



**Considerations in Implementing
VAWA's Special Domestic Violence Criminal Jurisdiction and
TLOA's Enhanced Sentencing Authority**

A Look at the Experience of the Pascua Yaqui Tribe

compiled by

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The first responsibility of any government, tribal or otherwise, is the safety and protection of its people, for there can be no security or freedom for all, if there is insecurity and fear for any of us. Pascua Yaqui tribal officials no longer have to simply stand by and watch their women be victimized with no recourse.

-- the Honorable Peter Yucupicio
Chairman, Pascua Yaqui Tribe of Arizona

Introduction

On February 20, 2014, pursuant to the Violence Against Women Reauthorization Act of 2013 (VAWA 2013), the Pascua Yaqui Tribe was one of only three Tribes across the United States to begin exercising Special Domestic Violence Criminal Jurisdiction (SDVCJ) over non-Indian perpetrators of domestic violence. Since that time, the Tribe has had 20 reported cases involving non-Indians defendants.

On July 2, 2014, for the first time since 1978 when the U.S. Supreme Court stripped tribal governments of their criminal authority over non-Indians in *Oliphant v. Suquamish Indian Tribe* (1978), our tribe obtained the first conviction of a non-Indian, a twenty-six year old Hispanic male, for the crime of domestic violence assault committed on the Pascua Yaqui Reservation.

Throughout this process, the Pascua Yaqui Tribe has actively engaged in a process of sharing information with other tribes who are exercising (or considering exercising) powers restored under the Tribal Law and Order Act of 2010 and the Violence Against Women Act of 2013.

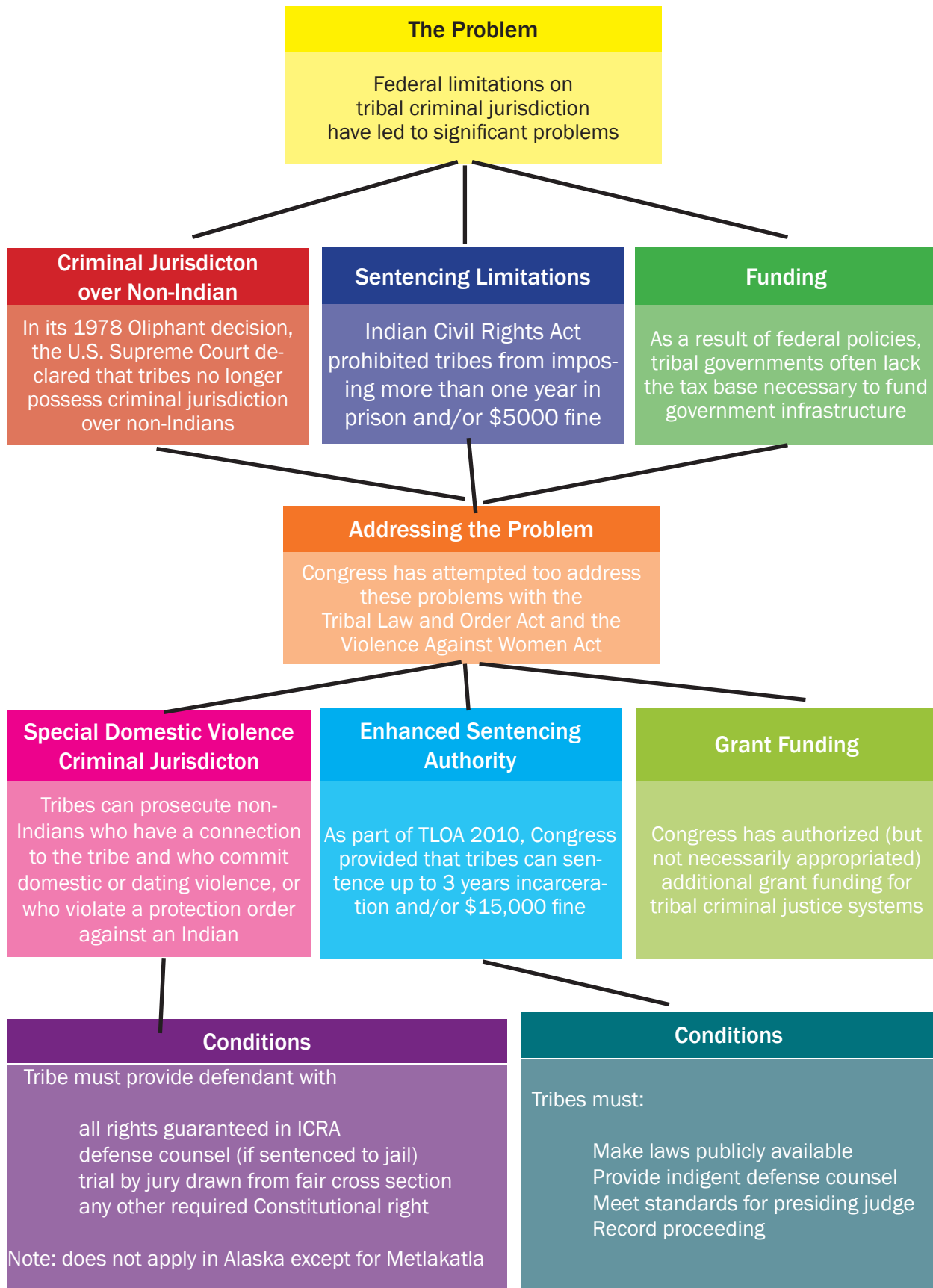
Both editors of this book have been actively involved in various aspects of this process since the beginning. Alfred Urbina was Chief Prosecutor for the Pascua Yaqui Tribe during the lobbying of Congress, the application process and the first few months of the pilot project, at which time he became Attorney General, a position he currently holds. Melissa Tatum has been working on VAWA issues since 2000, when she began consulting, writing, and teaching workshops on VAWA's full faith and credit provisions. After Pascua Yaqui was named as one of the three pilot project tribes, she assisted with some of the training and technical assistance involved in preparing to launch the pilot project.

We assembled this book both to share our experiences and to provide other tribes with information about the process. We begin by providing a brief overview of these two federal statutes and about our tribe and our criminal justice system. We then explore the requirements of the federal statutes more fully, including the issues and challenges they raise.

Part IV provides a summary of our experiences to date with VAWA's special domestic violence criminal jurisdiction, and Part V then takes a step back and looks at the factors that, in our experience, tribes should consider in deciding whether to exercise these powers. The appendices in Part VI contain resources that might be of use, and a list of other resources that might be helpful.

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Part I

Setting the Stage



Criminal Jurisdiction in Indian country

Jurisdiction refers to the authority of a government to enact laws to regulate conduct and to prosecute those who violate the law. For federal and state governments, criminal jurisdiction is tied to their geographic territory. With limited exceptions (such as diplomatic immunity), federal and state governments possess the authority to prosecute anyone who violates the law within their territory. The power springs from the theory that defendant's conduct is said to violate community norms. That is why prosecutions are usually entitled "the People versus the Defendant" or "the State versus the Defendant."

As a result of a series of federal statutes and court decisions, tribes lack this same territorial jurisdiction. Instead, criminal jurisdiction in Indian country is divided between the federal, state, and tribal governments. This fractured jurisdiction creates a great deal of confusion and requires extensive coordination between police departments, prosecutors' offices, court systems, probation/parole offices, and victim service providers.

This complicated maze of laws presents numerous obstacles to the effective enforcement of criminal laws in Indian country. The three primary obstacles are the

- (1) inability of tribal governments to prosecute non-Indians who violate the law in Indian country;
- (2) sentencing limitations imposed by the Indian Civil Rights Act; and
- (3) funding available to support tribal government infrastructure.

Congress has taken action to address these obstacles in the 2010 Tribal Law and Order Act and the 2013 revisions to the Violence Against Women Act. This guidebook explores those laws and questions tribes should consider in deciding whether to exercise these restored powers.

Overview of VAWA's SDVCJ

Congress enacted VAWA 2013 in part to address the problem of sexual and domestic violence committed by non-Indians against Native women. VAWA 2013 restores to tribes the ability to prosecute non-Indians who commit domestic violence in Indian country. VAWA 2013 refers to this as “Special Domestic Violence Criminal Jurisdiction,” and sets out a series of requirements tribes must satisfy if they want to exercise this restored authority. VAWA 2013 establishes a two year time frame for a pilot project (three tribes were selected for the pilot project: Pascua Yaqui, Umatilla, and Tulalip) and declares that its provisions take effect two years after the date of enactment. Since VAWA 2013 was signed into law in March 2013, it becomes fully effective in March 2015. It should be noted that VAWA 2013 does not apply in Alaska except for Metlakatla.

VAWA 2013 allows tribes to prosecute non-Indians for three categories of crimes – domestic violence, dating violence, and violations of protection orders – provided the tribe satisfies the prerequisites. The statute also requires that at least one of the parties in the case must be Indian and that the defendant must have some connection to the tribe, such as living or working in the Tribe’s Indian country, or being involved in a relationship with a member of the tribe or with an Indian who resides in the tribe’s Indian country.

VAWA 2013 requires that tribes wishing to exercise the restored authority must provide the defendant with

- 1) all the rights guaranteed by the statute [the Indian Civil Rights Act]
- 2) including (if the defendant is sentenced to jail time) all rights listed in 1302(c) [TLOA]
- 3) the right to a trial by an impartial jury that is drawn from sources that
 - (A) reflect a fair cross section of the community; and
 - (B) do not systematically exclude any distinctive group in the community, including non-Indians.
- 4) “all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction over the defendant.”

25 USC 1304.

Overview of TLOA's Enhanced Sentencing Provisions

The Tribal Law and Order Act of 2010 is a comprehensive statute focused on all aspects of investigating and prosecuting crime in Indian country. One aspect of TLOA is its provisions restoring to tribes enhanced sentencing authority over certain defendants and certain crimes.

Prior to passage of the TLOA, the Indian Civil Rights Act prohibited tribes from imposing more than one year imprisonment and/or more than a \$5000 fine. The original ICRA limitations did not address the issue of “stacking,” that is, whether a defendant convicted of multiple offenses could be sentenced to consecutive terms, and federal courts have been divided about whether tribal courts can “stack” sentences.

TLOA provides that if a tribe complies with the listed prerequisites, the tribal court can sentence a defendant to 3 years and a \$15,000 fine for a single offense and can stack those sentences up to a cumulative total of 9 years. Even if a tribe satisfies the prerequisites, however, this authority does not apply to every defendant convicted in tribal court. Rather, it applies only to defendants who (1) have previously been convicted of the same or a comparable offense by any jurisdiction in the United States, or (2) are being prosecuted for an offense comparable to a felony.

The prerequisites listed in TLOA are that the tribe:

- 1) must provide defendant with an attorney whose conduct meets the minimum standards of the Sixth Amendment
 - a) the attorney must be licensed to practice law by any jurisdiction in the US that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys; and
 - b) the attorney must provide the defendant with effective assistance of counsel
- 2) the judge presiding over the case must have sufficient legal training and be licensed to practice law
- 3) make publicly available the tribe's
 - a) criminal laws
 - b) rules of evidence
 - c) rules of criminal procedure
- 4) the tribal court must also maintain a record of the criminal proceeding

25 USC 1302.

Part II

The Pascua Yaqui Tribe A Closer Look



Location and Demographics

Approximately 4-5000 people reside on the 2,200 acre Pascua Yaqui Reservation, located in Pima County, Arizona, near the southwestern edge of the City of Tucson. The Reservation is approximately 60 miles north of the United States-Mexico International Border. The Tribe is located near a major metropolitan city, and while this is a positive for business ventures, it can have a negative effect on crime that occurs on the reservation. Crime does not respect borders and the influx of illegal drugs, guns, and wrongdoers from surrounding communities is a major issue that impacts the safety of our community and strains our criminal justice system.

According to U.S. Census data, Pascua Yaqui Reservation residents include non-Indians and a small number of individuals who are members of other tribes. Nearly 43 percent of all Pascua Yaqui households consist of a mother and children with no father present, making single mother households the most common type of household on the reservation. Approximately 800 Non-Indians work for the Tribal Government, work for Tribal Casino Enterprises, or attend school on the Reservation. The 2010 U.S. Census, estimates that a large percentage of Tribal members on the Reservation live in poverty. Per capita income on the reservation is \$9,039, a third of Pima County (\$25,093) and the State of Arizona (\$25,680). Pascua Yaqui households are four times more likely to receive Food Stamps (49 percent) and eight times more likely to receive public assistance than are residents of the county or state. Nearly forty percent of Pascua Yaqui adults, and forty-two percent of children, live at or below the federal poverty level, more than twice the county and state rates.

Domestic violence is and has been the most pressing criminal justice challenge facing the Pascua Yaqui Tribe. Domestic violence charges account for a significant majority of all criminal filings, cases include aggravated assault, assault, disorderly conduct, and trespass cases in which domestic violence is a factor.



Criminal Justice Infrastructure

Historically, the Yaqui people have always had some form of law enforcement and dispute resolution, most notably through our ceremonial societies. In 1982, the Tribe adopted a Criminal Code, some parts of our Civil Code, and we adopted our Constitution in 1988, all of which helps spell out current Yaqui Law.

In 1988, the Tribe took over the judicial system from the B.I.A. through a 638 contract. The Bureau of Indian Affairs police patrolled the Reservation exclusively until 1991. In 1991, the Tribe hired three Tribal police officers who served alongside B.I.A. officers. In 1998, The Tribe signed a 638 agreement with the B.I.A. to direct its own law enforcement services. Currently, the Tribe employs twenty-six uniformed patrol officers who are certified by Arizona P.O.S.T as State certified officers and most are federal Special Law Enforcement Commissioned (SLEC) certified officers. Three of the officers are Criminal Investigators. The Tribe has agreements with various state and federal agencies for access to criminal information databases, evidence processing, and emergency services communications.

In 1997, the Tribe started the Pascua Yaqui Victim Services program, and the Tribe employs a number of Victim Advocates.

The Pascua Yaqui Police responds to approximately 6000 calls for service a year. A percentage of the criminal calls are referred to the Prosecutor's office for possible prosecution. The incidents referred are evaluated and most of them are independently charged into tribal court.

- In FY 2011-2012, the Tribal Prosecutor's Office filed a total of 684 cases. Of those, 650 were criminal and 267 were domestic violence cases. 121 cases were declined.
- In FY 2012-2013, the Tribal Prosecutor's Office filed a total of 698 cases. Of those, 600 were criminal matters and 155 cases were declined. A large percentage of the cases involved alcohol and domestic violence.
- In FY 2013-2014, the Tribal Prosecutor's Office filed a total of 934 cases. Of those, 610 were adult criminal matters and 176 cases were declined, (including 3 potential VAWA cases). A large percentage of the cases have been related to alcohol and domestic violence. Our VAWA cases have increased the number of adult criminal cases filed by 5%.

Our Prosecutor's Office also routinely handles criminal extradition cases. In the past few years, the office has extradited murder suspects, sex offenders, burglary suspects, witnesses, and people who were evading justice in other jurisdictions by hiding on our reservation. The Tribe has conducted 30 criminal extraditions in the past few years. Over all we have conducted a total of 65 criminal extraditions, mostly to the State of Arizona through The Pima County Prosecutor's Office, and the Tucson Police Department.

