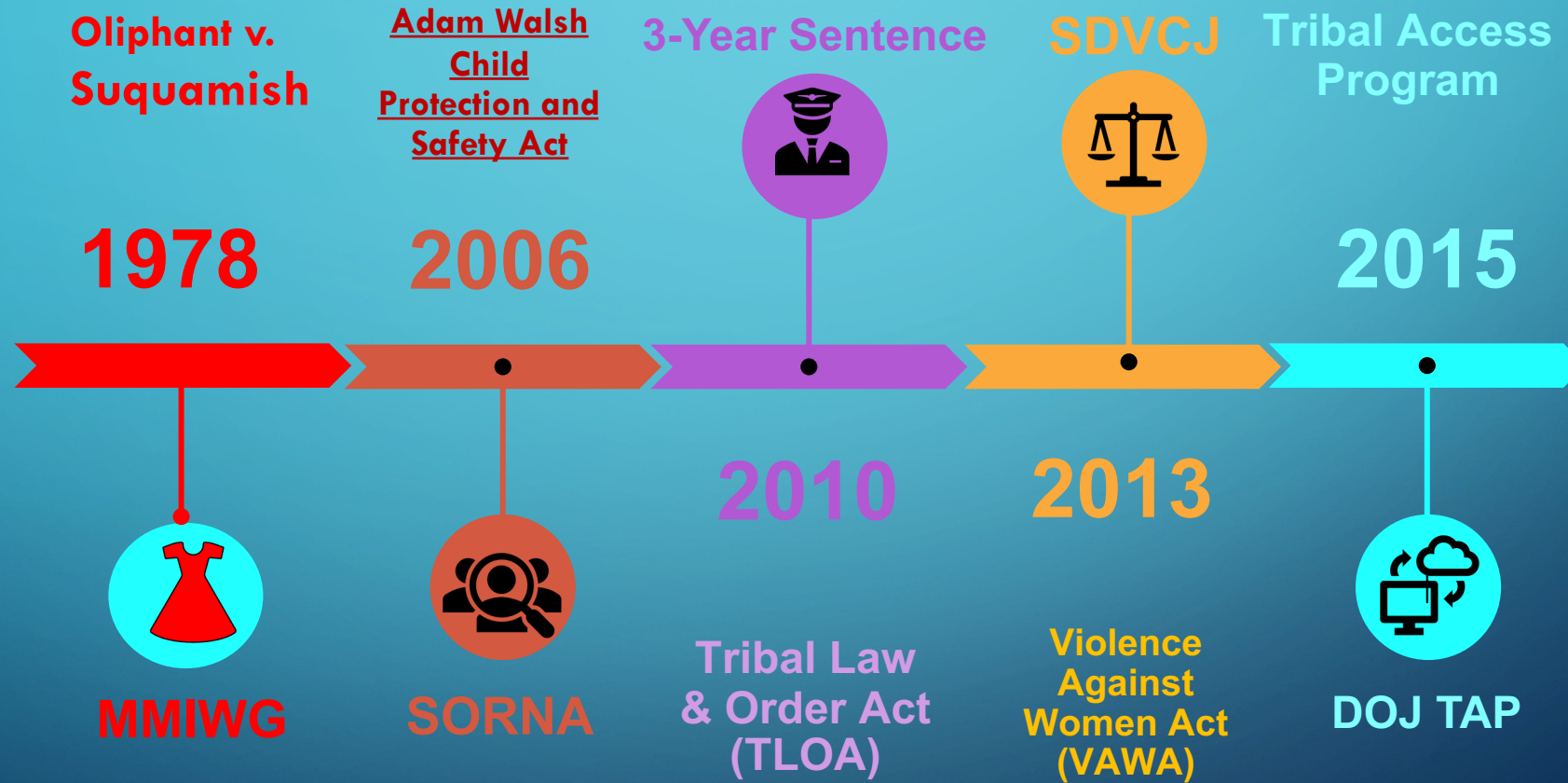


Roundtable Discussion Implementing VAWA '22 Based on VAWA '13 Lessons Learned

Fred Urbina & OJ Flores
Pascua Yaqui Tribe



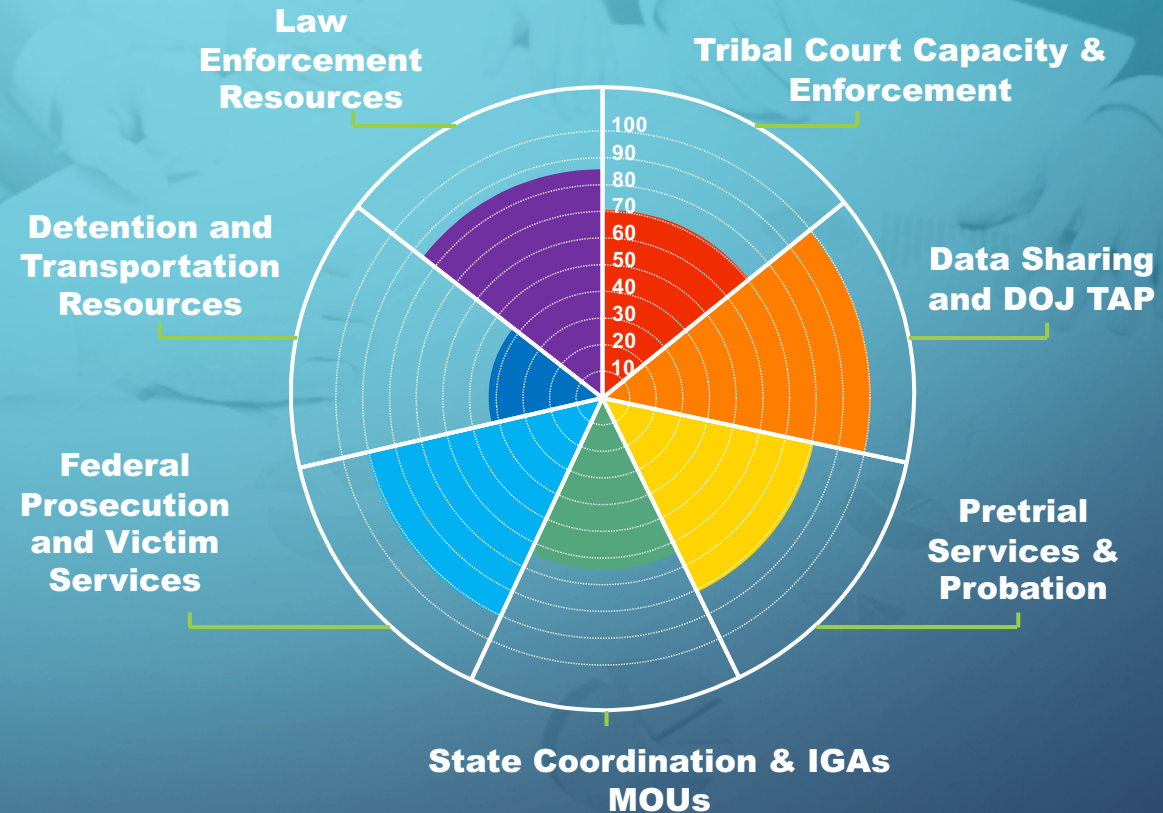
INDIAN COUNTRY JUSTICE ROADMAP & TOOLS



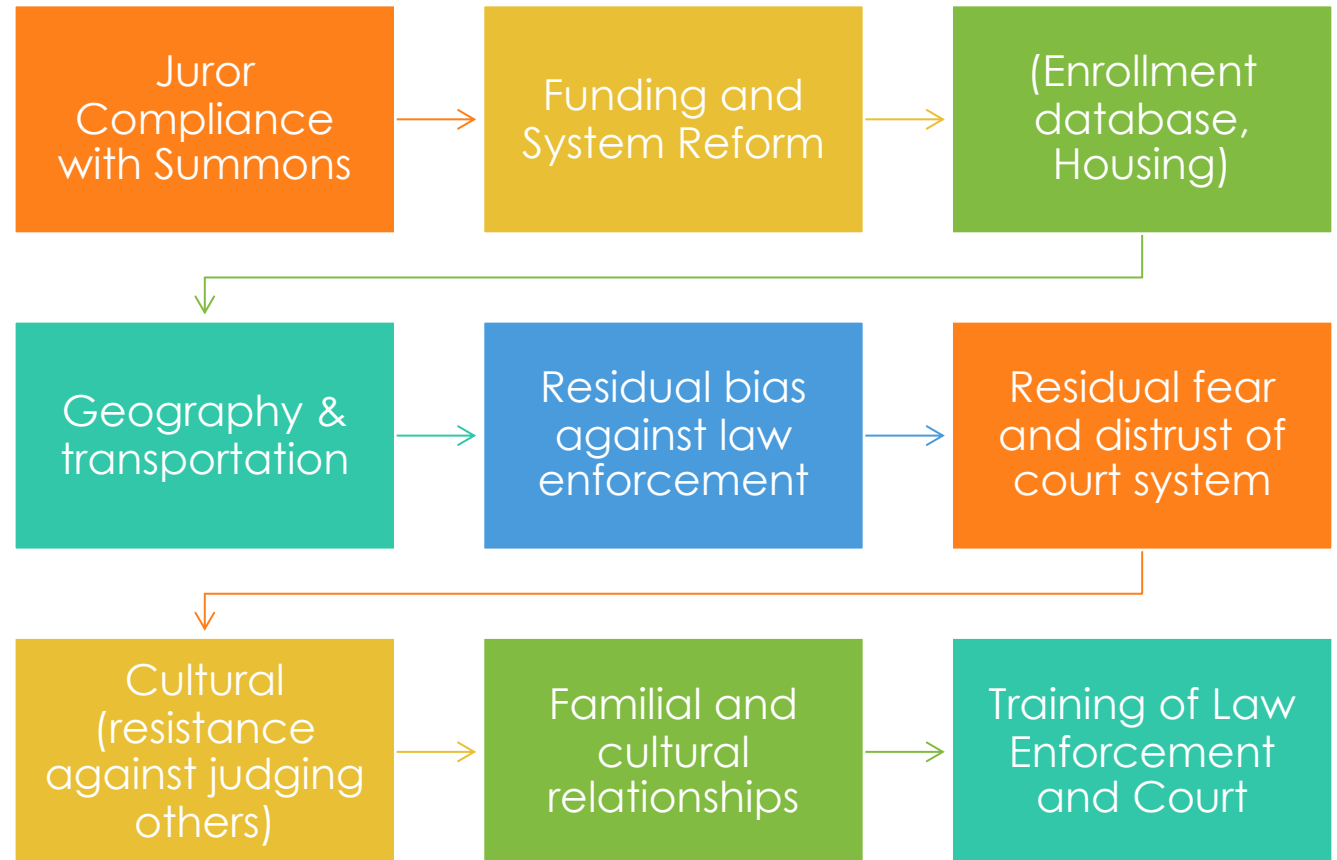
ENVIRONMENTAL SCAN & COORDINATED SYSTEM

Multiple Factors to Consider

- Sufficient Law Enforcement Resources?
- Jurisdiction exercised, and coordination with local, state, and federal systems?
- Tribal Court Capacity?
- Detention & Transport?
- 638 Contract, BIA Direct Services?
- Pretrial & Probation Services?



CHALLENGES



Considerations for Implementing VAWA/TLOA

- The Right people? Judge, Public Defense, Prosecutor, Victim Advocate (could be contracted)
- T.A.P. DOJ program provides Tribes access to national criminal databases (CJIS). Uploading disposition data, warrants, sex offender data, & orders of protection. Amber Alert Systems.
- VAWA SDVCJ Implementation: Is your code available publicly? Or online?
- TLOA Implementation?: SAUSA Program & enhanced sentences. Public Defenders, SLEC, Police Judges (jurisdictional flexibility), U.S. Attorney, Tribal liaison?
- SORNA Implementation?: Sex offender management program. (VAWA 2022 Sexual Assault)
- Joint Jurisdiction Court Agreements/ multi-jurisdiction Task Forces?
- Extradition Process? Writs of offenders, & State/tribal absconders (cooperation).
- Alternatives: Pretrial Services & Risk Assessment; Probation; Civil Remedy-Banishment-fines
- Accounting method to determine cost per VAWA case; (DOJ Reimbursement)



