



**UNITED STATES SENATE
COMMITTEE ON INDIAN AFFAIRS
LEGISLATIVE HEARING ON “S. 2785, A BILL TO PROTECT NATIVE CHILDREN
AND PROMOTE PUBLIC SAFETY IN INDIAN COUNTRY;” S. 2916, “A BILL TO
PROVIDE THAT THE PUEBLO OF SANTA CLARA MAY LEASE FOR 99 YEARS
CERTAIN RESTRICTED LAND AND FOR OTHER PURPOSES;” AND S. 2920, “THE
TRIBAL LAW AND ORDER REAUTHORIZATION ACT OF 2016.”**

**WRITTEN TESTIMONY OF THE
HONORABLE ALFRED L. URBINA,
ATTORNEY GENERAL, PASCUA YAQUI TRIBE OF ARIZONA**

May 18, 2016

Chairman Barrasso and Distinguished Members of the Committee:

Good afternoon, my name is Alfred Urbina, and I currently serve as the Attorney General of the Pascua Yaqui Tribe, a Federally Recognized Tribe from the State of Arizona. On behalf of our Tribal Council and membership, thank you for this opportunity. It is an honor to be here today to provide testimony to the Committee regarding the need for public safety improvement and tribal law and order in Indian Country. I am pleased to offer support for the “Tribal Youth and Community Protection Act of 2016,” and the “Tribal Law and Order Reauthorization Act of 2016.” Both Bills will go a long way to help tribes confront lingering jurisdictional gaps regarding violence against tribal families, help stop the proliferation of illegal drugs, and provide additional tools for cross-jurisdiction cooperation.

First, I would like to thank the Committee and staff for your leadership on these matters. The drafting, passage, and implementation of the “Tribal Law & Order Act of 2010” (TLOA) and the

“Violence Against Women Reauthorization Act of 2013,” (VAWA 2013) is having a positive impact in Indian Country. Recent TLOA and VAWA authority provided measured tools that foster longstanding policies of tribal self-determination and tribal self-governance.

Before expanding on the need for the new proposed legislation, I will talk briefly about the current state of VAWA and TLOA implementation on the Pascua Yaqui Reservation because it provides relevant context to the bipartisan measures brought forward today.

THE SUCCESS OF TLOA & VAWA IMPLEMENTATION

To begin, the strength of the Pascua Yaqui Tribe flows directly from our people. Domestic violence is considered a serious crime against the Tribe, and our families. In enacting the provisions of TLOA and VAWA, the Tribe sought to afford the victims of domestic violence the maximum protection that the law provides. The safety of victims of domestic violence and drug related crimes, especially children, became easier to address through the intervention of Tribal law enforcement, Tribal Special Assistant U.S. Attorneys (SAUSA), and support from our federal partners and Tribal Liaisons.¹

On February 20, 2014, pursuant to VAWA 2013, the Pascua Yaqui Tribe was one of three Tribes 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,² the Pascua Yaqui 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.

¹ Senior Litigation Counsel and Tribal Liaison, John Joseph Tuchi, 2009-2012 (now United States District Judge-District of Arizona), Tribal Liaison Rui Wang, Assistant U.S. Attorney, District of Arizona.

² *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

Since that time, the Pascua Yaqui Tribe has prosecuted a total of 22 non-Indian cases involving 15 males and 1 non-Indian female involved in 30 VAWA investigations that have thus far resulted in 8 criminal convictions. VAWA cases include crimes of domestic violence and violations of protection orders where 15 tribal females and 2 tribal male were victims. Most of the VAWA perpetrators have extensive criminal records in the State of Arizona.

- Two offenders had active state 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.
- On average, VAWA offenders were contacted by Tribal police at least six times before VAWA authority existed on the Pascua Yaqui Reservation and VAWA offenders have been involved in close to 90 Pascua Yaqui police incidents, pre and post VAWA.
- Eleven of the cases involved children in the home. A total of 20 children, all under the age of eleven, were exposed to violence, were victims, or actually 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 domestic violence relationship dynamics.
- Thirteen (13) of the offenders are of Hispanic descent, 2 are “Legal Permanent Residents” from Mexico. Two (2) offenders are Caucasian males, 4 are African-American, 1 is of Asian descent, and 1 offender is a lineal tribal descendant who does not qualify for enrollment.
- Thirteen (13) of the incidents involved alcohol or drugs. Ten (10) of the offenders have been previously arrested for cases involving drug use, possession, DUI, or alcohol related offenses.
- Most of the offenders appeared to be unemployed and only 2 offenders did not have a criminal record in the State of Arizona. Seven of the offenders had previously been arrested for violent crimes, weapons, or threats in the State of Arizona. Two offenders are felons, both having been convicted for Burglary in the State of Arizona.
- Five cases remain open and in 2 cases, tribal warrants have been issued, one post-conviction (probation absconder) and one pre-trial for failure to appear. Seven (7) cases were declined after review.
- Seven (7) cases were dismissed for issues related to the *U.S. v. Castleman* case.³

³ The Supreme Court issued a decision in *United States v. Castleman*, 134 S. Ct. 1405 (2014) during the Pilot Project for tribal special domestic violence criminal jurisdiction. Both the majority opinion and Justice Scalia’s concurrence included footnotes referencing the definition of the term “domestic violence” under the new federal law, 25 U.S.C. §1304. The discussion of the VAWA statute by the Justices in dicta raised questions about the scope and severity of “violence” required for crimes that can be charged by tribes who have implemented special domestic violence criminal jurisdiction (SDVCJ) under VAWA. Several of the tribes who have implemented SDVCJ report that the *Castleman* decision had an immediate impact on their charging decisions. There have been several cases where the tribes felt it could not prosecute based on the dicta in *Castleman* and dismissed the cases only to have the offenders subsequently reoffend with a more serious crime.

PROBLEMS PERSIST

Recent and important Tribal justice measures presented some Indian Nations with an opportunity to restore and exercise selected authority to protect their people from crime and violence. However, notwithstanding VAWA, TLOA, and the crime fighting efforts of tribes, there still exists a super storm of injustice that has darkened Indian Country for decades. Today, in 2016, a public safety and public health crisis is still present on most Native American reservations. The long-term lack of security for women and children has brought on a “crisis of confidence” in both tribal and federal justice systems. The restoration of authority, new proposed legislation, and enhanced coordination with federal authorities represents a new dawn. 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 homes across our Reservation and across Indian Country. Many men, women, and children will continue to suffer through this storm of injustice. The new legal and jurisdictional framework, while slightly changed, will not work absent the proper funding for tribal courts, victims, and support services. The majority of tribes simply do not have the resources to provide comprehensive changes to their systems or guarantee suitable services for victims and their families.

TRIBAL CONTROL IS THE KEY

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 brothers. Tribes are in the best position to close jurisdictional gaps and safe havens for lawbreakers.

With a self-reported 500 non-Indian community members living on the Pascua Yaqui Reservation and approximately 800 Non-Indians working or attending school on the Pascua Yaqui Reservation, the probability that additional VAWA cases will arise is foreseeable and likely.

Regarding S. 2920, the reauthorization of the Bureau of Prisons pilot program is a critical part of any plan that will address tribal law and order. The current regime is unworkable, disorganized, and jail conditions are deplorable. Reentry programming will be unsuccessful without a strong primary detention system and a humane corrections option. Reauthorizing law enforcement and judicial training for investigation and prosecution of illegal narcotics is critical. Substance abuse problems brought on by illegal drug sales, manufacturing, and the explosion of the opioid addiction epidemic is crippling Indian Country. The implementation of VAWA 2013 SDVCJ confirms that Tribes require access to federal background-check information in the criminal and civil context. Data collection and criminal information database access is critical in a cross-jurisdiction environment. Also, given that access would allow for the sharing of tribal criminal justice information, increased data sharing would allow for the closure of criminal information gaps that now stretch across the tribal-federal landscape. The Shadow Wolves drug-trafficking-prevention program is an important tool for drug interdiction and the prevention of terrorism in our homeland. The Shadow Wolves are also an organization that operates in a traditional manner that respects the culture of the indigenous people who have inhabited the desert southwest for thousands of years. Improving justice for Indian youth is long overdue. When Native youth are prosecuted federally, there is a lack of programming and coordination. When youth are held in the State juvenile system,

there is an absence of culturally relevant curriculum available. Creating tribal liaisons and special assistant federal public defenders, similar to the liaisons and special assistant U.S attorneys in the U.S. attorneys' offices is a great idea, however, Tribes also need direct funding to provide these critical services. A liaison will be helpful if Tribes have established the Public Defense infrastructure to begin with.

Regarding S. 2785, "A bill to protect Native children and promote Public Safety in Indian Country," it is clear to the Pascua Yaqui Tribe after exercising Special Domestic Violence Criminal Jurisdiction under VAWA 2013, that several important provisions were omitted. First, when addressing domestic violence, there is a strong likelihood that children will be part of most relationships, as will other family members who may live in the home. In our cases, we found that at least 13 of our incidents included children in the home. Some children were victims of violence or were exposed to violence. In three cases, tribal officials had to remove the children from the home and place them in a foster home for their protection. Also, the Tribe found that we could not charge a VAWA offender with ancillary crimes that were committed during the commission of a VAWA offense or during the prosecution of that offense. For example, in one case, a VAWA offender was brought in for violating a court probation order. Since the infraction was not an original DV VAWA offense, the Tribe could not proceed. This would apply to instances where the offender was in possession of illegal drugs, assaulted a police or detention officer, destroyed property, or committed any other crime while they were being prosecuted for a VAWA offense. Finally, in recent VAWA cases, criminal background checks of VAWA offenders found that many had criminal convictions for drug or alcohol offenses and many of our cases were alcohol related. If VAWA offenders are on the Reservation and they are associated with drug use, drug sales, or the facilitation of such conduct, Tribes require the necessary authority to address this behavior.

BACKGROUND INFORMATION

PASCUA YAQUI VAWA IMPLEMENTATION

On March 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, visited 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).⁴ On February 6, 2014, the Tribe received official notice that the Tribe was designated a participating Pilot Tribe authorized to exercise

⁴ <https://www.justice.gov/sites/default/files/tribal/legacy/2014/02/06/appl-questionnaire-pascua-yaqui.pdf>

SDVCJ.⁵ The Pascua Yaqui Tribe SDVCJ Pilot status story was picked up and released locally, statewide, and nationally, via press release by the White House.⁶ On February 12, 2014, VAWA Pilot information was posted for notice in the Federal Register by the Department of Justice.⁷ Official Tribal notice was sent out via global e-mail to all tribal government and casino enterprise employees, as well as being posted on the official Pascua Yaqui Tribal Internet site on February 6th, 2014.⁸ 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.⁹ 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, 2014.¹⁰

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.¹¹ The

⁵ <http://www.justice.gov/tribal/docs/letter-to-pascua-yaqui.pdf>

⁶ (<http://www.whitehouse.gov/blog/2014/02/06/moving-forward-protect-native-american-women-justice-department-announces-va-wa-2013->), Department of Justice (Attorney General) (<http://www.justice.gov/opa/pr/2014/February/14-ag-126.html>), the U.S. Attorney for the District of Arizona, http://www.justice.gov/usao/az/press_releases/2014/PR_02062014_Vawa.html, and a Pascua Yaqui press release, that was sent to the following Southern Arizona news organizations: Television Stations: KOLD, KVOA, FOX, and KGUN; Newspaper: AZ Daily Star, Explorer News, Wick Publications, and the Tucson Weekly. http://www.pascuayaqui-nsn.gov/index.php?option=com_content&view=article&id=144:pascua-yaqui-tribe-asserts-authority-to-prosecute-all-persons-including-non-indians-for-domestic-violence&catid=12:newa

There was also some television coverage in Phoenix via a news video segment available at <http://www.azcentral.com/news/free/20140206tribes-authority-non-indians.html>

⁷ Fed. Reg. Volume 79, Number 29 (Wednesday, February 12, 2014)[[Notices]][Pages 8487-8488] Federal Register Online via the Government Printing Office [www.gpo.gov] [FR Doc No: 2014-03023]

<http://regulations.justia.com/regulations/fedreg/2014/02/12/2014-03023.html> See also 78 Fed. Reg. 71645 (Nov. 29, 2013)

⁸ (<http://www.pascuayaqui-nsn.gov/>).

⁹ See (http://azstarnet.com/news/local/pascua-yaqui-gain-added-power-to-prosecute-some-non-indians/article_3417ac6e-c683-50d4-9a55-cc386524c468.html)

¹⁰ (<http://turtletalk.wordpress.com/2014/02/07/pascua-yaqui-press-release-re-va-wa-pilot-program-selection/>)

¹¹ <http://www.kvoa.com/news/domestic-violence-not-tolerated-by-pascua-yaqui-tribe/>,

(http://colorlines.com/archives/2014/02/a_small_victory_for_native_women.html),

<http://america.aljazeera.com/watch/shows/the-stream/the-stream-officialblog/2014/2/21/native-american->

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.

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tribesbeginpilotprogramtoprosecutedomesticviolence.html, <http://n.pr/Nei2Mx>, <http://www.nativeamericacalling.com/>, <http://kjzz.org/content/24088/pascua-yaqui-begins-prosecuting-non-natives-under-vaawa>, http://www.washingtonpost.com/national/arizona-tribe-set-to-prosecute-first-non-indian-under-a-new-law/2014/04/18/127a202a-bf20-11e3-bcec-b71ee10e9bc3_story.html, <http://uanews.org/story/ua-alums-involved-in-effort-to-legally-prosecute-non-indians-on-pascua-yaqui-tribe>, <http://america.aljazeera.com/articles/2014/4/23/for-one-arizona-tribeacheanceforjusticeafterdecadesoflegallimbo.html>, <http://www.wildcat.arizona.edu/article/2014/04/ua-alum-aides-american-indian-tribe-in-suing-non-indians>, <http://cronkitenewsonline.com/2014/10/pascua-yaqui-begin-prosecuting-non-tribal-members-for-domestic-violence/>

¹² *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

jury, after hearing evidence presented by a tribal prosecutor, in front of an Indian judge, determined that the Tribe did not have jurisdiction in a fairly serious DV Assault case.

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.

LESSONS LEARNED

Some offenders have had a long history of contact with Tribal Police & generally have a State criminal history:

1. NCIC access is required to properly assess who the offender is (DOJ TAP Program).
2. Offenders may have warrants or a history of harming the victim in another jurisdiction.
3. Offenders are using Indian Country to exploit jurisdictional gap and offenders are aware of jurisdictional gap.
4. Victims were reluctant to report DV incidents due to jurisdictional gap and no safety option from Tribal, State, or Federal system (no trust).
5. Difficult DV cases are increasingly difficult in VAWA SDVCJ context.

Multi-jurisdictional environment makes prosecution difficult:

1. Offenders can flee Tribal jurisdiction and Tribal Court process. Tribes may require a State/Tribal IGA/MOU to extradite, ensure comity to tribal court order, and domesticate & execute tribal warrants. Outreach between tribes and surrounding jurisdictions need to occur.
2. Proximity to Mexico raises issues of prosecuting Legal Permanent Residents, or undocumented aliens, must advise Border Patrol upon arrest. There is heightened

- scrutiny as a conviction can also trigger deportation. Tribes may be required to provide Spanish language court interpreters.
3. The limited nature of jurisdiction & the Supreme Court *Castleman* decision makes cross-deputization and jurisdictional flexibility important. This allows officers to arrest into surrounding State or Federal jurisdictions on ancillary charges (trespassing, drugs, non-victim crimes, etc.).
 4. Criminal investigations are more difficult and police officers require additional training. Depending on the facts, an SDVCJ case can have several different matters evolve from one incident (Tribal criminal case, federal case, tribal dependency case, or a state criminal case).
 5. Offender can have a state felony or misdemeanor warrants. Coordination, extradition and inter-jurisdictional movement of offenders have to occur.
 6. Ethical issues arise if a Defendant is not provided effective assistance of counsel. Public Defenders must have a working knowledge of Indian Law and how to operate in a cross-jurisdictional environment.

Non-Indian offender issues:

1. There is no requirement from the VAWA law to collect offender or victim data.
2. VAWA convictions are not being entered into NCIC, national database (yet).
3. Preliminary profile of PYT VAWA offender is unemployed male in long term relationship with Tribal member, who may have drug or alcohol use history, previous criminal history and previous tribal police contact.
4. Healthcare costs are an issue. Who covers when a non-Indian is in Tribal custody? While in BIA custody? Jail costs & transportation?
5. Indirect costs have increased: Healthcare, case related investigative costs, expert witnesses, mental health evaluations, child welfare matters, ancillary cases, post-conviction costs, additional litigation.
6. Who funds Offender sanctioned classes and programming. There will be a requirement to loop in state services or contract for such services.
7. Equal protection and due process issues may arise, fairness & equal treatment in sentencing, pre-trial release determinations, and jury composition.
8. Composition of jury is difficult when attempting to hail non-Indian jurors and not excluding non-Indian jurors.
9. Non-Indians can be lineal tribal descendants who don't meet blood quantum requirements (1 case for Pascua Yaqui).

TLOA/VAWA authority maximized, gives tribes the flexibility to control crime:

1. The purpose of VAWA Pilot Program was to develop best practices.
2. Exercising integrated authority of TLOA and VAWA through Tribal SAUSAs, Tribal Law enforcement with SLEC cards, NCIC access, and State law enforcement & prosecution authority, provides 360 degree jurisdictional management and complete criminal data intelligence. This provides an opportunity for planning, prevention, and crime control policy creation.
3. Hybrid systems allow for better coordination with DOJ, BIA, and State authorities. The DOJ sponsored Inter-Tribal Working Group (ITWG), SAUSA Program, SLEC

Cards, Central Violations Bureau (CVB) citations program, BIA Purpose Code X Program, and the DOJ Tribal Access Program (TAP), provides maximum jurisdictional flexibility for tribal justice systems.