In 2011, through the American Reinvestment Recovery Act (ARRA), the Tribe constructed a \$21 Million dollar, state-of-the-art multi-purpose justice/court complex. In May of 2012, the Tribe began operating the Pre-Trial Services (PTS) Division of the Tribal Court. Pre-Trial Services has effectively reduced the number of Yaqui defendants being held for pre-trial detention, kept some offenders employed, and monitored offenders in the community who were released during the pre-trial phase of their case.

The Pascua Yaqui tribal court provides all defendants with the same rights in tribal court as they would have in state court. The Pascua Yaqui Constitution expressly incorporated the language of the Indian Civil Rights Act (ICRA), for the Tribe's own Bill of Rights. The tribe funds a full-fledged Public Defenders Office (originally opened in 1995) with four licensed defense attorneys who represent those accused of crimes. The Tribe also funds four private contracted defense attorneys for those cases where a conflict of interest exists. Defendants are entitled to all protections, including an indigent defendant's right to appointed counsel, at the expense of the tribe. Our Tribal Court enforces the Indian Civil Rights Act (ICRA), fundamental due process, Tribal common law, U.S. Supreme Court case law, and fundamental human rights. The Pascua Yaqui Tribe also guarantees the selection of diverse and objective jurors from our community. VAWA contains explicit language that tribes exercising authority under these new provisions must draw from jury pools that reflect a fair cross-section of the community and do not systematically exclude any distinct group of people, including non-Indians.

The right to counsel and due process that appear to be products of American jurisprudence is deeply rooted in Yaqui indigenous tradition and practice. Our Tribal culture and history supports the right of having a person speak on a defendant's behalf. These concepts, teaching, and traditions pre-date the U.S. Constitution and the Bill of Rights and are rooted in beliefs that are arguably as old as English Common Law.

Adult and Juvenile Detention Services are mostly handled by the Bureau of Indian Affairs, (B.I.A.). Adult Tribal inmates, including Non-Indian VAWA defendants, are transported to a private regional B.I.A. contracted detention facility in San Luis, Arizona. On Jul 23, 2013, Pascua Yaqui Tribal leaders met with B.I.A. Justice Services in Washington D.C. to discuss detention issues and other concerns. The Tribe met with Mr. Darren Cruzan and Mr. Charles Addington. On Dec 20, 2013, the BIA began delivering Tribal inmates to the B.I.A. detention Pilot program at Emerald Corporation in San Luis, Arizona. The contracted facility is close to the tribal Reservation & is sensitive to tribal detainee needs. The Tribe employs detention officers for short-term tribal detention, booking, transportation, and pre-trial detention needs.



Part III

The Federal Requirements: A Closer Look



Preliminary Issues

The Tribal Law and Order Act's enhanced sentencing provisions expand only the sentence that a tribal court can compose; they do not expand a tribe's criminal jurisdiction. VAWA's special domestic violence criminal jurisdiction expands a tribe's criminal jurisdiction, but does not expand its sentencing authority.

It is thus important to be clear which requirements go with which authority. If a tribe opts to exercise only special domestic violence criminal jurisdiction, it can prosecute non-Indians who commit domestic or dating violence (or violate a protection order) in the tribe's Indian country, but are limited to one year in jail and/or a \$5000 fine per offense. In this case, the tribe must comply only with the requirements of VAWA 2013.

If a tribe opts to exercise only TLOA's enhanced sentencing authority, but not SDVCJ, then the tribe can prosecute only Indians, but can impose a higher sentence. The tribe needs to comply only with TLOA's requirements. A tribe that wishes to prosecute non-Indians AND sentence them to prison, must satisfy the requirements of both statutes.

We take a closer look at these requirements in this section, with illustrations drawn from the Pascua Yaqui Tribe's experiences with the pilot project. Pascua Yaqui is exercising only SDVCJ; it is not (yet) using the enhanced sentencing authority, as it must first amend its constitution. Before we dive into the details of the federal statutes, two preliminary topics are worth quickly noting.

The first is that there is a lurking issue about whether Congress possessed the authority to enact either or both of the statutes. In *U.S. v. Lara*, the defendant raised the issue of Congress' authority to enact the Duro Fix amendment. The U.S. Supreme Court ruled that Congress did "possess the constitutional power to lift the restrictions on the tribes' criminal jurisdiction over nonmember Indians as the statute seeks to do," but the Court noted that it was "not now faced with a question dealing with potential constitutional limits on congressional efforts to legislate far more radical changes in tribal status. In particular, this case involves no interference with the power or authority of any State. Nor do we now consider the question whether the Constitution's Due Process or Equal Protection Clauses prohibit tribes from prosecuting a nonmember citizen of the United States." *US v. Lara*, 541 US 193 (2004)

The second topic revolves around the issue of interpretation. Many of the prerequisites require some changes in tribal law. How are these laws going to be interpreted? In parallel with the corresponding federal constitutional right? What role will tribal law play in the interpretation process? It is important not to let yourself be trapped by federal definitions and interpretations. Tribes, like states, are certainly free to be more protective of individual rights than is required by federal law. For example, with respect to the interpretation of the right to counsel, the tribe may want to set a higher standard for effective assistance of counsel than is required by the Sixth Amendment.

Making Laws Publicly Available

TLOA explicitly requires that prior to charging the defendant, a tribe must make publicly available its criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances). VAWA 2013 requires that tribes also comply with this same standard if the tribe sentences the defendant to jail time. As a practical matter, however, this requirement is likely to hold true in all SDVCJ cases.

According to the US Supreme Court, due process requires that a defendant must have some notice of what rules govern his conduct. TLOA's notice requirement is designed to address the concern that it is sometimes difficult to know what the tribe's laws are and to whom they apply. Tribes will thus want to ensure that all their laws, rules, regulations, and court opinions that relate to criminal justice and criminal procedure are publicly available, including to incarcerated individuals. The statute does not define "publicly available," but most tribes use the internet to make their criminal laws, rules of evidence and rules of criminal procedure "publicly available." Some tribes have also placed hard copies in publicly accessible places such as: tribal buildings, tribal agencies, tribal jails and tribal libraries. Other tribes are providing hard copies to those who request it.

There is also a larger notice issue here, not just of the substance of tribal law, but of the tribe's intention to exercise the powers restored under TLOA and VAWA. To avoid potential due process problems later, a tribe will want to take steps to provide notice to the community of its intent to exercise the restored powers.

25 USC 1302 (c) Rights of defendants

In a criminal proceeding in which an Indian tribe, in exercising powers of self-government, imposes a total term of imprisonment of more than 1 year on a defendant, the Indian tribe shall . . . (4) prior to charging the defendant, make publicly available the criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances) of the tribal government. . . .

On February 6, 2014, the Pascua Yaqui Tribe received official notice that the it was designated a participating Pilot Tribe authorized to exercise SDVCJ. The Tribe SDVCJ Pilot status story was picked up and released locally, statewide, and nationally, via press release by the White House. On February 12, 2014, VAWA Pilot information was posted for notice in the Federal Register by the Department of Justice. Official Tribal notice was sent out via Global e-mail to all tribal and casino employees, as well as being posted on the official Pascua Yaqui Tribal Internet site on February 6th, 2014. The news received significant coverage in local and national media, and the Tribe also conducted interviews with several news outlets.

Our experiences taught us the importance of a formal media policy. Tribes that decide to exercise these powers will want to decide who will conduct outreach, create talking points, address the press/media, create press releases, radio PSAs, television interviews, community education, internet updates, and write newspaper articles.

NOTICE



The Pascua Yaqui Tribe is one of the first three tribes in the nation to be authorized to prosecute non-Indian offenders for certain domestic violence and protection order crimes. This jurisdiction goes into effect on **February 20, 2014**. After that date, a non-Indian who has substantial ties to the Tribe (such as living on the reservation, working for the Tribe or the Tribe's casino, or having a dating partner or spouse who is Pascua Yaqui or a member of another Indian tribe) can be prosecuted by the Pascua Yaqui Tribe in the Tribe's own criminal justice system.

The Tribe will provide non-Indian defendants with constitutional rights equal to those in the outside states. These rights include the right to an attorney if they cannot afford their own, the right to effective assistance of counsel, the right to a law trained judge, and the right to file a habeas corpus petition in federal court to name a few. The Pascua Yaqui Tribe already provides these rights to Indian defendants in its justice system.

If you have questions about these changes to the law, please contact: Alfred Urbina, Chief Prosecutor at 520-879-6263, alfred.urbina@pascuayaqui-nsn.gov
Or

Amanda Lomayesva, Attorney General at 520-883-5119,
aslomayesva@pascuayaqui-nsn.gov

More info at: www.justice.gov/opa/pr/2014/February/14-ag-126.html

Over which defendants?

The Violence Against Women Act contains special requirements for which defendants can be charged under the Act's special domestic violence criminal jurisdiction. The statute does not apply if both the victim and defendant are non-Indian. Since the tribe already has criminal jurisdiction over Indians, it essentially means that the victim must be Indian. The statute also requires that a connection exist between the defendant and the tribe and lists the acceptable connections. The details are in the statutory excerpt below.

Note that if victim is a tribal member, that is sufficient. If victim is a non-member Indian, the victim must reside in the tribe's Indian country.

Since the identity of the parties is prescribed in the statute, the prosecutor should treat the identity of the parties as an element of the crime and include them in the complaint.

TLOA does not increase a tribe's criminal jurisdiction, so the tribe must have some other basis for possessing jurisdiction over the defendant. TLOA is focused instead on the nature of the crime and whether it warrants an enhanced sentence.

VAWA SDVCJ

25 U.S. Code § 1304(b)(4)

(A)(i) In general A participating tribe may not exercise special domestic violence criminal jurisdiction over an alleged offense if neither the defendant nor the alleged victim is an Indian.

(ii) Definition of victim In this subparagraph and with respect to a criminal proceeding in which a participating tribe exercises special domestic violence criminal jurisdiction based on a violation of a protection order, the term "victim" means a person specifically protected by a protection order that the defendant allegedly violated.

(B) Defendant lacks ties to the Indian tribe. A participating tribe may exercise special domestic violence criminal jurisdiction over a defendant only if the defendant—

- (i) resides in the Indian country of the participating tribe;
- (ii) is employed in the Indian country of the participating tribe; or
- (iii) is a spouse, intimate partner, or dating partner of—
 - (I) a member of the participating tribe; or
 - (II) an Indian who resides in the Indian country of the participating tribe.

For which crimes?

For TLOA's enhanced sentencing authority to apply, the tribe must either be prosecuting the defendant "for an offense comparable to an offense that would be punishable by more than 1 year of imprisonment if prosecuted by the United States or any of the States" (that is to say, for the equivalent of a felony) or the defendant must have been "previously convicted of the same or a comparable offense by any jurisdiction in the United States."

A tribe may exercise VAWA's special domestic violence criminal jurisdiction if (1) the tribe provides the required rights, (2) the defendant committed domestic violence, dating violence, or violated a protection order in the tribe's territory, and (3) the defendant has the required connections with the tribe. 25 USC 1304(c).

The statute defines each of these three categories of crimes:

"Domestic Violence" means violence committed by a current or former spouse or intimate partner of the victim ("spouse or intimate partner" has the same meaning as in 18 USC 2266), by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, or by a person similarly situated to a spouse of the victim under the domestic- or family- violence laws of an Indian tribe that has jurisdiction over the Indian country where the violence occurs. 25 USC 1304(a)(2).

"Dating violence" means violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship. 25 USC 1304(a)(1).

Not all violations of protection orders qualify to be the basis for special domestic violence criminal jurisdiction. The statute defines "protection order" in 25 USC 1304(a)(5), but the critical portion of the definition is the exclusion found in 25 USC 1304(c)(2)(B). That section provides that, in addition to occurring in the tribe's Indian country, the violation must (1) be of the "portion of a protection order that . . . prohibits or provides protection against violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person; (2) the protection order must have been issued against the defendant; and (3) the protection order must be consistent with 18 USC 2265(b) and be enforceable by the tribe. Section 2265(b) requires that a court issuing a protection order have jurisdiction to do so and must provide the respondent with due process.

Practical Tip: Amending Tribal Law

Complying with the requirements of TLOA and VAWA will likely require a tribe to amend one or more portions of its laws, regulations, and/or court procedures. Tribes will want to ensure they follow the proper procedures for amending those legal provisions.

A Potential Problem: US v. Castleman

On March 26, 2014, the Supreme Court decided *U.S. v. Castleman*. Castleman had an immediate impact on the Tribe's criminal charging decisions when evaluating misdemeanor DV arrests under SDVCJ authority. In the Castleman case, the defendant moved to dismiss his 2008 federal indictment under 18 USC 922(g)(9), which forbids the possession of firearms by anyone convicted of a "misdemeanor crime of domestic violence." He argued that his 2001 conviction in Tennessee did not qualify as a "misdemeanor crime of domestic violence" because it did not involve "the use or attempted use of physical force," required by 18 USC 921(a)(33)(A)(ii). The Court held that the use of physical force was "satisfied by even the slightest offensive touching."

What is problematic for new SDVCJ cases is that the VAWA defines the term domestic violence as "violence" committed by a current or former spouse or intimate partner of the victim..." 25 U.S. Code § 1304 (a)(2). The federal definition of a "misdemeanor crime of domestic violence" used to determine Castleman, will likely be used by federal and tribal courts to establish the charging boundaries under VAWA. The Tribe, like many other jurisdictions, commonly charge crimes that arise early in the cycle of domestic violence relationships that may not include an "offensive touching" as an element to the crime, although they are nonetheless violent and dangerous crimes.

The dynamics and cycle of intimate partner violence is that offenders, in order to maintain power and control, will use escalating abusive and violent behavior against their partner. Over the life of a relationship, aggressive and hostile behavior increases in both frequency and severity. The cycle may end in the eventual separation of the couple, harm to the victim, or even the death of the victim. The Tribe's ability to address and prevent violent encounters through the limited authority of VAWA SDVCJ appears to be further restricted by the holding in Castleman. All the same, the Pascua Yaqui Tribe maintains that a tribal crime of domestic violence under VAWA currently requires only that the offense include the use or attempted use of physical force, the threatened use of a deadly weapon, indirect force, or the violation of an order of protection.

Investigation

The prerequisites for VAWA's Special Domestic Violence Criminal Jurisdiction and for TLOA's Enhanced Sentencing Authority are focused on the court proceedings. Thus, they do not specifically require changes at the investigation stage of the criminal justice process. Nevertheless, important changes are likely to be needed, particularly with respect to the training provided to law enforcement officers and to victim advocates. Changes may also be needed to their operational procedures. Tribal police are usually the first responders to reports of crime, and their work is critical in gathering the information necessary to make informed decisions about how and whether to proceed with prosecution in a particular case, as is illustrated by the diagram on page 22.

If a tribe chooses to exercise VAWA's special domestic violence criminal jurisdiction, by definition, that expands the tribe's criminal jurisdiction, which in turn changes the powers held by tribal law enforcement. Since the tribe would be able to prosecute non-Indians who commit certain crimes, the tribal police would have the power to arrest those individuals and take them to tribal jail. Tribal law enforcement will need to receive training on the scope of this new authority.

