

TRIBAL COURT JURY TRIALS

Hon. Bruce C. Fox, Chief Judge of Laguna Tribal Court

Oscar “OJ” Flores, Chief Prosecutor of the Pascua Yaqui Tribe

AGENDA

- Why a Jury Trial
- Pretrial Conference
- Jury Pool
- Trial Day
- Post Trial



WHY A JURY TRIAL

- **Indian Civil Rights Act (ICRA)**: 25 U.S.C. § 1302(a)(6): No Indian tribe in exercising powers of self-government shall. . .
- 6. deny to any person in a criminal proceeding the right to a speedy and public trial . .
- 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.

WHY A JURY TRIAL

- **U.S. Const. amend. VI**: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and 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 to have the Assistance of Counsel for his defense

WHY A JURY TRIAL

- 25 U.S.C. § 1301 Definitions
- § 1302 Constitutional Rights
- § 1303 Habeas Corpus
- § 1304 Tribal Jurisdiction over Crimes of Domestic Violence

WHY A JURY TRIAL

- **25 U.S.C. §1302 (additional rights for TLOA expanded jurisdiction)**
- **(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;

WHY A JURY TRIAL

- **25 U.S.C. §1302 (additional rights for TLOA expanded jurisdiction)**
- **(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.

WHY A JURY TRIAL

- **25 U.S.C. § 1304 (Special domestic violence jurisdiction over non-Indians)**
- **(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;

WHY A JURY TRIAL

- **25 U.S.C. § 1304 (Special domestic violence jurisdiction over non-Indians)**
- **(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.

WHY A JURY TRIAL

Pascua Yaqui Tribe – PYT Const. art. I § 1:

- Consistent with the provisions of this Constitution, the Pascua Yaqui Tribe in exercising its powers of self-government shall not. . . Deny to any person accused of any offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six (6) persons.

Pueblo of Laguna

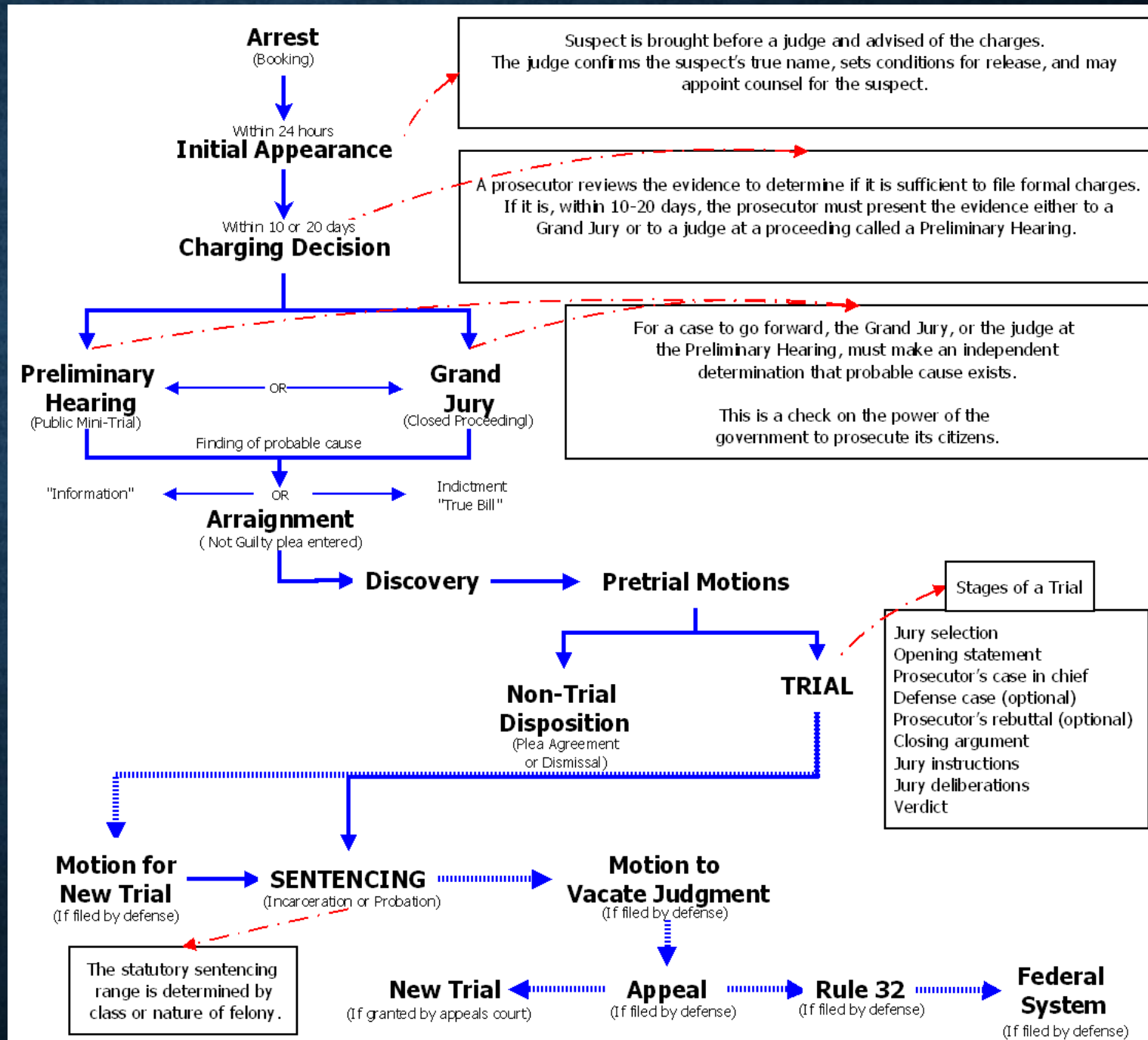
- All criminal defendants advised in writing and on the record of the right to jury trial using identical language as ICRA.
- Rules of Criminal Procedure Rule : must make jury demand within 14 days of first pretrial.