4. The TLOA DOJ Bureau of Prisons (BOP) Pilot program must be reauthorized by Congress and expanded to include VAWA defendants and lower level crimes and convictions involving multi-year sentences related to Domestic Violence.

Victim issues:

1. VAWA victim Profile: Single tribal female with children, unemployed, living in Tribal housing as head of household or in a multi-generational household, in long term relationships with Non-Indian males. (Married, children in common, or residing in same household).
2. VAWA does not include funding for prevention services.
3. Tribal Orders of Protection are not being entered into NCIC, making it difficult to enforce off Reservation.
4. VAWA Offender Tribal Criminal history currently is not being added to NCIC.
5. Women, children, and non-intimate partners living in the household are not being fully protected by VAWA. (Grandparents, elders, cousins, etc.)
6. Many Domestic Violence crimes can't be prosecuted due to *Castleman* issues.
7. Sexual assault by a non-Indian "stranger" who is not in a relationship with the victim is not covered by VAWA 2013.

CHALLENGES

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*.¹³ *Castleman* had an immediate impact on the Tribe's criminal charging decisions when evaluating 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

¹³ *United States v. Castleman*, 134 S. Ct. 1405 (2014).

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, but nonetheless, they are violent and dangerous. 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.

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*.

VAWA FUNDING

The Pascua Yaqui Tribe is requesting that Congress or the Department of Justice, make sufficient funds directly available to Tribes to properly implement and sustain into the future VAWA, SORNA, and the Tribal Law and Order Act (TOLA), during and beyond the implementation phase. Tribes require permanent funding and access to resources and services that are available to state, county, and municipal governments. Within VAWA 2013, there is 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 has officially requested a proportional share of the funding for the 2015-2018 fiscal years, in order that we may carry out all of the many responsibilities that we have as a VAWA 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 had two cases arise that implicated SDVCJ within the first two weeks of implementation and have had a total of 30 VAWA investigations and filed 22 into Tribal Court. Significant resources have been dedicated

to the cases. The Tribe would be better able to fund these programs as well as additional programs going forward if monies are appropriated under VAWA 2013, which are intended, pursuant to 25 USC 1304(g) 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 OVW Office to develop a Tribal Funding Plan and distribute the funds as tribal set-aside funding which could be added to existing Tribal 638 Contract as a modification. This method would allow the funding to be easily transferred to the Tribe. As such, we respectfully request that Congress or the Department of Justice provide a mechanism for disbursement of the funding provided for in VAWA 2013.

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 95% of all persons arrested on the reservation. 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.

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 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 arbiter 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.

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.¹⁴ Between 1985 and 1988, the Department of Interior operated the Pascua Yaqui 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 Tribal Court from the B.I.A. through a 638 contract.¹⁵

The Bureau of Indian Affairs police patrolled the Reservation exclusively until 1991. In 1991, the Tribe hired three Tribal police officers who served alongside the 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.

¹⁴ 50 Fed. Reg. 34,555 (Aug.26, 1985)

¹⁵ Indian Self-Determination and Education Assistance Act, Pub. L. 93-638

The Tribe is 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 limited NCIC¹⁶ and ACJIS¹⁷ criminal information access. In 2005, the Tribe entered into an Intergovernmental Agreement with Pima County to participate in the Pima County Regional Special Weapons and Tactics (SWAT) Team program for police SWAT services. In 2006, the Tribe approved an Intergovernmental Agreement with Arizona DPS for crime laboratory services for the purpose of examining and processing evidence collected during criminal investigations. 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 enhanced access to ACJIS, 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 provides 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 monitors offenders in the community who are released during the pre-trial phase of their case. In 2011, the Tribe, in partnership with the Department of Justice (DOJ) and the U.S. Attorney's Office, appointed tribal prosecutors as federal Special Assistant United

¹⁶ <https://www.fbi.gov/about-us/cjis/ncic>

¹⁷ Arizona Criminal Justice Information System (ACJIS)

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 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, while located far from 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)¹⁸, which was modified 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 to ensure that a fair cross-section of the community is included in the jury selection process. VAWA contains explicit language that requires tribes choosing to exercising authority

¹⁸ 25 U.S.C. §§ 1301-1304

under the new provisions, draw people from jury pools that reflect a fair cross-section of the community and do not systematically exclude any distinct group of people, including non-Indian community members.

The Pascua Yaqui tribal court provides all defendants with the same rights in tribal court as they would have in state or federal court. The original 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 guaranteed 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 right to counsel and due process that are products of American jurisprudence are deeply rooted in Yaqui indigenous tradition and practice. Our Tribal culture and history supports the right of having a person speak on behalf of the accused. These concepts, teachings, 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, (wikoijaut) of a Yaqui Pueblo in present day Sonora, Mexico (it can also be equated to the executive branch of government).¹⁹

¹⁹ Spicer, Edward. Pascua: A Yaqui Village in Arizona, University of Chicago Press, 1940. Reprint: University of Arizona Press, 1984.

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.²⁰ 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 included, “Lutu’uria,” which translates to “truth.” The phrase “yo’ora lutu’uria” refers to “elders truth” and the notion of senu noka (one word) was used to describe historical decisions (precedent). The concern for not just majority but a collective decision beyond individualism was prominent.²¹

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.²² The Tribe is located near a major metropolitan city, while this is important for business ventures, it can have a negative impact 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

²⁰ *Id.*

²¹ Via email, Dr. David Delgado Shorter.

²² The Tribe has more than 19,000 members, many of whom have relatives residing on both sides of the border. Both the Pascua Yaqui Tribe and our Yaqui relatives in Mexico regularly visit each other for religious, cultural, and tribal purposes.

impacts the safety of our community and strains our criminal justice system. Tribal members are exposed to drug smuggling, drug cartels, human traffickers, and gang members. The most recent 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 the per capita income in 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 cases are referred to the Pascua Yaqui Prosecutor's office, the U.S. Attorney, or the Pima County Attorney for possible prosecution. The cases referred are evaluated and the majority 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 recent VAWA cases increased the number of adult criminal cases filed by 5%.

The Pascua Yaqui 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, four 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.

TRIBAL LAW AND ORDER ACT OF 2010

On September 22, 2010, the Pascua Yaqui Tribal Council amended the Pascua Yaqui Rules of Criminal Procedure and Criminal Court Rules to implement the federal amendment to the Indian Civil Rights Act (ICRA), to benefit from the changes to Indian Country criminal justice by the Tribal Law & Order Act, (TLOA).²³ Prior to the signing of the Act, the Tribal Council and the Office of the Attorney General were actively involved in shaping the federal language and urging our federal representatives to pass the law. For years, the Pascua Yaqui Tribal Council worked to change the status quo and informed Congress and federal officials about our struggles with crime control, safety, and security.

Beginning on October 1, 2010, any Indian accused of a crime, including Indians from other tribes, have had the right to defense counsel at the Tribe's expense, if the Tribe will seek *any* amount of jail time in their criminal cases. Soon, the Tribe will also be able to take advantage of additional authority to sentence criminals up to three years of incarceration per offense, up to a maximum total of nine years. At the time, TLOA was the most significant change in federal law affecting Indian Country and the Pascua Yaqui Tribe in close to 40 years. However, in order to benefit from

²³ <https://www.justice.gov/sites/default/files/usao-az/legacy/2010/10/14/Tribal%20Law%20%20Order%20Act%202010.pdf>

the additional sentencing authority, the Pascua Yaqui Tribe had to amend our tribal Constitution. The Pascua Yaqui Constitution of 1988 adopted the provisions of the Indian Civil Rights Act, and incorporated the provisions as our “Bill of Rights.” Pascua Yaqui Constitution, Art. 1, Section 1(g). Our Constitution limited punishment to one (1) year per offense. On July 24, 2015, the Tribe held an election and removed the sentencing restrictions. In a few months, the Tribal Council will vote to consider changes to the criminal code that will adopt the enhanced sentencing authority found in TLOA.

TRIBAL LAW AND ORDER ACT 2010 IMPLEMENTATION

The Pascua Yaqui Tribal Prosecutor’s Office and the Office of the Attorney General took lead roles in providing input to federal authorities as they revised the ICRA. The Prosecutor’s office sent a representative to Washington D.C. and Minneapolis, Minnesota, to speak to lawmakers and the U.S. Attorney General to advocate for changes to tribal criminal justice. The Prosecutor’s office also worked closely with the U.S. Attorney’s Office for Arizona to help create an Indian Country framework that was put into practice by the U.S. Attorney to combat crime on Arizona reservations. The Tribe aggressively sought to promote an enhanced coordinated response to crime on reservations. This led directly to a sharp increase in tribal, federal, and state prosecutions for crimes that occur on our reservation. This policy and work will continue and it will hopefully increase the federal prosecution and convictions of those who commit major crimes and prey on our people.

1. **Costs:** The implementation of some of the provisions of the Tribal Law & Order Act, namely, Title III, Section 304, has cost the Tribe approximately \$300,000-\$400,000 a year in additional attorney salaries and benefits by the hiring of 4 full time attorneys (2 prosecutors and 2 defense attorneys), and 4 defense conflict (contract) attorneys.

2. **Representation:** Through the office of the Public Defender and contracted defense attorneys, the Pascua Yaqui Tribe now provides free legal representation to 95% of all Indians and non-Indians arrested on the reservation. Approximately 2.5% of individuals arrested do not qualify for free legal representation and approximately 2.5% waive representation.
3. **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 adversarial system. For example, the process has spurned additional appeals, evidentiary hearings, additional scientific evidentiary analysis, expert testimony, competency evaluations, and an increase in criminal trials.

PASCUA YAQUI TRIBAL-FEDERAL SAUSA PROGRAM

Between October 31, 2011 and November 4, 2011, the United States Attorney's Office for the District of Arizona held a week-long course to train prosecutors from several of Arizona's tribal governments so they could participate in the federal prosecution of offenders from their communities. The training kicked off the U.S. Attorney's Office Tribal Special Assistant United States Attorney (SAUSA) program.²⁴ This cross-commissioning is encouraged by the Tribal Law and Order Act and mandated by the District of Arizona's Operational Plan for Public Safety in Indian Country. The goal of the Tribal SAUSA program is to train eligible tribal prosecutors in federal law, procedure, and investigative techniques to increase the likelihood that every viable criminal offense is prosecuted in tribal court, federal court, or both if necessary. The program also allows the tribal prosecutors to co-counsel with federal prosecutors on felony investigations and prosecutions of offenses arising out of their respective tribal communities. After completing training, each tribal SAUSA is mentored by an experienced federal prosecutor assigned to the District of Arizona's Violent Crime Section.

²⁴ <https://www.justice.gov/opa/blog/tribal-community-prosecutors-receive-federal-cross-commissioning>

SAUSA PROGRAM IMPLEMENTATION

The early phase of implementing the SAUSA program has focused on coordination of cases through federal/tribal Multidisciplinary Team Meetings (MDT), advancing the timeline for presentation of cases for federal prosecution, and improving coordination and management of cases between Tribal and Federal authorities. Special attention is given to cases involving violent crimes, sex crimes, and habitual domestic violence offenders, even in cases where the Defendant is a non-Indian. The tribal program has been in operation since 2011. The U.S. Attorney's Office has been diligent in working cooperatively with the assigned tribal SAUSA and the Tribal Prosecutor's Office.

A primary challenge has become coordinating time and scheduling. The Tribal SAUSA has a full criminal case load with the Pascua Yaqui Prosecutor's Office in addition to the evaluation, follow-up, and assisting with the prosecution of cases at the federal level. As the program continues, it may be helpful for the SAUSAs to have dedicated support staff to help with logistics, coordination of calendars, and case management. Communication, coordination, and cooperation has been enhanced with several different agencies responsible for law enforcement on the Pascua Yaqui Reservation, to include, the U.S. Attorney's Office (Tucson), the F.B.I., tribal Law Enforcement, and federal victim services. Cases are being filed, reopened, and appropriate cases are being declined after thorough review and coordinated follow-up investigations. Tribal criminal investigators, F.B.I. agents, and crime labs are working closely together to bring strong tribal and federal investigations. Defendants are being transferred and transported to tribal court and federal court via writ and arrest warrants. The charging and prosecution of federal crimes committed on the Pascua Yaqui Reservation has increased exponentially due to the SAUSA program and enhanced local MDT meetings. Although federal prosecution is not the ultimate answer to social

problems in our community, the Pascua Yaqui Tribe will continue to work with our federal partners to develop a coordinated crime control policy for our community.

ADAM WALSH SEX OFFENDER REGISTRATION AND NOTIFICATION (SORNA)

The Tribe has recently enacted the Adam Walsh Sex Offender Registration and Notification Act (SORNA).²⁵ The Prosecutor's Office is working with the Tribal Council, Attorney General, and Law Enforcement to completely implement the new law. SORNA provides a comprehensive set of minimum standards for sex offender registration and notification to the Tribal community. SORNA aims to close potential gaps and loopholes that existed under prior law and strengthens the nationwide network of sex offender registration and notification programs. The Pascua Yaqui Tribe has substantially implemented SORNA and is registering, monitoring, and informing the community about the presence of twenty-four (24) registered sex offenders who are living on the Reservation.

OFFICE OF THE PROSECUTOR

The Prosecutor's Office performs several different functions for the Pascua Yaqui Tribe. The Office is responsible for representing our government in Tribal Court in all misdemeanor and felony type criminal matters, including adult and juvenile crimes. The Pascua Yaqui Police respond to approximately 6000 calls for service a year. A large percentage of the criminal calls are referred to the Prosecutor's office for possible prosecution. The cases are evaluated and many are independently charged into tribal court. The Tribal Prosecutor also represents the tribe in civil related matters, to include civil forfeiture of property used in the transportation or sale of narcotics

²⁵ <http://pascuayaqui.nsopw.gov/Home.aspx>

and all civil Child Welfare/Child Dependency matters that originate on the Reservation. The Prosecutor's office advises, coordinates, and collaborates with Pascua Yaqui Law Enforcement, Pre-Trial Services, Probation, Victim Services, Centered Spirit, Education, and Social Services. The Tribal Prosecutor's Office also handles victim notification in criminal cases. Victims are notified about the status of their case, the release conditions involving the defendant, plea agreements, provided transportation if needed, and advised of the terms of any sentence imposed by the court.

DEPARTMENT OF JUSTICE INDIAN COUNTRY LEGAL FELLOW

On Thursday, December 4, 2014, the Department of Justice selected the First ever Indian Country Justice fellow Charisse Arce, of Bristol Bay, Alaska, to serve in the District of Arizona.²⁶ Arce will also serve a portion of her appointment in the Pascua Yaqui tribal prosecutor's office. This is the first Gaye L. Tenoso Indian Country Fellowship within the Attorney General's Honors Program, and it is awarded to an extraordinarily well-qualified new attorney with a deep interest in and enthusiasm for improving public safety in tribal communities.

"The Pascua Yaqui Tribe is pleased to have the opportunity to partner with the District of Arizona U.S. Attorney's Office and the Attorney General's Honors Program, through the Gaye L. Tenoso Indian Country Fellowship," said Pascua Yaqui Tribal Chairman Peter Yucupicio. "We welcome the new Department of Justice fellow and look forward to a productive partnership as we fight violent crime, work to keep our community safe, and continue to implement the Violence Against Women Act (VAWA), and Special Domestic Violence Criminal Jurisdiction (SDVCJ)."

²⁶ <https://www.justice.gov/legal-careers/attorney-generals-indian-country-fellowship>

ACCESS TO NATIONAL CRIMINAL INFORMATION DATABASES

On November 5, 2015, the Department of Justice announced that the Pascua Yaqui Tribe would participate in the initial User Feedback Phase of the Tribal Access Program for National Crime Information (TAP),²⁷ a program that provides federally recognized tribes the ability to access and exchange data with national crime information databases for both civil and criminal purposes.

“TAP will support tribes in analyzing their needs for national crime information and help provide appropriate solutions, including a state-of-the-art biometric/biographic computer workstation with capabilities to process finger and palm prints, take mugshots and submit records to national databases, as well as the ability to access the FBI’s Criminal Justice Information Service (CJIS) systems for criminal and civil purposes through the Department of Justice. TAP will also provide specialized training and assistance for participating tribes.”

Currently, the Tribe has limited NCIC “read only” access through an IGA with the Arizona Department of Public Safety (DPS). The TAP program will help the Tribe upload outstanding tribal warrants, orders of protection, and criminal conviction information.

PURPOSE CODE X

The Pascua Yaqui Tribe has requested to formally participate in the Bureau of Indian Affairs’ Office of Justice Services (BIA-OJS) Purpose Code X²⁸ program that was created in 2015 to assist our tribal Social Services Department when they are seeking to place children in safe homes.

“The BIA-OJS Purpose Code X Program will provide tribal social service agencies with the information they need [through name-based checks] to protect the children they place into care in

²⁷ <https://www.justice.gov/opa/pr/departments-justice-announces-10-tribes-participate-initial-phase-tribal-access-program>

²⁸ <http://www.bia.gov/cs/groups/public/documents/text/idc1-031473.pdf>

emergency situations when parents are unable to provide for their welfare.” Currently, Pascua Yaqui social workers may be able to conduct a warrant check or private research of potential placement options, but warrant checks do not generally reveal criminal history. Also, the checks are impractical at night and after regular work hours in emergency situations.