This is also a good time for refresher training on

- the difference between authority to arrest and authority to detain, and the different procedures involved in each. This is particularly true since the BIA recently discovered its training was built on an incorrectly narrow definition of the power to detain.
- tribal law regarding the rights guaranteed to individuals as part of the criminal justice process, as well as the elements of probable cause and how to write a report that fulfills the elements of probable cause.
- the dynamics of domestic violence and the investigative techniques necessary to build an effective case (including types of questions that should be asked). This training should include information about the dynamics of domestic violence same-sex relationships. For example, Pascua Yaqui had a case where the officer had to conduct additional follow up to establish an intimate relationship.

Finally, if your tribe has victim advocates, this is a good time for them to be trained on the new powers.

25 U.S. Code § 1302 - Constitutional rights

(a) In general. No Indian tribe in exercising powers of self-government shall—

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense (except as provided in subsection (b));

(7)(A) require excessive bail, impose excessive fines, or inflict cruel and unusual punishments;

(B) except as provided in subparagraph (C), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 1 year or a fine of \$5,000, or both;

(C) subject to subsection (b), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 3 years or a fine of \$15,000, or both; or

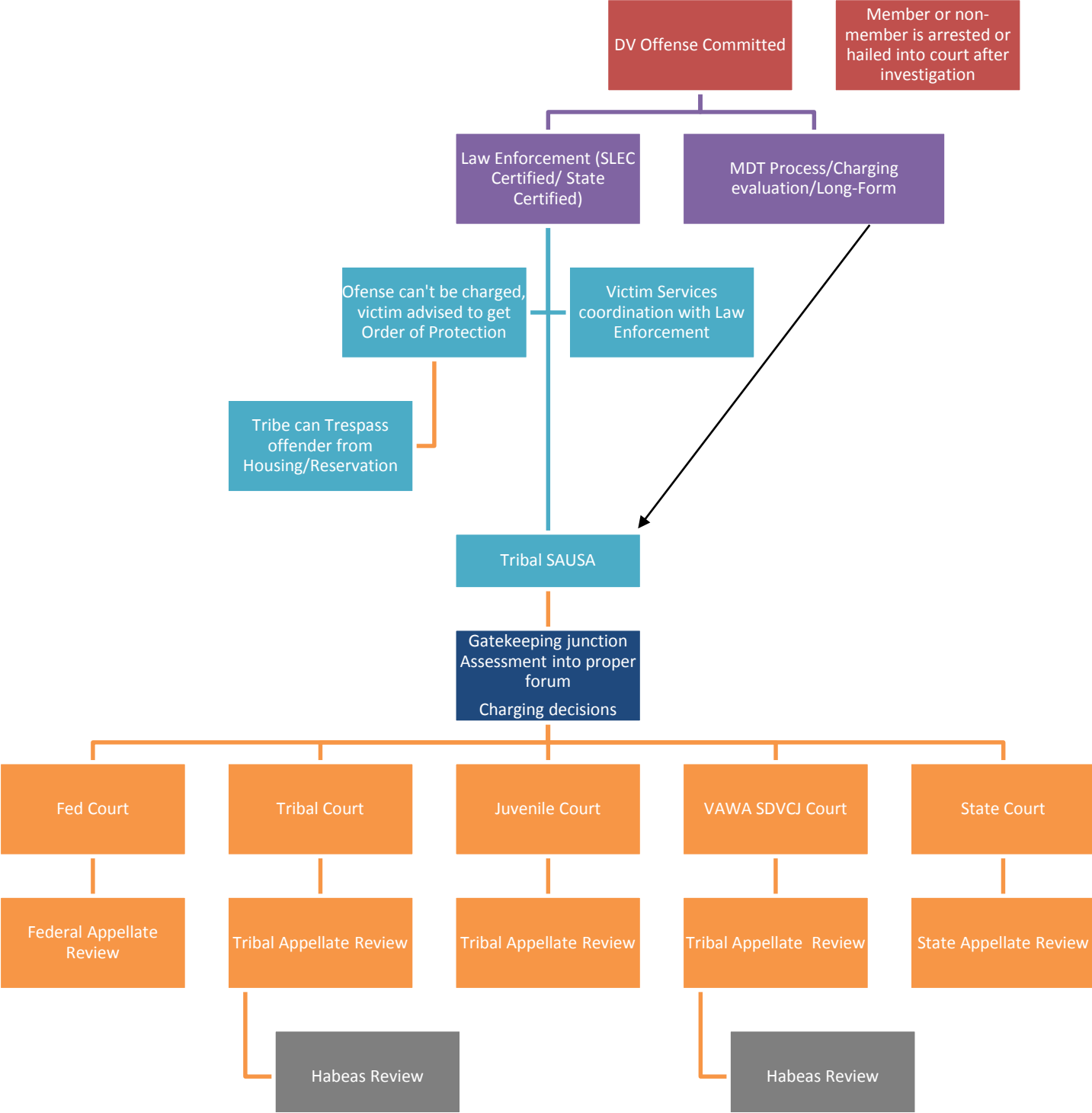
(D) impose on a person in a criminal proceeding a total penalty or punishment greater than imprisonment for a term of 9 years;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

Diagram of VAWA Prosecution Decisions



Prosecution

Tribal prosecutors, just like state and federal prosecutors, must exercise prosecutorial discretion about where and how to spend scarce resources. If a tribe chooses to exercise special domestic violence criminal jurisdiction, the tribal prosecutor will need to make charging decisions and evaluate which cases qualify and which ones the tribe wants to pursue. If a tribe chooses to exercise enhanced sentencing authority, the prosecutor will need to decide in which cases the tribe wants to seek additional jail time or fines.

The Pascua Yaqui Tribe has developed a strong, cooperative working relationship with its local US Attorneys office, and mutual cooperation has assisted in ensuring access to all relevant information the prosecutor may want to consider in making the charging decisions. It also enables informed decisionmaking as to whether a particular case should be referred for federal prosecution.

Additionally, the prosecutor will want to review and amend and form complaints, motions, and other documents. The next page contains an example of a complaint.

ABCs of Representation

It is important to note that neither the Tribal Law and Order Act nor the Violence Against Women Act change the basic contours of the work done by prosecutors, defense counsel, and the courts. TLOA and VAWA add elements to the list of things to consider, but they do not remove anything from that list.

Prosecutors and defense attorneys should still review and investigate the validity of the arrest, evidentiary matters (was evidence seized properly? is it admissible?), whether prima facie case has been established, whether procedural rules have been followed, whether any of defendant's rights have been violated, whether defendant's individual rights have been violated, etc.

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IN THE PASCUA YAQUI TRIBAL COURT
IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

Pascua Yaqui Tribe,
Plaintiff,

vs.

Bad Man Interloper,
Defendant.

Case No.

CRIMINAL COMPLAINT

The PASCUA YAQUI TRIBE, hereby complains and alleges, upon information and belief, that the above named defendant, **a non-Indian over whom the Tribe has special domestic violence criminal jurisdiction pursuant to 25 U.S.C. § 1304**, while on the Pascua Yaqui Reservation, did commit the following offense(s):

COUNT 1: 4 PYTC § 1-130(A)(3) ~ Assault / 3-10 (A) ~ Domestic Violence

On or about March 02, 2014 at approximately 7:01 p.m., at or near 5200 W. Siari Kuta, Tucson, AZ, Defendant committed assault by knowingly touching another person with the intent to injure, insult or provoke such person, to wit: ***grabbed the collar of Tribal victim, an enrolled member of the Pascua Yaqui Tribe who is a dating partner of the defendant.***

COUNT 3: 4 PYTC § 1-150(A) ~ Battery / 3-10 (A) ~ Domestic Violence

On or about March 02, 2014 at approximately 7:01 p.m., at or near 5200 W. Siari Kuta, Tucson, AZ, Defendant did willfully strike another person or otherwise inflict bodily injury, or who, by offering violence, caused another to harm her, to wit: ***hit Tribal victim, an enrolled member of the Pascua Yaqui Tribe who is a dating partner of the defendant.***

And such violations, upon conviction, are punishable under the Pascua Yaqui Tribal Codes. The undersigned hereby swears or affirms that this complaint is based upon information and belief, and the attached Affidavit and Verification, or signed statement.

DATED this 3rd day of March, 2014.

Complainant/Attorney

Pursuant to Article I, § 1(g) of the Pascua Yaqui Constitution, 4 PYTC § 4-20, and 25 U.S.C. § 1302(a)(b), If found guilty at sentencing or plea agreement, the Pascua Yaqui Tribe will seek punishment that may include imprisonment.

DEFENDANT: Bad man Interloper

ADDRESS: 5353 E.Speedway, Apt. 812, Tucson, AZ 85711

DOB: 07/07/77 ORIGIN: **Hispanic**

SEX: Male HT: 5'010" WT: 180 EYES: Brown HAIR: Brown

Note: Accused persons may obtain disclosure information about their case ten days after arraignment by contacting the Prosecutor's Office at 7777 S. Camino Huivisim, Tucson, AZ 85757. [3 PYT R.Crim.P. Rule 38]

Pre-trial Detention and Habeas

VAWA 2013 also amended the procedures for writs of habeas corpus. Under 25 USC 1303, individuals held in tribal custody may seek a writ of habeas corpus from the federal courts. The new provisions establish standards for determining when a stay of detention should be issued, and also declare that a tribe which has “ordered the detention of any person has a duty to timely notify such person of his rights and privileges” under ICRA’s habeas provisions. It should be noted that this new notice requirement does not appear to be limited to non-Indian defendants, but appears to apply to all persons charged under the special domestic violence criminal jurisdiction.

These provisions raise a host of technical questions, including: What does “timely notify” mean? How should notification be handled when the defendant has little or no knowledge of the English language? Will you need an interpreter? Is a form with the information in other languages sufficient?

In addition to these new requirements, VAWA’s special domestic violence criminal jurisdiction means that non-Indians will now be housed in tribal detention facilities, in both pretrial detention and when serving sentences. Issues that may arise include: Who would be responsible for detention and costs? Must non-Indians be housed separate from tribal members? Are they receiving adequate medical care? Who provides and pays for that medical care? Are they receiving sufficient counseling services?

25 USC 1304(e) Petitions to stay detention.

- (1) In general. A person who has filed a petition for a writ of habeas corpus in a court of the United States under section 1303 of this title may petition that court to stay further detention of that person by the participating tribe.
- (2) Grant of stay. A court shall grant a stay described in paragraph (1) if the court—
 - (A) finds that there is a substantial likelihood that the habeas corpus petition will be granted; and
 - (B) after giving each alleged victim in the matter an opportunity to be heard, finds by clear and convincing evidence that under conditions imposed by the court, the petitioner is not likely to flee or pose a danger to any person or the community if released.
- (3) Notice. An Indian tribe that has ordered the detention of any person has a duty to timely notify such person of his rights and privileges under this subsection and under section 1303 of this title.

Indigent Defense Counsel

One of the requirements for exercising TLOA's enhanced sentencing authority is that the tribe must "provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution" and that the attorney provided must be "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." 25 USC 1302(c)(1) and (2).

VAWA 2013 requires that tribes who exercise special domestic violence criminal jurisdiction must comply with the TLOA requirements in all cases where a term of imprisonment is imposed. 25 USC 1304(d)(2). Thus, in SDVCJ cases where the defendant is sentenced to incarceration, the tribe must meet the same standards as for providing indigent defense counsel.

The statutory requirements can be broken into three parts:

1) Indigent defendants must be provided with an attorney at the tribe's expense. In adopting regulations to satisfy the first requirement, a tribe must determine how it will define "indigent," (that is, when will a defendant be considered too poor to hire his or her own attorney?) and what system it will use for appointing an attorney. Several types of systems exist. The three most common systems are a

- 1) public defender office (in which the tribe employs defense attorneys on a full-time basis),
- 2) a contract system (the tribe hires attorneys on an as needed basis), and
- 3) a pro bono or required service system (members of the tribal bar take turns accepting court appointments to serve as defense counsel).

Pascua Yaqui tribal culture and history supports the right of having a person speak on a defendant's behalf. These concepts, teaching, and traditions pre-date the U.S. Constitution and the Bill of Rights and are rooted in beliefs that are arguably as old as English Common Law. Thus, the right to counsel and due process that appear to be products of American jurisprudence is deeply rooted in Yaqui indigenous tradition and practice. As a result of Yaqui tradition and belief, the Pascua Yaqui Tribe has a well-established public defender system.

2) the attorney must be licensed to practice law by a licensing board that (a) applies appropriate professional licensing standards, and (b) effectively ensures the competence and professional responsibility of its licensed attorneys.

3) the attorney must provide, at a minimum, effective assistance of counsel as defined under the U.S. Constitution.

No matter what system the tribe chooses to use, it must ensure that the attorneys who serve as defense counsel meet the minimum standards required by both TLOA and VAWA 2013. Those standards have two parts: a basic competency standard and a licensing requirement. Tribes have a number of options for satisfying these requirements, including:

- 1) Creating its own tribal licensing procedure;
- 2) Requiring membership in a State Bar Association; or
- 3) Requiring membership in the Bar Association of another Tribe (provided that Tribal Bar satisfies the requirements).

Both TLOA and VAWA 2013 require that a tribe provide the defendant with a right to effective assistance of counsel at least equal to that required by the U.S. Constitution. The federal and state courts have developed a large body of law defining what “effective assistance of counsel” means, and a tribe may choose to adopt the standard used by the federal and state courts or to create its own standard.

Under the federal standard, a defendant must show not only that the attorney’s actions and decisions were below the acceptable standard, and must also prove that those failings prejudiced the defendant. In applying this test, the federal courts have required that the defendant point to specific things the attorney did wrong and essentially prove that no reasonable attorney would behave in that manner. This complicated test has been applied in a very technical way that has produced a great deal of controversy. (See, for example, *Muniz v. Smith*, a case in which the record revealed that the defense attorney had fallen asleep in court. The Sixth Circuit reviewed the transcript and decided the part of the trial the attorney slept through was not sufficiently important that it would have affected the outcome of the case.).

The required quality of legal assistance may be one area in which the tribe may want to depart from the federal minimum standards and impose a higher standard as a matter of tribal law.

Judges

The Tribal Law and Order Act requires that the judge who presides over cases involving enhanced sentencing authority must have “sufficient legal training to preside over criminal proceedings” and must be “licensed to practice law by any jurisdiction in the United States.” VAWA 2013 echoes these requirements, declaring that before a term of imprisonment of any length may be imposed in a case exercising special domestic violence criminal jurisdiction, the tribe must provide the defendant with all rights described in 25 USC 1302(c), which includes TLOA’s standards for judges.

These requirements raise three questions. Before we explore those questions, however, it is worth noting that these standards do not necessarily apply to all members of the tribal judiciary. They do not even necessarily apply to all judges hearing criminal cases. Rather, they apply only to judges who preside over criminal cases in which the enhanced sentencing authority will be used or which involved special domestic violence criminal jurisdiction.

1) *What constitutes a criminal proceeding?* Is it the trial only? Does it include all stages from first appearance to post-conviction proceedings? No clear answer exists, but the safe approach is to at least treat all proceedings at the trial level as included within this requirement.

