


PASCUA YAQUI TRIBE

*PROSECUTING DOMESTIC
VIOLENCE IN TRIBAL COURT*

OUR SDVCJ EXPERIENCE

Chief Prosecutor OJ Flores

CONTEXT

Indian Country jurisdiction, policies, and nearly 40 years under *Oliphant* has created widespread injustice and mistrust. TLOA, VAWA, & SORNA are great "first steps." For tribes that are fortunate enough to implement, it will take decades to reverse the current reality and it will take years for communities and families to heal. Tribal members are still reluctant to report crimes to tribal police. They simply do not trust systems that had frequently let them down. Only a handful of Tribes have been able to exercise VAWA restored jurisdiction. If all 566 Federally recognized Tribes had participated in the VAWA 2013 Pilot program, we would have been able to protect thousands of women and children who went unprotected, are still living in fear, and who justice is still been denied.



WASHINGTON POST

APRIL 18, 2014

National

Arizona tribe set to prosecute first non-Indian under a new law

By Sari Horwitz April 18, 2014

Justice is slow to arrive for Native women



▶ Play Video 4:53

The Violence Against Women Act was expanded in 2013 to allow Native American tribes to prosecute non-Indians in cases involving domestic violence. Before that, women like Frances Cupis were unable to press charges against violent partners in tribal court. (Whitney Shefte/The Washington Post)



ICRA 1968

DEFENDANT RIGHTS (PRE-TLOA)

- The right to the equal protection of the tribe's laws.
- The right not to be deprived of liberty or property without due process of law.
- The right against unreasonable search and seizures.
- The right not to be twice put in jeopardy for the same tribal offense.
- The right not to be compelled to testify against oneself in a criminal case.
- The right to a speedy and public trial.
- The right to a trial by jury of not less than six persons.
- The right to be informed of the nature and cause of the accusation in a criminal case.
- The right to be confronted with adverse witnesses.
- The right to compulsory process for obtaining witnesses in one's favor.
- The rights against excessive bail, excessive fines, and cruel and unusual punishments.





TLOA AND VAWA: A PRELIMINARY NOTE

- Important to understand what each statute does and how they relate to each other
- TLOA 2010 restores tribal sentencing authority
- VAWA 2013 restores tribal criminal jurisdiction
- Tribes can choose to comply with
 - Either
 - Neither
 - Both



SECTION 908: PILOT PROJECT

- VAWA 2013 went into force for all tribes on March 7, 2015
- Statute authorized a pilot project
- Three tribes selected to take part:
 - Pascua Yaqui
 - Tulalip
 - CTUIR





TLOA

- Provide defendant with attorney who
 - Satisfies licensing standards
 - Provides effective assistance of counsel
- Presiding Judge has sufficient legal training and is licensed
- Make publicly available (including interpretive documents)*
 - Criminal laws
 - Rules of evidence
 - Rules of criminal procedure
 - Judicial recusal standards and procedures
- Record proceeding






TLOA

- "require excessive bail, impose excessive fines, or inflict cruel and unusual punishments, and in **no event** 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"
- **TLOA**: 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
- impose on a person in a criminal proceeding a total penalty or punishment greater than imprisonment for term of 9 years;





MARCH 7, 2013
PRESIDENT OBAMA SIGNS VAWA 2013



VAWA 2013: WHAT IT DOES & HOW IT WORKS

If a Tribe complies with statutory requirements, VAWA 2013 **restores to the tribe the ability to prosecute** defendants...


- Who live or work in the tribe's Indian country OR who are a spouse/intimate partner of a tribal member or an Indian who lives in the tribe's Indian country; and
- Who commit dating violence or domestic violence or who violate the no contact/no harassment portion of a protection order
- Within the tribe's Indian country





SDVCJ: 25 USC 1304

Tribe must provide defendant with

- All the rights guaranteed by the Indian Civil Rights Act
- Including (if defendant is sentenced to jail time) all rights listed in Section 1302(c) [TLOA]
- Right to 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
- "all other rights necessary..." catch-all provision







OTHER PROSECUTION CASE CONCERNS

25 U.S.C. 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--


- (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.

OTHER PROSECUTION CASE CONCERNS

25 U.S.C. 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--

- (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 video recording of the trial proceeding.