BUREAU OF INDIAN AFFAIRS TIWAHE (FAMILY) INITIATIVE

This year, the Pascua Yaqui Tribe was selected by the Bureau of Indian Affairs to participate in the federal Tiwahe initiative.²⁹ “The initiative promotes a comprehensive and integrated approach to supporting family stability and strengthening tribal communities by addressing interrelated issues associated with child welfare, domestic violence, substance abuse, poverty, and incarceration. Tiwahe means “family” in the Lakota language. The Tiwahe initiative directly supports the Generation Indigenous initiative, which is focused on addressing barriers to success for Native youth, by leveraging BIA programs in concert with other Federal programs that support family and community stability and cultural awareness.”

The Pascua Yaqui Tribe will work with our federal partners to implement the Tiwahe program this fiscal year, through a tribal centered plan. The Tribe will attempt to address the interrelated problems of poverty, violence, and substance abuse faced by our community. The Tribe will do this through the coordination and integration of social service programs with our Tribal Court. We will work to strengthen and maintain family cohesiveness, prepare our family wage earners for work opportunities, and provide rehabilitative alternatives to incarceration for family members with substance abuse issues.

²⁹ <http://www.bia.gov/cs/groups/xasia/documents/document/idc1-032110.pdf>

FEDERAL COURT SENTENCING, PRIOR CONVICTIONS, AND DISPARITY

Violent crime in Indian Country has created a public safety and public health crisis across the Nation. Although federal sentencing is not the main issue, it is a contributing factor when violent crime is not prosecuted, cases are declined, or when sentencing outcomes do not fit the crime. In order to help address this problem, counseled Tribal Court convictions should be recognized, considered, and applied to federal sentencing determinations of persons who commit crimes in Indian Country and additional data must be collected by all agencies responsible for criminal investigations.

Federal prosecutions of offenders from Pascua Yaqui Indian Country generally consist of dangerous felony level cases.³⁰ In Arizona, Tribal borders do not protect Reservations from crimes related to gangs, drug sales, human smuggling, and major drug cartel enterprises. We are on the front line. The majority of offenders prosecuted federally have lengthy tribal criminal histories. Their criminal acts and individual crime sprees have harmed tribal families, injured vulnerable children, and have disrupted the peace of our tribal community. Tribal criminal convictions are not included as part of the criminal history determination of the federal sentencing guidelines in our Indian Country cases, (particularly felony-level crimes) and sentences only average approximately 32 months in length (when outliers are removed). Our outcomes are certainly less than a Native or non-Native offender would receive in Arizona State court for similar serious and violent felony crimes. Thirty-two months is generally not a long enough period to properly

³⁰ Offenses like murder, manslaughter, aggravated assault, sexual offenses, child abuse, child molestation, gang related crimes, gun related offenses, burglary, home invasions, and arson make up a majority of Pascua Yaqui cases referred for federal prosecution.

consider punishment, rehabilitation, justice, job training, or other restorative practices and policies prior to an offender returning home to our Tribal community.

Criminal jurisdiction in Indian Country is evolving and many tribal Courts are as sophisticated as their state counterparts. Some of the arguments against recognition and reliance of tribal sentencing outcomes are outdated, paternalistic, do not afford comity and respect for tribal decision making, and do not account for present day reality. There are now dozens of Tribes that are exercising either enhanced Special Domestic Violence Criminal Jurisdiction (SDVCJ) under the Violence Against Women Act, (VAWA) or that have implemented the Tribal Law and Order Act (TLOA) provisions. The Pascua Yaqui Tribe is one of those Tribes. The Tribe has investigated 30 different cases of domestic violence committed by Non-Indians on our Reservation. The cases involved incidents of strangulation, hair-dragging, physical assaults, and conduct that repeatedly victimized whole families. Of those cases, the offenders had close to 90 separate Tribal police contacts, pre and post VAWA implementation. The majority of the offenders also had lengthy state criminal histories that consisted of violent offenses, drug and alcohol related offenses, and weapons related offenses. Three of the offenders were felons. Three offenders had felony warrants, two for burglary and one for armed robbery out of the State of Oklahoma. Two of the offenders were Legal Permanent Residents (LPR) from Mexico. The Tribe has convicted eight of the non-Indian offenders in Tribal court for domestic violence related offenses. Tribal Court convictions of Non-Indians and Indians should be recognized by federal courts. This is the new reality and the future of Indian Country jurisdiction. Jurisdiction is changing, tribes are fighting hard to protect their community, crime is multi-jurisdictional in nature, and there is no reason the federal court process should not properly account for this.

Moreover, every person arrested and charged in the Pascua Yaqui Tribal Court is guaranteed legal representation if they face a day in jail, that has been the case now for many years. Most of the offenders that will be prosecuted in federal court will have a tribal criminal history and possibly, a State criminal history. The majority of their relevant Tribal court convictions will be counseled, unless they chose to waive legal representation. The actions of major crime offenders are not traditional, they are not cultural, and they are not the norm for our tribal community.

Policymakers should also consider the unique nature of each tribe and each federal district. The District of Arizona is different than the District of South Dakota. Likewise, the Pascua Yaqui Tribe differs from the Navajo Nation and any other Tribe. Although we may be faced with some of the same realities, crime is different, laws are different, and approaches to justice, punishment, restoration, and sentencing are different. For example, in Arizona, federal priorities and resources are largely spent on immigration related enforcement. Federal courts in Arizona are clogged with immigration reentry cases, drug smuggling matters, and criminal charges centered on the policies of Operation Streamline.³¹ Although necessary, the result is that there are less resources devoted to Indian Country crime in Arizona. This means that less Indian Country cases are investigated, less cases are referred, more cases are declined, and the cases that are referred are more likely to be declined due to inadequate investigations and delayed indictments.³² We should also consider jurisdictional realities and how each Federal District policy impacts sentencing outcomes.

In Arizona, generally, the U.S. Attorney's Office does not prosecute Indian Country drug cases. It is hard to recall the last federal drug case prosecuted from the Pascua Yaqui Reservation. Drug use

³¹ https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-95_May15.pdf

³² <https://www.justice.gov/tribal/file/796976/download>

and sales, including marijuana, cocaine, crack, heroine, and methamphetamine have reached epidemic levels on the Pascua Yaqui Reservation. There have been drop houses, drug related shootings, gang violence, drug related violence, and serious crimes related to the sale of drugs. Many of the social ills in our community are directly related to drug use. The reason given for the lack of federal prosecutions of street level drug sales in Indian Country is that there is a threshold issue concerning “drug mules” who smuggle large quantities of drugs into the Country from Mexico.

Disparity in sentencing is not an issue in Southern Arizona when comparing Indian defendants prosecuted for major violent felony crimes with similarly situated defendants prosecuted in Arizona. Often, federal “crack” conviction sentencing will be compared to sentences of tribal defendants to indicate that disparity that exists in Indian Country criminal outcomes. Because of the lack of federal drug prosecutions and our actual major crimes sentencing results, the analogy does not fit in the District of Arizona cases that flow from the Pascua Yaqui Reservation. However, if there is a glaring disparity, it may be in the justice received by victims and families. Victims may face language barriers, cultural barriers, discrimination, and inadequate federal jury representation. Largely, the Pascua Yaqui community and our victims were dissatisfied with our federal court outcomes, and our tribal court outcomes for that matter. Justice was hampered and limited by our tribal Constitution, our code, scarce resources, and decades enduring federal agencies who were not investigating or prosecuting our major crimes. This history helped to create a lawless atmosphere and a situation where the community simply does not trust our justice systems. Tribal Court outcomes should be respected and given as much weight as mitigating factors would have on downward departures during federal sentencing determinations. Tribal court criminal history should also play a factor when federal courts are considering pre-trial release of

tribal defendants, especially if a court is contemplating release back into the Tribal community. Federal policies, regional factors, and Reservation crime rates should be considered when allocating prosecution, victim, and investigative resources.

FEDERAL DECLINATIONS

Any consideration of federal sentencing, federal prosecution, or Indian Country jurisdiction should include an analysis of federal declinations, as federal jurisdiction has been primary since the passage of the Major Crimes Act of 1885. Federal prosecutions and sentencing must be considered in light of federal declinations and federal resources for law enforcement investigations. On the Pascua Yaqui Reservation, the declination rate has actually risen dramatically. The U.S. Attorney advised the Tribe in 2008 that there was no crime on the Pascua Yaqui Reservation and no declinations. Although that may have been true when reviewing federal referrals and convictions, it was not an accurate representation of what was actually occurring on the ground. As expected, once federal crimes started to get prosecuted in earnest in 2009, the local declination rate increased. However, the rate is not as high as other places in Indian Country. Interrelated, less than half of the major crime incidents reported since 2008 have been officially referred for federal prosecution. However, in the major crime cases that have been officially referred since 2009, a majority have been indicted by the U.S. Attorney's Office. Most of the cases were investigated and referred by tribal detectives who have their federal Special Law Enforcement Commission (SLEC) and they were assisted by local F.B.I. agents in complex cases. The prosecution process was facilitated by tribal prosecutors who are tabbed as Special Assistant United States Attorneys, (SAUSAs).

Attached is a recent breakdown of most of the Pascua Yaqui Tribe's Federal case outcomes from 2009-2014 (taken from federal Sentencing Orders and press releases). The attached

spreadsheet notes thirty-two federal convictions and six revocations. When you remove outliers, the average federal sentence involving Pascua Yaqui defendants is between 32-36 months, with 36 months of federal Supervision. That is fairly low when you compare a federal sentence to a sentence from the State of Arizona for a comparable crime. The Tribe has had approximately sixty cases officially referred over this time span. Referred means that a Tribal investigator, tribal police officer, or a federal agent sent an investigation to the U.S. Attorney for prosecution. This is much higher than what was occurring prior to 2008. Approximately fifteen cases have been officially declined, three cases were dismissed, one person was found not guilty at trial, and one case was prosecuted by the State. Five non-Indians were prosecuted federally over this time span (two for domestic violence incidents). Twenty of these cases were also prosecuted tribally, some were joint prosecutions, and most outcomes were concurrent to each other. The investigation, timing, (Statute of limitations) evidence, and coordination issues impact when, how, and by who a case gets prosecuted by.

There were many potential federal (felony) cases, (probably close to 50 between 2008-2014) that were reported and investigated, but never officially referred, indicted, or prosecuted because the investigation did not yield the proper probable cause to support charges or there were witness issues or a lack of cooperation.

The Tribe has been working well with the F.B.I. and the U.S. Attorney's Office and the listed outcomes serve as evidence of overall improved cooperation and good work by police, victim services, and other support divisions in our criminal justice system. The Tribe believes that recent federal arrests and convictions have helped to lower the overall crime rate on the Reservation, increased the quality of life, and also helped to provide a general deterrent, now and for the foreseeable future.

RECOMMENDATIONS

- The Pascua Yaqui Tribe strongly recommends that Congress require that counseled tribal court convictions be considered in federal sentencing determinations.
- Federal Courts should also consider Tribal criminal history during pretrial release determinations.
- The Pascua Yaqui Tribe recommends that federal sentences, release dates, and timely notification occur to Tribal authorities and victims.
- The Tribe strongly recommends other sentencing alternatives, reentry programs, education, and or job related programming be included as part of criminal sentences, especially if the tribal defendant is going to return to the reservation.
- The Pascua Yaqui Tribe recommends that federal declinations by the U.S. Attorney's Office be broken out by Tribal jurisdiction, annually.
- The Pascua Yaqui Tribe recommends that all criminal investigations with a potential federal nexus that are opened by tribal law enforcement, B.I.A., and the F.B.I. be accounted for separately, aggregated annually, broken out by crime, and distinguished from investigations that are actually referred for prosecution.

PREVIOUS & RELEVANT PASCUA YAQUI HABEAS MATTER

On August 17, 2011, the United States Court of Appeals for the 9th Circuit issued an Opinion in the case of *Miranda v. Anchondo*³³, 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.

³³ *Miranda v. Anchondo*, 684 F.3d 844 (9th Cir. 844), cert. denied, 2012 WL 2396988 (U.S. Oct. 1, 2012); *Bustamante v. Valenzuela*, 715 F.Supp.2d 960 (D.Ariz.2010). Tribes are allowed to impose consecutive one year terms for separate offenses charged in a single criminal proceeding.

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

The first responsibility of any government, tribal or otherwise, is the safety and protection of its people. For there can be no security or peace where there is insecurity and fear. Pascua Yaqui tribal officials no longer have to simply stand by and watch their people be victimized with no recourse. Violent behavior against intimate partners or vulnerable family members by tribal members or non-Indians is conduct that is no longer tolerated. Protecting victims of violent crime, domestic violence, and sexual assault is about justice and safety, and it is also about fairness, and dignity.

Full restoration of criminal jurisdictional authority for Tribal governments over all crimes and persons should be the next step. 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. VAWA 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. The proposed “Tribal Youth and Community Protection Act of 2016” will help address some of the gaps to cover children and ancillary crimes a VAWA defendant may commit. However, more problems exist, like the fact that the law does not cover sexual assaults or stalking committed by strangers.

Full restoration would help ensure fairness, safeguard tribal communities, and help clear up long standing jurisdictional problems. 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, his external criminal history may also be considered. Noncitizens visiting or residing in the United States are also subject to federal and State criminal jurisdiction despite their exclusion from the political process.

ADDITIONAL TRIBAL EMPOWERMENT AND SUPPORT IS KEY

The starting place to reverse historical jurisdictional problems and injustices in Indian Country is with strong tribal justice systems that are supported with the required resources. Criminal investigations occur at the local level. Along with strong and meaningful federal prosecutions, our local government and court system is the best vehicle to protect Yaqui victims, mothers, and children from violent perpetrators. The recent Pascua Yaqui VAWA and TLOA implementation process bear those beliefs out. However, without the resources to fund robust court and victim services, the gains may only lead to the same revolving door of repeat violence and ineffective criminal prosecutions that we are all too familiar with. The Tribal Law & Order Act, the amendments to the Indian Civil Rights Act, the Adam Walsh Act, VAWA, and changes to the Pascua Yaqui code will enhance the safety and security of our community as the laws are implemented, followed, and properly enforced.

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 court system and heal our community. 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 people, dedicated significant resources, and spent countless hours to see these changes through. However, it will take additional hard work, federal legislation, resources, and dedication to continue to fully and effectively protect and support our victims who have been impacted by violence. We respectfully request additional Congressional assistance to help address the persistent violence and drug abuse that plagues our community. Additional support for Tribal Court systems will also further the current federal strategy that promotes the longstanding policies of Indian self-determination, tribal self-governance, and tribal self-sufficiency.

In closing, we thank the United States Congress, the Obama Administration, the Department of Justice (DOJ), our sister Tribes, advocacy groups, the National Congress of American Indians (NCAI), the Tribal Law & Policy Institute (TLPI), the National Indigenous Women's Resource Center (NIWRC), the Center for Court Innovation (CCI), and the National Council of Juvenile & Family Court Judges (NCJFCJ)³⁴ for the leadership, cooperation, and assistance during the past few years as we worked to better protect our Reservation community.

³⁴ Humble thanks to the United States Congress for drafting and passing TLOA & the Reauthorization of VAWA, thanks to the Department of Justice, (DOJ) Deputy Associate Attorney General Sam Hirsch, Director Tracy Toulou, Counsel to the Director, Marcia Hurd, National Indian Country Training Coordinator Leslie Hagen, Native American Issues Coordinator Jeremy Jehangiri. And the U.S. Attorney's Office, District of Arizona. Thanks for the efforts of the Department of the Interior (DOI), Kevin Washburn, Associate Solicitor Michael Berrigan, Attorney Advisor Leta Hollon, Director of the office of Tribal Justice, Darren Cruzan, Associate Director Tricia Tingle, and Deputy Associate Director Steve Juneau. Thanks to Technical Assistance providers: The National Congress of American Indians, (NCAI) Natasha Anderson, Virginia Davis, and John Dossett. The Tribal Law & Policy Institute (TLPI), Chia Halpern Beetso & Jerry Gardner and the National Council of Juvenile & Family Court Judges (NCJFCJ), Jessica Singer and Steve Aycock. The University Of Arizona School Of Law, and Professor Melissa Tatum, Finally, thank you to all the members of the Intertribal Technical Assistance Working Group on Special Domestic Violence Criminal Jurisdiction (ITWG).

