University of Washington School of Law
UW Law Digital Commons

Ninth Circuit Briefs Court Briefs

1-19-1996

Appellant's Opening Brief - U.S. v Lomayaoma, Docket No. 95-10516 (86 F.3d 142 (9th Cir. 1996))

Follow this and additional works at: https://digitalcommons.law.uw.edu/ninthcir

B 09

US9C1995-10516-02
{810C985B-03D5-40F6-A679-BF1DD724C910}
{38665}{27-040126-233626}{011996}

APPELLANT'S BRIEF

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JAN 19 1996

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff/Appellee,	)	
	)	No. CA 95-10516
-vs-	)	
	)	DC #CR-90-313-PCT-EHC
WILMER LOMAYAOMA,	)	District of Arizona
	)	
Appellant.	)	
	)	

ON APPEAL FROM THE JUDGMENT OF
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

APPELLANT'S OPENING BRIEF

FREDRIC F. KAY
Federal Public Defender
District of Arizona

JON M. SANDS
Asst. Federal Public Defender
234 North Central Avenue, Suite 810
Phoenix, Arizona 85004
Telephone: (602) 379-3290

Attorneys for Appellant

DATE MAILED: January 16, 1996

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff/Appellee,	)	
	)	No. CA 95-10516
-vs-	)	
	)	DC #CR-90-313-PCT-EHC
WILMER LOMAYAOMA,	)	District of Arizona
	)	
Appellant.	)	
	)	

ON APPEAL FROM THE JUDGMENT OF
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

APPELLANT'S OPENING BRIEF

FREDRIC F. KAY
Federal Public Defender
District of Arizona

JON M. SANDS
Asst. Federal Public Defender
234 North Central Avenue, Suite 810
Phoenix, Arizona 85004
Telephone: (602) 379-3290

Attorneys for Appellant

DATE MAILED: January 16, 1996

TABLE OF CONTENTS

PAGE

I. STATEMENT OF ISSUES PRESENTED FOR REVIEW 1

A. UNDER UNITED STATES v. LOPEZ, ___ U.S. ___, 115 S.Ct. 1624 (1995), THE INDIAN MAJOR CRIMES ACT IS UNCONSTITUTIONAL AND THE DISTRICT COURT LACKS JURISDICTION. 1

B. THE GOVERNMENT FAILED TO SUFFICIENTLY STATE A VIOLATION OF FEDERAL, STATE, OR LOCAL LAW AS A BASIS FOR A REVOCATION OF SUPERVISED RELEASE. 1

C. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT A SUPERVISED RELEASE REVOCATION ON THE BASIS OF A VIOLATION OF FEDERAL, STATE OR LOCAL LAW. 1

II. STATEMENT OF JURISDICTION 2

A. District Court Jurisdiction 2
B. Appellate Court Jurisdiction 2
C. Bail Status 2

III. STATEMENT OF THE CASE 2

A. Nature of the Case; Course of Proceedings 2
B. Statement of Relevant Facts 3

IV. SUMMARY OF ARGUMENTS 6

A. Under United States v. Lopez, ___ U.S. ___, 115 S.Ct. 1624 (1995), The Major Crimes Act, 18 U.S.C. § 1153, Is Unconstitutional And The District Court Lacked Jurisdiction To Revoke Mr. Lomayaoma's Supervised Release. 6

B. In The Petition To Revoke Supervised Release, The Government Failed To Specifically State The Violation Of Federal, State Or Local Law. 6

C. There Was Insufficient Evidence To Support A Supervised Release Revocation On The Basis Of A Violation Of Federal, State Or Local Law 7

V. ARGUMENT 7

A. THE DISTRICT COURT LACKED JURISDICTION OVER MR. LOMAYAOMA'S SUPERVISED RELEASE REVOCATION 7

1. Standard of Review. 7
2. The Major Crimes Act Is Unconstitutional And This Court Lacks Jurisdiction. 7
   a. Indian Major Crimes Act Jurisdiction Before Lopez 8
   b. Indian Major Crimes Act Jurisdiction After Lopez 11
3. Summary 15

B. THE GOVERNMENT FAILED TO STATE A VIOLATION OF LAW 15

1. Standard of Review 15
2. The Government's Failure To Allege A Basis For Revocation 15

C. THE GOVERNMENT HAS NOT PRODUCED SUFFICIENT EVIDENCE TO MAINTAIN ITS CLAIM AGAINST MR. LOMAYAOMA. 18

1. Standard of Review 18
2. The Government Failed To Put Forth Sufficient Evidence That Mr. Lomayaoma Violated The Law. 18
3. The Government Failed To Prove Mr. Lomayaoma's Intent To Commit A Crime. 20