OTHER PROSECUTION CASE CONCERNS

(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
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25 USC 1304 (2014)

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.





ORDERS OF PROTECTION

18 U.S.C. 2265

(b) Protection order.--A protection order issued by a State, tribal, or territorial court is consistent with this subsection if--

- **(1)** such court has jurisdiction over the parties and matter under the law of such State, Indian tribe, or territory; and
- **(2)** reasonable notice and opportunity to be heard is given to the person against whom the order is sought sufficient to protect that person's right to due process. In the case of ex parte orders, notice and opportunity to be heard must be provided within the time required by State, tribal, or territorial law, and in any event within a reasonable time after the order is issued, sufficient to protect the respondent's due process rights.



ORDERS OF PROTECTION

18 U.S.C. 2265

(a) Full Faith and Credit.--Any protection order issued that is consistent with subsection (b) of this section by the court of one State, Indian tribe, or territory (the issuing State, Indian tribe, or territory) shall be accorded full faith and credit by the court of another State, Indian tribe, or territory (the enforcing State, Indian tribe, or territory) and enforced by the court and law enforcement personnel of the other State, Indian tribal government or Territory as if it were the order of the enforcing State or tribe.





ORDERS OF PROTECTION

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.



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 - iii. is enforceable by the participating tribe; and
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DOMESTIC VIOLENCE


- By statute 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.
 - Spouse or intimate partner has same meaning as in 18 USC 2266
 - Is the US v. Castleman standard satisfied? (crime of violence)
- Must occur in tribe's Indian country



DOMESTIC & DATING VIOLENCE

(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.



SPOUSE OR INTIMATE PARTNER

(7) Spouse or intimate partner: The term "spouse or intimate partner" has the meaning given the term in section 2266 of Title 18.

18 U.S.C. 2266(7): Spouse or intimate partner.--The term "spouse or intimate partner" includes--**(A)** for purposes of-- **(i)** sections other than 2261A (stalking)--

- I. a spouse or former spouse of the abuser, a person who shares a child in common with the abuser, and a person who cohabits or has cohabited as a spouse with the abuser; or
- II. a person who is or has been in a **social relationship of a romantic or intimate nature** with the abuser, as determined by the **length** of the relationship, the **type** of relationship, and the **frequency** of interaction between the persons involved in the relationship



EXCEPTIONS = DEFENSE TO JURISDICTION


(b) Nature of criminal jurisdiction

(4) Exceptions

(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.





CASE CONSIDERATION


- Limited by geographic jurisdiction
- Limited by relationship
 - Dating: social relationship of a romantic or intimate nature with the victim determined by Length, Type & Frequency
 - Domestic:
 - current or former spouse or intimate partner of the victim,
 - a spouse or former spouse of the abuser, a person who shares a child in common with the abuser, and a person who cohabits or has cohabited as a spouse with the abuser; or
 - a person who is or has been in a social relationship of a romantic or intimate nature with the abuser, as determined by the length, type, and frequency.
 - 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
- Limited by "violence" or offense?





DOMESTIC "VIOLENCE"

U.S. v. Castleman: Argued Jan. 15, 2014, Pilot Project began February 2014, Decided March 26, 2014



- 18 USC 922 (g): Federal law prohibiting possession of firearm if convicted of misdemeanor crime of domestic violence
- 18 USC 921 defines "misdemeanor crime of domestic violence" as: an offense that .
 - (i) is a misdemeanor under Federal, State, or Tribal law; and
 - (ii) has, as an element, **the use** or attempted use **of physical force**, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim
- "intentionally or knowingly cause[d] bodily injury to" the mother of his child conviction qualifies as "a misdemeanor crime of domestic violence."





CASTLEMAN


- 2001, Castleman was charged and pled guilty to having "intentionally or knowingly cause[d] bodily injury to" the mother of his child, in violation of Tennessee law
- 2008, indicted federally for selling firearms on black market.
- Moved dismiss arguing that his conviction did not qualify as a "misdemeanor crime of domestic violence" because it did not "ha[ve], as an element, the use ... of physical force,"
- District Court agreed because 18 USC 922 requires "violent contact with the victim."
- SCOTUS: we hold that Congress incorporated the common-law meaning of "force", namely, **offensive touching** in § 921(a)(33)(A)'s definition of a "misdemeanor crime of domestic violence."
- It is important to keep in mind, however, that the operative phrase we are construing is not "domestic violence"; it is "physical force."