Sentenced Date	Gender	Name	Offense	Class
20-Oct-10	M	Jonathan Garcia	Aggravated Assault	D, C, C
22-Oct-10	M	Manuel Cupis	Aggravated Assault (Drive-by shooting)	D, C, C
27-Oct-10	M	Victorio Kaye Jaimez	Aggravated Assault-Domestic Violence	C
2-Dec-10	M	Estevan Miguel Estrella	Aggravated Assault (Drive-by shooting)	D, C, C
25-Apr-11	M	Victoriano Valenzuela	Sexual Conduct with a Minor (statutory rape) - Domestic Violence	C
31-May-11	M	Juvenile	Arson X 3	
29-Jun-11	M	Gerardo Benito Ramirez	Murder Homicide	F
4-Aug-11	M	Jonathan Garcia	Aggravated Assault	D, C, C
19-Dec-11	M	Jose Conrado Madrid	Sexual Assault with Minor - Domestic Violence	A
12-Apr-12	M	Aaron James Delores	Aggravated Assault-Domestic Violence - Stabbing	C
17-May-12	M	Gary A. Chavez	Theft - Fraud involving Tribal Funds	A
29-May-12	M	Leandro Jesus Flores	Sexual Assault - Domestic Violence	A
17-Oct-12	M	Jonathan Garcia	Aggravated Assault	D, C, C
30-Nov-12	M	James Rayburn Johnson	Assault Domestic Violence - Interference with Communications [Non-Indian]	C
31-Jan-13	M	Micheal Alvarez-Saurez	Aggravated Assault - Stabbing	C
6-Mar-13	M	Avery Rupert Lopez	Aggravated Assault - Stabbing	C
22-May-13	M	Gilbert Casillas Jr.	Aggravated Assault - Domestic Violence - Stabbing	C
12-Aug-13	M	Donald Lawrence Bustamante	Prohibited Possessor (Firearm)	C
18-Nov-13	M	Peter Ron Acuna	Aggravated Assault	C
25-Nov-13	M	Christopher Montana	Child Abuse	
2-Dec-13	M	Luis Gonzales	Dog Mauling (State Crime Assimilation case)	
26-Mar-14	M	Micheal Alvarez-Saurez	Aggravated Assault - Stabbing	C
31-Mar-14	M	Victoriano Valenzuela	Sexual Conduct with a Minor (statutory rape) - Domestic Violence	C
30-May-14	M	James Rayburn Johnson	Assault Domestic Violence - Interference with Communications [Non-Indian]	C

17-Jun-14	M	Francisco Garcia	Aggravated Robbery / Aggravated Assault	D, C, C
13-Aug-14	M	Michael Madrid Jr.	Aggravated Assault	C
25-Aug-14	M	John Martin Griffith	Domestic Violence Aggravated Assault - Non Indian	
8-Sep-14	M	Garin Patrick Thomas	Aggravated Assault - Serious Injury	C
1-Oct-14	M	Sonny R. Lozano	Aggravated Robbery / Aggravated Assault	D
28-Oct-14	M	Ramiro Osuna Bustamante	DV Aggravated Assault, X2 (DV Habitual Offender Case)	C
13-Mar-15	M	Christopher Rene Koch	Prohibited Possessor (Drug Related)	C
28-May-15	M	James Rayburn Johnson	Assault Domestic Violence - Interference with Communications [Non-Indian]	C
16-Jun-15	M	Isaac Alvarez	Aggravated Assault (stabbing knife)	C
16-Jun-15	M	Isaac Tito Coronado	Prohibited Possessor	C
6-Aug-15	M	Victorio Kaye Jaimez	Aggravated Assault - Domestic Violence	C
	M	Noah Espinoza	Aggravated Assault (Drive-by shooting)	D, C, C
	M	Joseph Camargo	Murder Homicide	

Ordered	Supervised	Revoked
10 months	3 yrs	-----
18 months	3 yrs.	-----
51 months	3 yrs	-----
36 months	3 yrs.	-----
24 months	Lifetime	-----
6 months	24 months	-----
210 months	5 yrs	-----
-----	36 months	Time Served
96 months	Lifetime	-----
48 months	3 yrs.	-----
0	2 yrs.	-----
60 months	5 years	-----
-----	0	10 months
24 months	36 months	-----
18 months	3 yrs.	-----
44 months	36 months	-----
21 months	3 yrs.	-----
18 months	3 yrs.	-----
70 months	3 yrs.	-----
0	2 yrs.	-----
0	1 yr	-----
-----	24 months	4 months
-----	Lifetime	6 mnths
-----	24 months	8 months

10 months	3 yrs.	-----
0	3 yrs	-----
0	3 yrs.	-----
31 months	3 yrs	-----
9 months	3 yrs.	-----
34 months	3 yrs.	-----
24 months	3 yrs.	-----
-----	0	10 months
33 months	18 months	3 months
Time Served	2 yrs.	-----
-----	24 months	6 mnths
36 months	3 yrs.	-----

*Office of the United States Attorney, John S. Leonardo
District of Arizona*

FOR IMMEDIATE RELEASE
Thursday, February 18, 2016

Public Affairs
COSME LOPEZ
Telephone: 602.514.7694
Mobile: 602.686-8614
cosme.lopez@usdoj.gov
WWW.JUSTICE.GOV/USAO/AZ

PASCUA YAQUI BROTHERS SENTENCED TO PRISON FOR AGGRAVATED ASSAULTS ON THE PASCUA YAQUI INDIAN NATION

TUCSON, Ariz. – On February 10, 2016, Steven Gabriel North, 33, of Tucson, Ariz., and a member of the Pascua Yaqui Indian Nation, was sentenced by U.S. District Judge James A. Soto to serve 63 months in prison for aggravated assault with a dangerous weapon. On February 18, 2016, Antonio Ruben North, 30, also of Tucson, Ariz., and a member of the Pascua Yaqui Indian Nation, and brother and co-defendant of Steven Gabriel North, was sentenced by Judge Soto to serve 28 months in prison for aiding and abetting his brother in committing aggravated assault with a dangerous weapon. Both defendants had previously pleaded guilty to these offenses.

On July 25, 2014, Steven Gabriel North stabbed four victims with a knife during an altercation. Antonio Ruben North aided his brother in committing the stabbings by physically fighting with the victims. When fleeing from the scene after the altercation, the defendants ran over one of the victims with their vehicle. All four victims suffered injuries from the assault, which occurred on the Pascua Yaqui Indian Nation. One of the victims is also a member of the Pascua Yaqui Indian Nation.

The investigation in this case was conducted by the Federal Bureau of Investigation and the Pascua Yaqui Police Department. The prosecution was handled by Angela W. Woolridge, Assistant U.S. Attorney, District of Arizona, Tucson.

CASE NUMBER: CR-15-0266-TUC-JAS
RELEASE NUMBER: 2016-012_North

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2016 VAWA Update

The VAWA Numbers

30 VAWA investigations	22 cases charged (7 declined, 1 sent federally)
22 defendants	8 Convictions (1 dismissed as diversion)
Hispanic 13	7 dismissals for evidentiary issues-Castlemen
Afr Am 4	1 Jury Trial – Not Guilty
Caucasian 2	5 Open
Mex 2	1 Warrant
Asian 1	
4 Defendants have reoffended	2 Defendants on Warrant
2 have 3 VAWA arrests	1 post-conviction
1 Defendant has 5 VAWA arrests	1 pretrial
13 Investigations include alcohol/drugs as a factor	Approximately 20 children present during DV acts

Associated Financial Considerations

A VAWA arrest has shed some light on constitutional defense considerations. In one of our VAWA cases, a court appointed conflict attorney filed an *ex parte Ake* Motion. This is a request by a defense attorney to the court, without notice to the prosecutor, for funds for defense to hire experts in support of their defense theory. This *Ake* funding request is significant because it is a U.S. Supreme Court case that determined that it would be unconstitutional, under due process and effective assistance of counsel considerations, to deny an indigent defendant access to expert assistance if the defendant cannot otherwise afford one. *Ake v. Oklahoma*, 470 U.S. 68, 74 (1985). Given that VAWA expressly states "In a criminal proceeding in which a participating tribe exercises special domestic violence criminal jurisdiction, the participating tribe shall provide to the defendant ***all other rights whose protection is necessary under the Constitution of the United States...***" it is incumbent upon the Tribe to operate with the assumption that a federal court's review of a VAWA case would impose the same obligation upon the Tribal government. See 25 U.S.C.A. § 1304.

Our Tribal Court was recently confronted with a *Ake* request and ordered the Tribe to fund mental health expert examination of a VAWA defendant. The Office of the Prosecutor, in anticipation of the Court's ruling, sought assistance from professionals in the Mental Health Court of Pima County Superior Court. The Office was able to contact some mental health experts who agreed to offer the government rate for evaluations, which is substantially less.

Court related VAWA issues

There has been some VAWA case incidents that are noteworthy. The first instance involves the Court's dismissal of a VAWA case at the Arraignment because the Judge who conducted the Initial Appearance was not a licensed attorney. VAWA "requires that the judge presiding over the criminal proceeding [] has sufficient legal training to preside over criminal proceedings; and [] is licensed to practice law by any jurisdiction in the United States." There is a consensus among federal partners and other VAWA implementing tribes that this requirement (1) does not mean that a non-state bar licensed judge cannot preside over a VAWA initial hearing, (2) all of our Court Judges have sufficient legal training and are

licensed in the PY Bar Association which is a jurisdiction in the U.S., (3) the initiations of formal charges begins at the reading of the charges, which is the Arraignment hearing, not the initial hearing, and (4) if it is sufficient for county and municipalities to have non-licensed elected justices preside over criminal hearings then it is sufficient for Tribes to also permit.

The second noteworthy instance occurred when our Court challenged the legality of a VAWA probation violation arrest. The Court dismissed the probation violation reasoning that the defendant could not be arrested since he already had probation violation proceedings already set and that we could only arrest if he was again in violation of VAWA. However, VAWA is limited to criminal conduct involving violent DV acts, as such the defendant can commit crimes that PYT Court cannot preside over. Yet, if the conduct is in violation of the terms of probation, i.e. our court's orders, they can be brought to answer to the court. This includes a subsequent intervening criminal act during probation revocation proceedings.

The most recent instance involved the Court ruling that the defendant controlled the timetable for hearings. Our most recent VAWA case involved a defendant who decided to plead guilty to the complaint at the initial hearing (within 24hrs of arrest). He did so against the advice of his court appointed counsel, who put on the record that he did not advise the defendant to plead guilty and risk a sentence of up to one year incarcerated. The prosecutor then requested that the sentencing hearing be set out, at least a couple days to allow the court to have all relevant information about the defendant's criminal history and the circumstances surrounding the case, such as medical records of the victim who showed up to the hearing in a neck brace. The victim also requested a couple days to provide any information to the court as well as calm down from the traumatic incident that just occurred. The Court denied setting out the sentencing hearing over the prosecutor and victims requests. The Court advised that he will assume that if the Tribe files a complaint it must be prepared to present all aspects of the case, including sentencing recommendations. This rationalization by the Court creates some difficult practical considerations. First, if the act was violent and the victim and community safety is at risk, the initial hearing must occur in order for release conditions and/or bail to be imposed. Second, it is unrealistic to acquire medical records prior to a 24hour initial hearing. Third, as with most DV cases, there is always on-going investigation required, which means there exists information that neither prosecutor nor defense is privy to at the initial hearing. The Court imposed a 30 day sentence with credit for 1 day and suspending the remaining 29 days for 6 months of probation. The Tribe requested at least 5 days detention, given the available information and the condition of the victim, as well as the victim's request.

Extraditions

Recently, a monumental criminal proceeding occurred in the Tribes ability to hold criminals accountable. Historically, the arm of our criminal justice could not extend beyond the boundaries of the reservation. The Office of the Prosecutor has seemingly broke through that barrier. A recent criminal act that began on the reservation and fled into the county was charged in the county. This suspect is on our Court's warrant list. The Office of the Prosecutor then filed a demand for extradition, containing our tribal court warrant, with the county attorney's office under A.R.S. § 13-3869. This state statute provides that if a tribe honors extraditions to the state, then the state shall honor extraditions to the tribe. The Superior Court Judge accepted our Tribal Court warrant and served it upon the suspect, placing a hold upon him should he post bail. For several years now, the Office of the Prosecutor has permitted and executed extraditions of criminals from the reservation to state authorities. Because of this positive relationship the Tribe will now be able to reach some criminals off the reservation and bring them into our court to be held accountable through the state extradition process.

PROFILE:**Pascua Yaqui Tribe****Violence Against Women Act Special Domestic Violence Criminal Jurisdiction**

Summary: The Pascua Yaqui Tribe was one of three initial tribes selected by the U.S. Department of Justice to pilot enhanced criminal court jurisdiction pursuant to the Violence Against Women Reauthorization Act (VAWA) of 2013. This law vested tribes with the authority, subject to certain conditions, to arrest, and prosecute non-Indians who commit certain domestic violence crimes within their territory. The Pascua Yaqui Tribe formed an advisory board that worked with state and federal agencies, as well as with an inter-tribal working group, to prepare for implementation of the law. The tribe began exercising Special Domestic Violence Criminal Jurisdiction under VAWA in February of 2014 and prosecuted the country's first criminal domestic violence case against a non-Native offender under this law. With the law fully implemented, the Pascua Yaqui Tribe now has the ability to protect adult victims within its reservation from non-Indian domestic violence offenders.

Tribe: Pascua Yaqui Tribe

Program: Violence Against Women Act Special Domestic Violence Criminal Jurisdiction

Program Running Length: February 2014 to the Present

Contact:

Alfred Urbina, Attorney General

Phone: (520) 883-5119

Fax: (520) 883-5084

Alfred.Urbina@pascuayaqui-nsn.gov

7777 S. Camino Huivisim, Bldg C

Tucson, AZ 85757

<http://www.pycourts.org>

1. Tribal Demographics

- a. **Location:** The Pascua Yaqui Indian Reservation is located in Tucson, Arizona. The reservation is known as "New Pascua," a reflection of the fact that the tribe has several other traditional communities throughout southern Arizona, many of which are older than the reservation itself. These communities include Old Pascua (also in Tucson), Barrio Libre (in the City of South Tucson), Marana (northwest of Tucson), = Guadalupe (southeast of Phoenix), Penjamo (in Scottsdale), and Coolidge (north of Tucson).
- b. **Land characteristics:** The Pascua Yaqui Indian Reservation is a desert community. The reservation is located in the southwestern part of the Tucson metropolitan area and is adjacent to the San Xavier Indian Reservation, part of the Tohono O'odham Nation.
- c. **Population:** As of 2015, there were over 19,000 enrolled tribal members. Around 800 non-Indians work for the tribal government and casino (approximately 32% of all employees). Five hundred non-Indians live on the reservation.

2. Background

a. Problem to be addressed:

As with many other tribes, domestic violence poses a serious threat to the safety and well-being of the Pascua Yaqui community. Pascua Yaqui Tribal Police respond to incidents of domestic violence on a daily basis, and often the perpetrators of these incidents are non-Indians. However, until recently, federal law prevented the tribe from arresting and prosecuting non-Indians who committed domestic violence crimes on tribal lands. If a domestic violence report was made, there were few options available to tribal law enforcement. Often tribal officers would pick up the offenders, drop them off at the edge of the reservation, and threaten to arrest them for trespass if they returned. The federal government had criminal jurisdiction over these cases but rarely prosecuted them, leaving non-Indian offenders free to continue their criminal conduct and leaving tribal victims at risk.

In order to increase its ability to protect its citizens, the Pascua Yaqui Tribe petitioned Congress for Special Criminal Jurisdiction under the Violence Against Women Act (VAWA) of 2013, which would enable them to arrest and prosecute non-Indian domestic violence offenders. The tribe was granted this authority when it was accepted as one of the three initial tribes for the VAWA Pilot Project.

b. Target Population:

As a tribe that meets the requirements to implement Special Domestic Violence Criminal Jurisdiction under VAWA, the tribe may now arrest and prosecute non-Indians who commit certain domestic violence crimes against Pascua Yaqui adults. However, because VAWA jurisdiction is limited to domestic violence crimes and to cases involving adult victims, the tribe does not have the ability to prosecute non-Indians who commit non-domestic violence crimes or who threaten or abuse Pascua Yaqui children.

c. Program History:

The history behind the development of this program stretches back before the 2013 reauthorization of the Violence Against Women Act. Over the years, the Pascua Yaqui Tribe has worked to overcome problems stemming from the federal limitations on tribal criminal jurisdiction and they have been lead contributors to the development of enhanced sentencing options for Indian tribes.

Pre-Pilot History

For the Pascua Yaqui Tribe, expressing the full extent of their jurisdictional sovereignty has been a priority for many years. In 2008 a tribal member challenged the tribal court's authority to impose consecutive sentences exceeding one year under the Indian Civil Rights Act. That case, titled *Miranda v. Anchondo*, was eventually appealed to the Ninth Circuit Court of

Appeals. As the case brought widespread attention to the Pascua Yaqui Tribal Court, it pushed the tribe to evaluate their court system and determine whether any reforms were needed.

The Pascua Yaqui Tribal Council examined the tribe's criminal codes and procedures regarding fair treatment of criminal defendants, and decided to pass a law that guaranteed all Native defendants, including Indians from other tribes, the right to defense counsel at the tribe's expense if the tribe was seeking jail time. The tribe also lobbied Congress about increasing the sentencing authority of tribal courts. The tribe employed this second approach to validate that tribal courts can impose criminal sentences of more than one year and to affirm the legitimacy of their court processes.

In October of 2009, the Chief Prosecutor of the Pascua Yaqui Tribe attended the Department of Justice's Tribal Nations Listening Session on public safety. During that session, representatives from the Tribe offered several suggestions to strengthen the sovereignty of tribes and their ability to protect their tribal members. First, representatives suggested increasing sentencing maximums from one year to up to three years imprisonment for each criminal offense. Additionally, Pascua Yaqui representatives suggested that tribal courts should be allowed to consecutively sentence offenders for separate criminal offenses to multi-year sentences of incarceration. The talks from that session added to the development of new federal laws regarding enhanced sentencing options for tribal courts--Congress ultimately incorporated the suggestions made by tribal advocates into the Tribal Law and Order Act of 2010 (TLOA).

Immediately after the passage of TLOA, the Pascua Yaqui Tribal Council amended the Pascua Yaqui Court Rules in order to comply with the requirements of the law and gain enhanced sentencing authority. In order to become TLOA compliant, the Tribal Council had to make its laws publicly available, provide defense counsel to indigent defendants, have a law-trained judge, and purchase technology to record court proceedings. In complying with the requirements of TLOA, the tribe also laid the groundwork for complying with some of the mandates of VAWA.

In 2012, and again in 2013, Pascua Yaqui tribal leaders travelled to Washington, D.C. to appeal to Congressional leaders for criminal jurisdiction over non-Indians and explain the serious need for the Violence Against Women Reauthorization Act to help alleviate domestic violence on reservations. Tribal leaders also explained that tribal courts would be fair to non-Indian defendants and had the ability to ensure the full protection of their rights.