2) *What constitutes “sufficient legal training”?* TLOA does not require that the judge hold a law degree. Rather, it requires only that the judge have “sufficient” legal training to preside over criminal proceedings. That training may be acquired through law school, through judicial training certification programs, or other workshops. The tribe also retains the authority (at least initially) to determine what constitutes sufficient training.

3) *How does the requirement that judges be licensed relate to the licensing requirement for attorneys?* The TLOA provisions relating to defense counsel mandated that the licensing entity set standards for professional conduct. That requirement is not repeated in the section discussing judicial licensing. This distinction probably traces back to the fact that most states have a different set of standards for qualification of judges and qualification of attorneys. Judges may be members of the bar association, but judicial standards of conduct are usually set by court rule or statute, and allegations of judicial misconduct are usually heard by a different review body. Tribes will want to consider whether to create standards of judicial conduct and a body for reviewing allegations that those standards have been violated.

Other Trial Requirements

TLOA requires that a tribe exercising enhanced sentencing authority must maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding. This same requirement applies in all special domestic violence criminal proceedings where the defendant is sentenced to jail.

This fairly straight forward requirement means that tribes will need to invest in one of the technologies for recording the proceeding and establish procedures for the use of that technology.

A more difficult requirement is the jury standards imposed by VAWA 2013. The statute requires that each “participating tribe shall provide to the defendant . . . the right to a trial by an impartial jury that is drawn from sources that ...reflect a fair cross section of the community; and do not systematically exclude any distinctive group in the community, including non-Indians”

This requirement raises both practical and legal issues. A well-developed but complex body of federal requirements exist regarding the meaning and application of the fair cross section standard. Will these standards be interpreted to apply to tribes? Or will a separate body of law be developed to interpret these requirements?

As practical matter, what steps will the tribe use to ensure a fair cross-section? What sources and lists will be used to build a list of potential jurors? How are the jury summons and questionnaires distributed? How is “community” defined? What kind of enforcement mechanisms are available when potential jurors are non-Indian?

These questions have no answer as of yet and will require further thought and attention.

Sentencing

Unless a tribe complies with prerequisites for enhanced sentencing, the tribe may not impose for the conviction of any one offense any penalty or punishment greater than imprisonment for a term of 1 year and/or a \$5000 fine. ICRA did not originally address “stacking” but TLOA amended ICRA to state that tribes may not “impose on a person in a criminal proceeding a total penalty or punishment greater than imprisonment for a term of 9 years.”

If tribes comply with prerequisites, they gain enhanced sentencing authority and can impose for conviction of any one offense a sentence of no more than 3 years imprisonment and/or a \$15,000 fine. The same “stacking” limitations – no more than 9 years imprisonment - apply.

25 USC 1302(d) provides that tribes may require defendants sentenced under the enhanced authority to serve that sentence

- (A) in a tribal correctional center that has been approved by the Bureau of Indian Affairs for long-term incarceration, in accordance with guidelines to be developed by the Bureau of Indian Affairs . . .
- (B) in the nearest appropriate Federal facility, at the expense of the U.S. pursuant to the Bureau of Prisons tribal prisoner pilot program . . .
- (C) in a State or local government-approved detention or correctional center pursuant to an agreement between the Indian tribe and the State or local government; or
- (D) in an alternative rehabilitation center of an Indian tribe . . .

Tribes may also require defendants “to serve another alternative form of punishment, as determined by the tribal court judge pursuant to tribal law.” 25 USC 1302(d)(2).

Tribes will need to determine which option they wish to pursue and how that choice will be funded. If defendants are to serve sentences in non-tribal facilities, then agreements need to be negotiated, including matters such as monitoring, good behavior credits, etc.

If defendants are to serve their sentences in tribal facilities, the tribe will need to get the requisite approvals of their facilities. This may prove problematic, depending on the BIA requirements. BIA’s initial draft guidelines requires tribal personnel policies to include compliance with federal EEO standards, ADA standards, and the Prison Rape Elimination Act, as well as compliance with ACA standards.

Part IV

A Look at the Experiences of the Pascua Yaqui Tribe



The Data

The Pascua Yaqui Tribe has a two square mile reservation located seven miles from Tucson. The tribe has more than 19,000 enrolled members and 7 off-reservation Yaqui communities. Approximately 800 non-Indians work for the tribal government and the casino, which is 32% of all employees. Approximately 500 non-tribal members reside on the reservation.

Since February 26, 2014 (the date of the first arrest of a non-Indian), the Tribe has had 72 DV cases, 54 of which involved Indian defendants and 18 (or 25%) involved non-Indians. The 18 cases with non-Indian defendants involve 15 defendants (3 re-offended). Of those:

- 6 cases are currently active and 1 is pending
- 2 have been set for a jury trial (one Nov. 12, 2014 (same sex couple) and one Dec. 9, 2014)
- 1 is stayed pending a mental health evaluation
- 2 convictions by plea agreement
- 4 were serious enough to warrant referrals for federal prosecution
- 6 were dismissed/declined for jurisdictional, investigative, or witness related problems

The Offenders:

- Median Age: 31 (Ages 19-50)
- 14 male, 1 female
- 9 were of Hispanic descent (2 are Legal Permanent Residents from Mexico)
- 2 were White males
- 3 are African-Americans
- 1 is of Asian descent
- 1 is a lineal tribal descendant, but does not qualify for enrollment
- Only 3 offenders did not have criminal records in the State of Arizona
- 7 of the offenders had been arrested for violent crimes, weapons, or threats (assault, threats, weapon misconduct, assaults, trespassing, and domestic violence) in the State of Arizona
- 2 offenders are Felons, both having been convicted for Burglary in the State of Arizona
- 10 of the offenders have been arrested in Arizona for cases involving drug use/possession/DUI or alcohol
- 2 offenders had active felony warrants, one out of Oklahoma for Armed Robbery
- VAWA offenders have been involved in 84 PYT Police incidents (pre/post VAWA)

The Victims:

- 13 female victims, 2 male victims
- Median age: 30 (Ages 19-43)
- 8 victims of dating relationships
- 3 female victims married partners
- 2 female parent victims
- 3 cases involved Orders of Protection pre- and post-arrest
- 18 children present during incidents
- Ages: Infant – 11 years old
- Median Age: 4 years old
- 3 resulted in open dependency case

Other data

:

- At least 8 offenders were living on the Reservation in Tribal Housing; others were staying intermittently or for a short period of time
- 10 violent injuries (hair dragging, Strangulation, Bruising, Closed fist strikes to the face)
- 7 of the incidents involved alcohol.
- One incident involved a same-sex relationship
- Most of the offenders and victims appear to be unemployed.
- None of the Tribal victims or defendants appear to be active cultural participants.
- One Defendant, while being arrested stated, “You can’t do anything to me anyway.”

Lessons Learned

Most Pascua Yaqui VAWA SDVCJ cases involve defendants with significant ties to the community.

Most offenders had established themselves in our community and have some social connections to tribal members. At least nine offenders were living on the Reservation in Tribal subsidized housing; some were staying intermittently or for short periods of time. The majority of the incidents occurred in our low-income tribal rental units, where the defendants were residing. Two of the incidents involved married couples who lived on the Reservation. Eleven of seventeen incidents involved single tribal females in relationships with non-Indians. Eleven of the cases involved children in the home. In four incidents, the children belonged to the non-Indian offender. One of the offenders is a lineal descendant of a Tribal member, grew up on the Reservation, but does not qualify for tribal membership.

Domestic Violence crimes committed by non-Indians is a significant problem on our Reservation.

On average, our VAWA offenders had been contacted on at least six different occasions by Tribal police, (pre-VAWA 2013) many incidents involved crimes and our VAWA victims. A total of seventy-three different Tribal police reports were generated on our Reservation by our VAWA offenders before VAWA went into effect. Recently, after the Tribe started to exercise VAWA SDVCJ, a survey was administered by the Prosecutor's Office. Of the 220 people surveyed, 130 respondents thought that DV/family disputes were a big problem. Thirty-six people knew someone who was a victim of domestic violence and the perpetrator was a non-Indian. An additional thirty-six knew someone who was a victim of DV and the ethnicity of the perpetrator was unknown. Twenty-five had been an actual victim of DV, of those, six were victims of non-Indian perpetrators.

Pascua Yaqui VAWA offenders are a diverse group. Seven offenders were of Hispanic descent, two are Legal Permanent Residents (LPR) from Mexico. Two offenders were Caucasian males, three are African-Americans, and one is of Asian descent. One of the incidents involved a same sex couple. Most of the offenders were unemployed. Only two offenders did not have a criminal record in the State of Arizona. Seven out of ten offenders had been arrested for violent crimes, weapons, or threats (assault, threats, weapon misconduct, assaults, trespassing, and domestic violence) in the State of Arizona. Two offenders are felons, both having been convicted for burglary in the State of Arizona. Ten of the offenders have been previously arrested for cases involving drug use/possession/DUI or alcohol. Two offenders had active felony warrants, one for armed robbery out of Oklahoma. Four of the offender's acts were serious enough to warrant referrals for federal prosecution (strangulation, aggravated assault, etc.).

Pascua Yaqui children are being exposed to violence and are at a high risk for being physically abused, neglected, and witnessing intimate partner violence in our community. A majority of our VAWA incidents involved children who were at home during the domestic violence that occurred (a total of 17 children under the age of eleven). Our Social Services Department (CPS) was involved in some of the cases and children were removed from the home. These children have faced physical intimidation and threats, are living in fear, and are at risk for developing school related problems, medical illnesses, PTSD, and other impairments. In some of our cases, children were the "reporting party" and one child was assaulted by a victim for reporting the VAWA SDVCJ incident. Some of our children have experienced violence and psychological trauma. Unfortunately, tribes do not have the authority to charge for crimes that endanger, threaten, or harm children.

Implementation is complex, but we are learning. The VAWA SDVCJ enactment was historic. However, implementation and execution has proven to be just as complex as the jurisdictional scheme. It took decades to create a jurisdictional mess in Indian Country; it will take time, diligence, and patience to solve some of the problems created on our Reservations and communities.

Part V

Factors to Consider



Should we exercise the restored powers?

Both VAWA 2013 and TLOA create mechanisms whereby tribes can resume exercising sovereign powers that were previously limited by the federal government. These may not, however, be powers that every tribe will want or need. And both statutes require compliance with a complicated and expensive set of prerequisites which may prove to be impossible or unworkable for many tribal courts or tribal governments. Nothing in either statute requires tribes to use these powers; there is no deadline for making a decision, and it is not a one-time-only option. Tribes can make a decision, and change that decision at any time (so long as it does not adversely impact rights guaranteed to defendants).

The first step, then, is for tribes to take time to assess whether they want or need these powers, and if so, whether the ability to exercise the powers is worth the expense of complying with the prerequisites. Questions to ask include:

1. Are these powers consistent with the way we operate our criminal justice system, and with our fundamental beliefs, culture, and tradition?
 - a. do we handle these types of matters as crimes or civil infractions?
 - b. do we use incarceration and fines as sanctions?
2. Would these powers help us address problems that exist in our territory?

In answering this second question, tribes should conduct an assessment of the reservation environment (see page 37) and an assessment of their criminal justice system (see pages 38-39). Any information gathered will help predict the numbers of future VAWA SDVCJ cases, the number of enhanced sentences, and the amount of resources that may be needed. These assessments should also include attention to costs and budget requirements (see page 40) and alternatives to exercising the powers in TLOA and VAWA 2013 (see page 41). In conducting these assessments, the tribe should focus on what problems it is experiencing, where things are going well, and whether exercising these newly restored powers will assist in addressing the problems (or might hinder what is working well).

Environmental Assessment

The environmental assessment should include information such

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|---------------|--|
| Geography: | are you located in an urban or rural area? near a major city? |
| Demographics: | what is the population of your reservation? How many are citizens? non-member Indians? how many non-Indians live, work, or go to school on the reservation? How are race relations? |
| Culture: | how strong is your traditional culture? do you have groups of elders, youth, and other cultural participants? are they fractured or do they form strong interest groups? |
| Economics: | how strong is the reservation economy? what is the unemployment rate? the poverty rate? do you have gaming? do you pay per caps? |
| Politics: | How is your tribal government structured? Your social service system? What would each segment of government need to do to comply with the requirements of the federal law? Does it have the necessary personnel and other resources? What factions and other interest groups exist? What roles do they play? |
| Crime rate: | what kinds and quantity of crimes are committed? by whom? are serious crimes going unpunished (or under-punished)? what role do drug and alcohol abuse play? Are there effective rehabilitation systems, including prevention and treatment programs? Do you have any gang or drug cartel issues? How many defendants are repeat offenders, with conviction(s) in tribal, state, or federal court? |
| Housing: | What is the composition of housing on your reservation? Do you provide tribal housing? Who is in tribal housing? |
| Education: | Who operates the schools? What is the graduation/ dropout rate? Do you have at tribal college? community college? How many people have college or graduate degrees? |

Be sure to include any other relevant information such as resources, significant events, public perceptions, etc. Be sure to also consider what does this information looks like in surrounding jurisdictions.

Examining the system

Understanding how your criminal justice process works, and identifying its strengths and weaknesses, is a critical step in assessing whether the powers restored by TLOA and VAWA would be useful to you, and if so, whether their benefits outweigh the costs.

We have divided the criminal justice process into seven parts and have grouped questions accordingly. Please keep in mind that the questions and their answers are not likely to fit completely into the boxes we have used. As you work through these questions, be aware that some might not fit your situation; some may overlap more than one category, and this is certainly not a complete list of possible questions.

In answering these questions and conducting this review, it is important to start with an honest assessment and systemic evaluation of the system as a whole and to recognize that a tribal justice system is part of a larger regional system of justice, part of a larger ecosystem & symbiotic in nature.

It is also important to assess not just the individual parts of the system, but also to assess the system as a whole. What is the culture of your Tribal Justice System? Consider readiness, operational capacity, process, effectiveness, strengths, weaknesses, limitations, technology gaps. How is your system organized? How is it working? What resources will you need to accomplish your goal? What resources can you provide? What intrinsic, personnel, and systemic assets do you possess?

Your Laws

What do your current laws say about dating violence, domestic violence, and enforcing protection orders? Would they need to be amended to apply to non-Indians? To impose criminal sanctions?

How many tribal crimes carry a potential sentence of one year imprisonment? How many of those would you want to carry a higher sentence?

What changes would you need to make to your rules of procedure? To your rules of evidence? Do you currently make all these documents publicly available? Does your court issue written opinions? Are these publicly available?

Do you have a constitution? Would it need to be amended? What would be the process for doing so?

Law Enforcement

How is the department structured? Are police cross-commissioned/state certified, tribally certified, federally certified (SLEC)?

Do they have access to NCIC? to court records? to Warrant and Order of Protection information? Do they have mutual aid agreements? Can they cite people using federal CVB citations? Do they participate in associations that share information/training?

Do they have local evidence processing support? Do they work well with federal and state counterparts? How about with probation, pre-trials services, and prosecuting attorneys from all three jurisdictions?

Will they need local training for VAWA? Who will conduct the training? Do they need investigative support? Do they work with victim advocates? Are officers Bilingual?

Who handles detention? Will this entity take non-Indians?

Does the public have confidence and trust in your agency?

Intergovernmental Cooperation

Justice System/partners: (federal/state/local): Who is on the team? What is the culture of those organizations?

