF PROF. RON J. WHITENER

One difficulty that Indian tribes face in providing representation for criminal defendants stems from the fact that the vast majority of federal funding for tribes is provided under contracts or compacts between the tribes and the United States, for the implementation of federal obligations for reservation law enforcement. Because the Indian Civil Rights Act affords only a limited right to counsel, funding from Congress has not provided for public defenders in tribal courts. Consequently, many tribes either provide for indigent defense by relying on advocates with little or no legal training, or do not provide for indigent defense at all.

In the recently-passed Tribal Law and Order Act (TLOA), Congress for the first time addressed the issue of public defense in tribal courts. Prior to passage of the TLOA, the maximum sentence a tribal court could impose was one year of imprisonment and a five thousand dollar fine. Now, pursuant to the TLOA, a tribal court may impose a maximum sentence of three years of imprisonment (or consecutive sentences totaling up to nine years of imprisonment) and a fifteen thousand dollar fine. However, in any "criminal proceeding in which an Indian Tribe . . . imposes a total term of imprisonment of more than 1 year . . . the Indian Tribe shall -- (1) provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and (2) at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys. . . ."[1] While these provisions might be read to require defense attorneys to have attended law school and passed state bar association licensing requirements, the Senate report states that they merely "require attorneys and judges presiding over [specified] criminal trials to meet certain licensing standards. Whether the standard employed is a state, federal, or tribal standard will be a decision for the tribal government."[2]

While the provisions of the TLOA do provide incentives for more tribes to hire public defenders, funding for experienced defenders is a separate issue of concern. The TLOA recognized the need for public defense and sought to address this need by changing the purposes for which financial assistance may be provided from "the employment of judicial personnel"[3] to "the employment of tribal court personnel, including tribal court judges, prosecutors, public defenders, appointed defense counsel, guardians *ad litem*, and court-appointed special advocates for children and juveniles."[4] The Senate report on the TLOA notes that this change "acknowledges that funding provided to tribal court programs administered by the Departments of the Interior and Justice can be used to improve public defender programs."[5] However, while authorizing funding for public defense, the TLOA does not actually appropriate any increases to tribal judicial base funding for that purpose. Thus, if a tribe wishes to allot funds to public

---

[1] 25 U.S.C. § 1302(c).

[2] Senate Report 111-93, p. 18, fn. 57 (October 29, 2009).

[3] 25 U.S.C. 3613(b)(2), Pub.L. 103-176, Title I § 103, Dec. 3 1993, 107 Stat. 2007.

[4] 25 U.S.C. 3613(b)(2).

[5] Senate Report 111-93, p. 18 (October 29, 2009).

defense, it must either reduce funding for other court personnel and programs, or use unrestricted funds which come from tribal sources such as taxation or economic development.

Over the past 11 years, as revenues from tribal economic development have increased, the UW NALC has noted a significant increase in funding for tribal public defense – primarily from gaming revenues. However, while tribal gaming has provided much-needed unrestricted revenues for some tribes, the majority of tribes nationally do not have any casino gaming; and of those that do, 13% of the tribes make approximately 66% of the revenues.[6] Meanwhile, tribes have very limited access to tax revenues due to United States Supreme Court decisions restricting tribal authority to tax non-members, and are unable to tax lands held in trust by the United States for the benefit of tribes and individual Indians. Thus, for rural tribes with no population base to create economic development opportunities, the insufficient funds available for social services require public defense to compete with the enormous health and social service needs faced by indigenous communities.