In March of 2013, President Obama signed the Violence Against Women Reauthorization Act (VAWA) into law, authorizing tribes that meet certain conditions to exercise Special Domestic Violence Criminal Jurisdiction. This would allow tribes to exercise their sovereign power to investigate, prosecute, convict and sentence non-Indian offenders who commit

domestic violence crimes against tribal members. Though the law was scheduled to take effect on March 7, 2015, it also authorized a voluntary “Pilot Project” which would allow certain tribes to begin exercising Special Domestic Violence Criminal Jurisdiction before the law’s effective date.

Pilot Project Phase (Planning, Design, and Implementation)

The Pilot Project was designed to have two separate phases. The first phase would invite tribes to participate in a working group in order to help plan and troubleshoot ideas relating to the implementation process for tribes. In order to participate in this phase, tribes had to submit letters of interest to join the working group. The second phase would begin when a tribe was authorized by the Department of Justice to begin the early exercise of Special Domestic Violence Criminal Jurisdiction. Tribes that wished to participate in this phase were asked to submit applications to the Department of Justice for review.

During Phase I of the Pilot Project, the Department of Justice launched the Intertribal Working Group (ITWG) on Special Domestic Violence Criminal Jurisdiction. The ITWG is voluntary meetings of tribal representatives who exchange opinions, information, and advice on how tribes can best exercise Special Domestic Violence Criminal Jurisdiction (SDVCJ). Between July and December of 2013, the Pascua Yaqui Tribe participated in numerous meetings with the ITWG where they discussed methods for combating domestic violence, addressing victims’ safety needs, and strategies to safeguard defendants’ rights.

In order to ensure that they would be able to participate in Phase 2 of the Pilot Project, on December 28, 2013, the Pascua Yaqui Tribal Council passed an ordinance amending its court rules to be compliant with VAWA. These amendments provided for changes to the tribe’s criminal jurisdiction to allow the tribe to prosecute non-Indians under SDVCJ; increased due process rights for defendants; and ensured that a cross-section of the community would be represented in the jury pool.

On December 30, 2014, the Pascua Yaqui Tribe submitted its application to the Department of Justice requesting to enter Phase 2 of the Pilot Project. The application consisted of an in-depth questionnaire that required the tribe to demonstrate that it provided all of the procedural safeguards required by the Act to protect defendants’ rights. On February 6, 2014, the tribe received official notice that it had been selected as a pilot tribe. One of the requirements of the Pilot Project was that the tribe provide a two-week notice period to inform the community of the change in the law. In order to ensure that individuals would be aware that a change in legal process might be affecting their rights, the tribe sought opportunities to broadcast their pilot status. The tribe conducted interviews with several news outlets across the country, including an internet news program called Colorlines and National Public Radio. Stories and press releases were also posted online and on social media platforms like Facebook.

Community meetings advising of the change in law were also held in New Pascua and the tribe's other traditional communities.

On February 20, 2014, the Pascua Yaqui Tribe began exercising Special Domestic Violence Criminal Jurisdiction over non-Indian perpetrators of domestic violence. On July 2, 2014, for the first time since 1978, an Indian tribe obtained the conviction of a non-Indian for committing a crime, in this case, the crime of domestic violence.

3. Program Description

a. Program Goals and Objectives:

The Pascua Yaqui Tribe seeks to provide all of its citizens with the greatest protection from crime and violence that the law can provide. The Pascua Yaqui Tribe implemented VAWA 2013 in order to address the issue of domestic violence on the reservation. The tribe is now better able to protect its women and children by ensuring that every perpetrator of domestic violence is held accountable for his or her actions.

b. Legal Requirements for Implementation:

The Violence Against Women Reauthorization Act of 2013 contains a series of legal requirements that must be satisfied in order for a tribe to exercise Special Domestic Violence Criminal Jurisdiction. These requirements act as procedural safeguards to ensure that non-Indian defendants are provided the due process protections that they would receive in federal or state court. The requirements can be broken down into three categories: 1) due process protections, 2) limitations on jurisdiction, and 3) compliance with federal case law.

Due Process Protections:

In addition to the rights guaranteed to defendants by the Indian Civil Rights Act, VAWA requires that tribes implement several additional specific procedures to ensure that defendants receive due process. Many of these rights overlap with those required by the Tribal Law and Order Act. These rights are:

- **The right to counsel for indigent defendants:** The tribe must provide legal counsel to any defendant who cannot afford an attorney. The Pascua Yaqui Tribe has hired additional public defenders to deal with the increased caseload.
- **Law-trained judges:** The judge presiding over the criminal proceeding must be law-trained and licensed by any jurisdiction in the United States.
- **Publicly available criminal laws:** The tribe must make all of their applicable criminal laws, codes, court rules, and rules of evidence available to the public.
- **Maintain a record of criminal proceedings:** The tribal court must produce and maintain a record of the criminal proceedings.

- **The right to a jury selected from a fair cross-section of the community:** The Pascua Yaqui Tribe selects non-Indians who live and/or work on the reservation to sit on its juries. The tribe mixes a list of enrolled tribal members with a list of the non-Indians on the reservation and then randomizes the lists to select the jury pool.
- **The right to file habeas writ in federal court:** The tribal court must inform a detained non-Indian defendant of his/her right to have a federal court review the case by petitioning for a writ of habeas corpus at any time.

Limitations on Jurisdiction:

The Violence Against Women Act places strict limitations on the exercise of Special Domestic Violence Criminal Jurisdiction. Several specific conditions must be met:

- **Types of Crimes:** The tribe may only prosecute a non-Indian who commits a) domestic violence, b) dating violence, or who c) violates a protection order.
- **Types of Defendants:** The defendant must be a non-Indian with sufficient ties to the Indian community. This requirement is only satisfied if the defendant lives on the reservation, works for the tribe, or is the spouse, intimate partner, or dating partner of a tribal member or other Indian person living on the reservation.
- **Types of Victims:** The victim must be a tribal member or Indian who lives on the prosecuting tribe's reservation.
- **Place of Criminal Act:** The crime must occur in Indian Country.

Federal Case Law:

Beyond the statutory requirements, the Pascua Yaqui Tribe is careful to comply with any federal case law that could potentially restrict tribal exercise of Special Domestic Violence Jurisdiction. For instance, a recent Supreme Court case, *U.S. v. Castleman*, has had a major influence on the tribe's charging decisions. In *Castleman*, the Supreme Court concluded that for an act to qualify as domestic violence, an aggressor must engage in "offensive touching" so that the offense meets the statutory requirements for physical force. Although the Court was interpreting a different federal statute, not directly related to the requirements of VAWA, the language from *Castleman* is likely to be invoked if a challenge is posed to the implementation of VAWA in federal court. Therefore, the Pascua Yaqui Tribe continues to be cautious with its charging decisions while they await confirmation from Congress that violent force is not required to charge domestic violence crimes under VAWA 2013.

c. Program Design

The tribe adapted its existing procedural framework for investigating and prosecuting domestic violence crimes so that it may now, under the conditions specified above, exercise

jurisdiction over non-Indians. The investigation of a domestic violence crime is now similar whether or not the accused is Native. When an act of domestic violence is committed on the reservation, tribal law enforcement officers respond to the scene and question whoever is present in order to establish what happened, create a police report, and possibly make an arrest. If the offender is arrested, tribal prosecutors use the information contained in the police report to make a charging decision.

However, the tribe does not pursue every potential VAWA case, and may hand cases over for state or federal prosecution, depending on the circumstances. The tribe works extensively with state and federal law enforcement agencies and is able to consider any open cases an offender may have when deciding whether to charge that defendant in tribal court. Non-Indian offenders, who are picked up for domestic violence crimes may have active state or federal warrants for more serious offenses. For example, the tribe recently had a defendant with an active warrant for armed robbery from the state of Oklahoma. While the tribe lost the jury trial against the defendant on jurisdictional grounds (failure to prove an “intimate relationship” in a same-sex context), the defendant was immediately extradited to Oklahoma for prosecution. Although not a so-called successful prosecution, the case illustrated that tribal courts are able to carry out fair trials against non-Indian defendants.

The tribe also uses a multidisciplinary team (MDT) comprised of tribal and federal law enforcement agencies to assist with the investigation and prosecution of multi-jurisdictional cases. Using this process, the tribe has referred several of its more severe domestic violence cases (i.e. strangulation, aggravated assault) for federal prosecution, since greater punishment may be secured in federal court than in tribal court, due to the limits on tribes’ sentencing authority. Cases referred for federal prosecution may be picked up by the U.S. Attorney’s Office in Tucson or brought by one of the Tribe’s Special Assistant U.S. Attorneys (SAUSAs). SAUSAs are appointed by the tribe, in partnership with the U.S. Attorney’s Office and Department of Justice, and may prosecute cases in federal court.

c. Program Administration:

Throughout the pilot project, the tribe was required to report to the Department of Justice. The tribe was also in constant communication with the Bureau of Indian Affairs, the National Congress of American Indians, and a number of other committees and advisory groups formed to address and respond to implementation issues.

On the Pascua Yaqui reservation, no single person, group, or agency is responsible for running the pilot project. Tribal Council, law enforcement, prosecutors, public defenders, judges, court personnel, and the entire Pascua Yaqui community have been vital to the implementation and enforcement of the law. In cooperation with state and federal law enforcement agencies, and the U.S. Attorney’s Office in Tucson, the tribe now investigates

domestic violence crimes that are perpetrated by both Indians and non-Indians and decides the proper judicial forum for charging those individuals.

4. Planning and Implementation

a. Funding:

The Pascua Yaqui Tribe funded its own participation in the VAWA pilot project. However, in 2010 the tribe received a \$21 million Recovery grant from the American Reinvestment Recovery Act (ARRA) to construct its multi-purpose justice complex. The ability to implement VAWA would have been far more challenging without some of the resources that were developed due to the support of the Recovery Act grant. That grant funded the tribe's multi-purpose justice complex, which is used for officer training, court training, attorney training, victim services and a BIA-approved detention facility. Additionally, that grant funded necessary technology upgrades, such as a secured data-communication line so law enforcement could obtain information about the criminal histories of non-Indian defendants through NCIC.

When estimating the cost of implementing VAWA, the Pascua Yaqui Chief Prosecutor, O.J. Flores, stated that the cost incurred by a particular tribe could vary dramatically based on the size of the reservation, the number of cases, social demographics, and the extent of the tribe's current infrastructure. However, Mr. Flores estimates that the cost of implementation could easily eclipse a million dollars annually considering all costs, including salaries for a law-trained judge and licensed prosecutors and defense attorneys, a court record system, administrative staff, approved detention facilities and personnel, training for law enforcement, code changes, and public forums to provide notice of the change in law. Additionally, there would be increased costs of litigation, such as working with experts when necessary, compensation for witnesses, defendant healthcare costs, overtime for officers, and forensic testing.

Technical Assistance:

The Tribe has worked with multiple technical assistance providers throughout every phase of the project, including the Center for Court Innovation, the National Congress of American Indians, the Tribal Law and Policy Institute, and the National Council of Juvenile and Family Court Judges. Their assistance centered on conducting a justice system needs assessment, code structuring, law enforcement training, VAWA prosecutor training, and organizing the administrative process. Additionally, during implementation, the tribe worked with TA providers to troubleshoot early concerns and address unforeseen legal issues as they arose.

b. Partnerships:

Local, state, and federal partnerships have been critical to the Pascua Yaqui Tribe's successful exercise of Special Domestic Violence Jurisdiction. Each phase of the process has required extensive communication and collaboration between the tribe and its partners. The tribe works regularly with the Pima County Prosecutor's Office, the Tucson Police Department, the U.S. Attorney's Office in Tucson, the U.S. Department of Justice, and the Bureau of Indian Affairs. Because of the jurisdictional overlap, the tribe's positive relationships with state and federal law enforcement have been very beneficial. The tribe also assists the state and federal governments with criminal extraditions. As of October 2014, the tribe has conducted a total of 65 criminal extraditions from the Reservation, primarily to the state of Arizona through the Pima County Prosecutor's Office and the Tucson Police Department. Tribal law enforcement also participates in a local integrated information sharing system with state and federal law enforcement that makes investigation and prosecution more efficient for everyone.

c. Factors Contributing to Success:

Much of the Pascua Yaqui Tribe's success with the pilot project can be attributed to the groundwork that was laid prior to the passage of VAWA.

- *Existing Justice Complex* - In 2010, the tribe received a \$21 million grant through the American Reinvestment Recovery Act (ARRA) to construct a state-of-the-art multipurpose justice complex, which enabled the tribe to comply with many of the requirements for VAWA implementation.
- *Existing Legal Framework* - Before applying for pilot status, the tribe had already developed its criminal justice system infrastructure and adapted its criminal code to comply with VAWA.
- *Partnerships* - The tribe had positive, preexisting relationships with many of the state and federal partners that it worked with throughout the pilot project and implementation phase.

d. Challenges:

- *Complying with Federal Case Law* - A recently decided U.S. Supreme Court case, *U.S. v. Castleman*, poses a challenge to the tribe's exercise of Special Domestic Violence Jurisdiction under VAWA. In *Castleman*, the Supreme Court held that the physical force requirement to establish a "misdemeanor crime of domestic violence" (under a different federal statute) was "satisfied by even the slightest offensive touching." The tribe is troubled by the Supreme Court's "offensive touching" language, as the tribal prosecutor's office commonly charges for domestic violence crimes that do not involve physical contact, but still involve situations that are violent and

dangerous to the victim. In the tribe's experience, perpetrators of domestic violence tend to escalate their abusive behavior over time in order to maintain a position of power and control. Unfortunately, *Castleman* may be used to limit tribal domestic violence jurisdiction if a VAWA Special Domestic Violence Criminal Jurisdiction case winds up in federal court. The tribe wants to protect victims of domestic violence and ensure that VAWA 2013 will survive any future efforts to have the law narrowly construed or overturned. To balance these commitments, the tribe has been very conservative in deciding which VAWA 2013 cases to charge. It is also mounting a pre-emptive strike in anticipation of the law being challenged by collaborating with the U.S. Attorney's Office to identify and respond to potential arguments.

- *Articulating the existence of an "intimate" relationship* - VAWA 2013 requires the tribe to prove that the victim and defendant were in an "intimate" or "dating" relationship before moving forward with prosecution. The tribe has encountered some difficulties with this requirement, particularly in one case that involved a same-sex couple whose relationship may not have been public. Tribal police are now being trained to ask questions that will help establish whether or not the relationship between the parties is "intimate," as is required for the tribe to have jurisdiction.
- *Costs & Resources* - Tribal prosecutors have been very selective with which cases to charge due to limitations in resources, such as available bed spaces in their long-term detention facility. There have been instances where the contracted detention center has reached maximum capacity and the tribe has been left to consider alternative options, such as pre-trial release, as well as the housing needs of violent offenders and those with medical conditions. To remedy this issue, the tribe is asking Congress to appropriate money under VAWA 2013 to assist with some of the costs of implementation.
- *Post-Conviction Challenges* - Now that the tribe has convicted several non-Indians for domestic violence, they must determine the best way to manage these offenders once they begin probation. The tribe is exploring whether it should transfer probation services via an intergovernmental agreement to the State of Arizona or Pima County. Alternatively, if the offender stays on the reservation, the tribe will have to determine what sort of rehabilitative services it could offer given limitations on funding and facility space.

e. Lessons Learned:

While implementing Special Domestic Violence Criminal Jurisdiction, the Pascua Yaqui Tribe has learned several important lessons. First, young children are often involved in domestic violence cases. These children live in homes where they are being exposed to violence, and are

at high risk of physical abuse, neglect, and psychological trauma. In fact, in several of the VAWA cases that the tribe has prosecuted, the police reports were made by children. In one case, the child was assaulted by the victim for reporting the incident. Unfortunately, the tribe still lacks the authority to charge non-Indian offenders for committing crimes against children. The tribe is asking Congress to consider extending special criminal jurisdiction to include offenses committed against children.

Second, it takes significant time and money to implement and exercise VAWA jurisdiction. There are less costly alternatives to prosecution, such as civil remedies, alternative sentencing, and referral for state or federal prosecution, that may be equally effective in certain cases.

5. Program Outcomes

a. Number Served:

Thus far, the tribe has handled nearly thirty domestic violence cases involving non-Indians. Eight of these cases resulted in conviction by plea agreement, while another four cases were serious enough to warrant referral for federal prosecution.

b. Program Effectiveness:

VAWA cases accounted for 25% of all domestic violence cases filed by the tribe during the pilot period from February 2014 to March 2015. Additionally, the tribe is now collecting as much data as possible in order to identify the underlying risk factors for domestic violence in their community, with the hope of petitioning for funding to address these issues in the future. The tribe also hopes to work with federal partners to implement a comprehensive evaluation of the pilot tribes' experiences

c. Community Response:

The implementation of VAWA Special Domestic Violence Criminal Jurisdiction has made a meaningful impact in the Pascua Yaqui community. Tribal members had become accustomed to domestic violence by non-Indians because the justice system was not able to respond in any meaningful way. However, as the community has become aware of the tribe's renewed ability to arrest, convict, and sentence non-Indian offenders, awareness has spread about the problem of domestic violence. Through outreach, the Pascua Yaqui community is slowly being re-educated and reassured that this form of abuse should not and will not be tolerated.

d. Success Stories:

"The true success of VAWA is not merely the ability to arrest, convict, and punish. It is correcting years of victimization acceptance by our community."