WHY A JURY TRIAL

- **Pueblo of Laguna written advisement of rights signed and acknowledged by the Defendant at arraignment (selected sections)**
- **CRIMINAL ARRAIGNMENT ADVISEMENT OF RIGHTS**
- You, the Defendant, are appearing before the Pueblo of Laguna Court for the purpose of an arraignment . . . Under the laws of the Pueblo of Laguna and the Indian Civil Rights Act of 1968 you have the following rights:
- You have the right to consult with an attorney of your choice at your own expense at any time and if deemed eligible, the Public Defender may represent you if you so choose;
- You have the right to a speedy trial, a public trial and a jury trial (a jury trial upon request pursuant to the Rules of Criminal Procedure if accused of an offense punishable by imprisonment); . . .
- (Signatures)

Criminal Process:

- Arrest
- Initial Appearance
- Bond/Pretrial Release
- *Preliminary Hearing (GJ)*
- Arraignment
- Pretrial Discovery/Disclosure & Motions
- Trial / Non-Trial Disposition
- Sentencing
- Appeals



WHY A JURY TRIAL

IMPORTANCE OF JURY SERVICE

- Jurors perform a vital role in the American system of justice. The protection of our rights and liberties is largely achieved through the teamwork of judge and jury who, working together in a common effort, put into practice the principles of our great heritage of freedom. The judge determines the law to be applied in the case while the jury decides the facts. Thus, in a very important way, jurors become a part of the court itself.

WHY A JURY TRIAL

IMPORTANCE OF JURY SERVICE

- Jurors must be men and women of sound judgment, absolute honesty, and a complete sense of fairness. Jury service is a high duty of citizenship. Jurors aid in the maintenance of law and order and uphold justice among their fellow citizens. Their greatest reward is the knowledge that they have discharged this duty faithfully, honorably, and well. In addition to determining and adjusting property rights, jurors may also be asked to decide questions involving a crime for which a person may be fined, placed on probation, or confined in prison. In a very real sense, therefore, the people must rely on jurors for the protection of life, liberty, and the pursuit of happiness

PRETRIAL CONFERENCE

- Scheduled 3 – 4 weeks prior to trial
- Have the parties completed trial preparation?
- **Is a jury panel needed?**
- *Voir dire* rules
- Rules of Evidence and Procedure
- Jury Instruction deadline, Pretrial motion deadline, Motion *in Limine* deadline
 - Example: in a domestic violence case the defense will ask by *motion in limine* that any prior bad acts of Defendant be disclosed prior to trial and that defense be notified and be given an opportunity to object prior to disclosure to the jury and outside of the hearing of the jury.
- Incarcerated inmate must have civilian clothes
- Subpoenas

PRETRIAL CONFERENCE

- Jury Instruction Example: Battery
- NMRA UJI 14-320. BATTERY; ESSENTIAL ELEMENTS
- For you to find the defendant guilty of battery [as charged in Count _____]¹, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:
 - 1. The defendant intentionally touched or applied force to _____ (*name of victim*) by _____²;
 - 2. The defendant acted in a rude, insolent or angry manner³;
 - 3. This happened in New Mexico on or about the _____ day of _____, _____.