Constitutional issues, Code development, & Changes

IRA Style Constitution?
ICRA Codified May
need amendments to
take advantage of
TLOA

Due Process: Right to
Counsel, Right to
Notice, Right to
Appeal

Equal Protection:
Change references
from "Indian" to
"persons"

TLOA Implementation:
Sentencing, addition
of VAWA Covered
Crimes, consistent
elements

SORNA
Implementation: Sex
offender (VAWA
2022 Sexual Assault
Covered Crimes)

Criminal Rules and
Procedure: Jury
Process, Summons:
Define "Community"

Extradition Process
Writs of offenders, &
State/tribal
absconders

Alternatives: Pretrial
Services & Risk
Assessment;
Probation; Ankle
Bracelets

Post Case Reporting:
Information Sharing
via DOJ TAP

PRETRIAL SERVICES -GPS Ankle Monitoring Release

Pretrial Supervision and ankle monitoring for court ordered defendants.

Release based on a Risk Assessment

This program allows defendants to keep their jobs and support their family while awaiting trial.

GPS zones help protect the victim while the defendant is awaiting trial.

The cost of ankle monitoring is less than detention and arguably just as effective.





CHALLENGES IN INITIAL IMPLEMENTATION

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

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.



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.





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



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”





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.





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.





CHALLENGES IN INITIAL IMPLEMENTATION

- *Victim statements “collection”*
- *911 Call Preservation*
- “Violence”, Touching and other non-violent forms of abuse
- Intimate or Dating Partner facts
- Crime Lab Partnerships/Agreement
- Warrants & Extraditions
- Officer Training
- Issuing Appointments
- “Responsible Office” vs Detectives





PASCUA YAQUI TRIBE: *OUR LITIGATION*





PASCUA YAQUI TRIBE

- Two square mile reservation
- 7 miles from City of Tucson
- Appx 65 miles from Mexico border
- 22,000+ 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)



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 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 Victims 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.

GARRIS TRIBAL COURT SUMMONS

- Total Summons Sent out----- 101
- Total Number of Jurors that Appeared for Jury --
-23
- Non-Tribal Members in pool---- 10
- Tribal Members in pool--- 91
- Summons that came back with bad address----
16
- Responses Received ---- 46
- No response Received---- 55
- Jurors Excused----- 9
- Jurors Not Excused----- 12
- Tribal Members that Appeared for Jury--- 18
- Non-Tribal Members Appearing for Jury--- 5



GARRIS TRIAL

- 23 jurors (3 law enforcement, analyst, Cop, Dispatcher)
- After Voir Dire, 11 jurors left
- Peremptory Strikes:
 - Defense struck 3 jurors
 - Prosecutor struck 1 juror (waived 2 strikes)
- 2 Non-Indians left on Jury of 6 (+1 alternate)
- Tribal jurors from Off-Reservation communities
- Non-Indian was Jury Foreman
- Non-Indian selected as alternate



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



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

PYT EXTRADITION CASE

In April 2016, a non-Indian was convicted for acts of domestic violence assault against his Yaqui enrolled girlfriend. A tribal court warrant was issued for his arrest for failing to comply with his conditions of his sentence. The Pascua Yaqui Office of the Prosecutor filed a demand for extradition with the county attorney's office under Arizona's extradition law. The extradition request contained our tribal court warrant based on VAWA authority. The state statute provides that if a tribe honors extradition to the state, the state will honor extraditions to the tribe. The county superior court judge accepted our Tribal Court warrant and served it upon the defendant who was in the Pima County jail on unrelated charges. In August 2016, the defendant was picked up by Pascua Yaqui law enforcement and brought back to PY Tribal Court.





LITIGATION ISSUES

- 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



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

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