– OJ Flores, Chief Prosecutor, Pascua Yaqui Tribe

e. Documents:

- [http://www.ncai.org/tribal-vawa/getting-started/Practical Guide to Implementing VAWA TLOA letter revision 3.pdf](http://www.ncai.org/tribal-vawa/getting-started/Practical%20Guide%20to%20Implementing%20VAWA%20TLOA%20letter%20revision%203.pdf)
- [http://www.ncai.org/tribal-vawa/pilot-project-itwg/Pascua Yaqui VAWA Implementation Timeline 2015.pdf](http://www.ncai.org/tribal-vawa/pilot-project-itwg/Pascua%20Yaqui%20VAWA%20Implementation%20Timeline%202015.pdf)

Quotes:

- Spreading the word, advising the community of arrests, convictions and sentences here on our land has brought awareness not only to the problem of domestic violence, but is re-educating the community that this form of violence does not and should not be tolerated.
- The immediate success of VAWA is the break in the silence.
- We are very satisfied with the working relationship we have with the TAs and are even more pleased to continue working with them as this jurisdiction becomes more robust and expansive.
- Because of the relationship that our tribe has developed with our federal partners, we are able to staff all multi-jurisdictional cases with our US Attorney's Office. This positive working relationship has proven to be a tremendously useful tool when considering what type of punishment is appropriate given tribal limitations.
- With the collaboration of our federal partners and our fellow tribes across Indian Country, we seek to attack all barriers head on in an effort to expand our jurisdictional reach and to demonstrate that we not only have the capacity but the ability to administer justice fairly.



**UNITED STATES SENATE
COMMITTEE ON INDIAN AFFAIRS
LEGISLATIVE HEARING ON “S. 2785, A BILL TO PROTECT NATIVE CHILDREN
AND PROMOTE PUBLIC SAFETY IN INDIAN COUNTRY;” S. 2916, “A BILL TO
PROVIDE THAT THE PUEBLO OF SANTA CLARA MAY LEASE FOR 99 YEARS
CERTAIN RESTRICTED LAND AND FOR OTHER PURPOSES;” AND S. 2920, “THE
TRIBAL LAW AND ORDER REAUTHORIZATION ACT OF 2016.”**

**WRITTEN TESTIMONY OF THE
HONORABLE ALFRED L. URBINA,
ATTORNEY GENERAL, PASCUA YAQUI TRIBE OF ARIZONA**

May 18, 2016

Chairman Barrasso and Distinguished Members of the Committee:

Good afternoon, my name is Alfred Urbina, and I currently serve as the Attorney General of the Pascua Yaqui Tribe, a Federally Recognized Tribe from the State of Arizona. On behalf of our Tribal Council and membership, thank you for this opportunity. It is an honor to be here today to provide testimony to the Committee regarding the need for public safety improvement and tribal law and order in Indian Country. I am pleased to offer support for the “Tribal Youth and Community Protection Act of 2016,” and the “Tribal Law and Order Reauthorization Act of 2016.” Both Bills will go a long way to help tribes confront lingering jurisdictional gaps regarding violence against tribal families, help stop the proliferation of illegal drugs, and provide additional tools for cross-jurisdiction cooperation.

First, I would like to thank the Committee and staff for your leadership on these matters. The drafting, passage, and implementation of the “Tribal Law & Order Act of 2010” (TLOA) and the

“Violence Against Women Reauthorization Act of 2013,” (VAWA 2013) is having a positive impact in Indian Country. Recent TLOA and VAWA authority provided measured tools that foster longstanding policies of tribal self-determination and tribal self-governance.

Before expanding on the need for the new proposed legislation, I will talk briefly about the current state of VAWA and TLOA implementation on the Pascua Yaqui Reservation because it provides relevant context to the bipartisan measures brought forward today.

THE SUCCESS OF TLOA & VAWA IMPLEMENTATION

To begin, the strength of the Pascua Yaqui Tribe flows directly from our people. Domestic violence is considered a serious crime against the Tribe, and our families. In enacting the provisions of TLOA and VAWA, the Tribe sought to afford the victims of domestic violence the maximum protection that the law provides. The safety of victims of domestic violence and drug related crimes, especially children, became easier to address through the intervention of Tribal law enforcement, Tribal Special Assistant U.S. Attorneys (SAUSA), and support from our federal partners and Tribal Liaisons.¹

On February 20, 2014, pursuant to VAWA 2013, the Pascua Yaqui Tribe was one of three Tribes 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,² the Pascua Yaqui 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.

¹ Senior Litigation Counsel and Tribal Liaison, John Joseph Tuchi, 2009-2012 (now United States District Judge-District of Arizona), Tribal Liaison Rui Wang, Assistant U.S. Attorney, District of Arizona.

² *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

Since that time, the Pascua Yaqui Tribe has prosecuted a total of 22 non-Indian cases involving 15 males and 1 non-Indian female involved in 30 VAWA investigations that have thus far resulted in 8 criminal convictions. VAWA cases include crimes of domestic violence and violations of protection orders where 15 tribal females and 2 tribal male were victims. Most of the VAWA perpetrators have extensive criminal records in the State of Arizona.

- Two offenders had active state 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.
- On average, VAWA offenders were contacted by Tribal police at least six times before VAWA authority existed on the Pascua Yaqui Reservation and VAWA offenders have been involved in close to 90 Pascua Yaqui police incidents, pre and post VAWA.
- Eleven of the cases involved children in the home. A total of 20 children, all under the age of eleven, were exposed to violence, were victims, or actually 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 domestic violence relationship dynamics.
- Thirteen (13) of the offenders are of Hispanic descent, 2 are “Legal Permanent Residents” from Mexico. Two (2) offenders are Caucasian males, 4 are African-American, 1 is of Asian descent, and 1 offender is a lineal tribal descendant who does not qualify for enrollment.
- Thirteen (13) of the incidents involved alcohol or drugs. Ten (10) of the offenders have been previously arrested for cases involving drug use, possession, DUI, or alcohol related offenses.
- Most of the offenders appeared to be unemployed and only 2 offenders did not have a criminal record in the State of Arizona. Seven of the offenders had previously been arrested for violent crimes, weapons, or threats in the State of Arizona. Two offenders are felons, both having been convicted for Burglary in the State of Arizona.
- Five cases remain open and in 2 cases, tribal warrants have been issued, one post-conviction (probation absconder) and one pre-trial for failure to appear. Seven (7) cases were declined after review.
- Seven (7) cases were dismissed for issues related to the *U.S. v. Castleman* case.³

³ The Supreme Court issued a decision in *United States v. Castleman*, 134 S. Ct. 1405 (2014) during the Pilot Project for tribal special domestic violence criminal jurisdiction. Both the majority opinion and Justice Scalia’s concurrence included footnotes referencing the definition of the term “domestic violence” under the new federal law, 25 U.S.C. §1304. The discussion of the VAWA statute by the Justices in dicta raised questions about the scope and severity of “violence” required for crimes that can be charged by tribes who have implemented special domestic violence criminal jurisdiction (SDVCJ) under VAWA. Several of the tribes who have implemented SDVCJ report that the *Castleman* decision had an immediate impact on their charging decisions. There have been several cases where the tribes felt it could not prosecute based on the dicta in *Castleman* and dismissed the cases only to have the offenders subsequently reoffend with a more serious crime.

PROBLEMS PERSIST

Recent and important Tribal justice measures presented some Indian Nations with an opportunity to restore and exercise selected authority to protect their people from crime and violence. However, notwithstanding VAWA, TLOA, and the crime fighting efforts of tribes, there still exists a super storm of injustice that has darkened Indian Country for decades. Today, in 2016, a public safety and public health crisis is still present on most Native American reservations. The long-term lack of security for women and children has brought on a “crisis of confidence” in both tribal and federal justice systems. The restoration of authority, new proposed legislation, and enhanced coordination with federal authorities represents a new dawn. 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 homes across our Reservation and across Indian Country. Many men, women, and children will continue to suffer through this storm of injustice. The new legal and jurisdictional framework, while slightly changed, will not work absent the proper funding for tribal courts, victims, and support services. The majority of tribes simply do not have the resources to provide comprehensive changes to their systems or guarantee suitable services for victims and their families.

TRIBAL CONTROL IS THE KEY

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 brothers. Tribes are in the best position to close jurisdictional gaps and safe havens for lawbreakers.

With a self-reported 500 non-Indian community members living on the Pascua Yaqui Reservation and approximately 800 Non-Indians working or attending school on the Pascua Yaqui Reservation, the probability that additional VAWA cases will arise is foreseeable and likely.

Regarding S. 2920, the reauthorization of the Bureau of Prisons pilot program is a critical part of any plan that will address tribal law and order. The current regime is unworkable, disorganized, and jail conditions are deplorable. Reentry programming will be unsuccessful without a strong primary detention system and a humane corrections option. Reauthorizing law enforcement and judicial training for investigation and prosecution of illegal narcotics is critical. Substance abuse problems brought on by illegal drug sales, manufacturing, and the explosion of the opioid addiction epidemic is crippling Indian Country. The implementation of VAWA 2013 SDVCJ confirms that Tribes require access to federal background-check information in the criminal and civil context. Data collection and criminal information database access is critical in a cross-jurisdiction environment. Also, given that access would allow for the sharing of tribal criminal justice information, increased data sharing would allow for the closure of criminal information gaps that now stretch across the tribal-federal landscape. The Shadow Wolves drug-trafficking-prevention program is an important tool for drug interdiction and the prevention of terrorism in our homeland. The Shadow Wolves are also an organization that operates in a traditional manner that respects the culture of the indigenous people who have inhabited the desert southwest for thousands of years. Improving justice for Indian youth is long overdue. When Native youth are prosecuted federally, there is a lack of programming and coordination. When youth are held in the State juvenile system,

there is an absence of culturally relevant curriculum available. Creating tribal liaisons and special assistant federal public defenders, similar to the liaisons and special assistant U.S attorneys in the U.S. attorneys' offices is a great idea, however, Tribes also need direct funding to provide these critical services. A liaison will be helpful if Tribes have established the Public Defense infrastructure to begin with.

Regarding S. 2785, "A bill to protect Native children and promote Public Safety in Indian Country," it is clear to the Pascua Yaqui Tribe after exercising Special Domestic Violence Criminal Jurisdiction under VAWA 2013, that several important provisions were omitted. First, when addressing domestic violence, there is a strong likelihood that children will be part of most relationships, as will other family members who may live in the home. In our cases, we found that at least 13 of our incidents included children in the home. Some children were victims of violence or were exposed to violence. In three cases, tribal officials had to remove the children from the home and place them in a foster home for their protection. Also, the Tribe found that we could not charge a VAWA offender with ancillary crimes that were committed during the commission of a VAWA offense or during the prosecution of that offense. For example, in one case, a VAWA offender was brought in for violating a court probation order. Since the infraction was not an original DV VAWA offense, the Tribe could not proceed. This would apply to instances where the offender was in possession of illegal drugs, assaulted a police or detention officer, destroyed property, or committed any other crime while they were being prosecuted for a VAWA offense. Finally, in recent VAWA cases, criminal background checks of VAWA offenders found that many had criminal convictions for drug or alcohol offenses and many of our cases were alcohol related. If VAWA offenders are on the Reservation and they are associated with drug use, drug sales, or the facilitation of such conduct, Tribes require the necessary authority to address this behavior.

BACKGROUND INFORMATION

PASCUA YAQUI VAWA IMPLEMENTATION

On March 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, visited 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).⁴ On February 6, 2014, the Tribe received official notice that the Tribe was designated a participating Pilot Tribe authorized to exercise

⁴ <https://www.justice.gov/sites/default/files/tribal/legacy/2014/02/06/appl-questionnaire-pascua-yaqui.pdf>

SDVCJ.⁵ The Pascua Yaqui Tribe SDVCJ Pilot status story was picked up and released locally, statewide, and nationally, via press release by the White House.⁶ On February 12, 2014, VAWA Pilot information was posted for notice in the Federal Register by the Department of Justice.⁷ Official Tribal notice was sent out via global e-mail to all tribal government and casino enterprise employees, as well as being posted on the official Pascua Yaqui Tribal Internet site on February 6th, 2014.⁸ 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.⁹ 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, 2014.¹⁰

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.¹¹ The

⁵ <http://www.justice.gov/tribal/docs/letter-to-pascua-yaqui.pdf>

⁶ (<http://www.whitehouse.gov/blog/2014/02/06/moving-forward-protect-native-american-women-justice-department-announces-va-wa-2013->), Department of Justice (Attorney General) (<http://www.justice.gov/opa/pr/2014/February/14-ag-126.html>), the U.S. Attorney for the District of Arizona, http://www.justice.gov/usao/az/press_releases/2014/PR_02062014_Vawa.html), and a Pascua Yaqui press release, that was sent to the following Southern Arizona news organizations: Television Stations: KOLD, KVOA, FOX, and KGUN; Newspaper: AZ Daily Star, Explorer News, Wick Publications, and the Tucson Weekly. http://www.pascuayaqui-nsn.gov/index.php?option=com_content&view=article&id=144:pascua-yaqui-tribe-asserts-authority-to-prosecute-all-persons-including-non-indians-for-domestic-violence&catid=12:newa

There was also some television coverage in Phoenix via a news video segment available at <http://www.azcentral.com/news/free/20140206tribes-authority-non-indians.html>

⁷ Fed. Reg. Volume 79, Number 29 (Wednesday, February 12, 2014)[[Notices]][Pages 8487-8488] Federal Register Online via the Government Printing Office [www.gpo.gov] [FR Doc No: 2014-03023]

<http://regulations.justia.com/regulations/fedreg/2014/02/12/2014-03023.html> See also 78 Fed. Reg. 71645 (Nov. 29, 2013)

⁸ (<http://www.pascuayaqui-nsn.gov/>).

⁹ See (http://azstarnet.com/news/local/pascua-yaqui-gain-added-power-to-prosecute-some-non-indians/article_3417ac6e-c683-50d4-9a55-cc386524c468.html)

¹⁰ (<http://turtletalk.wordpress.com/2014/02/07/pascua-yaqui-press-release-re-va-wa-pilot-program-selection/>)

¹¹ <http://www.kvoa.com/news/domestic-violence-not-tolerated-by-pascua-yaqui-tribe/>),

(http://colorlines.com/archives/2014/02/a_small_victory_for_native_women.html),

<http://america.aljazeera.com/watch/shows/the-stream/the-stream-officialblog/2014/2/21/native-american->

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.

On February 20, 2014, pursuant to VAWA 2013, the Pascua Yaqui Tribe was one of three Tribes 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,¹² the Pascua Yaqui 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 Tribe has had one jury trial where the jury found that there was not sufficient evidence of a dating relationship between the victim and defendant. The case, *PYT v. Garris*, ended in the acquittal of the defendant. Although we would have preferred a guilty verdict, this first full jury trial fleshed out many pre-trial arguments, and proved our system works. A non-Indian was arrested and held by Pascua Yaqui law enforcement, he was represented by two attorneys, and a majority Yaqui

tribesbeginpilotprogramtoprosecutedomesticviolence.html, <http://n.pr/Nei2Mx>, <http://www.nativeamericacalling.com/>, <http://kjzz.org/content/24088/pascua-yaqui-begins-prosecuting-non-natives-under-vaawa>, http://www.washingtonpost.com/national/arizona-tribe-set-to-prosecute-first-non-indian-under-a-new-law/2014/04/18/127a202a-bf20-11e3-bcec-b71ee10e9bc3_story.html, <http://uanews.org/story/ua-alums-involved-in-effort-to-legally-prosecute-non-indians-on-pascua-yaqui-tribe>, <http://america.aljazeera.com/articles/2014/4/23/for-one-arizona-tribeacheanceforjusticeafterdecadesoflegallimbo.html>, <http://www.wildcat.arizona.edu/article/2014/04/ua-alum-aides-american-indian-tribe-in-suing-non-indians>, <http://cronkitenewsonline.com/2014/10/pascua-yaqui-begin-prosecuting-non-tribal-members-for-domestic-violence/>

¹² *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

jury, after hearing evidence presented by a tribal prosecutor, in front of an Indian judge, determined that the Tribe did not have jurisdiction in a fairly serious DV Assault case.

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.

LESSONS LEARNED

Some offenders have had a long history of contact with Tribal Police & generally have a State criminal history:

1. NCIC access is required to properly assess who the offender is (DOJ TAP Program).
2. Offenders may have warrants or a history of harming the victim in another jurisdiction.
3. Offenders are using Indian Country to exploit jurisdictional gap and offenders are aware of jurisdictional gap.
4. Victims were reluctant to report DV incidents due to jurisdictional gap and no safety option from Tribal, State, or Federal system (no trust).
5. Difficult DV cases are increasingly difficult in VAWA SDVCJ context.

Multi-jurisdictional environment makes prosecution difficult:

1. Offenders can flee Tribal jurisdiction and Tribal Court process. Tribes may require a State/Tribal IGA/MOU to extradite, ensure comity to tribal court order, and domesticate & execute tribal warrants. Outreach between tribes and surrounding jurisdictions need to occur.
2. Proximity to Mexico raises issues of prosecuting Legal Permanent Residents, or undocumented aliens, must advise Border Patrol upon arrest. There is heightened

- scrutiny as a conviction can also trigger deportation. Tribes may be required to provide Spanish language court interpreters.
3. The limited nature of jurisdiction & the Supreme Court *Castleman* decision makes cross-deputization and jurisdictional flexibility important. This allows officers to arrest into surrounding State or Federal jurisdictions on ancillary charges (trespassing, drugs, non-victim crimes, etc.).
 4. Criminal investigations are more difficult and police officers require additional training. Depending on the facts, an SDVCJ case can have several different matters evolve from one incident (Tribal criminal case, federal case, tribal dependency case, or a state criminal case).
 5. Offender can have a state felony or misdemeanor warrants. Coordination, extradition and inter-jurisdictional movement of offenders have to occur.
 6. Ethical issues arise if a Defendant is not provided effective assistance of counsel. Public Defenders must have a working knowledge of Indian Law and how to operate in a cross-jurisdictional environment.