Are justice system teams interdependent? Supportive? What is the organizational framework of the multiple relationships?

Does a current ecosystem map or diagram of agencies or process exist? What networks do exist? Do they work together and well with the Tribe? Do MOUs, rules, statutes, or IGAs exist?

Is the system coordinated with a SAUSA, federal Tribal Liaison or cross-deputized police officers? How does the MDT process work or does it exist? What are the outcomes of any coordinated process? Satisfactory? Declinations? Communication?

How are decisions made? What is the relationship like with the Tribe? Do Protocols exist? Feedback loops? Public confidence? Trust? What is the history of any partnership? What gaps currently exist?

Prosecuting Crime

What is the declination rate for crimes on your reservation? How many defendants are charged with crimes in your courts?

How many of those are charged with crimes carrying a sentence of a year? Would your prosecutors and judges use the enhanced sentencing authority? Are they currently frustrated with the sentencing limitations?

How many are likely to be charged if you start exercising the restored powers? Will your prosecutor start charging more defendants in tribal court now that increased sentences are available? Would these increases be enough that you would need more prosecutors? judges? court staff?

Defense Counsel

Do you have an indigent defender system? If so, would it need to be expanded? If you do not have one, and you want to use the restored powers, you will have to create one. How many defendants would qualify for a court-appointed lawyer? What are the current requirements for attorneys who wish to practice law in your jurisdiction and appear in your tribal courts? Would those need to be changed? Do you require a licensing system that ensures the competence of attorneys? What ethical standards do you require attorneys to follow? How do you discipline attorneys that do not follow those standards?

Judges and Courts

What are the current qualifications required to serve as a judge in your court system? Would those constitute “Sufficient legal training” to preside over criminal cases? If not, what changes would you need to make? Do you currently require your judges to be licensed?

Is your court a court of record? If not, what changes would you need to make?

What do your current laws, regulations, and court rules say about the jury selection process? How does the process work in your tribe? Does that process comply with VAWA 2013’s fair cross-section requirement? If not, what changes would be required?

Sentencing and Incarceration

If you sentence defendants to more than one year imprisonment, you will need a place to incarcerate them. How many defendants is this likely to be? What facilities are available? What (if any) additional capacity would you need? How will you address the medical needs of non-Indian defendants while they are in custody? (both pre-trial and post-conviction)

Budgeting for Change

Operating a criminal justice system, which includes (at a minimum) a police department, a prosecutor's office, and a court system, is not cheap and requires a consistent flow of revenue. Add in victim services, probation/parole, and a public defender office, and the costs become staggering. Complying with all of the requirements in both VAWA and TLOA can increase these costs even more, both in time and in money.

The federal and state governments rely on taxes to raise the necessary revenue. As a result of federal Indian policy, however, many tribes lack the necessary tax base and taxation authority to do the same. The result is that the majority of tribal governments are dependent on economic development and on federal funding to finance their criminal justice system. These revenues have not always been consistent or reliable.

In addition to the direct costs of complying with the prerequisites (indigent defender systems, jury trials, incarceration, etc), substantial indirect costs are also likely to be required. For example, who will review and propose changes to your laws and procedures? Who will train law enforcement, prosecutors, judges, court staff and defense counsel on the new laws and procedures and how they work? What funding will be required to make these changes? To pay for any additional prosecutors, judges, defense counsel, and court staff? To pay to publish the laws and regulations? To process the licensing and educational requirements? To implement the jury selection process? To pay for incarceration? Where will these funds come from? Is that source of funding stable and reliable?

The Pascua Yaqui Tribe has covered the costs of implementing TLOA and VAWA with virtually no additional federal assistance.

Considering Alternatives

In considering these questions, a tribe may also want to consider possible alternatives, which may include:

Making no changes. ICRA's restrictions on sentencing and federal limitations on criminal jurisdiction may not be a problem for your tribe. You may have other effective ways of dealing with these problems or you may not be experiencing the type of behavior they are designed to address. In that case, it is probably not worth your time and effort to make the changes. Even if you are experiencing some of these problems, it may not be sufficient widespread or serious as to be worth the time and money to comply with the federal prerequisites.

Using Civil Infractions and Alternative Sentencing. If your tribe does not already make use of alternative sentencing (such as community service) or approach certain matters as civil, rather than criminal, infractions, you may want to consider whether those approaches would be more effective or at least effective enough that it is not worth your time to comply with the federal requirements.

Can other parts of TLOA address the problem? TLOA is a very broad and comprehensive statute, and it addresses a wide variety of obstacles to effective crime control on reservations. Will or could some of these other provisions provide sufficient tools that it is no longer worth the time and money to comply with the prerequisites to enhanced sentencing and prosecuting non-Indians? For example, would the SAUSA provisions be a workable compromise?

These methods do not have to be exclusive. For example, three Pascua Yaqui tribal prosecutors now have the opportunity to prosecute reservation based crimes in federal court as Special Assistant United States Attorneys, (SAUSAs). The Tribal Council recently signed a historic agreement with the Arizona U.S. Attorney's Office that allows this to occur.

Part VI

Appendices



Indian Civil Rights Act, 25 USC 1301 et seq
as amended by TLOA and VAWA

25 U.S. Code § 1302 - Definitions

For purposes of this subchapter, the term—

- (1) “Indian tribe” means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government;
- (2) “powers of self-government” means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians;
- (3) “Indian court” means any Indian tribal court or court of Indian offense; and
- (4) “Indian” means any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, title 18, if that person were to commit an offense listed in that section in Indian country to which that section applies.

25 U.S. Code § 1302 - Constitutional rights

- (a) In general. No Indian tribe in exercising powers of self-government shall—
 - (1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;
 - (2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;
 - (3) subject any person for the same offense to be twice put in jeopardy;
 - (4) compel any person in any criminal case to be a witness against himself;
 - (5) take any private property for a public use without just compensation;
 - (6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense (except as provided in subsection (b));
 - (7)
 - (A) require excessive bail, impose excessive fines, or inflict cruel and unusual punishments;
 - (B) except as provided in subparagraph (C), impose for conviction of any 1

- offense any penalty or punishment greater than imprisonment for a term of 1 year or a fine of \$5,000, or both;
 - (C) subject to subsection (b), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 3 years or a fine of \$15,000, or both; or
 - (D) impose on a person in a criminal proceeding a total penalty or punishment greater than imprisonment for a term of 9 years;
 - (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;
 - (9) pass any bill of attainder or ex post facto law; or
 - (10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.
- (b) Offenses subject to greater than 1-year imprisonment or a fine greater than \$5,000
A tribal court may subject a defendant to a term of imprisonment greater than 1 year but not to exceed 3 years for any 1 offense, or a fine greater than \$5,000 but not to exceed \$15,000, or both, if the defendant is a person accused of a criminal offense who—
- (1) has been previously convicted of the same or a comparable offense by any jurisdiction in the United States; or
 - (2) is being prosecuted for an offense comparable to an offense that would be punishable by more than 1 year of imprisonment if prosecuted by the United States or any of the States.
- (c) Rights of defendants. In a criminal proceeding in which an Indian tribe, in exercising powers of self-government, imposes a total term of imprisonment of more than 1 year on a defendant, 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;
 - (3) require that the judge presiding over the criminal proceeding—
 - (A) has sufficient legal training to preside over criminal proceedings; and
 - (B) is licensed to practice law by any jurisdiction in the United States;
 - (4) prior to charging the defendant, make publicly available the criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances) of the tribal government; and

- (5) maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding.
- (d) Sentences. In the case of a defendant sentenced in accordance with subsections (b) and (c), a tribal court may require the defendant—
 - (1) to serve the sentence—
 - (A) in a tribal correctional center that has been approved by the Bureau of Indian Affairs for long-term incarceration, in accordance with guidelines to be developed by the Bureau of Indian Affairs (in consultation with Indian tribes) not later than 180 days after July 29, 2010;
 - (B) in the nearest appropriate Federal facility, at the expense of the United States pursuant to the Bureau of Prisons tribal prisoner pilot program described in section 304(c) [1] of the Tribal Law and Order Act of 2010;
 - (C) in a State or local government-approved detention or correctional center pursuant to an agreement between the Indian tribe and the State or local government; or
 - (D) in an alternative rehabilitation center of an Indian tribe; or
 - (2) to serve another alternative form of punishment, as determined by the tribal court judge pursuant to tribal law.
- (e) Definition of offense. In this section, the term “offense” means a violation of a criminal law.
- (f) Effect of section. Nothing in this section affects the obligation of the United States, or any State government that has been delegated authority by the United States, to investigate and prosecute any criminal violation in Indian country.

25 U.S. Code § 1303 - Habeas corpus

The writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

25 U.S. Code § 1304 - Tribal jurisdiction over crimes of domestic violence

- (a) Definitions. In this section:
 - (1) Dating violence. The term “dating violence” means violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.
 - (2) Domestic violence. The term “domestic violence” means violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, or by a person similarly situated to a spouse of the victim under the domestic- or family- violence laws of an Indian tribe that has jurisdiction over the Indian country where the violence occurs.

- (3) Indian country. The term “Indian country” has the meaning given . . . in [18 USC 1151]
- (4) Participating tribe. The term “participating tribe” means an Indian tribe that elects to exercise special domestic violence criminal jurisdiction over the Indian country of that Indian tribe.
- (5) Protection order. The term “protection order”—
 - (A) means any injunction, restraining order, or other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person; and
 - (B) includes any temporary or final order issued by a civil or criminal court, whether obtained by filing an independent action or as a pendent lite order in another proceeding, if the civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection.
- (6) Special domestic violence criminal jurisdiction. The term “special domestic violence criminal jurisdiction” means the criminal jurisdiction that a participating tribe may exercise under this section but could not otherwise exercise.
- (7) Spouse or intimate partner. The term “spouse or intimate partner” has the meaning given the term in section 2266 of title 18.

(b) Nature of the criminal jurisdiction

- (1) In general. Notwithstanding any other provision of law, in addition to all powers of self-government recognized and affirmed by sections 1301 and 1303 of this title, the powers of self-government of a participating tribe include the inherent power of that tribe, which is hereby recognized and affirmed, to exercise special domestic violence criminal jurisdiction over all persons.
- (2) Concurrent jurisdiction. The exercise of special domestic violence criminal jurisdiction by a participating tribe shall be concurrent with the jurisdiction of the United States, of a State, or of both.
- (3) Applicability. Nothing in this section—
 - (A) creates or eliminates any Federal or State criminal jurisdiction over Indian country; or
 - (B) affects the authority of the United States or any State government that has been delegated authority by the United States to investigate and prosecute a criminal violation in Indian country.
- (4) Exceptions
 - (A) Victim and defendant are both non-Indians
 - (i) In general A participating tribe may not exercise special domestic

- violence criminal jurisdiction over an alleged offense if neither the defendant nor the alleged victim is an Indian.
- (ii) Definition of victim In this subparagraph and with respect to a criminal proceeding in which a participating tribe exercises special domestic violence criminal jurisdiction based on a violation of a protection order, the term “victim” means a person specifically protected by a protection order that the defendant allegedly violated.
- (B) Defendant lacks ties to the Indian tribe. A participating tribe may exercise special domestic violence criminal jurisdiction over a defendant only if the defendant—
 - (i) resides in the Indian country of the participating tribe;
 - (ii) is employed in the Indian country of the participating tribe; or
 - (iii) is a spouse, intimate partner, or dating partner of—
 - (I) a member of the participating tribe; or
 - (II) an Indian who resides in the Indian country of the participating tribe.
- (c) Criminal conduct. A participating tribe may exercise special domestic violence criminal jurisdiction over a defendant for criminal conduct that falls into one or more of the following categories:
 - (1) Domestic violence and dating violence. An act of domestic violence or dating violence that occurs in the Indian country of the participating tribe.
 - (2) Violations of protection orders. An act that—
 - (A) occurs in the Indian country of the participating tribe; and
 - (B) violates the portion of a protection order that—
 - (i) prohibits or provides protection against violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person;
 - (ii) was issued against the defendant;
 - (iii) is enforceable by the participating tribe; and
 - (iv) is consistent with section 2265 (b) of title 18.
- (d) Rights of defendants. In a criminal proceeding in which a participating tribe exercises special domestic violence criminal jurisdiction, the participating tribe shall provide to the defendant—
 - (1) all applicable rights under this Act;
 - (2) if a term of imprisonment of any length may be imposed, all rights described in section 1302 (c) of this title;
 - (3) the right to a trial by an impartial jury that is drawn from sources that—
 - (A) reflect a fair cross section of the community; and
 - (B) do not systematically exclude any distinctive group in the community, including

non-Indians; and

- (4) all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction over the defendant.
- (e) Petitions to stay detention
- (1) In general. A person who has filed a petition for a writ of habeas corpus in a court of the United States under section 1303 of this title may petition that court to stay further detention of that person by the participating tribe.
 - (2) Grant of stay. A court shall grant a stay described in paragraph (1) if the court—
 - (A) finds that there is a substantial likelihood that the habeas corpus petition will be granted; and
 - (B) after giving each alleged victim in the matter an opportunity to be heard, finds by clear and convincing evidence that under conditions imposed by the court, the petitioner is not likely to flee or pose a danger to any person or the community if released.
 - (3) Notice. An Indian tribe that has ordered the detention of any person has a duty to timely notify such person of his rights and privileges under this subsection and under section 1303 of this title.

**Statement of
the Honorable Peter Yucupicio, Chairman
Pascua Yaqui Tribe of Arizona**

**Before the
Office of Tribal Justice
United States Department of Justice
Violence Against Women Government-to-Government Consultation
Rapid City, SD
Wednesday, October 15, 2014**

Hello, my name is Peter Yucupicio, and I currently serve as the Chairman of the Pascua Yaqui Tribe, a Federally Recognized Tribe from the State of Arizona. Thank you for the opportunity for the Pascua Yaqui Tribe to contribute to the discourse on the implementation of the Violence Against Women Reauthorization Act of 2013 (VAWA). The Pascua Yaqui Tribe is one of three pilot tribes that began exercising Special Domestic Violence Criminal Jurisdiction (SDVCJ) as of February 20, 2014. Since that time, the Tribe has had 20 reported cases involving Non-Indians defendants.

I want to begin by thanking the United States Congress, the Obama Administration, the Department of Justice (DOJ), the Department of the Interior (DOI), the National Congress of American Indians (NCAI), the Tribal Law & Policy Institute (TLPI), and the National Council of Juvenile & Family Court Judges (NCJFCJ) for their leadership and assistance during the past year.

BACKGROUND INFORMATION

Without question, it is important to start with the premise that the Pascua Yaqui Tribe's first duty has always been to protect and safeguard its citizenry, the people. A crime against one person is an offense against the people and the sovereign authority of our government. The Pascua Yaqui Tribe's sovereignty and duty to protect operate in large part to safeguard the political integrity, economic security, and the health and welfare of our community. Nothing is more important or vital to the health and survival of our people.