VI. CONCLUSION 21

VII. STATEMENT OF RELATED CASES 21

VIII. CERTIFICATE OF MAILING - DELIVERY 22

TABLE OF AUTHORITIES

CASES **PAGE**

Bernal-Zazueta v. United States,
225 F.2d 64 (9th Cir. 1955) 16

Carchman v. Nash,
105 S.Ct. 3401, 473 U.S. 714 (1985) 16

Cherokee Nation v. Georgia,
30 U.S. (5 Pet.) 1 (1831) 8

Dowling v. United States,
473 U.S. 207 (1985) 8

Ex Parte Crow Dog,
109 U.S. 556 (1883) 14

Johnson v. M'Intosh,
21 U.S. (8 Wheat.) 543 (1823) 8

Keeble v. United States,
412 U.S. 205, 209 (1973) 14

Martin v. Hunter's Lessee,
14 U.S. (1 Wheat.) 304 (1816) 8

McClanahan v. Arizona Stat Tax Comm'n,
411 U.S. 164 (1973) 11, 14

M'Culloch v. Maryland,
17 U.S. (4 Wheat.) 316 (1819) 8

Tee-Hit-Ton Indians v. United States,
348 U.S. 272 (1955) 9

United States v. Antelope,
730 U.S. 641 (1977) 10

United States v. Baclaan,
948 F.2d 628 (9th Cir. 1991 18

OTHER

U.S. Const. amend. v 9

U.S. Const., Art. I, Sect. 8, Cls. 3 3

U.S. Const., Art. II, Sect. 2, Cls. 2 3

United States v. Borrero-Isaza,
887 F.2d 1349 (9th Cir. 1989) 18

United States v. Carper,
24 F.3d 1157 (9th Cir. 1994) 17

United States v. Carrion,
457 F.2d 808 (9th Cir. 1972) 16

United States v. Cota-Guerrero,
907 F.2d 87 (9th Cir. 1990) 18

United States v. Fox,
95 U.S. 670 (1878) 8

United States v. Garcia,
771 F.2d 1369 (9th Cir. 1985) 16, 17

United States v. Guadarrama,
742 F.2d 487 (9th Cir. 1984) 16

United States v. Ibarra,
737 F.2d 825 (9th Cir. 1984) 18

United States v. Kagama,
118 U.S. 375, 382-84 (1886) 9-11, 13, 14

United States v. Lockard,
910 F.2d 542 (9th Cir. 1990) 15

United States v. Lopez,
___ U.S. ___, 115 S.Ct. 1624 (1995) 2, 6, 11, 12, 14

United States v. Pappadapoulos,
64 F.3d 522 (9th Cir. 1995) 12

United States v. Paskow,
11 F.3d 873 (9th Cir. 1993) 17

United States v. Soto-Olivas,
44 F.3d 788 (9th Cir. 1995) 16, 18

United States v. Stephenson,
928 F.2d 728 (6th Cir. 1991) 19

United States v. Vasquez-Velasco,
15 F.3d 833 (9th Cir. 1991) 7

United States v. Webster,
492 F.2d 1048 (D.C. Cir. 1979) 17

Worcester v. Georgia,
31 U.S. (6 Pet.) 515 (1832) 8, 9

STATUTES

18 U.S.C. § 1153 . . . . 2, 3, 6, 21

18 U.S.C. § 1291 2

18 U.S.C. § 1962(d) 16

18 U.S.C. § 2244(a)(1) 2, 4, 7, 20

18 U.S.C. § 2246 20

18 U.S.C. § 3565 17

18 U.S.C. § 3583 . . . . 15, 17

18 U.S.C. § 3583(e)(3) 18

RULES

Fed. R. Crim. P. 32.1 17

Fed. R. App. P. 4 2

OTHER

16 Cong. Rec. 936 (1865) 14

Articles of Confed., art. IX., cl. 4 13

Robert A. Williams, Jr., The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Jurisprudence, 1986 Wis. L. Rev. 219, 265 10

U.S. Const., Art. I, § 8, cls. 3 11

U.S. Const., Art. II, § 2, cls. 2 11

U.S. Constitution, amendment X 8

U.S.S.G. § 7B1.3 17

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff/Appellee, -vs- WILMER LOMAYAOMA, Defendant/Appellant.	No. CA 95-10516 DC #CR-90-313-PCT-EHC District of Arizona

I. STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. UNDER UNITED STATES v. LOPEZ, ___ U.S. ___, 115 S.Ct. 1624 (1995), THE INDIAN MAJOR CRIMES ACT IS UNCONSTITUTIONAL AND THE DISTRICT COURT LACKS JURISDICTION.

B. THE GOVERNMENT FAILED TO SUFFICIENTLY STATE A VIOLATION OF FEDERAL, STATE, OR LOCAL LAW AS A BASIS FOR A REVOCATION OF SUPERVISED RELEASE.

C. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT A SUPERVISED RELEASE REVOCATION ON THE BASIS OF A VIOLATION OF FEDERAL, STATE OR LOCAL LAW.

II. STATEMENT OF JURISDICTION

A. District Court Jurisdiction

The district court lacks jurisdiction under United States v. Lopez, ___ U.S. ___, 115 S.Ct. 1624 (1995).

B. Appellate Court Jurisdiction

Assuming there is federal jurisdiction, this Court has jurisdiction under 18 U.S.C. § 1291. Notice of appeal was timely filed under Federal Rules of Appellate Procedure 4.

C. Bail Status

Mr. Lomayaoma is in custody of the Bureau of Prisons serving a sentence of ten months.