Non-Indian offender issues:

1. There is no requirement from the VAWA law to collect offender or victim data.
2. VAWA convictions are not being entered into NCIC, national database (yet).
3. Preliminary profile of PYT VAWA offender is unemployed male in long term relationship with Tribal member, who may have drug or alcohol use history, previous criminal history and previous tribal police contact.
4. Healthcare costs are an issue. Who covers when a non-Indian is in Tribal custody? While in BIA custody? Jail costs & transportation?
5. Indirect costs have increased: Healthcare, case related investigative costs, expert witnesses, mental health evaluations, child welfare matters, ancillary cases, post-conviction costs, additional litigation.
6. Who funds Offender sanctioned classes and programming. There will be a requirement to loop in state services or contract for such services.
7. Equal protection and due process issues may arise, fairness & equal treatment in sentencing, pre-trial release determinations, and jury composition.
8. Composition of jury is difficult when attempting to hail non-Indian jurors and not excluding non-Indian jurors.
9. Non-Indians can be lineal tribal descendants who don't meet blood quantum requirements (1 case for Pascua Yaqui).

TLOA//VAWA authority maximized, gives tribes the flexibility to control crime:

1. The purpose of VAWA Pilot Program was to develop best practices.
2. Exercising integrated authority of TLOA and VAWA through Tribal SAUSAs, Tribal Law enforcement with SLEC cards, NCIC access, and State law enforcement & prosecution authority, provides 360 degree jurisdictional management and complete criminal data intelligence. This provides an opportunity for planning, prevention, and crime control policy creation.
3. Hybrid systems allow for better coordination with DOJ, BIA, and State authorities. The DOJ sponsored Inter-Tribal Working Group (ITWG), SAUSA Program, SLEC

Cards, Central Violations Bureau (CVB) citations program, BIA Purpose Code X Program, and the DOJ Tribal Access Program (TAP), provides maximum jurisdictional flexibility for tribal justice systems.

4. The TLOA DOJ Bureau of Prisons (BOP) Pilot program must be reauthorized by Congress and expanded to include VAWA defendants and lower level crimes and convictions involving multi-year sentences related to Domestic Violence.

Victim issues:

1. VAWA victim Profile: Single tribal female with children, unemployed, living in Tribal housing as head of household or in a multi-generational household, in long term relationships with Non-Indian males. (Married, children in common, or residing in same household).
2. VAWA does not include funding for prevention services.
3. Tribal Orders of Protection are not being entered into NCIC, making it difficult to enforce off Reservation.
4. VAWA Offender Tribal Criminal history currently is not being added to NCIC.
5. Women, children, and non-intimate partners living in the household are not being fully protected by VAWA. (Grandparents, elders, cousins, etc.)
6. Many Domestic Violence crimes can't be prosecuted due to *Castleman* issues.
7. Sexual assault by a non-Indian "stranger" who is not in a relationship with the victim is not covered by VAWA 2013.

CHALLENGES

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*.¹³ *Castleman* had an immediate impact on the Tribe's criminal charging decisions when evaluating 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

¹³ *United States v. Castleman*, 134 S. Ct. 1405 (2014).

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, but nonetheless, they are violent and dangerous. 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.

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*.

VAWA FUNDING

The Pascua Yaqui Tribe is requesting that Congress or the Department of Justice, make sufficient funds directly available to Tribes to properly implement and sustain into the future VAWA, SORNA, and the Tribal Law and Order Act (TOLA), during and beyond the implementation phase. Tribes require permanent funding and access to resources and services that are available to state, county, and municipal governments. Within VAWA 2013, there is 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 has officially requested a proportional share of the funding for the 2015-2018 fiscal years, in order that we may carry out all of the many responsibilities that we have as a VAWA 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 had two cases arise that implicated SDVCJ within the first two weeks of implementation and have had a total of 30 VAWA investigations and filed 22 into Tribal Court. Significant resources have been dedicated

to the cases. The Tribe would be better able to fund these programs as well as additional programs going forward if monies are appropriated under VAWA 2013, which are intended, pursuant to 25 USC 1304(g) 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 OVW Office to develop a Tribal Funding Plan and distribute the funds as tribal set-aside funding which could be added to existing Tribal 638 Contract as a modification. This method would allow the funding to be easily transferred to the Tribe. As such, we respectfully request that Congress or the Department of Justice provide a mechanism for disbursement of the funding provided for in VAWA 2013.

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 95% of all persons arrested on the reservation. 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.

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 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 arbiter 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.

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.¹⁴ Between 1985 and 1988, the Department of Interior operated the Pascua Yaqui 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 Tribal Court from the B.I.A. through a 638 contract.¹⁵

The Bureau of Indian Affairs police patrolled the Reservation exclusively until 1991. In 1991, the Tribe hired three Tribal police officers who served alongside the 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.

¹⁴ 50 Fed. Reg. 34,555 (Aug.26, 1985)

¹⁵ Indian Self-Determination and Education Assistance Act, Pub. L. 93-638

The Tribe is 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 limited NCIC¹⁶ and ACJIS¹⁷ criminal information access. In 2005, the Tribe entered into an Intergovernmental Agreement with Pima County to participate in the Pima County Regional Special Weapons and Tactics (SWAT) Team program for police SWAT services. In 2006, the Tribe approved an Intergovernmental Agreement with Arizona DPS for crime laboratory services for the purpose of examining and processing evidence collected during criminal investigations. 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 enhanced access to ACJIS, 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 provides 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 monitors offenders in the community who are released during the pre-trial phase of their case. In 2011, the Tribe, in partnership with the Department of Justice (DOJ) and the U.S. Attorney's Office, appointed tribal prosecutors as federal Special Assistant United

¹⁶ <https://www.fbi.gov/about-us/cjis/ncic>

¹⁷ Arizona Criminal Justice Information System (ACJIS)

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 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, while located far from 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)¹⁸, which was modified 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 to ensure that a fair cross-section of the community is included in the jury selection process. VAWA contains explicit language that requires tribes choosing to exercising authority

¹⁸ 25 U.S.C. §§ 1301-1304

under the new provisions, draw people from jury pools that reflect a fair cross-section of the community and do not systematically exclude any distinct group of people, including non-Indian community members.

The Pascua Yaqui tribal court provides all defendants with the same rights in tribal court as they would have in state or federal court. The original 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 guaranteed 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 right to counsel and due process that are products of American jurisprudence are deeply rooted in Yaqui indigenous tradition and practice. Our Tribal culture and history supports the right of having a person speak on behalf of the accused. These concepts, teachings, 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, (wikoijaut) of a Yaqui Pueblo in present day Sonora, Mexico (it can also be equated to the executive branch of government).¹⁹

¹⁹ Spicer, Edward. Pascua: A Yaqui Village in Arizona, University of Chicago Press, 1940. Reprint: University of Arizona Press, 1984.

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.²⁰ 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 included, “Lutu’uria,” which translates to “truth.” The phrase “yo’ora lutu’uria” refers to “elders truth” and the notion of senu noka (one word) was used to describe historical decisions (precedent). The concern for not just majority but a collective decision beyond individualism was prominent.²¹

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.²² The Tribe is located near a major metropolitan city, while this is important for business ventures, it can have a negative impact 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

²⁰ *Id.*

²¹ Via email, Dr. David Delgado Shorter.

²² The Tribe has more than 19,000 members, many of whom have relatives residing on both sides of the border. Both the Pascua Yaqui Tribe and our Yaqui relatives in Mexico regularly visit each other for religious, cultural, and tribal purposes.

impacts the safety of our community and strains our criminal justice system. Tribal members are exposed to drug smuggling, drug cartels, human traffickers, and gang members. The most recent 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 the per capita income in 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 cases are referred to the Pascua Yaqui Prosecutor's office, the U.S. Attorney, or the Pima County Attorney for possible prosecution. The cases referred are evaluated and the majority 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 recent VAWA cases increased the number of adult criminal cases filed by 5%.

The Pascua Yaqui 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, four 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.

TRIBAL LAW AND ORDER ACT OF 2010

On September 22, 2010, the Pascua Yaqui Tribal Council amended the Pascua Yaqui Rules of Criminal Procedure and Criminal Court Rules to implement the federal amendment to the Indian Civil Rights Act (ICRA), to benefit from the changes to Indian Country criminal justice by the Tribal Law & Order Act, (TLOA).²³ Prior to the signing of the Act, the Tribal Council and the Office of the Attorney General were actively involved in shaping the federal language and urging our federal representatives to pass the law. For years, the Pascua Yaqui Tribal Council worked to change the status quo and informed Congress and federal officials about our struggles with crime control, safety, and security.

Beginning on October 1, 2010, any Indian accused of a crime, including Indians from other tribes, have had the right to defense counsel at the Tribe's expense, if the Tribe will seek *any* amount of jail time in their criminal cases. Soon, the Tribe will also be able to take advantage of additional authority to sentence criminals up to three years of incarceration per offense, up to a maximum total of nine years. At the time, TLOA was the most significant change in federal law affecting Indian Country and the Pascua Yaqui Tribe in close to 40 years. However, in order to benefit from

²³ <https://www.justice.gov/sites/default/files/usao-az/legacy/2010/10/14/Tribal%20Law%20%20Order%20Act%202010.pdf>

the additional sentencing authority, the Pascua Yaqui Tribe had to amend our tribal Constitution. The Pascua Yaqui Constitution of 1988 adopted the provisions of the Indian Civil Rights Act, and incorporated the provisions as our “Bill of Rights.” Pascua Yaqui Constitution, Art. 1, Section 1(g). Our Constitution limited punishment to one (1) year per offense. On July 24, 2015, the Tribe held an election and removed the sentencing restrictions. In a few months, the Tribal Council will vote to consider changes to the criminal code that will adopt the enhanced sentencing authority found in TLOA.

TRIBAL LAW AND ORDER ACT 2010 IMPLEMENTATION

The Pascua Yaqui Tribal Prosecutor’s Office and the Office of the Attorney General took lead roles in providing input to federal authorities as they revised the ICRA. The Prosecutor’s office sent a representative to Washington D.C. and Minneapolis, Minnesota, to speak to lawmakers and the U.S. Attorney General to advocate for changes to tribal criminal justice. The Prosecutor’s office also worked closely with the U.S. Attorney’s Office for Arizona to help create an Indian Country framework that was put into practice by the U.S. Attorney to combat crime on Arizona reservations. The Tribe aggressively sought to promote an enhanced coordinated response to crime on reservations. This led directly to a sharp increase in tribal, federal, and state prosecutions for crimes that occur on our reservation. This policy and work will continue and it will hopefully increase the federal prosecution and convictions of those who commit major crimes and prey on our people.

1. **Costs:** The implementation of some of the provisions of the Tribal Law & Order Act, namely, Title III, Section 304, has cost the Tribe approximately \$300,000-\$400,000 a year in additional attorney salaries and benefits by the hiring of 4 full time attorneys (2 prosecutors and 2 defense attorneys), and 4 defense conflict (contract) attorneys.

2. **Representation:** Through the office of the Public Defender and contracted defense attorneys, the Pascua Yaqui Tribe now provides free legal representation to 95% of all Indians and non-Indians arrested on the reservation. Approximately 2.5% of individuals arrested do not qualify for free legal representation and approximately 2.5% waive representation.
3. **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 adversarial system. For example, the process has spurned additional appeals, evidentiary hearings, additional scientific evidentiary analysis, expert testimony, competency evaluations, and an increase in criminal trials.

PASCUA YAQUI TRIBAL-FEDERAL SAUSA PROGRAM

Between October 31, 2011 and November 4, 2011, the United States Attorney's Office for the District of Arizona held a week-long course to train prosecutors from several of Arizona's tribal governments so they could participate in the federal prosecution of offenders from their communities. The training kicked off the U.S. Attorney's Office Tribal Special Assistant United States Attorney (SAUSA) program.²⁴ This cross-commissioning is encouraged by the Tribal Law and Order Act and mandated by the District of Arizona's Operational Plan for Public Safety in Indian Country. The goal of the Tribal SAUSA program is to train eligible tribal prosecutors in federal law, procedure, and investigative techniques to increase the likelihood that every viable criminal offense is prosecuted in tribal court, federal court, or both if necessary. The program also allows the tribal prosecutors to co-counsel with federal prosecutors on felony investigations and prosecutions of offenses arising out of their respective tribal communities. After completing training, each tribal SAUSA is mentored by an experienced federal prosecutor assigned to the District of Arizona's Violent Crime Section.

²⁴ <https://www.justice.gov/opa/blog/tribal-community-prosecutors-receive-federal-cross-commissioning>

SAUSA PROGRAM IMPLEMENTATION

The early phase of implementing the SAUSA program has focused on coordination of cases through federal/tribal Multidisciplinary Team Meetings (MDT), advancing the timeline for presentation of cases for federal prosecution, and improving coordination and management of cases between Tribal and Federal authorities. Special attention is given to cases involving violent crimes, sex crimes, and habitual domestic violence offenders, even in cases where the Defendant is a non-Indian. The tribal program has been in operation since 2011. The U.S. Attorney's Office has been diligent in working cooperatively with the assigned tribal SAUSA and the Tribal Prosecutor's Office.

A primary challenge has become coordinating time and scheduling. The Tribal SAUSA has a full criminal case load with the Pascua Yaqui Prosecutor's Office in addition to the evaluation, follow-up, and assisting with the prosecution of cases at the federal level. As the program continues, it may be helpful for the SAUSAs to have dedicated support staff to help with logistics, coordination of calendars, and case management. Communication, coordination, and cooperation has been enhanced with several different agencies responsible for law enforcement on the Pascua Yaqui Reservation, to include, the U.S. Attorney's Office (Tucson), the F.B.I., tribal Law Enforcement, and federal victim services. Cases are being filed, reopened, and appropriate cases are being declined after thorough review and coordinated follow-up investigations. Tribal criminal investigators, F.B.I. agents, and crime labs are working closely together to bring strong tribal and federal investigations. Defendants are being transferred and transported to tribal court and federal court via writ and arrest warrants. The charging and prosecution of federal crimes committed on the Pascua Yaqui Reservation has increased exponentially due to the SAUSA program and enhanced local MDT meetings. Although federal prosecution is not the ultimate answer to social

problems in our community, the Pascua Yaqui Tribe will continue to work with our federal partners to develop a coordinated crime control policy for our community.

ADAM WALSH SEX OFFENDER REGISTRATION AND NOTIFICATION (SORNA)

The Tribe has recently enacted the Adam Walsh Sex Offender Registration and Notification Act (SORNA).²⁵ The Prosecutor's Office is working with the Tribal Council, Attorney General, and Law Enforcement to completely implement the new law. SORNA provides a comprehensive set of minimum standards for sex offender registration and notification to the Tribal community. SORNA aims to close potential gaps and loopholes that existed under prior law and strengthens the nationwide network of sex offender registration and notification programs. The Pascua Yaqui Tribe has substantially implemented SORNA and is registering, monitoring, and informing the community about the presence of twenty-four (24) registered sex offenders who are living on the Reservation.

OFFICE OF THE PROSECUTOR

The Prosecutor's Office performs several different functions for the Pascua Yaqui Tribe. The Office is responsible for representing our government in Tribal Court in all misdemeanor and felony type criminal matters, including adult and juvenile crimes. The Pascua Yaqui Police respond to approximately 6000 calls for service a year. A large percentage of the criminal calls are referred to the Prosecutor's office for possible prosecution. The cases are evaluated and many are independently charged into tribal court. The Tribal Prosecutor also represents the tribe in civil related matters, to include civil forfeiture of property used in the transportation or sale of narcotics

²⁵ <http://pascuayaqui.nsopw.gov/Home.aspx>

and all civil Child Welfare/Child Dependency matters that originate on the Reservation. The Prosecutor's office advises, coordinates, and collaborates with Pascua Yaqui Law Enforcement, Pre-Trial Services, Probation, Victim Services, Centered Spirit, Education, and Social Services. The Tribal Prosecutor's Office also handles victim notification in criminal cases. Victims are notified about the status of their case, the release conditions involving the defendant, plea agreements, provided transportation if needed, and advised of the terms of any sentence imposed by the court.

DEPARTMENT OF JUSTICE INDIAN COUNTRY LEGAL FELLOW

On Thursday, December 4, 2014, the Department of Justice selected the First ever Indian Country Justice fellow Charisse Arce, of Bristol Bay, Alaska, to serve in the District of Arizona.²⁶ Arce will also serve a portion of her appointment in the Pascua Yaqui tribal prosecutor's office. This is the first Gaye L. Tenoso Indian Country Fellowship within the Attorney General's Honors Program, and it is awarded to an extraordinarily well-qualified new attorney with a deep interest in and enthusiasm for improving public safety in tribal communities.

"The Pascua Yaqui Tribe is pleased to have the opportunity to partner with the District of Arizona U.S. Attorney's Office and the Attorney General's Honors Program, through the Gaye L. Tenoso Indian Country Fellowship," said Pascua Yaqui Tribal Chairman Peter Yucupicio. "We welcome the new Department of Justice fellow and look forward to a productive partnership as we fight violent crime, work to keep our community safe, and continue to implement the Violence Against Women Act (VAWA), and Special Domestic Violence Criminal Jurisdiction (SDVCJ)."

²⁶ <https://www.justice.gov/legal-careers/attorney-generals-indian-country-fellowship>

ACCESS TO NATIONAL CRIMINAL INFORMATION DATABASES

On November 5, 2015, the Department of Justice announced that the Pascua Yaqui Tribe would participate in the initial User Feedback Phase of the Tribal Access Program for National Crime Information (TAP),²⁷ a program that provides federally recognized tribes the ability to access and exchange data with national crime information databases for both civil and criminal purposes.