Our ancestors walked the earth by the grace of the Creator; they were indigenous and roamed aboriginal territory from Durango in Southern Mexico, north to Colorado, and west to present day California. The Tribe has prospered and endured in the Rio Yaqui homeland since time immemorial. Authority was inherent and derived in part by our elder's ability to protect, provide, and administer to the needs of the people. For nearly 500 years, the Yaqui people have fought to protect our homeland. Long before the marking of the International Border and the birth of the State of Arizona, the Pascua Yaqui people had settled in various communities from present day Tumacacori to Guadalupe, Arizona. In 1964, Congressman Morris K. Udall introduced a bill in Congress authorizing the transfer of 202 acres of federal desert land to our Yaqui elders southwest of the City of Tucson, Arizona. On September 18, 1978, Congress, through Public Law 95-375, recognized the Tribe as a United States Indian Tribe.

TRIBAL POLICY

Domestic violence and family violence are serious crimes against society, the Pascua Yaqui Tribe, and our families. The Tribe, in enacting the VAWA SDVCJ, sought to provide the victims of domestic violence or family violence, the maximum protection from further violence that the law can provide. Furthermore, the strength of the Pascua Yaqui Tribe is family, and the safety of victims of domestic and family violence, especially children, must be ensured by immediate intervention of law enforcement, prosecution, education, treatment, and other appropriate services. Our response to domestic and family violence stresses the enforcement of laws to protect the victim and to hold the perpetrator accountable, which will in turn communicate the Tribe's policy that violent behavior against intimate partners or family members is criminal behavior and will not be excused or tolerated.

Domestic violence is and has been the most pressing criminal justice challenge facing the Pascua Yaqui Tribe. Domestic violence charges account for a significant majority of all criminal filings, cases include aggravated assault, assault, disorderly conduct, and trespass cases in which domestic violence is a factor. Pascua Yaqui stakeholders have been unusually consistent in identifying a core set of issues and challenges that they agreed should be addressed. For example, there is complete unanimity across agencies interviewed recently that our community's most serious public safety concern is domestic violence. The next most serious public safety problem identified was drug and alcohol related crime, including use, possession, and trafficking. Stakeholders agreed that alcohol was a major factor in many reservation crimes, including many domestic violence incidents.

PASCUA YAQUI JUSTICE SYSTEM

Historically, the Yaqui people have always had some form of law enforcement and dispute resolution, most notably through our ceremonial societies. In 1982, the Tribe adopted a Criminal Code, some parts of our Civil Code, and we adopted our Constitution in 1988, all of which helps spell out current Yaqui Law. In addition to our Constitution, our elders, chose to create a Tribal Court system as the arbitrator of Yaqui justice and our forum for the resolution of disputes. Our official justice system has been operating in one form or another, for more than 25 years. Pursuant to its sovereign authority, our Tribal Council also created a law enforcement department and a tribal prosecutor's office as the representatives of the tribe in matters both criminal and civil in nature. The various functions performed by the Office of the Prosecutor, law enforcement, and the Tribal Court, are instrumental in ensuring that the Tribal Council can help guarantee the safety and protection of our people. A sustainable future for our government and people is largely dependent on a robust judiciary and a strong executive arm to enforce the mandates of our Constitution, ensure the protection of the people, and defend individual rights guaranteed by our laws and our Constitution.

In 1978, the Tribe was originally subject to Arizona State jurisdiction under 25 U.S.C. § 1300f(c) and PL280. In 1985, the State of Arizona retroceded criminal & civil jurisdiction. Between 1985 and 1988, the Department of Interior operated the tribal court system through a "Court of Indian Offenses," a "CFR" Court operated by the Bureau of Indian Affairs, (B.I.A.). In 1988, the Tribe took over the judicial system from the B.I.A. through a 638 contract. The Bureau of Indian Affairs police patrolled the Reservation exclusively until 1991. In 1991, the Tribe hired three Tribal police officers who served alongside B.I.A. officers. In 1998, The Tribe signed a 638 agreement with the B.I.A. to direct its own law enforcement services. In 1997, the Tribe started the Pascua Yaqui Victim Services program. Currently, the Tribe employs twenty-six uniformed patrol officers who are certified by Arizona P.O.S.T as State certified officers and most are federal Special Law Enforcement Commissioned (SLEC) certified officers. Three of the officers are Criminal Investigators. The Tribe also employs a number of Victim Advocates.

The Tribal people are also served by the Federal Bureau of Investigation (F.B.I.) (Phoenix Division), for assistance with major criminal investigations. In 1993, the Tribe entered into a User Agreement with the Arizona Department of Public Safety (DPS) for NCIC and ACIC criminal information access. In 2006, the Tribe approved an Intergovernmental Agreement with Arizona DPS for crime laboratory services for the purpose of processing evidence. In 2009, the Tribe entered into an Intergovernmental Agreement (IGA) with the Pima County Sheriff's Department for participation in the Spillman Records Management System and Computer Aided Dispatch System for better access to ACIC, NCIC, ALETS, NLETS, and MVD databases. In 2010, the Tribe entered into an IGA with Pima County to take part in the Pima County Wireless Integrated Network (PCWIN). PCWIN will provide improved public emergency services and regionally coordinated mutual aid. In 2011, through the American Reinvestment Recovery Act (ARRA), the Tribe constructed a \$21 Million dollar, state-of-the-art multi-purpose justice/court complex. In May of 2012, the Tribe began operating the Pre-Trial Services (PTS) Division of the Tribal Court. Pre-Trial Services has effectively reduced the number of Yaqui defendants being held for pre-trial detention, kept some offenders employed, and monitored offenders in the community who were released during the pre-trial phase of their case. In 2011, the Tribe, in partnership with the DOJ and the U.S. Attorney's Office appointed tribal prosecutors as federal Special Assistant United States Attorneys (SAUSA). The Tribe was also certified by the DOJ as substantially implementing the Sex Offender Registration and Notification Act (SORNA).

Adult and Juvenile Detention Services are mostly handled by the Bureau of Indian Affairs, (B.I.A.). Adult Tribal inmates, including Non-Indian VAWA defendants, are transported to a private regional B.I.A. contracted detention facility in San Luis, Arizona. On Jul 23, 2013, Pascua Yaqui Tribal leaders met with B.I.A. Justice Services in Washington D.C. to discuss detention issues and other concerns. The Tribe met with Mr. Darren Cruzan and Mr. Charles Addington. On Dec 20, 2013, the BIA began delivering Tribal inmates to the B.I.A. detention Pilot program at Emerald Corporation in San Luis, Arizona. The contracted facility is close to the tribal Reservation & is sensitive to tribal detainee needs. The Tribe employs detention officers for short-term tribal detention, booking, transportation, and pre-trial detention needs.

DUE PROCESS

In 1995, the Tribe opened the Pascua Yaqui Public Defenders Office to provide public defense services to indigent tribal members. In 2010, the Tribal Council amended the Pascua Yaqui Court Rules to implement federal amendments to the Indian Civil Rights Act (ICRA) by the 2010 Tribal Law & Order Act (TLOA). The 2010 amendment guaranteed tribal members, (including Indians from other tribes) the right to defense counsel at the Tribe's expense if the Tribe seeks any amount of jail time in their criminal cases. On Dec 18, 2013, the Tribal Council passed Ordinance 20-13, the Court Rules Amendments of 2013 to comply with VAWA 2013 implementation requirements. Ordinance 20-13 changed the Tribe's jurisdiction, ensured defense counsel for indigent non-Indian defendants, and changed the composition of the Tribe's jury pool.

The Pascua Yaqui tribal court provides all defendants with the same rights in tribal court as they would have in state court. The Pascua Yaqui Constitution expressly incorporated the language of the Indian Civil Rights Act (ICRA), for the Tribe's own Bill of Rights. The tribe funds a full-fledged Public Defenders Office with four licensed defense attorneys who represent those accused of crimes. The Tribe also funds four private contracted defense attorneys for those cases where a conflict of interest exists. Defendants are entitled to all protections, including an indigent defendant's right to appointed counsel, at the expense of the tribe. Our Tribal Court enforces the Indian Civil Rights Act (ICRA), fundamental due process, Tribal common law, U.S. Supreme Court case law, and fundamental human

rights. The Pascua Yaqui Tribe also guarantees the selection of diverse and objective jurors from our community. VAWA contains explicit language that tribes exercising authority under these new provisions must draw from jury pools that reflect a fair cross-section of the community and do not systematically exclude any distinct group of people, including non-Indians.

The right to counsel and due process that appear to be products of American jurisprudence is deeply rooted in Yaqui indigenous tradition and practice. Our Tribal culture and history supports the right of having a person speak on a defendant's behalf. These concepts, teaching, and traditions pre-date the U.S. Constitution and the Bill of Rights and are rooted in beliefs that are arguably as old as English Common Law. As early as 1918, in the United States, the Yaqui formed a quasi-governmental body in charge of the "Yaqui Nation" within the United States, presided over by a "commandante-general" (captain) which is equated to a war chief, (wikoiijaut) of a Yaqui Pueblo in present day Sonora, Mexico (it can also be equated to the executive branch of government). The Captain was responsible for maintaining order, recruiting a police force, preside over trial courts, and administering punishments. The Yaqui Nation also had a Kovanau, or, in Spanish, gobernador, (governor). The 'kovanau's duty was first, to administer the land of the pueblo, and, second, to concern himself in all disputes and difficulties that arose. The war chief presided over trials and the 'Kovanau gathered witnesses for defense and tried to uncover extenuating circumstances. While courts generally enforce individual responsibility for crime and enforce individual rights, Pascua Yaqui historical cultural practices revolve around the principle of collective responsibility arising from a foundational social kinship system. Some concepts of traditional practices and norms include, "Lutu'uria," which translates as "truth," the phrase "yo'ora lutu'uria" refers to "elders truth," and the notion of senu noka (one word) is used to describe historical decisions (precedent). The concern for not just majority but a collective decision beyond individualism is prominent.

DEMOGRAPHICS & STATISTICS

Approximately 4-5000 people reside on the 2,200 acre Pascua Yaqui Reservation, located in Pima County, Arizona, near the southwestern edge of the City of Tucson. The Reservation is approximately 60 miles north of the United States-Mexico International Border. The Tribe is located near a major metropolitan city, while this is a positive for business ventures, it can have a negative effect on crime that occurs on the reservation. Crime does not respect borders and the influx of illegal drugs, guns, and wrongdoers from surrounding communities is a major issue that impacts the safety of our community and strains our criminal justice system. Tribal members are at risk of being exposed to drug smuggling, drug cartels armed with military grade weapons, human traffickers, and ex-prison gang members. The last murder of a tribal member to occur on the Pascua Yaqui Reservation was a shooting that was committed by a non-Indian, Hispanic male. According to U.S. Census data, Pascua Yaqui Reservation residents include non-Indians and a small number of individuals who are members of other tribes. Nearly 43 percent of all Pascua Yaqui households consist of a mother and children with no father present, making single mother households the most common type of household on the reservation. Approximately 800 Non-Indians work for the Tribal Government, work for Tribal Casino Enterprises, or attend school on the Reservation. The 2010 U.S. Census, estimates that a large percentage of Tribal members on the Reservation live in poverty. Per capita income on the reservation is \$9,039, a third of Pima County (\$25,093) and the State of Arizona (\$25,680). Pascua Yaqui households are four times more likely to receive Food Stamps (49 percent) and eight times more likely to receive public assistance than are residents of the county or state. Nearly forty percent of Pascua Yaqui adults, and forty-two percent of children, live at or below the federal poverty level, more than twice the county and state rates.

The Pascua Yaqui Police responds to approximately 6000 calls for service a year. A percentage of the criminal calls are referred to the Prosecutor's office for possible prosecution. The incidents referred are evaluated and most of them are independently charged into tribal court.

- In FY 2011-2012, the Tribal Prosecutor's Office filed a total of 684 cases. Of those, 650 were criminal and 267 were domestic violence cases. 121 cases were declined.
- In FY 2012-2013, the Tribal Prosecutor's Office filed a total of 698 cases. Of those, 600 were criminal matters and 155 cases were declined. A large percentage of the cases involved alcohol and domestic violence.
- In FY 2013-2014, the Tribal Prosecutor's Office filed a total of 934 cases. Of those, 610 were adult criminal matters and 176 cases were declined, (including 3 potential VAWA cases). A large percentage of the cases have been related to alcohol and domestic violence. Our VAWA cases have increased the number of adult criminal cases filed by 5%.

Our Prosecutor's Office also routinely handles criminal extradition cases. In the past few years, the office has extradited murder suspects, sex offenders, burglary suspects, witnesses, and people who were evading justice in other jurisdictions by hiding on our reservation. The Tribe has conducted 30 criminal extraditions in the past few years. Over all we have conducted a total of 65 criminal extraditions, mostly to the State of Arizona through The Pima County Prosecutor's Office, and the Tucson Police Department.

CRIMINAL JURISDICTION

The Pascua Yaqui Pueblo's criminal jurisdiction is divided into three separate prongs: tribal jurisdiction, federal jurisdiction, and state jurisdiction. The court system where a person is prosecuted depends on the accused person's citizenship status, status as an "Indian," and the status of any victims. The determination can be complex. Roughly speaking, the Tribe has jurisdiction over all Indians who commit crimes within the reservation boundaries. The federal government also has jurisdiction over major crimes committed by Indians in our community. The federal government and the State of Arizona, by and large retain jurisdiction over crimes committed by non-Indians on the reservation. However, the Tribe now has criminal jurisdiction pursuant to VAWA 2013 over non-Indians in crimes of domestic violence committed on our Reservation. In the near future, the Pascua Yaqui Tribe hopes to better coordinate all three prosecution prongs from the reservation. This coordination will ensure that the Tribe can seek better outcomes for victims and be more accountable to the members of our community. For example, three Pascua Yaqui tribal prosecutors now have the opportunity to prosecute reservation based crimes in federal court as Special Assistant United States Attorneys, (SAUSAs). The Tribal Council recently signed a historic agreement with the Arizona U.S. Attorney's Office that allows this to occur.

VAWA IMPLEMENTATION:

On February 20, 2014, pursuant to the Violence Against Women Reauthorization Act of 2013 (VAWA 2013), the Pascua Yaqui Tribe was one of only three Tribes across the United States to begin exercising Special Domestic Violence Criminal Jurisdiction (SDVCJ) over non-Indian perpetrators of domestic violence. On July 2, 2014, for the first time since 1978 when the U.S. Supreme Court stripped tribal governments of their criminal authority over non-Indians in *Oliphant v. Suquamish Indian Tribe* (1978), our tribe obtained the first conviction of a non-Indian, a twenty-six year old Hispanic male, for the crime of domestic violence assault committed on the Pascua Yaqui Reservation.

The first responsibility of any government, tribal or otherwise, is the safety and protection of its people, for there can be no security or freedom for all, if there is insecurity and fear for any of us. Pascua Yaqui tribal officials no longer have to simply stand by and watch their women be victimized with no recourse. As President Obama said when he signed VAWA 2013 into law, “Tribal governments have an inherent right to protect their people, and all women deserve the right to live free from fear.” Although long overdue, this authority represents a historic first step for law and order in Indian Country and it is a strong example of tribal sovereignty and self-determination.