III. STATEMENT OF THE CASE

A. Nature of the Case; Course of Proceedings

In 1991, Mr. Lomayaoma pled guilty to one count of abusive sexual contact in violation of 18 U.S.C. § 1153 and § 2244(a)(1). (E.R. 1).[1] This offense arose on the Hopi Indian Reservation, and involved a minor victim, who was an Indian. (Id.). On February 11, 1991, the district court sentenced Mr. Lomayaoma to 21 months incarceration, and 36 months supervised release. (Id.).

On July 5, 1995, a probation officer filed a petition with the court requesting revocation of Mr. Lomayaoma's supervised release based on his alleged failure to remain law-

---

[1]The abbreviation "E.R." refers to the appellant's Excerpts of Record and will be followed by the document number.

abiding. (C.R. 32).[2] At the revocation hearing on October 13, 1995, Mr. Lomayaoma appeared before the Honorable Earl H. Carroll. (T.R. 10/13/95 at 1).[3] At the end of the government's evidence, Mr. Lomayaoma moved for dismissal for failure to state a charge and for sufficiency of the evidence. (T.R. 10/13/95 at 43-46). These motions were denied. (Id.). The court found Mr. Lomayaoma violated his condition of supervised release. (T.R. 10/13/95 at 46; C.R. 48)

Disposition was set for November 6, 1995 (C.R. 94). Mr. Lomayaoma filed a motion to dismiss for lack of jurisdiction. (C.R. 44). This motion was denied at the disposition hearing. (C.R. 48; T.R. 11/6/95 at 4, 161). Mr. Lomayaoma's renewed motions to dismiss for failure to state a claim and insufficient evidence were also denied. (C.R. 42; T.R. 11/16/95 at 17). The court revoked Mr. Lomayaoma's supervised release. (Id.; T.R. 11/6/95 at 15). He was sentenced to ten months imprisonment. (Id. at 15-16; C.R. 48, 49).

Mr. Lomayaoma filed his notice of appeal on November 8, 1995. (C.R. 51). This Court granted Mr. Lomayaoma's motion for expedited briefing schedule on December 12, 1995. (Order 12/12/95).

B. Statement of Relevant Facts

This case arises from the Hopi Indian Reservation in the District of Arizona. (E.R. 1). Jurisdiction is premised on the Major Crimes Act, 18 U.S.C. § 1153. (E.R. 1 Indictment 9/11/90; E.R. 2 Judgment and Commitment 2/11/91). Mr. Lomayaoma was on

---

[2]The abbreviation "C.R." refers to Clerk's Record and will be followed by the pertinent docket number.

[3]The abbreviation "R.T." refers to the Reporter's Transcript and will be followed by the pertinent date and page number(s).

supervised release from a conviction for abusive sexual contact in violation of 18 U.S.C. § 2244(a)(1) when a petition to revoke was filed. (E.R. 32).

The events took place in the small village of Polacca, on the Hopi Indian Reservation. As cousins of the alleged victims, the Lomayaoma family often interacted with M.'s and T.'s family. (T.R. 10/13/95, p. 19).[4] Rethema Youvella, the alleged victims' mother, allowed the Lomayaoma family to borrow videotapes out of her home. The Lomayaomas made this borrowing commonplace as they were frequently over at the Youvella home picking up and returning tapes. (Id. at 19).

On August 2, 1995, Wilmer Lomayaoma entered the Youvella home to return videotapes that his children had borrowed. (Id. at 14-15). Ms. Youvella was not home. (Id. at 10). Mr. Lomayaoma had brought back videos before. (Id. at 8-9). Indeed, the movies were often in M.'s and T.'s bedrooms, and he had gone into their rooms in the past to get movies. (Id. at 8). Mr. Lomayaoma first went into T.'s bedroom, where she was sleeping. To wake her up, he touched her on her stomach, over her clothing. (Id. at 8, 15-16; 38). When T. awoke, Mr. Lomayaoma told her he brought back movies and he asked where he should leave the videotapes. (Id. at 24, 38). T. told him to place the tapes on the table. (Id. at 24). The movies were mostly kept in M.'s room, who was T.'s older sister. (Id. at 31).

Mr. Lomayaoma then left T.'s bedroom, and entered M.'s bedroom, where Ms. Youvella kept the stacks of videotapes. (Id. at 9, 16, 31). He sought to wake her, and touched her over her clothing, and over her blanket, while she slept. (Id. at 15-16). M. said she felt the

---

[4]Abbreviations "M" and "T" are used as the alleged victims are juveniles.

touch through the blanket and clothing over her vaginal area. (Id. at 8). M. woke up, and Mr. Lomayaoma told her that he was bringing back the videotapes. (Id. at 16). M. told Mr. Lomayaoma to place the tapes on the shelf across the room. (Id. at 9, 17). Mr. Lomayaoma put the tapes away and left the room. (Id. at 17). M. did not scream or yell at him. (Id. at 17).

After Mr. Lomayaoma left, M. and T. called their mother and told her about Mr. Lomayaoma's visit. (Id. at 28). The Hopi Police Department were notified and a counselor interviewed the girls. (Id. at 35, 36, 40). The Hopi police took Mr. Lomayaoma into custody on charges of child molestation. The tribal court deferred Mr. Lomayaoma's prosecution, pending his compliance with the court's conditions. (R.T. 10/13/95 at 48; C.R. 45). Mr. Lomayaoma met each of the requisite conditions. (Id.).