JUSTICE SCALIA

Concurring in part and concurring in the judgment.


- *Johnson* is significant here because it concluded that "the phrase 'physical force' means violent force—that is, force capable of causing physical pain or injury to another person."
- Unfortunately, the Court bypasses that narrower interpretation of § 921(a)(33)(A)(ii) in favor of a much broader one that treats any offensive touching, no matter how slight, as sufficient. That expansive common-law definition cannot be squared with relevant precedent or statutory text.
- Footnote cites 25 USC 1304 as an example of a statute that defines "domestic violence" as "violence" and does not include offensive touching and other non-violent forms of abuse.





OTHER PROSECUTION CASE CONCERNS

- *Ake v. Oklahoma*, 470 U.S. 68 (1985): Requiring the government to make one expert available to indigent defendants was not an excessive financial burden
 - Pascua Yaqui Tribal Code is silent on the issue of whether the Court could order the Tribe to pay cost, but the federal law granting the Tribe the authority to prosecute non-Indian defendants required the Court have in place appropriate procedures and protections to ensure that a non-Indian defendant was provided with guarantees and rights provided by the Constitution of the United States. 25 U.S.C 1304(d)(4).
 - Concerns: Due Process & Effective Assistance of Counsel
- *Miranda v. Arizona*, 384 U.S. 436 (1966): statements made in response to interrogation by a defendant in police custody will be admissible at trial only if the prosecution can show that the defendant was informed of his rights and waived them
 - Police reports & training
 - Trial presentation of invocation – Right to remain silent cannot be used against you
 - Concerns: 5th Amendment (self-incrimination) & 6th Amendment (right to an attorney)
- Protections Order v. Orders in a Criminal matter protecting
 - Probation violation arrest
 - VAWA Jurisdiction
 - Concerns: 4th Amendment – Stop, detain, arrest





IF SENTENCED TO JAIL TIME, MUST COMPLY WITH TLOA

- Provide defendant with attorney who
 - Satisfies licensing standards
 - Provides effective assistance of counsel
- Presiding Judge has sufficient legal training and is licensed
- Make publicly available (including interpretive documents)*
 - Criminal laws
 - Rules of evidence
 - Rules of criminal procedure
 - Judicial recusal standards and procedures
- Record proceeding