PRETRIAL CONFERENCE

- Jury Instruction Example: Presumption of Innocence, Etc.
- NMRA UJI 14-5060. PRESUMPTION OF INNOCENCE; REASONABLE DOUBT; BURDEN OF PROOF
- The law presumes the defendant to be innocent unless and until you are satisfied beyond a reasonable doubt of his guilt.
- The burden is always on the state to prove guilt beyond a reasonable doubt. It is not required that the state prove guilt beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is a doubt based upon reason and common sense--the kind of doubt that would make a reasonable person hesitate to act in the graver and more important affairs of life.

JURY POOL

- To be legally qualified for U.S. jury service, an individual must:
 - be a United States citizen;
 - be at least 18 years of age;
 - reside primarily in the judicial district for one year;
 - be adequately proficient in English to satisfactorily complete the juror qualification form;
 - have no disqualifying mental or physical condition;
 - not currently be subject to felony charges punishable by imprisonment for more than one year; and
 - never have been convicted of a felony (unless civil rights have been legally restored)

JURY POOL - *CHALLENGES*

225 USC § 1304(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

...

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

JURY POOL – *VAWA TRIBES*

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JURY POOL – *VAWA TRIBES*

Pascua Yaqui Tribe

- Same jury pool for all crimes
- Jury Sources:
 - Enrolled members
 - Spouses of enrolled members
 - Tribal employees
 - Permanent residents of reservation
- Draws from Tribal Census Roll, Housing and Human Resources Dep'ts

JURY POOL – *VAWA TRIBES*

Tulalip Tribe

- One jury pool for all crimes
- Jury sources:
 - Tribal members living on or near reservation
 - Residents w/in boundaries of reservation
 - Tribal employees
- Draws juror list from enrollment and HR dep'ts
 - Compares these #s with census data
- Separate DV Docket

JURY POOL – *VAWA TRIBES*

Confederated Tribes of the Umatilla Indian Reservation:

- Same jury pool for all crimes
- Jury sources: residents within boundaries of reservation
- Juror list empanelled from voter registration list provided by county

JURY POOL – *VAWA TRIBES*

Sisseton-Wahpeton Oyate

- Two separate jury pools
 - Non-SDVCJ cases: Resident tribal members only
- SDVCJ sources:
 - Enrolled members
 - Residents w/in boundaries of reservation
 - Tribal employees
 - Lessees of tribal land
- Each voting district of reservation represented on SDVCJ juror list

JURY POOL – *VAWA TRIBES*

Sisseton-Wahpeton Oyate

- **SWO CODES OF LAW CHAPTER 23: 23-10-03 ELIGIBILITY FOR JURY DUTY; SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION**
- **Any potential juror for a special domestic violence criminal jurisdiction case must be an adult 18 years or older who meets the eligibility requirements of 23-10-02 except for that of 23-10-02(1). In such a case, the juror must be drawn from sources that reflect a fair cross section of the community.**

JURY POOL – *VAWA TRIBES*

Assiniboine and Sioux Tribes of the Fort Peck Reservation

- Two separate jury pools
 - Non-SDVCJ cases: resident tribal members only
 - SDVCJ: resident tribal members and resident non-Indians
- Non-Indian juror list generated by 15th Judicial District of Montana
 - Accounts for 98% of reservation
 - Reservation is 60% Indian, 40% non-Indian
- Separate DV Docket

JURY POOL – *VAWA TRIBES*

Fort Peck Comprehensive Code of Justice: Title VI, Sec. 507 Right to Jury Trial

- (1) Where the Tribes are exercising Special Criminal Domestic Violence Jurisdiction under the Violence Against Women Reauthorization Act of 2013, an eligible juror is any resident within the boundaries of the Fort Peck Reservation of the age of 18 or over, regardless of race or tribal citizenship, is of sound mind and discretion, has never been convicted of a felony, is not a judge or justice, officer or employee of the Court or an employee of the Reservation police force or Reservation jail, and is not otherwise disqualified according to standards established by the Court
- (c) A list of at least 21 resident enrollees of the Tribes, and in the case of the Tribes exercising Special Criminal Domestic Violence Jurisdiction, a list of at least 21 non-member residents of the Reservation, who are eligible for jury duty shall be prepared and maintained by the clerk.