Mr. Lomayaoma was on supervised release at the time of the alleged August 2, 1994, incident. (E.R. 2). On July 25, 1995, the United States government filed a petition to revoke Mr. Lomayaoma's supervised release, claiming Mr. Lomayaoma violated the terms of his supervision by violating a federal, state or local law. (E.R. 32).

At the hearing, the government produced no evidence that Mr. Lomayaoma had in fact violated a federal, state or local law. No tribal court pleadings were introduced nor was there evidence of any court determination. No federal charges were pending. Further, no evidence was introduced as to Mr. Lomayaoma's intent or state of mind. The only evidence of Mr. Lomayaoma's intent was to his purpose of returning the tapes. (T.R. 10/13/95 at 8-9, 24). He had been in the rooms in the past for that purpose. (Id. at 8). At the end of the hearing on October 13, 1995, the district court revoked Mr. Lomayaoma's supervised release and took him

. . .

into custody. (C.R. 49). On November 6, 1995, Mr. Lomayaoma was sentenced to 10 months incarceration. (C.R. 48, 49). Mr. Lomayaoma now appeals. (C.R. 51).

IV. SUMMARY OF ARGUMENTS

A. Under United States v. Lopez, ___ U.S. ___, 115 S.Ct. 1624 (1995), The Major Crimes Act, 18 U.S.C. § 1153, Is Unconstitutional And The District Court Lacked Jurisdiction To Revoke Mr. Lomayaoma's Supervised Release.

Although the Constitution grants Congress the right to make treaties with Indian Nations and to regulate commerce with the Indian tribes, the Major Crimes Act itself has nothing to do with either. The Major Crimes Act is unsupported by the treaty power authority vested in Congress, nor is Mr. Lomayaoma is aware of any treaty with the Hopi Tribe that would justify the Major Crimes Act. Congress should be limited to its power under the Commerce Clause, whereby it is given the power to legislate and regulate commerce with the Indian tribes as it does with the states. No other power granted to the federal government in the Constitution gives Congress the right to exercise this authority over the Indian Nations. Because the Major Crimes Act has no substantial connection to Commerce, the Act lacks any constitutional basis.

B. In The Petition To Revoke Supervised Release, The Government Failed To Specifically State The Violation Of Federal, State Or Local Law.

Mr. Lomayaoma's conditions of supervised release provide that he is not to violate any federal, state or local law. In his petition, the government alleges that he committed "child molestation." No evidence was introduced of the charge, nor was evidence introduced that either a federal, state or local court had determined that an offense had been committed. Under due process, and the precedent of this Court, such a judicial determination is necessary prior to the filing of a violation.

C. There Was Insufficient Evidence To Support A Supervised Release Revocation On The Basis Of A Violation Of Federal, State Or Local Law.

The government has not produced sufficient evidence to violate Mr. Lomayaoma. Assuming there is jurisdiction, and there is a sufficient claim, the government's proof is insufficient to violate Mr. Lomayaoma. Taken in the light most favorable to the government, the evidence is still inconclusive that any violation took place. The victims' testimony goes only to a touching to awaken them, which, under the circumstances, is explainable by Mr. Lomayaoma's efforts to return video tapes. Moreover, the government has produced no evidence as to Mr. Lomayaoma's specific intent as to the offense.

V. ARGUMENTS

A. THE DISTRICT COURT LACKED JURISDICTION OVER MR. LOMAYAOMA'S SUPERVISED RELEASE REVOCATION.

1. Standard of Review.

The court of appeals reviews de novo the issues of constitutionality and jurisdiction. United States v. Vasquez-Velasco, 15 F.3d 833, 838-9 (9th Cir. 1994).

2. The Major Crimes Act Is Unconstitutional And This Court Lacks Jurisdiction.

Mr. Lomayaoma had pled guilty to abusive sexual contact in violation of 18 U.S.C. § 1153 and § 2244(a)(1). This supervised release violation, revocation and disposition arises from that plea. The plea was under a Major Crimes Act prosecution, involving an offense listed as 18 U.S.C. § 1153, and occurring in Indian Country and involving an Indian defendant and victim. Mr. Lomayaoma contends that under United States v. Lopez, ___ U.S. ___, 115 S.Ct. 1624 (1995), the Major Crimes Act is unconstitutional and this Court lacks jurisdiction.

a. **Indian Major Crimes Act Jurisdiction Before Lopez**

Congress can exercise only the powers granted to it by the Constitution. M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819). As Chief Justice Marshall stated in regard to the exercise of federal power:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.

Id. at 421. The question raised by this motion to dismiss is whether the exercise of federal power in the Indian Major Crimes Act is a legitimate "end" within the "scope of the constitution", as Chief Justice Marshall used those terms.

A fundamental tenet of our government is that any law passed by Congress must have as its basis some provision of the United States Constitution. The federal government is one of delegated and enumerated powers. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816). All other powers have been retained by the states or the people. U.S. Constitution, amendment X. In the area of criminal law, federal crimes are solely creatures of statute. Dowling v. United States, 473 U.S. 207, 213 (1985). Congress's power to declare an act a crime must ultimately be grounded in some provision of the Constitution. United States v. Fox, 95 U.S. 670 (1877). Without question, the federalization of a crime such as manslaughter can only be sustained upon a sound constitutional foundation.