On Mar 7, 2013, VAWA 2013 was signed into law by President Obama. On Jun 26, 2013, the U.S. Attorney for the District of Arizona, John Leonardo, visits the Pascua Yaqui Tribe and toured our court facility. The Tribe expressed an interest in the implementation of Special Domestic Violence Criminal Jurisdiction. On July 09, 2013, the Tribal Chairman submitted a letter to the Department of Justice’s, Mr. Tracy Toulou, as a preliminary expression of interest in exercising SDVCJ and asked to be designated as a participating Tribe. On July 15, 2013, the Pascua Yaqui Tribe was one of approximately 27 federally recognized Indian tribes that timely sent “preliminary expressions of interest” in participating in the Pilot Project. By doing so, tribes expressed an interest in participating in both Phase One and Phase Two of the Pilot Project.

The Department of Justice launched the Intertribal Technical-Assistance Working Group on Special Domestic Violence Criminal Jurisdiction (ITWG), as part of Phase One of the Pilot Project. The ITWG is a voluntary working group of designated tribal representatives who exchange views, information, and advice, peer to peer, about how tribes may best exercise SDVCJ, combat domestic violence, recognize victims’ rights and safety needs, and safeguard defendants’ rights. Between July, 2013 and December 2013, Tribal representatives participated in a series of teleconferences, participated as panelists, and participated in ITWG in-person meetings.

On December 30, 2013, the Tribe submitted an extensive application to the DOJ to be designated a Pilot Tribe and to start exercising SDVCJ (Phase II). On February 6, 2014, the Tribe received official notice that the Tribe was designated a participating Pilot Tribe authorized to exercise SDVCJ. The Pascua Yaqui Tribe SDVCJ Pilot status story was picked up and released locally, statewide, and nationally, via press release by the White House. On February 12, 2014, VAWA Pilot information was posted for notice in the Federal Register by the Department of Justice. Official Tribal notice was sent out via Global e-mail to all tribal and casino employees, as well as being posted on the official Pascua Yaqui Tribal Internet site on February 6th, 2014. On February 10th, 2014, the Arizona Daily Star ran a front page story that circulated to 238,000 readers in Southern Arizona, including the City of Tucson. The story was also posted on their online news site. The online AZSTARNET has a reach of 1 million independent views per month and has approximately 12 million page views per month. The Pascua Yaqui press release was shared online through a leading internet Indian Country legal news blog called “Turtle Talk,” it was posted on February 7, 2014.

The Tribe conducted interviews with several news outlets to include, the Arizona Daily Star, the Seattle Times, the L.A. Times, Washington Post, Tucson KVOA television news, Colorlines, Aljazeera, NPR, 91.5 KJZZ, MintPress, the Arizona Daily Wildcat, and Cronkite News. The Tucson area news story by KVOA ran on the nightly news on February 23, 2014 and on the morning of February 24, 2014, and was broadcast in the greater Southern Arizona area, to include the City of Tucson and the Pascua Yaqui Reservation.

VAWA CASES:

Since February 20th, our tribe has arrested a total of thirteen non-Indian males and one non-Indian female involved in seventeen SDVCJ incidents (three additional cases were declined). SDVCJ cases have included crimes of domestic violence and violations of protection orders where fourteen tribal females and one tribal male were victims. Most of the VAWA perpetrators have extensive criminal records in the State of Arizona. Two offenders had active warrants for their arrests, one for armed robbery out of the State of Oklahoma. Four of the cases were serious enough to warrant referrals for federal prosecution (strangulation, aggravated assault). On average, VAWA offenders were contacted by Tribal police at least six times before SDVCJ authority existed on the Pascua Yaqui Reservation. VAWA offenders have been involved in a total of eighty-four Pascua Yaqui police incidents, (reports pre and post VAWA). Often, the victim in those cases was the same person involved in our new VAWA crimes. Eleven of the cases involved seventeen children in the home, all under the age of eleven. (In four incidents the children belonged to the non-Indian offender). In many of our cases, children were exposed to violence, were victims, or reported the crime while it was in progress. Three of the VAWA offenders have already reoffended with the same victim, demonstrating a pattern of abusive behavior that we know can be a part of DV relationship dynamics.

At least nine offenders were living on the Reservation in Tribal housing; the others were staying intermittently for short periods of time. The majority of the incidents occurred in our low-income tribal rental units. Eleven of fourteen incidents involved single tribal females (two couples were married). Seven offenders are of Hispanic descent, two are “Legal Permanent Residents” from Mexico. Two offenders are White males, three are African-Americans, and one is of Asian descent. Six of the incidents involved alcohol. One of the incidents involved a same sex couple. Most of the offenders and victims appear to be unemployed. Only two offenders did not have a criminal record in the State of Arizona. Seven out of ten offenders had been arrested for violent crimes, weapons, or threats in the State of Arizona (threats, weapon misconduct, assaults, trespassing, and domestic violence). Two offenders are felons, both having been convicted for Burglary in the State of Arizona. Ten of the offenders have been previously arrested for cases involving drug use/possession/DUI or alcohol. At the present time, one Jury Trial is set for November 12, 2014 and a second Jury Trial is set for December 9, 2014. One case is stayed to determine the mental competency of a defendant.

Currently, SDVCJ under VAWA 2013 is limited to only crimes of domestic violence, dating violence, or violations of an order of protection committed in Indian country, where the defendant is a spouse or intimate partner of a tribal member. Further, it does not permit tribal prosecutions unless the defendant has “sufficient ties to the Indian tribe,” meaning he/she must either reside in the Indian country of the prosecuting tribe, be employed in the Indian country of the prosecuting tribe, or be the spouse or intimate partner of a member of the prosecuting tribe.

Recently, after the Tribe started to exercise VAWA SDVCJ, a survey was administered by the Prosecutor’s Office. 220 surveys were filled out by community members about VAWA and the Tribe’s implementation. Of the 220 people surveyed, 130 respondents thought that DV/family disputes were a big problem. Thirty-six people knew someone who was a victim of domestic violence and the perpetrator was a non-Indian. An additional twenty-seven were the victims of DV and the perpetrator was Indian. An additional thirty-six knew someone who was a victim of DV and the ethnicity of the perpetrator was unknown. Twenty-five had been an actual victim of DV, of those, six were victims of non-Indian perpetrators. 140 respondents had heard of VAWA and 155 had heard of the tribe having VAWA jurisdiction.

With a self-reported 500 non-Indians living on the Reservation and approximately 800 Non-Indians working or attending school on the Reservation, the probability that additional SDVCJ cases will arise is highly likely. We can safely project at least an additional 10 VAWA SDVCJ cases for the remainder of the VAWA Pilot Project. Hypothetically, given the 20 incidents that occurred at Pascua Yaqui in six months, if 500 other federally recognized Indian Tribes had this authority and averaged 20 incidents, then at least 10,000 crimes of domestic violence could have been investigated and or prosecuted across Indian Country.

TRAINING & TECHNICAL ASSISTANCE:

Prior to VAWA implementation, the Prosecutor's Office and the Pascua Yaqui Attorney General's Office worked with Technical Assistance Providers, the Intertribal Working Group (ITWG), Professor Melissa Tatum, from the University of Arizona School of Law, Indian Country Justice Partners (ICJP) , and the Pascua Yaqui Police Department to produce VAWA criminal justice system related training sessions, materials, and documents. Training sessions were conducted with law enforcement officers, court personnel, Victim Services, the Pascua Yaqui Attorney General's Office, and the Public Defender's office. On March 27, 2014, the Prosecutor's Office, along with Professor Tatum, conducted training for the Office of the Public Defender and private contract attorneys. The Prosecutor's Office, along with Indian Country Justice Partners (ICJP) produced a draft PowerPoint and a brochure to bring VAWA information to our community and staff. Brochures were distributed to several offices on the Reservation (Senior Center, Administration, Centered Spirit, Head Start, Dental, Health, Casino Del Sol, Casino of the Sun, and posted online). In addition to the Department of Justice, the U.S. Attorney's Office, District of Arizona, and the University Of Arizona School Of Law's IPLP Program, the Tribe was assisted by the following Technical Assistance Providers:

The National Congress of American Indians (NCAI):

Primary NCAI Contact: Natasha K. Anderson, NCAI Staff Attorney
John Dossett, General Counsel
National Congress of American Indians (NCAI)

The Tribal Law and Policy Institute (TLPI)

Primary TLPI Contact: Chia Halpern Beetso, TLPI Tribal Law Specialist
Tribal Law and Policy Institute (TLPI)

The National Council of Juvenile and Family Court Judges (NCJFCJ)

Primary NCJFCJ Contact: Jessica Singer, NCJFCJ Attorney

CHALLENGES TO VAWA IMPLEMENTATION:

There have been challenges during Pascua Yaqui's VAWA SDVCJ implementation. For example, on March 26, 2014, the Supreme Court decided *U.S. v. Castleman*. *Castleman* had an immediate impact on the Tribe's criminal charging decisions when evaluating misdemeanor DV arrests under SDVCJ authority. In the *Castleman* case, James Castleman moved to dismiss his 2008 federal indictment under 18 U. S. C. §922(g)(9), which forbids the possession of firearms by anyone convicted of a "misdemeanor crime of domestic violence." He argued that his 2001 conviction in Tennessee did not qualify as a "misdemeanor crime of domestic violence" because it did not involve "the use or attempted use of physical force," required by 18 U. S. C. §921(a)(33)(A)(ii). The Court held that the use of physical force was "satisfied by even the slightest offensive touching." What is problematic for new SDVCJ cases is that the VAWA defines the term domestic violence as "violence" committed by a

current or former spouse or intimate partner of the victim...” 25 U.S. Code § 1304 (a)(2). The federal definition of a “misdemeanor crime of domestic violence” used to determine Castleman, will likely be used by federal and tribal courts to establish the charging boundaries under VAWA. The Tribe, like many other jurisdictions, commonly charge crimes that arise early in the cycle of domestic violence relationships that may not include an “offensive touching” as an element to the crime, nonetheless, they are violent and dangerous crimes. These crimes can include Trespassing, Threatening and Intimidation, Tampering with Communications, Burglary, Breaking & Entering, Stalking, Disorderly Conduct, Unlawful Imprisonment, Harassment, Endangerment, Custodial Interference, and Malicious Mischief (criminal property damage).

The dynamics and cycle of intimate partner violence is that offenders, in order to maintain power and control, will use escalating abusive and violent behavior against their partner. Over the life of a relationship, aggressive and hostile behavior increases in both frequency and severity. The cycle may end in the eventual separation of the couple, harm to the victim, or even the death of the victim. The Tribe’s ability to address and prevent violent encounters through the limited authority of VAWA SDVCJ appears to be further restricted by the holding in Castleman. All the same, the Pascua Yaqui Tribe maintains that a tribal crime of domestic violence under VAWA currently requires only that the offense include the use or attempted use of physical force, the threatened use of a deadly weapon, indirect force, or the violation of an order of protection.

Additional Challenges:

Costs: The implementation of some of the provisions of the Tribal Law & Order Act, and the Violence Against Women Act, have raised costs that have been fully covered by the Tribe, with virtually no additional federal assistance. Through the Office of the Public Defender and contracted defense attorneys, the Pascua Yaqui Tribe now provides free legal representation to over 90% of all persons arrested on the reservation. Approximately 5% of persons arrested do not qualify for free legal representation and approximately 5% waive representation. All VAWA defendants who have been prosecuted have had a public defender or contracted defense attorney appointed at the Tribes expense in their cases to assist them.

Resources and Complexity: The majority of Pascua Yaqui criminal cases are appointed to the Pascua Yaqui Public Defender’s Office. Although, the Tribe has hired additional attorneys, there is still a deficiency in resources when considering the resulting complexity of a full blown adversarial system. For example, the process has spurred additional litigation, appeals, evidentiary hearings, scientific evidentiary analysis, additional investigation, expert testimony, additional data collection, and other administrative and indirect costs.

Logistical issues: Some questions arose when considering the detention and medical treatment of non-Indian defendants. Who would be responsible for detention and costs? The B.I.A. advised that they would hold and administer to non-Indian defendants and the Tribe has taken responsibility for any medical treatment of VAWA defendants while in tribal custody.

PROBLEMS IN INDIAN COUNTRY PERSIST:

VAWA 2013 is historic and like a ray of sunshine, it may help to penetrate the dark clouds that hover over Indian Country. VAWA presents some Indian Nations with an opportunity to restore and exercise select authority to protect their people in cases of domestic violence. However, notwithstanding VAWA, recent federal legislation, and crime fighting efforts of tribes, there still exists a super storm

of injustice that has darkened Indian Country for decades. Today, in 2014, a public safety and public health crisis is still present on most Native American reservations and communities, especially for the villages of our relatives in Alaska. The long-term lack of security for women and children has brought on a “crisis of confidence” in both tribal and federal justice systems. Just over a month ago, on August 29, 2014, the UN Committee on the Elimination of Racial Discrimination released its Concluding Observations. The report cites more than 20 areas of discriminatory laws, practices, and policies in the United States, including violence against women. The Concluding Observations call on the U.S. “to intensify its efforts to prevent and combat violence against women, particularly against American Indian and Alaska Native women, and ensure that all cases of violence against women are effectively investigated, perpetrators prosecuted and sanctioned, and victims provided with appropriate sanctions.” The Committee reiterated its call for the United States “to take effective measures to guarantee, in law and practice, the right to access justice and effective remedies for all indigenous women who are victims of violence.”

VAWA SDVCJ authority represents a new dawn on the Pascua Yaqui Reservation. Not only are we now able to address human rights abuses perpetuated for decades upon women, but we are also able to do this while guaranteeing the civil rights of the accused. On the other hand, just like when a major storm passes, our community will have to take time to survey the damage, reconcile with victims and families, and rebuild the trust that has been lost. There are shattered tribal communities across the United States and Indian Country. Many women and children will continue to suffer through a storm of shame and injustice. The overarching legal and jurisdictional framework has not changed for their villages, reservations, and communities. Some tribes will simply not have the resources to comply with the mandates of VAWA. So VAWA remains a bittersweet first step, a ray of opportunity that can hopefully spread across Indian Country.

LESSONS LEARNED:

Most Pascua Yaqui VAWA SDVCJ cases involve defendants with significant ties to the community. Most offenders had established themselves in our community and have some social connections to tribal members. At least nine offenders were living on the Reservation in Tribal subsidized housing; some were staying intermittently or for short periods of time. The majority of the incidents occurred in our low-income tribal rental units, where the defendants were residing. Two of the incidents involved married couples who lived on the Reservation. Eleven of seventeen incidents involved single tribal females in relationships with non-Indians. Eleven of the cases involved children in the home. In four incidents, the children belonged to the non-Indian offender. One of the offenders is a lineal descendant of a Tribal member, grew up on the Reservation, but does not qualify for tribal membership.

Domestic Violence crimes committed by non-Indians is a significant problem on our Reservation. On average, our VAWA offenders had been contacted on at least six different occasions by Tribal police, (pre-VAWA 2013) many incidents involved crimes and our VAWA victims. A total of seventy-three different Tribal police reports were generated on our Reservation by our VAWA offenders before VAWA went into effect. Recently, after the Tribe started to exercise VAWA SDVCJ, a survey was administered by the Prosecutor’s Office. Of the 220 people surveyed, 130 respondents thought that DV/family disputes were a big problem. Thirty-six people knew someone who was a victim of domestic violence and the perpetrator was a non-Indian. An additional thirty-six knew someone who was a victim of DV and the ethnicity of the perpetrator was unknown. Twenty-five had been an actual victim of DV, of those, six were victims of non-Indian perpetrators.