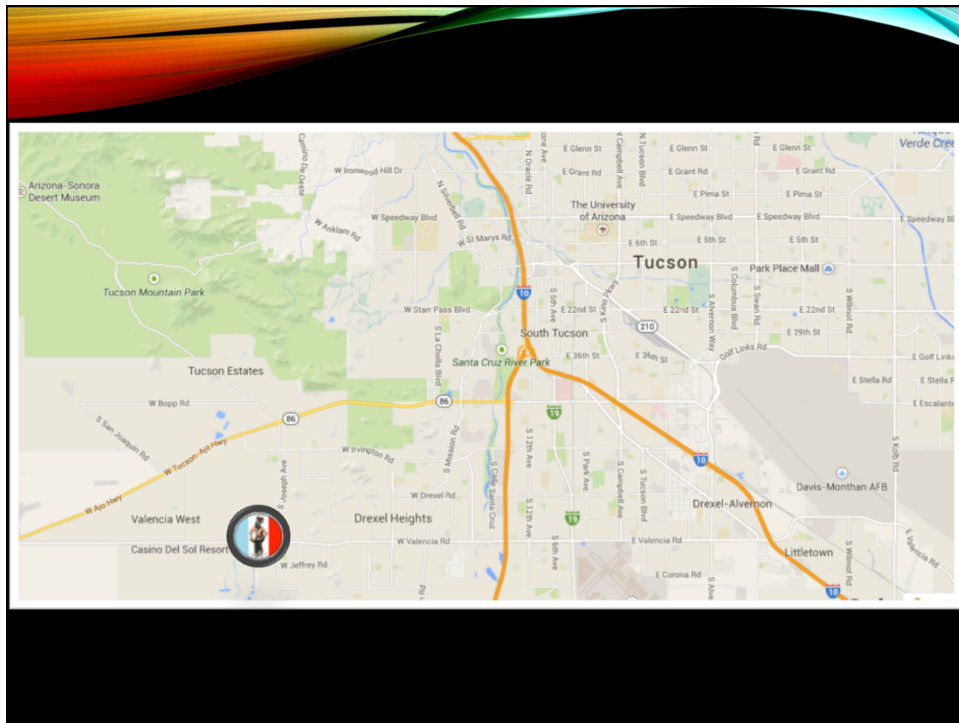
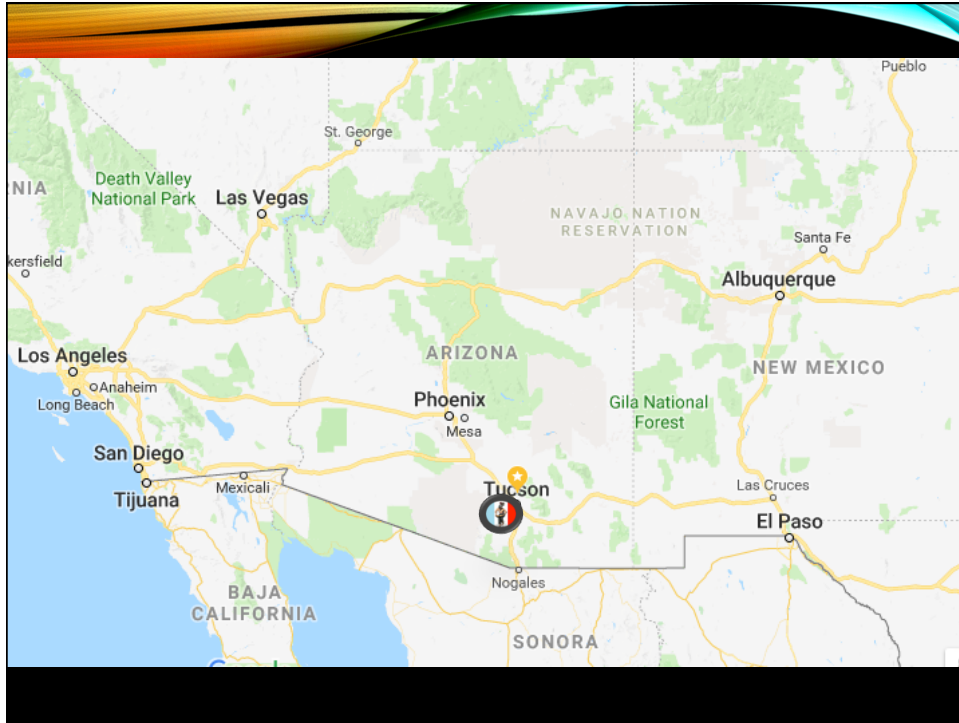
PASCUA YAQUI TRIBE: *OUR SDVCJ EXPERIENCE*




PASCUA YAQUI TRIBE

- Two square mile reservation
- 7 miles from City of Tucson
- Appx 65 miles from Mexico border
- 19,000+ enrolled tribal members
 - 7 off-reservation Yaqui communities
- Appx. 500 non-tribal members reside on reservation
- 799 non-Indian government and casino employees (32% of all employees)









PASCUA YAQUI TRIBE


Demographics:

- Population + 5.1%
- Population = 4,000-5,000 (Census 2010-participants)
- Median Age- 24
- Traditional Married Couples=32% (State 48%)
- Female Head of Household=42.9% (single mothers) (County 12.4%)
- Approx. 40-45% of all families live in poverty.
- Unemployment: 24%
- Mortality: Male- age 49 Female-59


PYT VAWA OVERVIEW YEAR #1

- 20 During Pilot Period
 - Within the year VAWA accounted for 25% of all DV cases
- 16 defendants
 - Median Age: 30
 - Ages 19-50
 - 9 Hispanic offenders (1 female)
 - 3 African-American males
 - 2 Caucasian males
 - 1 Asian male
- 15 male, 1 female
- 86 law enforcement contacts pre- and post-VAWA
- 1 same-sex
- 10 violent injuries
 - Hair dragging
 - Strangulation
 - Bruising
 - Closed fist strikes to the face
- 3 defendants have re-offended post-VAWA