Beginning with this Court's decisions in the cases popularly known as the "Marshall Trilogy," Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), a number

of justifications have been offered for Congress' "plenary power" over Indian affairs. See, e.g., Worcester, 31 U.S. at 559 (noting that powers of war and peace, of making treaties, and of regulating commerce "comprehend all that is required for the regulation of our intercourse with the Indians"); United States v. Kagama, 118 U.S. 375, 382-84 (1886) (arguing that Indians are "wards of the nation" and holding that the federal government has a trust responsibility to protect Indians); Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279 (1955) (noting that "discovery and conquest [gives] the conquerors sovereignty over and ownership of the lands thus obtained").

Of these cases, the one most on point is United States v. Kagama, 118 U.S. 375 (1886), where the Supreme Court held that Congress did indeed have power to pass such a general criminal code that would apply to the activities of Indians on Indian reservations. The Court reached that conclusion, even though it recognized that the Constitution of the United States is almost silent in regard to the relations of the federal government to the numerous tribes of Indians that live within its borders. In fact, the Court noted that the only powers listed in the Constitution that apply to Indians are the treaty power and the commerce clause. The Court specifically rejected the commerce clause as a source of power to pass the Major Crimes Act:

> But we think it would be a very strained construction of this clause [the commerce clause] that a system of criminal laws for Indians living peaceably in their reservations, which left out the entire code of trade and intercourse laws justly enacted under that provision, and established punishments for the common-law crimes of murder, manslaughter, arson, burglary, larceny, and the like, without any reference to their relation to any kind of commerce, was authorized by the grant of power to regulate commerce with the Indian tribes.

. . .

. . .

Id. at 378-79. Instead, the Kagama Court concluded that the power to regulate the activities of Indians on Indian reservations was not to be found in the Constitution. In summary fashion, the Court stated:

> The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers,, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else; because the theater of its exercise is within the geographical limits of the United States; because it has never been denied; and because it alone can enforce its laws on all the tribes.

Id. at 384-85. See also United States v. Antelope, 430 U.S. 641, 648 (1977)(citing Kagama).

The Kagama explanation of the source of federal power over Indians is important for several reasons. First of all, the statement that the power of the federal government over Indians must exist in the federal government "because it has never existed anywhere else" is fundamentally unsound. As noted above, Congress can only exercise the powers that the Constitution grants to it. It cannot exercise powers simply out of "necessity." Second, the preceding quotation reveals the frontier prejudices of the day, as well as the patronizing attitude of the federal government. Modern consideration of the Kagama decision raises the question of whether legal doctrines that can be traced to prejudice against Indian people should serve as the basis for upholding such unconstitutional exercises of power as the Major Crimes Act. The entire notion of Congress' "plenary power" over Indian affairs "at its core regards tribal peoples as normatively deficient and culturally, politically and morally inferior." Robert A. Williams, Jr., The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Jurisprudence, 1986 Wis. L. Rev. 219, 265

Nearly one hundred years after Kagama, the Court repudiated the doctrines of conquest, discovery, and trusteeship as sources of federal power over Indian affairs and settled on the treaty and commerce clauses as the source of that power. In McClanahan v. State Tax Comm'n of Arizona, 411 U.S. 164 (1973), the Court stated that

> [t]he source of federal authority over Indian matters has been the subject of some confusion, but it is now generally recognized that the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making.

Id. at 172 n.7 (emphasis added). The McClanahan decision recognizes the constitutional problems with basing federal power over Indian affairs on such outdated notions as discovery and conquest. Thus, in the post-McClanahan era, federal authority to enact the Major Crimes Act must either be found in the government's treaty power, U.S. Const., Art. II, § 2, cls. 2, or in its commerce power, U.S. Const., Art. I, § 8, cls. 3. If it is not, then that authority does not exist at all.

In the instant case, Mr. Lomayaoma is unaware of any treaty made between the United States and the Hopi Tribe that provides that the United States may exercise criminal jurisdiction on the Hopi reservation over members of the Hopi Tribe. Therefore, for Congress' enactment of the Major Crimes Act to be valid, its ability to do so must therefore lie in its power to regulate commerce with the Indian tribes.

b. Indian Major Crimes Act Jurisdiction After Lopez

Recently, in United States v. Lopez, __ U.S. __, 115 S.Ct. 1624 (1995), the Supreme Court held that the Gun-Free School Zones Act was unconstitutional because the federal government cannot exercise a general police power, and as a result, the Act exceeded Congress's power to enact laws under the Constitution's Commerce Clause. The same argument implies with

equal force in this case. Because the federal government does not have a general police power, the Major Crimes Act can be sustained only if it is tied to one of Congress's powers enumerated in the Constitution. There is no such power that would justify the passage of the Major Crimes Act, which on the surface is nothing more than a general criminal code that applies to the activities of Indians on Indian Reservations.