Even for tribes who are able to generate funding to support public defense, and especially for tribes in remote areas, retention of attorneys and other professionals is often a problem. While no research appears to have been done on the ability of rural tribes to fund and fill public defense positions with experienced personnel, an analogous issue is the effort by the Indian Health Service to maintain doctors in rural tribal clinics. The Indian Health Service (IHS) provides a strong Loan Repayment Program for medical students who commit to working for a minimum of two years in IHS clinics and hospitals;[7] but even with this incentive, rural communities often find it difficult to retain doctors. In a recent review, the Indian Health Service had 174 vacancies for physicians and 238 vacancies for nurses,[8] and on a recent visit to the Fort Peck Reservation in northeastern Montana, the UW NALC found that Reservation's IHS hospitals and clinics had only half of their medical professional positions filled. With no corresponding programs to assist attorneys with their education loans, recruitment and retention of trained attorneys is sure to be even more difficult. The UW NALC is attempting to address this through a pilot program through which juveniles in tribal court who would otherwise proceed unrepresented, are represented by the Tribal Court Public Defense Clinic attorneys through the use of low cost web-based video conferencing. While this is certainly not ideal, it is better than allowing these cases to proceed entirely without counsel.

While disparities in the availability of public defenders for individuals prosecuted in tribal courts are considerable, the need for effective representation for this population is also especially pronounced. Native Americans suffer the worst mortality statistics of all races in the United States. Native Americans have a higher chance of dying at a young age; their infant mortality rate is 22% higher than that of all other races,[9] and for children ages 1-4, the two leading causes

---

[6] Time Magazine, *Indian Casinos: Wheels of Misfortune*, December 16, 2002 (http://www.time.com/time/magazine/article/0,9171,1003896,00.html).

[7] http://www.ihs.gov/jobscareerdevelop/dhps/lrp/index.cfm

[8] Indian Health Service, Department of Human and Health Services, http://www.ihs.gov/JobsCareerDevelop/CareerCenter/Vacancy/dsp_stats.cfm.

[9] *Id*. at 56, *available at* http://www.ihs.gov/PublicInfo/Publications/trends98/part3.pdf).

of death are accidents (at 3.3 times the rate for all other races) and homicide (at 2.2 times the rate for all other races).[10] This trend remains the same through age 14, but for children ages 5-14, suicide becomes the third leading cause of death (at 3 times the rate for all other races).[11] For American Indian and Alaskan Native youth ages 15 to 24, accidents remain the number one cause of death (at approximately 3 times the rate for all other races), but suicide becomes the second highest cause of death (at 2.5 times the rate for all other races). American Indians and Alaska Natives suffer an alcohol-induced mortality rate that is 6.1 times higher than all other races in the United States.[12] These statistics point to an underlying prevalence of such conditions as Fetal Alcohol Spectrum Disorder; traumatic brain injury; depression; alcohol induced brain dysfunction; post-traumatic stress disorder; attachment disorder; and a variety of other issues which have an effect on cognitive abilities and lead to higher chances of becoming involved in the criminal justice system.

The lack of public defense for individuals who face these disparities leaves them extremely vulnerable to the workings of an adversarial system which often resembles a game, in which police officers are able to use various forms of deception, trust development, intimidation and other "trickery" to investigate crimes, and to induce suspects to confess to crimes.[13] These practices have been allowed by courts in an effort to combat criminals who operate with a high knowledge of the law and require police to "play on their level."[14] The United States Supreme Court has stated that these practices are vital to the ability of the government to prosecute and convict criminals, and that leeway in the methods allowed to law enforcement must be given.[15] This includes the use of "informers, accessories, accomplices, false friends, or any of the other betrayals which are 'dirty business' . . . ."[16] Applying this principle of gamesmanship, police have been granted authority by the courts to investigate crimes in ways that disproportionately affect individuals with cognitive impairments. For example, police are given latitude to ask people for consent to searches which would otherwise be unlawful. Unlike police seeking to engage in custodial interrogation, police requesting permission to search have no obligation to inform suspects of their rights, and their ability to secure consent depends upon peoples' general ignorance of those rights.[17]

Even in situations where police are seeking to obtain incriminating statements from suspects, the courts have allowed ploys such as putting an undercover agent in a cell with a defendant.[18]

---

[10] *Id*. at 65.

[11] *Id*. at 66.