PYT VAWA OVERVIEW UP-TO-DATE

- 56 Investigations
- 42 cases charged
 - 19 convictions
 - 14 dismiss for evidentiary reasons
 - 3 jury trials
 - 7 open
 - 2 warrant (Pretrial)
 - 14 declined
- 2 Extraditions
- 9 defendants have re-offended post-VAWA
 - 2 have 5 VAWA arrests
 - 1 has 3 arrests
 - 6 have 3 arrests
- 40 defendants
 - 35 Male, 5 Female
 - Median Age: 31; Range 18-57
 - Hispanic 27
 - African Am. 6
 - Caucasian 4
 - Mexican 2
 - Asian 1
- 1 same-sex
- 10 violent injuries
 - Hair dragging
 - Strangulation
 - Bruising
 - Closed fist strikes to the face
- 32+ Children present during acts of DV




PYT VAWA CASES

PYT v. Garris JT 11/14/14 – Tribe did not sufficiently prove “intimate partner or dating relationship.” No verdict as to Guilt.

- **Facts:** Defendant Garris is a 20 year old African-American male in a “relationship” with a 48 year old Yaqui member. On Friday evening they were both at the Victim’s sister’s house consuming alcohol when they decided to go home. However, they began arguing in the street. Police on-sited and intervened. Defendant was cited for M.I.P. The Victim walked home during Defendant’s contact. Approximately 25min later Defendant arrived upset and under the belief that the Victim called the police on him. Defendant shoved the Victim to the ground causing him to hit his head on concrete and punched him multiple time causing severe bleeding and numerous lacerations.
- **Uncontested:** Defendant brutally assaulted the Victim.
- **Issue:** “Relationship.” They lived together for approximately 10 months shared resources. They never had sexual intercourse but did have some moments of intimacy. Both the Victim and Defendant have not openly identified themselves sexually.

PG




PYT VAWA CASES

PYT v. Jaimez May 9, 2017 marks the first jury trial conviction of a non-Indian defendant in a Tribal Court since *Oliphant* decision under the Violence Against Women Act (VAWA) authority.

- **Facts:** In September 2016, Mr. Jaimez, a 19-year-old Hispanic male, was on probation for a previous VAWA conviction in which he pleaded guilty to strangling the same victim. Mr. Jaimez returned from visiting his family and became angry because the victim had the door open waiting for her daughter, and he demanded that she close it. Mr. Jaimez got so upset and argumentative that he began yelling at her. In the course of the argument, Mr. Jaimez picked up some of the victim's stereo and threw it on the floor and punched it on the floor. Pascua Yaqui Law Enforcement arrived to find the victim crying and Mr. Jaimez admitted to officers that he had broken the victim's stereo. A jury made up of both tribal and non-tribal members found Mr. Jaimez guilty of domestic violence malicious mischief and was sentenced June 9, 2017, to 100 days detention.
- **Legal Issues:**
 - Competency
 - Crime Against Property: violence directed or threat of violence
 - Jury Instructions: Non-Indian Status


PG



PYT VAWA CASES


Debriefing:

- Pretrial Motions / Issue resolution
 - Jury Instructions / Verdict Form
 - Jury pool selection process – objection
 - Court clerk record keeping
 - Motions *in limine* – tribal court predictability
- Law Enforcement Trial Prep
 - Report writing
 - Evidence collection
- Warrants & Extraditions



IMPLEMENTATION CHALLENGES

- Investigative/Defense Funds
- **Mental Health costs (Ake motion)**
- Notice issues
 - Signage, publication, accessibility, compliance with tribal code (broad)
 - "Notification will include sending press releases to the print and electronic media outlets in the tribe's area." Federal Register, Vol. 79, No. 29, Associate Attorney General, DOJ
- Interpreter issues
- Law Enforcement training to establish DV relationship
- DV Trial training
- Access to national criminal databases (NCIC, etc.)
 - Orders of Protection
- Cooperation from US Attorney, County Attorney & all law enforcement agencies
- Warrant checks to maintain custody
- Inter-governmental Policies & Procedures
 - Housing
- Plea agreements should contain the DV allegation
 - Habitual offender
- PreTrial Services
- Detention facility
- Data collection
 - Children involved
 - Orders of Protection
 - Criminal histories
 - Family members involved



QUESTIONS OR CONSULTATIONS

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