In Lopez, the Supreme Court started its analysis with "first principles," namely, that the Constitution creates a federal government of enumerated powers. According to those principles, the powers delegated by the Constitution to the federal government are few and defined. Any powers that remain are reserved to the state governments and the people. Congress cannot legislate in areas outside those authorized by the Constitution. Lopez, 115 S. Ct. at 1626. Though the Court acknowledged that the Commerce Clause bestows broad power, it also stated "that this power is subject to outer limits." Id. at 1628. The Court then proceeded to define those outer limits: For a law that is purported to "affect" commerce, that law must regulate activity that not merely affects commerce, but "substantially affects" it. Id. at 1630. See also United States v. Pappadapoulos, 64 F.3d 522 (9th Cir. 1995) (explaining test). There are several reasons why the Major Crimes Act fails this test.

First, it is apparent that the Major Crimes Act affects commerce with the Indian tribes in no substantial way. Or, putting it another way, the Major Crimes Act affects commerce with Indian tribes in the same insubstantial way that a general federal criminal code would affect commerce with the several states. Activities that the Major Crimes Act criminalizes, such as murder and manslaughter, are non-economic and occur solely within the confines of Indian reservations. No matter how strained the construction of the Commerce Clause, there is no

special connection between the Major Crimes Act and commerce with the Indian tribes. The Court itself stated that:

> [I]t would be a very strained construction of this clause [the Commerce Clause] that a system of criminal laws for Indians ... without any reference to their relation to any kind of commerce, was authorized by the grant of power to regulate commerce with the Indian tribes.

Kagama, 118 U.S. at 378-79.

Second, there are strong arguments that the Commerce Clause should be given at least as narrow of an interpretation when it is applied to legislation affecting Indian tribes as it is given when it is applied to legislation affecting states. This result is indicated by the fact the drafters of the Constitution chose to constrict the language authorizing Congress to regulate commerce with the Indian tribes from that which had been found in the original Articles of Confederation. Though the states enjoyed considerable power to deal with Indian affairs under the Articles, the federal government also had the role of "regulating the trade and managing all affairs with the Indians." Articles of Confed., art. IX., cl. 4. That the planners of our constitutional form of government chose to limit Congress' power in Indian affairs to the simple regulation of commerce (rather than adding to that power the management of all affairs) indicates that this power should be interpreted narrowly. It would fly in the face of this limitation to adopt a standard that says a general criminal code does not substantially affect commerce with the states but does substantially affect commerce with the Indian tribes.

Finally, regardless of how the Commerce Clause is interpreted, the fact remains that the Major Crimes Act was not enacted to deal with commerce with the Indian tribes. Nowhere in the statutory language of the Major Crimes Act does it state that the purpose of the

act was to deal with reservation crime's effect on commerce. Rather, legislative history behind the Major Crimes Act indicates that it was enacted in response to the Supreme Court's decision in Ex Parte Crow Dog, 109 U.S. 556 (1883). (holding that federal court did not have jurisdiction to try Indian for the murder of another Indian, implicitly upholding the tribes' sovereign right to try and to punish their members). Outraged by this decision, Congress passed the Major Crimes Act in 1885. See Keeble v. United States, 412 U.S. 205, 209 (1973). Rather than noting its effect on commerce, those who supported the passage of the Act saw in it the possibility that Indians would become "civilized a great deal sooner" if the federal government had authority over them. 16 Cong. Rec. 936 (1865) (remarks of Representative Cutcheon, sponsor of the Act) (cited in Keeble, 412 U.S. at 211-12).

The new trilogy of Kagama, McClanahan and Lopez compels the conclusion that there is no Constitutional basis for the jurisdiction that the government seeks to exert in this case. Kagama held that the Major Crimes Act was based on some notion of inherent right in the federal government, and specifically held that it was not based on the commerce clause. 109 U.S. 556 Later, McClanahan said that power over Indians must have a basis in the treaty power or the commerce clause or there is no jurisdiction. 411 U.S. 164. Lopez looked at a general federal criminal statute with no specific connection to commerce and found it to be outside the limits of the Commerce Clause. 115 S.Ct. 1624. Is there any doubt that if Congress enacted a Federal Major Crimes Act (modeled after the Indian Major Crimes Act) in derogation of the power of the states it would be found unconstitutional in record time? So it should be with the Indian tribes.

. . .

. . .

3. Summary

Although the Constitution grants Congress the right to make treaties with Indian nations and to regulate commerce with the Indian tribes, the Major Crimes Act itself has nothing to do with either. The Major Crimes Act has never been found to be supported by the treaty power, nor is the defendant aware of any treaty with the Hope Tribe that would justify the Major Crimes Act. Congress should be limited to its power under the Commerce Clause, whereby it is given the power to legislate and regulate commerce with the Indian tribes as it does with the states. No other power granted to the federal government in the Constitution gives Congress the right to exercise this authority over the Indian nations. Because the Major Crimes Act has no substantial connection to commerce, the Act lacks any constitutional basis.

B. THE GOVERNMENT FAILED TO STATE A VIOLATION OF LAW.

1. Standard of Review

The court of appeals reviews de novo the district court's application of the supervised release statutes. United States v. Lockard, 910 F.2d 542 (9th Cir. 1990).