JURY POOL – *IMPORTANT TERMS*

- Distinctive Group
 - Generally “heightened scrutiny” classifications under the Equal Protection Clause of the 14th Amendment (gender, race, ethnicity)
 - Statutory provisions may specify other classifications (e.g., non-Indian, color, national origin, religion, economic status, political orientation)
- Not Fair and Reasonable Representation
 - No clear numerical thresholds
- Systematic Exclusion
 - Does not have to be intentional (Equal Protection), just inherent in the jury selection process

JURY POOL – *IMPORTANT TERMS*

- How is the tribe defining “community?”
 - Those who could be subject to tribal criminal jurisdiction
- Does state/federal precedent recognize the tribal court’s authority over that community of people?
 - Jury plan is more defensible the more it complies with this precedent
- *Batson* (*Batson v. Kentucky*, 476 U.S. 79) challenge: U.S. S.Ct. held that it is unconstitutional to use a peremptory jury strike to discriminate on the basis of race, ethnicity or sex

JURY POOL

Characteristics of an Effective Master Jury List ...

- ***Inclusive*** of the jury-eligible population;
 - Includes the largest possible number of jury-eligible persons within the jurisdiction
- ***Representative*** of the jury-eligible population;
 - Proportionately reflects the demographic characteristics and geographic distribution of the jury-eligible population within the jurisdiction
- ***Accurate*** address records.
 - Jury-related mailings will be delivered to the addressee.

JURY POOL

JURY PLAN:

- Detailed documentation of the procedures used to summon and qualify prospective jurors for trial.
- Usually adopted by the court as a formal expression of court policy.
- Essential Components
 - Statutory and regulatory authority
 - Jurisdictional authority of the court
 - Creation of the Master Jury List including description of the source list(s), criteria for identifying and removing duplicate records, suppression files, randomization methods
 - Jury Size
 - Verdict decision rules (unanimous or non-unanimous verdicts)
 - Qualification and exemption criteria
 - Excusal/deferral policy
 - Delegation of authority to determine eligibility, excusals?
 - Terms of service, compensation/expense reimbursement
 - Responsibility for jury system integrity including summons enforcement methods

JURY POOL

- JURY PLAN (CONTINUED)
 - Jury Size
 - Verdict decision rules (unanimous or non-unanimous verdicts)
 - Qualification and exemption criteria
 - Excusal/deferral policy
 - Delegation of authority to determine eligibility, excusals?
 - Terms of service, compensation/expense reimbursement
 - Responsibility for jury system integrity including summons enforcement methods

JURY POOL

BASIC PROCEDURES:

- Identify and obtain juror source list(s)
- If using two or more lists, merge and identify/remove duplicate records
- Randomize the Master Jury List
- 2-Step or 1-Step Summoning/Qualification Process?
- Mail jury summons/qualification questionnaire
- Review summons/questionnaire responses for eligibility and availability to serve
- Jurors call in to learn whether to report for service

JURY POOL

POTENTIAL SOURCE LISTS

- Tribal membership
- Spouses of tribal members
- Residents on tribal land
- Tribal employees
- Registered voters
- Licensed drivers/state identification card holders
- Consider requesting the master jury list from the local county court or from the state Administrative Office of the Courts.
- **BE SURE TO OBTAIN BOTH MAILING AND STREET ADDRESSES**
- **WARNING:** there is a direct correlation between the number of source lists used to create the master jury list and the degree of complexity in creating the list. Consider whether the benefits of adding another list outweigh the challenges it will cause to the list creation process.

JURY POOL

- “Any selection method may be used, manual or automated, that provides each eligible and available person with an equal probability of selection”

ABA Principles for Juries and Jury Trials,
Principle 10(B)(1).

- Generate a random number and assign to each record on the Master Jury List;
- Order the Master Jury List by the random number.

JURY POOL SIZE

- *Ballew v. Georgia*, 425 U.S. 223 (1978)
 - U.S. Supreme Court rules that the minimum size for a criminal jury is 6 persons.
- Federal court: jury size for criminal trials is 12.
- State court: jury size for criminal trials ranges from 6 to 12.
 - 6-person jury (non-capital felony): Connecticut, Florida
 - 7-person jury (misdemeanor): Virginia
 - 8-person jury (non-capital felony): Arizona, Utah
 - 6-person jury (misdemeanor), 12 person jury (felony): New Mexico
 - 6-person jury (all criminal charges): Pueblo of Laguna

JURY POOL

- Juror term
 - Each trial call in a new pool
 - Use a longer jury duty term: 30 days, 6 months, or a year? (Pueblo of Laguna: 1 year term)
- Jury orientation
 - In person or video
 - Questionnaire
- Number of jurors needed on trial day
 - Minimal (jury + alternates + peremptory + cause) 25 for 6-person jury, 45 for 12-person jury
- Requests for excusal
- Jury pay and mileage

JURY POOL

Qualification and Exemption Criteria:

- Under *Duren*, states/tribes have great discretion to determine the qualification and exemption criteria for jury service;
 - If those criteria systematically exclude a distinctive group, the tribe must provide a compelling justification for the criteria.
- Common qualification criteria in state/federal courts:
 - US citizenship, residency, age 18 and over, English fluency, criminal history, not on probation
- Common exemption criteria in state/federal courts:
 - Previous jury service, age (e.g., 70 and over), occupational and status-related exemptions

JURY POOL - *SUMMONS*

Summons Enforcement

- Fair cross section depends on consistent, even-handed enforcement of the jury summons/qualification questionnaire
- Authority to enforce summons is an inherent power of the court
- Enforcement Programs
 - An ounce of prevention: reminders ...
 - Second notice/summons approach
 - Order to Show Cause
 - Capias (Bench) Warrant
 - Fines/Fees

TRIAL DAY

- Coffee and donuts
- Pretrial issue
- Last minute plea agreements
- Seating chart
- *Voir dire*
 - Jury Instruction on Voir Dire
 - *Voir Dire* swearing in
 - Introduce the case, the parties and attorneys
 - Set aside some small town time
 - Attorney questions: Cannot ask opinions about the case or how they will decide the case.

TRIAL DAY: SEATING CHART EXAMPLE

1. Mr. Pink	2. Ms. Blonde	3. Mr. Orange
4. Ms. White	5. Ms. Brown	6. Mr. Blue

POST TRIAL

- The verdict
 - Polling the jury
- Discharge
- Released from admonition
- Free to talk about case
- Certificates of appreciation

VAWA TRIAL

- 1st VAWA Jury Trial November 14, 2014 – *PYT v. Garris*
- 1st VAWA Jury Trial Conviction May 9, 2017 – *PYT v. Jaimez*
- Process Description:
 - Party requests a jury trial;
 - 40-50 days prior to the jury trial date the Court Clerk will email Jeff at IT and request a specific number of jurors to be pulled for the jury trial (typically around 100-150 names/addresses);
 - Within 1-3 days Jeff will run the random juror selection on the database and send juror names and addresses electronically to court clerk;
 - 30 days prior to the jury trial date the Court Clerk will prepare the juror summons mailings (includes the juror summons, jury questionnaire and jury letter...see attached);
 - Prior to the jury trial the Judge will review juror requests to be excused and a response letter will be sent (see attached);
 - Jury selection/voir dire will happen on the jury trial date;
 - Jurors will be given proof of jury attendance letters and mileage claim forms at the completion of their service (see attached).

PASCUA YAQUI JURY TRIAL

- **2005**: We have been using an electronic selection process since 2005. Enrollment provided us access to their database and we were able to select random jurors (based on age....at least 18) and retrieve the addresses that enrollment had on file for them.
- **December 16, 2013**: We first contacted Casino Human Resources, Government Human Resources, Enrollment and Tribal Housing in early December 2013 to get assistance with expanding our existing database to include non-Yaquis in our jury pools. It was agreed that both Human Resources divisions would generate and forward a list of non-Yaqui employees to the Court and IT that would be included in a larger jury selection database. It was also discovered at that time that Housing only had a record of 9 non-Yaquis living in tribal housing. Enrollment also agreed to include access to the list of non-Yaqui spouses that they had in their database for the Court's juror pool.
- **January 6, 2014**: Court and IT received first non-Yaqui employee list from Government Human Resources.
- **February 18, 2014**: Court and IT received first non-Yaqui employee list from Casino Human Resources.
- **September 2014**: The first jury using the new database was pulled.

PUEBLO OF LAGUNA JURY TRIAL

- The Pueblo of Laguna has not completed VAWA expansion
- Currently jury pool from 8000 enrolled Pueblo of Laguna members: 3 juries in 10 years
 - About 4000 local population
 - About ½ adult-age
- Exploring other possibilities.
 - 300 Pueblo of Laguna employees (200 Laguna members)
 - 800 Laguna Development Corporation employees: Casino 30 miles from Laguna Court
 - Non-member residents: about 50 formally notify and request residency
 - What about incarceration location? Medical expense?
 - Separate pool for special domestic violence cases

CONTACT US

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ADDITIONAL RESOURCES

- NCAI: www.ncai.org/tribal-vawa
 - Previous Jury Composition Webinar
- Tribal Law and Policy Institute
 - Tribalprotectionorder.org
 - Tribal Laws Implementing TLOA Enhanced Sentencing and VAWA Enhanced Jurisdiction
- NCAI takes questions: tribal-vawa@ncai.org
- Honorable Bruce C. Fox, Pueblo of Laguna, (505)-552-1900, bfox@lagunapueblo-nsn.gov