Pascua Yaqui VAWA offenders are a diverse group. Seven offenders were of Hispanic descent, two

are Legal Permanent Residents (LPR) from Mexico. Two offenders were Caucasian males, three are African-Americans, and one is of Asian descent. One of the incidents involved a same sex couple. Most of the offenders were unemployed. Only two offenders did not have a criminal record in the State of Arizona. Seven out of ten offenders had been arrested for violent crimes, weapons, or threats (assault, threats, weapon misconduct, assaults, trespassing, and domestic violence) in the State of Arizona. Two offenders are felons, both having been convicted for burglary in the State of Arizona. Ten of the offenders have been previously arrested for cases involving drug use/possession/DUI or alcohol. Two offenders had active felony warrants, one for armed robbery out of Oklahoma. Four of the offender's acts were serious enough to warrant referrals for federal prosecution (strangulation, aggravated assault, etc.).

Pascua Yaqui children are being exposed to violence and are at a high risk for being physically abused, neglected, and witnessing intimate partner violence in our community. A majority of our VAWA incidents involved children who were at home during the domestic violence that occurred (a total of 17 children under the age of eleven). Our Social Services Department (CPS) was involved in some of the cases and children were removed from the home. These children have faced physical intimidation and threats, are living in fear, and are at risk for developing school related problems, medical illnesses, PTSD, and other impairments. In some of our cases, children were the "reporting party" and one child was assaulted by a victim for reporting the VAWA SDVCJ incident. Some of our children have experienced violence and psychological trauma. Unfortunately, tribes do not have the authority to charge for crimes that endanger, threaten, or harm children.

Implementation is complex, but we are learning. The VAWA SDVCJ enactment was historic. However, implementation and execution has proven to be just as complex as the jurisdictional scheme. It took decades to create a jurisdictional mess in Indian Country; it will take time, diligence, and patience to solve some of the problems created on our Reservations and communities. Several considerations could be examined and contemplated prior to implementation to make system change and transition as uncomplicated as possible:

Tribes should start by asking, "What is our goal or mission in implementing VAWA?" Is it consistent with our history, values, fundamental beliefs, customs, or traditions? Do we have a moral imperative or responsibility? Do we have a problem? For the Pascua Yaqui Tribe, protecting women and children and holding DV offenders accountable is consistent with our values and centuries of historical precedent of protecting our people and homeland. What resources will you need to accomplish your goal? What resources can you provide? What intrinsic, personnel, and systemic assets do you possess? Start with an honest assessment and systemic evaluation and recognize that a tribal justice system is part of a larger regional system of justice, part of a larger ecosystem & symbiotic in nature.

Tribal Justice System: What is the culture of your Tribal Justice System? Consider readiness, operational capacity, process, effectiveness, strengths, weaknesses, limitations, technology gaps. How is your system organized? How is it working? Do you have bar certified public defenders? Judges? Prosecutors? Does your system employ lay advocates? Does your system collect data, metrics, or measurements? Have you conducted case studies, interviews, focus groups, observation of activities, mapping of community assets, environmental scans, needs assessments, or a situational analysis. What is the tone of the community (Public Confidence/trust)? How will your VAWA system be designed? Consider economics, efficiency, and resources. Identify the elements and dynamics of system changes that are required for a Pilot. Is it consistent with your purpose and goals? Harmonized and aligned with VAWA 2013? How will you measure, improve, update, and adjust? How do you align, garner trust, and influence systems and teams? Is there a shared purpose?

Conduct an environmental scan: Any information gathered will help predict future VAWA SDVCJ cases and the amount of resources that may be needed. Demographics: How many non-Indians live work, or go to school on the Reservation? Consider the crime rate, poverty, unemployment, resource mapping, public perceptions, population, geography, historical education attainment/dropout rate, significant events, housing composition, economic & social temperature, and interest groups (elders, youth, cultural participants, etc.). Geography: location, near major metropolitan area, rural? Drug & alcohol abuse issues? Culture? Per Cap? What does this information look like in surrounding jurisdictions? Drug cartels/gangs? What is the quality of life? Do prevention and treatment programs exist? What is the primary causation and symptoms of your problem? What about race relations?

Information & data access: Do you have access to state and federal databases. Tribes will also need access to tribal information, employment information, criminal history, social history, and addresses for Jury pool composition, (Housing data, surveys, data repositories, etc). Data can be collected from Enrollment Department, H.R., Housing Dept., Grants & Contracts Office, Health Department, IHS, etc.

Justice System/partners: (federal/state/local): Who is on the team? What is the culture of those organizations? Are justice system teams interdependent? Supportive? What is the organizational framework of the multiple relationships? Does a current ecosystem map or diagram of agencies or process exist? What networks do exist? Do they work together and well with the Tribe? Do MOUs, rules, statutes, or IGAs exist? Is the system coordinated with a SAUSA, federal Tribal Liaison or cross-deputized police officers? How does the MDT process work or does it exist? What are the outcomes of any coordinated process? Satisfactory? Declinations? Communication? How are decisions made? What is the relationship like with the Tribe? Do Protocols exist? Feedback loops? Public confidence? Trust? What is the history of any partnership? What gaps currently exist?

Police Resources: How is the department structured? (BIA, Tribal, F.B.I., State, mix). Who is responsible? Accountability? If Tribal, have you maximized jurisdictional authority and flexibility? Are police cross-commissioned/state certified, tribally certified, federally certified (SLEC)? Do they have access to NCIC? Court records? Warrant and Order of Protection information? Do they have mutual aid agreements? Can they cite people using federal CVB citations? Do they participate in associations that share information/training? Do they have local evidence processing support? Do they work well with federal and state counterparts? How about with probation, pre-trials services, and prosecuting attorneys from all three jurisdictions? Will they need local training for VAWA? Who will conduct the training? Do they need investigative support? Do they work with victim advocates? Are officers Bi-lingual? Who handles detention? Will this entity take non-Indians? Does the public have confidence and trust in your agency?

Media Policy: Who will conduct outreach, create talking points, address the press/media, create press releases, radio PSAs, television interviews, community education, internet updates, and write newspaper articles? How will you conduct notice for the new law? How will the information be managed? Do you have a policy? What information will be shared? How are records shared and retained?

PREVIOUS & RELEVANT PASCUA YAQUI HABEAS MATTERS

On August 17, 2011, the United States Court of Appeals for the 9th Circuit issued an Opinion in the case of *Miranda v. Anchondo*, supporting the Pascua Yaqui Tribe's argument that our Tribal Court has the authority to sentence those convicted of multiple offenses to more than one year in jail. The case had wide ranging implications because it set precedent concerning the issue and affected

tribes across the United States.

The Pascua Yaqui Tribal Court convicted Miranda of eight criminal violations. The Honorable Cornelia Cruz sentenced her to two consecutive one-year terms, two consecutive ninety-day terms, and four lesser concurrent terms, for a total term of 910 days imprisonment. While serving her sentence, Miranda, through Chief Public Defender, Nicholas Fontana, appealed her conviction and sentence to the Pascua Yaqui Tribe Court of Appeals, arguing, *inter alia*, that her 910-day sentence violated the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1302(7). The tribal appellate court rejected Petitioner's arguments and affirmed her conviction on all counts.

Miranda then sought redress through the federal court system via a writ of habeas corpus. On habeas review, by the U.S. District Court of Arizona, the court concluded that the Indian Civil Rights Act, 25 U.S.C. § 1302(7) prohibited the tribal court from imposing consecutive sentences cumulatively exceeding one year for multiple criminal violations arising from a single criminal transaction and ordered that Miranda be released." The United States, through the U.S. Attorney's Office, and the Pascua Yaqui Tribe, through the Office of the Attorney General, appealed the Arizona District court's order granting Miranda's petition for writ of habeas corpus. The 9th Circuit ultimately disagreed with the district court and held that the Indian Civil Rights Act § 1302(7), unambiguously permits tribal courts to impose up to a one-year term of imprisonment for each discrete criminal violation and reversed the lower court's ruling. "Because § 1302(7) unambiguously permits tribal courts to impose up to a one-year term of imprisonment for each discrete criminal violation, and because it is undisputed that Petitioner committed multiple criminal violations, we reverse the district court's decision to grant Petitioner's amended habeas corpus petition."

Although the Miranda case never should have required federal court intervention, it cleared up any lingering doubt that tribal courts and our Tribal Council have the authority to impose punishments that are consistent with the Indian Civil Rights Act (ICRA), due process, and necessary to help keep our community members and visitors safe from harm.

CONCLUSION- TRIBAL CONTROL IS THE KEY:

VAWA Special Domestic Violence Criminal Jurisdiction is about fairness, justice, and dignity. Our women, children, and survivors deserve protection, their personal pain and shame must be turned into a constructive and purposeful tool that prevents violence and punishes perpetrators of domestic violence. The starting place to reverse historical jurisdictional problems and injustices in Indian Country is with strong tribal justice systems. Criminal investigations occur at the local level. Local government is the best government to protect Indian Country's mothers, daughters, sisters and wives from jurisdictional gaps, or safe havens for criminals. The Pascua Yaqui VAWA implementation process bears those beliefs out.

When a resident of one State crosses the border to visit another, that individual is subject to the criminal jurisdiction of the State he or she is visiting even though he or she cannot vote or serve on a jury there. Noncitizens visiting or residing in the United States are also subject to federal and State criminal jurisdiction despite their exclusion from the political process. Full restoration of criminal jurisdictional authority for Tribal governments should be the next step when we consider VAWA Reauthorization in the context of a tribe's sovereign authority when compared to State governments. While it is true that the U.S. has a federal trust responsibility to assist tribal governments in safeguarding the lives of Indian women and children, tribal governments have the same trust obligation to the people they represent and to all people who enter their boundaries. Thus, full restoration of civil and criminal jurisdiction to local tribes would help ensure fairness, safeguard tribal communi-

ties, and help clear up long standing jurisdictional problems.

For several different reasons, the challenges facing law enforcement and the justice system in our community are substantial. However, a window of opportunity exists to revolutionize and strengthen our system. The Pascua Yaqui Tribal Council, law enforcement, the Tribal Court, the Prosecutor's office, technical assistance providers, and our federal partners have recognized our current needs and have taken the opportunity to work together to effect change. In short, the Tribe has taken significant steps to protect our community, dedicated significant resources, and spent countless hours to see these changes through. However, it will take additional hard work, resources, and dedication to continue to fully and effectively implement the new law. The new VAWA law made a number of important changes to federal law that we have implemented and now use on a daily basis to protect our community while guarding the rights of the accused. The continual educating of community members, tribal law enforcement officers, prosecutors, judges, defense counsel, and other officials will be important. VAWA will require a significant amount of interagency coordination and it will be important to establish a framework or process for follow through.

PASCUA YAQUI TRIBE RECOMMENDATIONS

Clarify the definition of "Violence" or expand jurisdictional authority:

The Pascua Yaqui Tribe respectfully proposes that Congress amend the definition of the term "domestic violence" in the VAWA. "Domestic violence" in the context of the VAWA should be expanded to include specific crimes that do not require an element of "offensive touching." (Threatening & Intimidation, Criminal Damage of Property, Trespassing, Child Endangerment, etc.)

Reason: Domestic violence is generally a pattern of abusive behavior in a relationship that is used by one partner to gain or maintain power and control over an intimate partner. Domestic violence can be physical, sexual, emotional, economic, or psychological actions or threats of actions that influence another person, this includes behaviors that intimidate, manipulate, humiliate, isolate, frighten, terrorize, coerce, threaten, blame, hurt, injure, or wound someone, including physical abuse, sexual abuse, psychological abuse, economic abuse, and abuse targeted at children, pets, and family members.

A clarification would also help determine if and how a Tribal domestic violence assault case is restricted by the U.S. Supreme Court holding in *U.S. v. Castleman*. The United States should confirm that violent force is not required for an incident to qualify as an SDVCJ offense.

Expand the Scope of the Law:

Special Domestic Violence Criminal Jurisdiction should be expanded to include coverage of children, property, pets, and other vulnerable family members. Domestic violence perpetrators often destroy property, harm children and pets, and harm other family members. VAWA 2013 is helpful but limits a tribe's ability to protect the whole family.

VAWA IMPLEMENTATION FUNDING

The Pascua Yaqui Tribe is respectfully requesting that Congress, the Department of Justice, or the Department of the Interior make available funds to properly implement VAWA, SORNA, and the Tribal Law and Order Act (TOLA). The Pascua Yaqui Tribe is one of the three Tribes recently granted authority to exercise Special Domestic Violence Criminal Jurisdiction ("SDVCJ") under a Pilot Project authorized by the Violence Against Women Act Reauthorization of 2013, Public Law 113-4. This authority

became effective on February 20, 2014. Within VAWA 2013, there is an authorization for appropriations of up to \$5,000,000 for each of fiscal years 2014 through 2018 for participating tribes that are exercising SDVCJ. The Pascua Yaqui Tribe is requesting a proportional share of the \$5,000,000.00 for this fiscal year in order that we may carry out the many responsibilities that we have as a Pilot Project Tribe.

Section 904 of VAWA 2013, Public Law 113-4(2013) as codified in 25 U.S.C. 1304(f) allows the Attorney General to award grants to Indian Tribes for the following purposes:

(f) Grants to tribal governments

The Attorney General may award grants to the governments of Indian tribes (or to authorized designees of those governments)—

(1) to strengthen tribal criminal justice systems to assist Indian tribes in exercising special domestic violence criminal jurisdiction, including—

- (A) law enforcement (including the capacity of law enforcement or court personnel to enter information into and obtain information from national crime information databases);
- (B) prosecution;
- (C) trial and appellate courts;
- (D) probation systems;
- (E) detention and correctional facilities;
- (F) alternative rehabilitation centers;
- (G) culturally appropriate services and assistance for victims and their families; and
- (H) criminal codes and rules of criminal procedure, appellate procedure, and evidence

(2) to provide indigent criminal defendants with the effective assistance of licensed defense counsel, at no cost to the defendant, in criminal proceedings in which a participating tribe prosecutes a crime of domestic violence or dating violence or a criminal violation of a protection order;

(3) to ensure that, in criminal proceedings in which a participating tribe exercises special domestic violence criminal jurisdiction, jurors are summoned, selected, and instructed in a manner consistent with all applicable requirements; and

(4) to accord victims of domestic violence, dating violence, and violations of protection orders rights that are similar to the rights of a crime victim described in section 3771(A) of title 18, consistent with tribal law and custom.

The Pascua Yaqui Tribe currently expends considerable resources on all of the above programs, through both federal grants as well as significant sums of tribal dollars. The Tribe has had a total of eighteen cases arise that implicate SDVCJ within the first six months of implementation. This leads us to believe that significant resources are needed to be dedicated to SDVCJ cases. The Tribe would be better able to fund these programs as well as additional programs going forward if monies are appropriated under VAWA, which are intended to “supplement and not supplant any other Federal, State, tribal, or local government amounts made available to carry out activities described in this section.” A possible mechanism would be for the Department of Justice VAWA Office to develop a Tribal Funding Plan and distribute the funds as tribal set-aside funding which could be added to our existing 638 Contract as a modification. This method would allow the funding to be easily transferred from a federal agency to the Tribe.