2. The Government's Failure To Allege A Basis For Revocation Violates Mr. Lomayaoma's Due Process Rights.

The government has not adequately stated a basis for revoking Mr. Lomayaoma's supervised release. The district court sentenced Mr. Lomayaoma under 18 U.S.C. § 3583, which states that the court may revoke a term of supervised release if the defendant commits another federal, state or local crime during the term of supervision. The government offers no facial proof that Mr. Lomayaoma violated federal, state or local law. Had the court convicted Mr. Lomayaoma of a crime while on supervised release, the conviction would sufficiently warrant

revocation of his supervised release. See Carchman v. Nash, 473 U.S. 716, 105 S.Ct. 3401 (1985)(holding conviction conclusively establishes probation violation); United States v. Garcia, 771 F.2d 1369 (9th Cir. 1985)(holding a certified copy of a probationer's conviction in itself is sufficient proof that a probationer has committed a crime in violation of the terms of his probation). However, Mr. Lomayaoma has neither been charged with nor convicted of a new crime.

While a conviction is not necessary to revoke Mr. Lomayaoma's supervised release, some judicial determination must exist. See e.g., Garcia, 771 F.2d 1369. In Garcia, the defendant was on probation for violating the Racketeer influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(d). Id. at 1370. He moved to a new state, and subsequently pleaded guilty to three of four charges that he had violated local ordinances. Id. The district court held that the defendant had violated laws in contravention of the condition of his probation that he comply with all federal, state, and local laws, and revoked his probation. Id. The defendant contended that the subsequent convictions were invalid and could not, therefore, form the basis for revocation of probation. Id. at 1371. The court disagreed, and held that a conviction is not essential to revoke a defendant's probation. Id. (citing United States v. Guadarrama, 742 F.2d 487, 489 (9th Cir. 1984)); accord United States v. Carrion, 457 F.2d 808, 809 (9th Cir. 1972); Bernal-Zazueta v. United States, 225 F.2d 64 (9th Cir. 1955).

In all of the aforementioned cases, the court had entered a conviction prior to revoking the defendant's probation, parole or supervised release.[5] In each, a judicial

---

[5]The rulings of the court in probation or parole revocation cases are persuasive in supervised release cases. See United States v. Soto-Olivas, 44 F.3d 788, 789-90 (9th Cir.), cert.

determination of guilt had been made. In the present case, the tribal court deferred prosecution of Mr. Lomayaoma, contingent upon his successful completion of tribal court requirements. (T.R. 10/13/95 at 43; C.R. 42). Mr. Lomayaoma did not admit guilt. He did meet all the requirements set forth by the trial court, and, as a result, the prosecution has not gone forward. Hence, no judicial determination was ever made.

This Court, in Garcia, recognized the danger of revoking supervised release without cause, and stated that charges of a new crime were not enough to warrant revocation. 771 F.2d at 1370 n.1. The Ninth Circuit stressed that: "It is 'not a ground for revocation that a probationer has merely been charged with a crime.'" Id. (quoting United States v. Webster, 492 F.2d 1048, 1051 (D.C. Cir. 1974)(emphasis added). There must be more.

In the present case, the government failed to sufficiently allege a violation of law. It had not charged Mr. Lomayaoma with an actual offense, but just stated a generic allegation of

. . .

---

denied, 115 S.Ct. 2289 (1995)(rejecting petitioner's contention that probation and parole revocation proceedings differ from supervised release proceedings for double jeopardy purposes); United States v. Paskow, 11 F.3d 873, 881 (9th Cir. 1993)(holding there is no difference between parole and supervised release for ex post facto purposes, and stating "[s]upervised release and parole are virtually identical systems"). In United States v. Carper, 24 F.3d 1157, 1158 n.2 (9th Cir. 1994), this Court, addressing a defendant's right of allocution at revocation hearings, assumed the following:

> . . . [T]he same analysis would apply regardless of whether the revocation involves probation or supervised release. Neither the Sentencing Guidelines nor the Federal Rules of Criminal Procedure distinguish between the two for purposes of revocation procedures. See U.S.S.G. § 7B1.3; Fed. R. Crim. P. 32.1. While there are differences between the statutes governing revocation of probation, 18 U.S.C. § 3565, and supervised release, 18 U.S.C. § 3583, we do not believe those differences affect our analysis in this case. Id.

molestation. There had been no court determination that Mr. Lomayaoma violated the law and no court records of such a determination were introduced.

Because the district court issued its revocation petition on insufficient grounds and unreliable information, Mr. Lomayaoma's due process rights were violated. See United States v. Borrero-Isaza, 887 F.2d 1349, 1351 (9th Cir. 1989)(per curiam). Challenged information is unreliable if it "lacks some minimal indicium of reliability beyond mere allegation." United States v. Ibarra, 737 F.2d 825, 827 (9th Cir. 1984); see also United States v. Cota-Guerrero, 907 F.2d 87, 90 (9th Cir. 1990)(holding police arrest records alone as evidence of defendant's prior criminal history are not sufficient to support a departure). As such, the supervised release petition fails to sufficiently allege or prove a claim.

C. THE GOVERNMENT HAS NOT PRODUCED SUFFICIENT EVIDENCE TO MAINTAIN ITS CLAIM AGAINST MR. LOMAYAOMA.

1. Standard of Review

The court reviews findings of fact underlying a sentencing determination for clear error. United States v. Baclaan, 948 F.2d 628, 630 (9th Cir. 1991).