“TAP will support tribes in analyzing their needs for national crime information and help provide appropriate solutions, including a state-of-the-art biometric/biographic computer workstation with capabilities to process finger and palm prints, take mugshots and submit records to national databases, as well as the ability to access the FBI’s Criminal Justice Information Service (CJIS) systems for criminal and civil purposes through the Department of Justice. TAP will also provide specialized training and assistance for participating tribes.”

Currently, the Tribe has limited NCIC “read only” access through an IGA with the Arizona Department of Public Safety (DPS). The TAP program will help the Tribe upload outstanding tribal warrants, orders of protection, and criminal conviction information.

PURPOSE CODE X

The Pascua Yaqui Tribe has requested to formally participate in the Bureau of Indian Affairs’ Office of Justice Services (BIA-OJS) Purpose Code X²⁸ program that was created in 2015 to assist our tribal Social Services Department when they are seeking to place children in safe homes.

“The BIA-OJS Purpose Code X Program will provide tribal social service agencies with the information they need [through name-based checks] to protect the children they place into care in

²⁷ <https://www.justice.gov/opa/pr/departments-justice-announces-10-tribes-participate-initial-phase-tribal-access-program>

²⁸ <http://www.bia.gov/cs/groups/public/documents/text/idc1-031473.pdf>

emergency situations when parents are unable to provide for their welfare.” Currently, Pascua Yaqui social workers may be able to conduct a warrant check or private research of potential placement options, but warrant checks do not generally reveal criminal history. Also, the checks are impractical at night and after regular work hours in emergency situations.

BUREAU OF INDIAN AFFAIRS TIWAHE (FAMILY) INITIATIVE

This year, the Pascua Yaqui Tribe was selected by the Bureau of Indian Affairs to participate in the federal Tiwahe initiative.²⁹ “The initiative promotes a comprehensive and integrated approach to supporting family stability and strengthening tribal communities by addressing interrelated issues associated with child welfare, domestic violence, substance abuse, poverty, and incarceration. Tiwahe means “family” in the Lakota language. The Tiwahe initiative directly supports the Generation Indigenous initiative, which is focused on addressing barriers to success for Native youth, by leveraging BIA programs in concert with other Federal programs that support family and community stability and cultural awareness.”

The Pascua Yaqui Tribe will work with our federal partners to implement the Tiwahe program this fiscal year, through a tribal centered plan. The Tribe will attempt to address the interrelated problems of poverty, violence, and substance abuse faced by our community. The Tribe will do this through the coordination and integration of social service programs with our Tribal Court. We will work to strengthen and maintain family cohesiveness, prepare our family wage earners for work opportunities, and provide rehabilitative alternatives to incarceration for family members with substance abuse issues.

²⁹ <http://www.bia.gov/cs/groups/xasia/documents/document/idc1-032110.pdf>

FEDERAL COURT SENTENCING, PRIOR CONVICTIONS, AND DISPARITY

Violent crime in Indian Country has created a public safety and public health crisis across the Nation. Although federal sentencing is not the main issue, it is a contributing factor when violent crime is not prosecuted, cases are declined, or when sentencing outcomes do not fit the crime. In order to help address this problem, counseled Tribal Court convictions should be recognized, considered, and applied to federal sentencing determinations of persons who commit crimes in Indian Country and additional data must be collected by all agencies responsible for criminal investigations.

Federal prosecutions of offenders from Pascua Yaqui Indian Country generally consist of dangerous felony level cases.³⁰ In Arizona, Tribal borders do not protect Reservations from crimes related to gangs, drug sales, human smuggling, and major drug cartel enterprises. We are on the front line. The majority of offenders prosecuted federally have lengthy tribal criminal histories. Their criminal acts and individual crime sprees have harmed tribal families, injured vulnerable children, and have disrupted the peace of our tribal community. Tribal criminal convictions are not included as part of the criminal history determination of the federal sentencing guidelines in our Indian Country cases, (particularly felony-level crimes) and sentences only average approximately 32 months in length (when outliers are removed). Our outcomes are certainly less than a Native or non-Native offender would receive in Arizona State court for similar serious and violent felony crimes. Thirty-two months is generally not a long enough period to properly

³⁰ Offenses like murder, manslaughter, aggravated assault, sexual offenses, child abuse, child molestation, gang related crimes, gun related offenses, burglary, home invasions, and arson make up a majority of Pascua Yaqui cases referred for federal prosecution.

consider punishment, rehabilitation, justice, job training, or other restorative practices and policies prior to an offender returning home to our Tribal community.

Criminal jurisdiction in Indian Country is evolving and many tribal Courts are as sophisticated as their state counterparts. Some of the arguments against recognition and reliance of tribal sentencing outcomes are outdated, paternalistic, do not afford comity and respect for tribal decision making, and do not account for present day reality. There are now dozens of Tribes that are exercising either enhanced Special Domestic Violence Criminal Jurisdiction (SDVCJ) under the Violence Against Women Act, (VAWA) or that have implemented the Tribal Law and Order Act (TLOA) provisions. The Pascua Yaqui Tribe is one of those Tribes. The Tribe has investigated 30 different cases of domestic violence committed by Non-Indians on our Reservation. The cases involved incidents of strangulation, hair-dragging, physical assaults, and conduct that repeatedly victimized whole families. Of those cases, the offenders had close to 90 separate Tribal police contacts, pre and post VAWA implementation. The majority of the offenders also had lengthy state criminal histories that consisted of violent offenses, drug and alcohol related offenses, and weapons related offenses. Three of the offenders were felons. Three offenders had felony warrants, two for burglary and one for armed robbery out of the State of Oklahoma. Two of the offenders were Legal Permanent Residents (LPR) from Mexico. The Tribe has convicted eight of the non-Indian offenders in Tribal court for domestic violence related offenses. Tribal Court convictions of Non-Indians and Indians should be recognized by federal courts. This is the new reality and the future of Indian Country jurisdiction. Jurisdiction is changing, tribes are fighting hard to protect their community, crime is multi-jurisdictional in nature, and there is no reason the federal court process should not properly account for this.

Moreover, every person arrested and charged in the Pascua Yaqui Tribal Court is guaranteed legal representation if they face a day in jail, that has been the case now for many years. Most of the offenders that will be prosecuted in federal court will have a tribal criminal history and possibly, a State criminal history. The majority of their relevant Tribal court convictions will be counseled, unless they chose to waive legal representation. The actions of major crime offenders are not traditional, they are not cultural, and they are not the norm for our tribal community.

Policymakers should also consider the unique nature of each tribe and each federal district. The District of Arizona is different than the District of South Dakota. Likewise, the Pascua Yaqui Tribe differs from the Navajo Nation and any other Tribe. Although we may be faced with some of the same realities, crime is different, laws are different, and approaches to justice, punishment, restoration, and sentencing are different. For example, in Arizona, federal priorities and resources are largely spent on immigration related enforcement. Federal courts in Arizona are clogged with immigration reentry cases, drug smuggling matters, and criminal charges centered on the policies of Operation Streamline.³¹ Although necessary, the result is that there are less resources devoted to Indian Country crime in Arizona. This means that less Indian Country cases are investigated, less cases are referred, more cases are declined, and the cases that are referred are more likely to be declined due to inadequate investigations and delayed indictments.³² We should also consider jurisdictional realities and how each Federal District policy impacts sentencing outcomes.

In Arizona, generally, the U.S. Attorney's Office does not prosecute Indian Country drug cases. It is hard to recall the last federal drug case prosecuted from the Pascua Yaqui Reservation. Drug use

³¹ https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-95_May15.pdf

³² <https://www.justice.gov/tribal/file/796976/download>

and sales, including marijuana, cocaine, crack, heroine, and methamphetamine have reached epidemic levels on the Pascua Yaqui Reservation. There have been drop houses, drug related shootings, gang violence, drug related violence, and serious crimes related to the sale of drugs. Many of the social ills in our community are directly related to drug use. The reason given for the lack of federal prosecutions of street level drug sales in Indian Country is that there is a threshold issue concerning “drug mules” who smuggle large quantities of drugs into the Country from Mexico.

Disparity in sentencing is not an issue in Southern Arizona when comparing Indian defendants prosecuted for major violent felony crimes with similarly situated defendants prosecuted in Arizona. Often, federal “crack” conviction sentencing will be compared to sentences of tribal defendants to indicate that disparity that exists in Indian Country criminal outcomes. Because of the lack of federal drug prosecutions and our actual major crimes sentencing results, the analogy does not fit in the District of Arizona cases that flow from the Pascua Yaqui Reservation. However, if there is a glaring disparity, it may be in the justice received by victims and families. Victims may face language barriers, cultural barriers, discrimination, and inadequate federal jury representation. Largely, the Pascua Yaqui community and our victims were dissatisfied with our federal court outcomes, and our tribal court outcomes for that matter. Justice was hampered and limited by our tribal Constitution, our code, scarce resources, and decades enduring federal agencies who were not investigating or prosecuting our major crimes. This history helped to create a lawless atmosphere and a situation where the community simply does not trust our justice systems. Tribal Court outcomes should be respected and given as much weight as mitigating factors would have on downward departures during federal sentencing determinations. Tribal court criminal history should also play a factor when federal courts are considering pre-trial release of

tribal defendants, especially if a court is contemplating release back into the Tribal community. Federal policies, regional factors, and Reservation crime rates should be considered when allocating prosecution, victim, and investigative resources.

FEDERAL DECLINATIONS

Any consideration of federal sentencing, federal prosecution, or Indian Country jurisdiction should include an analysis of federal declinations, as federal jurisdiction has been primary since the passage of the Major Crimes Act of 1885. Federal prosecutions and sentencing must be considered in light of federal declinations and federal resources for law enforcement investigations. On the Pascua Yaqui Reservation, the declination rate has actually risen dramatically. The U.S. Attorney advised the Tribe in 2008 that there was no crime on the Pascua Yaqui Reservation and no declinations. Although that may have been true when reviewing federal referrals and convictions, it was not an accurate representation of what was actually occurring on the ground. As expected, once federal crimes started to get prosecuted in earnest in 2009, the local declination rate increased. However, the rate is not as high as other places in Indian Country. Interrelated, less than half of the major crime incidents reported since 2008 have been officially referred for federal prosecution. However, in the major crime cases that have been officially referred since 2009, a majority have been indicted by the U.S. Attorney's Office. Most of the cases were investigated and referred by tribal detectives who have their federal Special Law Enforcement Commission (SLEC) and they were assisted by local F.B.I. agents in complex cases. The prosecution process was facilitated by tribal prosecutors who are tabbed as Special Assistant United States Attorneys, (SAUSAs).

Attached is a recent breakdown of most of the Pascua Yaqui Tribe's Federal case outcomes from 2009-2014 (taken from federal Sentencing Orders and press releases). The attached

spreadsheet notes thirty-two federal convictions and six revocations. When you remove outliers, the average federal sentence involving Pascua Yaqui defendants is between 32-36 months, with 36 months of federal Supervision. That is fairly low when you compare a federal sentence to a sentence from the State of Arizona for a comparable crime. The Tribe has had approximately sixty cases officially referred over this time span. Referred means that a Tribal investigator, tribal police officer, or a federal agent sent an investigation to the U.S. Attorney for prosecution. This is much higher than what was occurring prior to 2008. Approximately fifteen cases have been officially declined, three cases were dismissed, one person was found not guilty at trial, and one case was prosecuted by the State. Five non-Indians were prosecuted federally over this time span (two for domestic violence incidents). Twenty of these cases were also prosecuted tribally, some were joint prosecutions, and most outcomes were concurrent to each other. The investigation, timing, (Statute of limitations) evidence, and coordination issues impact when, how, and by who a case gets prosecuted by.

There were many potential federal (felony) cases, (probably close to 50 between 2008-2014) that were reported and investigated, but never officially referred, indicted, or prosecuted because the investigation did not yield the proper probable cause to support charges or there were witness issues or a lack of cooperation.

The Tribe has been working well with the F.B.I. and the U.S. Attorney's Office and the listed outcomes serve as evidence of overall improved cooperation and good work by police, victim services, and other support divisions in our criminal justice system. The Tribe believes that recent federal arrests and convictions have helped to lower the overall crime rate on the Reservation, increased the quality of life, and also helped to provide a general deterrent, now and for the foreseeable future.

RECOMMENDATIONS

- The Pascua Yaqui Tribe strongly recommends that Congress require that counseled tribal court convictions be considered in federal sentencing determinations.
- Federal Courts should also consider Tribal criminal history during pretrial release determinations.
- The Pascua Yaqui Tribe recommends that federal sentences, release dates, and timely notification occur to Tribal authorities and victims.
- The Tribe strongly recommends other sentencing alternatives, reentry programs, education, and or job related programming be included as part of criminal sentences, especially if the tribal defendant is going to return to the reservation.
- The Pascua Yaqui Tribe recommends that federal declinations by the U.S. Attorney's Office be broken out by Tribal jurisdiction, annually.
- The Pascua Yaqui Tribe recommends that all criminal investigations with a potential federal nexus that are opened by tribal law enforcement, B.I.A., and the F.B.I. be accounted for separately, aggregated annually, broken out by crime, and distinguished from investigations that are actually referred for prosecution.

PREVIOUS & RELEVANT PASCUA YAQUI HABEAS MATTER

On August 17, 2011, the United States Court of Appeals for the 9th Circuit issued an Opinion in the case of *Miranda v. Anchondo*³³, 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.

³³ *Miranda v. Anchondo*, 684 F.3d 844 (9th Cir. 844), cert. denied, 2012 WL 2396988 (U.S. Oct. 1, 2012); *Bustamante v. Valenzuela*, 715 F.Supp.2d 960 (D.Ariz.2010). Tribes are allowed to impose consecutive one year terms for separate offenses charged in a single criminal proceeding.

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

The first responsibility of any government, tribal or otherwise, is the safety and protection of its people. For there can be no security or peace where there is insecurity and fear. Pascua Yaqui tribal officials no longer have to simply stand by and watch their people be victimized with no recourse. Violent behavior against intimate partners or vulnerable family members by tribal members or non-Indians is conduct that is no longer tolerated. Protecting victims of violent crime, domestic violence, and sexual assault is about justice and safety, and it is also about fairness, and dignity.

Full restoration of criminal jurisdictional authority for Tribal governments over all crimes and persons should be the next step. 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. VAWA 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. The proposed “Tribal Youth and Community Protection Act of 2016” will help address some of the gaps to cover children and ancillary crimes a VAWA defendant may commit. However, more problems exist, like the fact that the law does not cover sexual assaults or stalking committed by strangers.

Full restoration would help ensure fairness, safeguard tribal communities, and help clear up long standing jurisdictional problems. 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, his external criminal history may also be considered. Noncitizens visiting or residing in the United States are also subject to federal and State criminal jurisdiction despite their exclusion from the political process.

ADDITIONAL TRIBAL EMPOWERMENT AND SUPPORT IS KEY

The starting place to reverse historical jurisdictional problems and injustices in Indian Country is with strong tribal justice systems that are supported with the required resources. Criminal investigations occur at the local level. Along with strong and meaningful federal prosecutions, our local government and court system is the best vehicle to protect Yaqui victims, mothers, and children from violent perpetrators. The recent Pascua Yaqui VAWA and TLOA implementation process bear those beliefs out. However, without the resources to fund robust court and victim services, the gains may only lead to the same revolving door of repeat violence and ineffective criminal prosecutions that we are all too familiar with. The Tribal Law & Order Act, the amendments to the Indian Civil Rights Act, the Adam Walsh Act, VAWA, and changes to the Pascua Yaqui code will enhance the safety and security of our community as the laws are implemented, followed, and properly enforced.

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 court system and heal our community. 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 people, dedicated significant resources, and spent countless hours to see these changes through. However, it will take additional hard work, federal legislation, resources, and dedication to continue to fully and effectively protect and support our victims who have been impacted by violence. We respectfully request additional Congressional assistance to help address the persistent violence and drug abuse that plagues our community. Additional support for Tribal Court systems will also further the current federal strategy that promotes the longstanding policies of Indian self-determination, tribal self-governance, and tribal self-sufficiency.

In closing, we thank the United States Congress, the Obama Administration, the Department of Justice (DOJ), our sister Tribes, advocacy groups, the National Congress of American Indians (NCAI), the Tribal Law & Policy Institute (TLPI), the National Indigenous Women's Resource Center (NIWRC), the Center for Court Innovation (CCI), and the National Council of Juvenile & Family Court Judges (NCJFCJ)³⁴ for the leadership, cooperation, and assistance during the past few years as we worked to better protect our Reservation community.

³⁴ Humble thanks to the United States Congress for drafting and passing TLOA & the Reauthorization of VAWA, thanks to the Department of Justice, (DOJ) Deputy Associate Attorney General Sam Hirsch, Director Tracy Toulou, Counsel to the Director, Marcia Hurd, National Indian Country Training Coordinator Leslie Hagen, Native American Issues Coordinator Jeremy Jehangiri. And the U.S. Attorney's Office, District of Arizona. Thanks for the efforts of the Department of the Interior (DOI), Kevin Washburn, Associate Solicitor Michael Berrigan, Attorney Advisor Leta Hollon, Director of the office of Tribal Justice, Darren Cruzan, Associate Director Tricia Tingle, and Deputy Associate Director Steve Juneau. Thanks to Technical Assistance providers: The National Congress of American Indians, (NCAI) Natasha Anderson, Virginia Davis, and John Dossett. The Tribal Law & Policy Institute (TLPI), Chia Halpern Beetso & Jerry Gardner and the National Council of Juvenile & Family Court Judges (NCJFCJ), Jessica Singer and Steve Aycock. The University Of Arizona School Of Law, and Professor Melissa Tatum, Finally, thank you to all the members of the Intertribal Technical Assistance Working Group on Special Domestic Violence Criminal Jurisdiction (ITWG).