[12] Indian Health Service, 2006 National Summary: Measuring and Improving Quality Healthcare for American Indian/Alaska Natives, Government Performance and Results Act, January 2007 at A3, *available at* http://www.ihs.gov/PlanningEvaluation/documents/2006NationalSummaryPublic.pdf.

[13] Mary D. Fan, *The Police Gamesmanship Dilemma*, 44 UC Davis L. Rev. 1407 (2011).

[14] Philip B. Heyman, *Understanding Criminal Investigations,* 22 Harv. J. on Legisl. 315, 323-327 (1985).

[15] *Crawford v. United States*, 212 U.S. 183, 203-204 (1909).

[16] *On Lee v. United States*, 343 U.S. 747, 757 (1952).

[17] *Florida v. Jimeno*, 500 U.S. 248, 252 (1991).

[18] *Illinois v. Perkins*, 496 U.S. 292, 294-95 (1990).

Police officers throughout the United States are also trained in a very structured system of interrogation, using sophisticated psychological methods to convince suspects to confess to crimes.[19] They first confine the suspect to an isolated area before informing them of their *Miranda* rights.[20] Immediately following this warning, however, police are trained to use an interrogation format designed to discourage the suspect from invoking their right to counsel. As long as the suspect does not state affirmatively that they want to remain silent, or that they want to talk to an attorney prior to questioning, the police may continue to interrogate them. [21] The suspect is confronted with the assertion that the police believe he or she is the person who committed the crime and a very sophisticated interrogation takes place which is designed to increase the suspect's feeling of anxiety and hopelessness, and rationalizes his or her supposed actions. The interrogator leads the suspect to believe that cooperation will be the best option to minimize or escape from their current situation. The detailed mechanics of this type of interrogation are very heavily rooted in human psychology and works very well.

To achieve confessions, police have been give latitude to use deception in interrogations. To a certain degree, police are allowed to lie about the strength of their case,[22] and to lie about whether a confession will result in better plea offers from the prosecution. (In fact, empirical studies have shown that suspects who confess will, on average, receive worse plea offers from the prosecution, while suspects who exercise their right to remain silent receive more favorable offers.[23]) The trickery employed in criminal investigation is justified by courts as being a necessary evil to combat crime; and the system assumes that if the suspect did not actually commit the crime, he or she will not confess to it, even when faced with these deceptions. However, for individuals with mental illness, this assumption does not hold true. For example, Fetal Alcohol Spectrum Disorder, while not comprehensively measured in American Indian and Alaska Native populations, is suspected to exist at rates highest among all U.S. Races.[24] Individuals with conditions within this spectrum have difficulty with memory, difficulty understanding cause and effect, and are very suggestible.[25] This makes these individuals very susceptible to inaccurate and even completely false confessions.[26]

---

[19] Charles D. Weisselbert, *Mourning* Miranda, 96 Cal L. Rev. 1519, 1532.

[20] Note again the *Miranda* decision was based on United States Constitutional rights which do not limit tribal governments, thus unless a particular tribal court has ruled that a right to counsel exists under a tribal constitution or a tribal statute, a tribal *Miranda*-like warning is not required to be given by tribal law enforcement prior to interrogation.

[21] Charles D. Weisselbert, *Mourning* Miranda, 96 Cal L. Rev. 1519, 1532-1533 (description of the interrogation method).

[22] *Holland v. McGinnis*, 963 F.2d 1044 (7th Cir. 1992) (confession allowed where police falsely told suspect that his car had been seen at the crime scene); *see also*, *Frazier v. Cupp*, 394 U.S. 731 (1969) (confession allowed where police untruthfully told suspect that his accomplice had already confessed).

[23] Paul G. Cassell, *Miranda's Social Costs: an Empirical Reassessment*, 90 Nw. U. L. Rev. 387, 437 (1996).

[24] L.A. Kaskutas, *Understanding Drinking During Pregnancy Among Urban American Indian and African American Women*, 24 Alcohol Clin. Exp. Res. 1241 (2000).