2. The Government Failed To Put Forth Sufficient Evidence That Mr. Lomayaoma Violated The Law.

The government must prove by a preponderance of the evidence that Mr. Lomayaoma violated federal, state or local law. 18 U.S.C. § 3583(e)(3); United States v. Soto-Olivas, 44 F.3d 788, 792 (9th Cir.), cert. denied, 115 S.Ct. 2289 (1995). The government has not done so in the present case; it has merely stated that Mr. Lomayaoma entered the victims'

home to return a videotape, and touched each alleged victim over her clothing, and in one case, over the blanket, while they slept. (T.R. 10/13/95, pp. 42-43).

The Sixth Circuit addressed the issue of sufficiency of evidence in a supervised release revocation in United States v. Stephenson, 928 F.2d 728 (6th Cir. 1991). In Stephensen, the defendant was arrested for assault while serving a term of supervised release. Id. at 730. The district court granted the probation officer's petition to revoke the defendant's supervised release, and ordered him into custody for twelve months. Id. Upon review, the appellate court held that a probation officer's testimony and defendant's admission that he engaged in some "pushing" was insufficient to prove that the defendant had committed assault in violation of the conditions of his supervised release. Id. at 732-33. The court noted concern not with the nature of the evidence before it, but with the *paucity* of reliable evidence. Id. at 732 (emphasis added). The court found merit in the defendant's contention that the evidence was insufficient to warrant revocation because "the record [was] very scant on proof to support the finding of violations." Id. at 731.

Similarly, the district court terminated Mr. Lomayaoma's supervised release based upon scant proof of any violations. The evidence against him consists of testimony at the revocation hearing by the alleged victims and the Hopi Tribal Court counselor.

Mr. Lomayaoma had tapes to return; his family borrowed them often. (T.R. 10/13/95 at 14-13). He had even been in the girls' rooms before getting movies. (Id. at 8). That is where M. and T. kept may of their close to 50 videos. (Id. at 9, 14, 31). His presence was understandable, as were his actions. He woke M. and T. up, and asked them where he could put the tapes. (Id. at 16, 33). M. and T., in talking to Mr. Lomayaoma, did not yell or scream, but answered his questions. (Id. at 16, 25, 33). No evidence was introduced that Mr. Lomayaoma

acted with the specific sexual intent that is required for sexual abusive contact. See 18 U.S.C. 2244(a)(1).

Unsubstantiated allegations that Mr. Lomayaoma engaged in inappropriate touching of two young girls is not sufficient evidence to maintain the district court's revocation of his supervised release.

3. **The Government Failed To Prove Mr. Lomayaoma's Intent To Commit A Crime.**

The government must prove, by a preponderance of the evidence, that Mr. Lomayaoma committed a crime; an element of the crime of unlawful sexual contact is defendant's "intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person." 18 U.S.C. § 2246. Again, the government has produced no evidence that Mr. Lomayaoma possessed such an intent. The plain act of touching a sleeping child over her clothing and over the blanket, and asking where to replace a videotape does not, by itself, reveal an intent to abuse, humiliate, harass, or degrade the girls, or to arouse or gratify Mr. Lomayaoma's sexual desire. Without the requisite showing of intent, the government's revocation claim against Mr. Lomayaoma must fail.

. . .

. . .

. . .

. . .

. . .

. . .

VI. CONCLUSION

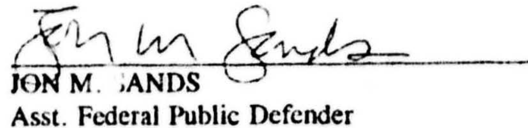
For the foregoing reasons, this Court should find that the Major Crimes Act, 18 U.S.C. 1153, unconstitutional and reverse for lack of jurisdiction. In the alternative, this Court should find that the government failed to sufficiently allege the supervised release violation and reverse. Finally, this Court should find the government failed to sufficiently prove the supervised release violation and reverse the revocation.

VII. STATEMENT OF RELATED CASES

There are no related cases.

Respectfully submitted: January 16, 1996.

FREDRIC F. KAY
Federal Public Defender



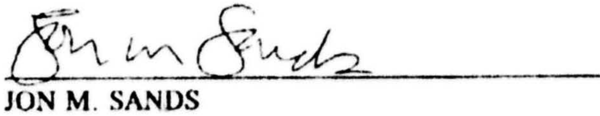
JON M. SANDS
Asst. Federal Public Defender

VIII. CERTIFICATE OF MAILING - DELIVERY

STATE OF ARIZONA)
) ss:
County of Maricopa)

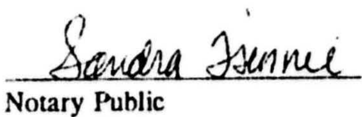
JON M. SANDS, being first duly sworn, upon his oath, deposes and says:

Two copies of **Appellant's Opening Brief** have this 16th day of January, 1996, been mailed to Assistant U.S. Attorney Charles F. Hyder, Room 4000, Federal Building, Phoenix, Arizona 85025, and a copy has been mailed to Wilmer Lomayaoma.



JON M. SANDS

SUBSCRIBED AND SWORN to before me this 16th day of January, 1996, by Jon M. Sands.



Notary Public

My Commission Expires:
My Commission Expires June 5, 1998