[25] Timothy Moore, *Fetal Alcohol Spectrum Disorder: A Need for Closer Examination by the Criminal Justice System*, 19 Criminal Reports 99 (2004).

[26] *Id*.

It is generally assumed that the scrutiny of a trained and competent defense attorney will act as a check on this approach to investigation and interrogation, which tribal law enforcement officers are trained to employ. In too many tribal jurisdictions, however, this safeguard is unavailable to defendants who cannot afford counsel. The investigation occurs, the police reports are forwarded to the prosecutor, and the defendant is charged with a crime. The prosecutor then engages in negotiations directly with the defendant, who will most likely plead guilty without any review of the circumstances of the case or any meaningful opportunity to challenge the evidence. While the number of alternative courts may be increasing, tribal courts generally still operate as adversarial systems, and the expanded sentencing provisions of the TLOA only increase the stakes for tribal defendants.

The funding provided to tribes for judicial and law enforcement services are insufficient to provide for all of the traditional roles in an adversarial criminal justice system. After tribes prioritize their limited funding, the model most often seen is the provision of a judge, prosecutor, clerk of court and law enforcement officers. Rarely does a tribe prioritize public defense as highly as these other positions. When a tribal court commences prosecution of tribal members for crimes, a power imbalance results between professionals who are trained in the complexities of the criminal justice system and defendants who must too often fend for themselves. This imbalance leads to a sense of fatalism among tribal defendants who don't have any concept of criminal procedure, defenses, plea negotiation, case analysis, rules of evidence, or all the other intricacies of criminal law and procedure; and the profound concerns to which it gives rise are only amplified when issues of illiteracy, cognitive disabilities, chemical dependency, or other factors are present which further compromise the ability of defendants to represent themselves .

The lack of fundamental fairness in an adversarial justice criminal system inevitably leads to instances of individual defendants pleading or being found guilty when their rights against illegal searches and seizures or impermissible interrogations have been violated, or other ICRA, tribal code, or tribal constitutional protections have been compromised. Native defendants, their families, and non-Indians residing or coming onto Indian reservations are acutely aware of the power imbalance which exists when a prosecutor represents the tribe and no indigent representation is provided. The result is distrust by tribal communities of their own courts, and labeling of tribal courts by outsiders as illegitimate and biased against parties adverse to the tribal government.

Competent public defenders not only ensure that criminal proceedings are fundamentally fair and that the rights of criminal defendants are respected and enforced; they also enhance both the actual and the perceived legitimacy of the criminal justice system. Public defenders are in a unique position to ensure that especially vulnerable defendants are neither lost in the often impersonal machinery of the criminal justice system nor overwhelmed by the complexities of the adversarial process. Finally, a public defender who is prepared to raise appropriate challenges regarding lax or improper police conduct, the clarity and validity of tribal code provisions, and the fairness and integrity of court proceedings, provides a constant pressure that ultimately makes criminal justice systems both more effective and more efficient, and results in better trained police, prosecutors, and judges as well.

The good news is that when tribal governments are able to generate unrestricted funds, provision of public defense appears to be a priority for many of them. Every year, we see more tribes provide some type of representation for Native Americans charged with crimes in their courts. My hope, however, is that at some point in the near future a comprehensive and sufficiently-funded right to counsel will be established to address what I believe to be an important right not afforded Native Americans in this country. Until such a time, I urge the Commission to make the funding of public defense services and technical assistance to existing tribal public defenders as high a priority as the building of prisons, the hiring of police and law enforcement officers, and the many other areas of need in which the Commission is charged with seeking solutions.

Thank you again for this opportunity to address the Commission regarding an issue of profound importance to all of us who are concerned with the administration of justice in tribal courts.

Prof. Ron J. Whitener
University of Washington School of Law
Box 353020 W.H. Gates Hall
Seattle, Washington 98195
ronw@uw.edu