

## Considerations for Implementing Enhanced Sentencing Authority: READINESS TO IMPLEMENT CHANGES IN YOUR TRIBAL COURT

### Presentation and Materials By:

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Hosted in Partnership With:  
American Probation & Parole Association



## Welcome

\* NTJC—WEBINAR INSTRUCTIONS by Joseph Sawyer, Technology Manager, The National Judicial College

\* WELCOME AND INTRODUCTIONS

### Faculty:

Christine Folsom-Smith, Director, The National Tribal Judicial Center at The National Judicial College

Hon. Jan Morris, Chief Court Administrator, Gila River Indian Community

Norena Henry, Senior Policy Advisor for Tribal Affairs, Bureau of Justice Assistance, U.S. Department of Justice

Laurel Iron Cloud, Criminal Law Specialist, Office of Justice Services, Bureau of Indian Affairs, U.S. Department of Interior

## Purpose of Webinar

- \* To review the changes required by TLOA;
- \* To discuss what specific crimes the tribe may seek to use enhanced sentencing for;
- \* To assess what one tribe changed in their code to become compliant with TLOA;
- \* To consider some pertinent issues when auditing your court; and
- \* To discuss some challenges that other tribal justice systems faced when making the changes necessary to implement the provisions of TLOA related to enhanced sentencing authority.
- \* OJP Resources
- \* Question/Answer Session

## First Steps to Implementation

Faculty member:

Christine Folsom-Smith, *Director, The National Tribal Judicial Center at The National Judicial College*



## How does TLOA change the ICRA?

- \* 25 USC § 1302(a) “No tribe in exercising powers of self-government shall ...”
- \* (7)
  - (C) subject to subsection (b), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 3 years or a fine of \$15,000, or both; or [you may only impose 3 years and \$15,000 per offense max if certain conditions are met]
  - (D) impose on a person in a criminal proceeding a total penalty or punishment greater than imprisonment for a term of 9 years; [you may not stack offenses for up to 9 years unless certain conditions met]

## Conditions for the Judge

- \* 25 USC § 1302(c)(3)—require(s) that the judge presiding over the criminal proceeding—
  - \* (A) has sufficient legal training to preside over criminal proceedings; and
  - \* (B) is licensed to practice law by any jurisdiction in the United States; AND

## Conditions for Defense Counsel

Under 25 USC § 1302(c)

- \* (1) provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and
- \* (2) at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys;

## Other Conditions

25 USC § 1302(c)

- (4) prior to charging the defendant, make publicly available the criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances) of the tribal government; [Make laws publicly available] and
- (5) maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding. [Be a “court of record”]

## Examples Of Crimes That Tribes May Consider For Enhanced Sentencing

- \* Murder
- \* Vehicular manslaughter (including DUI causing death)
- \* Repeat offender DUI – perhaps on 4<sup>th</sup> or 5<sup>th</sup> DUI within 10 years
- \* DUI causing substantial bodily harm
- \* Rape (spousal or otherwise); forcible sodomy; forcible oral copulation; forcible sexual penetration
- \* Assault with intent to commit rape
- \* Robbery – armed or strong-arm
- \* Kidnapping

## Examples Of Crimes That Tribes May Consider For Enhanced Sentencing (cont'd)

- \* Child molestation
- \* Statutory rape
- \* Repeat offender domestic violence (states and feds do this at 3<sup>rd</sup> offense)
- \* Battery (domestic violence or any) with deadly or dangerous weapon, or causing “substantial bodily harm” or “great bodily harm” or “protracted pain”

## Examples Of Crimes That Tribes May Consider For Enhanced Sentencing (cont'd)

- \* Assault, battery or threats to tribal elders
- \* Financial abuse of tribal elders above a certain dollar level
- \* Manufacturing or sales of controlled or hypnotic substances; particularly manufacturing that endangers children or elders; particularly sales to children
- \* Desecration of graves or sacred sites
- \* Any other offenses that the Tribe finds particularly appropriate for felony prosecution

## Other Points for Discussion by Your Community

- \* Assault, battery or threats to Tribal Officials such as Tribal Council members, Community Council members
- \* Assault, battery or threats to key employees such as Tribal Administrator, police officers, judge, prosecutor, defense attorney, domestic violence advocate, CASA worker, etc.

## Crimes Under TLOA

- \* Many crimes your jurisdiction prosecutes should remain as misdemeanors.
- \* You should make this determination based on what is best for your community.

## Gila River Indian Community: Code Specifics

Faculty member:  
Hon. Jan Morris, *Chief Court Administrator,*  
*Gila River Indian Community*



## Hon. Jan Morris

- \* Currently serves as the Chief Court Administrator for the Gila River Indian Community Court in Arizona
- \* Created the Tribal court for the Fort McDowell Yavapai Nation and served there as an Associate Judge
- \* Served the Hualapai Nation, the Yavapai-Apache Nation, and the Puyallup Tribe of Indians as Chief Judge
- \* Serves as Associate Justice for the Yavapai-Apache Court of Appeals
- \* An alumnus of The National Judicial College and joined the faculty of The National Tribal Judicial Center at The National Judicial College in 2000.

## What does your code look like now?

Pre-TLOA Sexual Abuse Section of the Gila River Indian Community (GRIC) Criminal Code:

5.817. Sexual Abuse.

A. A person commits sexual abuse by intentionally or knowingly engaging in sexual contact with any person not his spouse without consent of that person, or with any person who is under 15 years of age, and who is not his spouse.

B. The penalty for sexual abuse shall be imprisonment for a period not to exceed 365 days, or a fine not to exceed \$5000.00 or both.

C. "Sexual contact" means any touching of any part of the genitals, anus, or female breasts.



## Post-TLOA Sexual Abuse Section of the GRIC Criminal Code

### 5.802. Sexual Abuse.

A. A person commits the offense of sexual abuse if he intentionally or knowingly engages in sexual contact with any person without consent of that person.

B. Without consent includes any of the following:

1. The victim is reasonably coerced with the immediate use or threatened use of force against a person or property; or

2. The victim is incapable of consent by reason of mental disorder where the victim is unable to comprehend the distinctly sexual nature of the conduct or is incapable of understanding or exercising the right to refuse to engage in the conduct with another, drugs, alcohol, sleep or any other similar impairment of awareness, and such condition is known or should have been reasonably known to the defendant; or

3. The victim is intentionally deceived as to the nature of the act by the defendant, or the deception is known or should have been reasonably known to the defendant.

C. The penalty for felony sexual abuse shall be imprisonment for a period not to exceed three years, or a fine not to exceed \$15,000, or both.

D. The penalty for misdemeanor sexual abuse shall be imprisonment for a period not to exceed one year, or a fine not to exceed \$5,000, or both.

E. Effective Dates: The effective date for Subsection C shall be May 1, 2014. The effective dates for Subsection D shall be from January 1, 2014 through April 30, 2014.

*HISTORY:* GRIC Code § 5.817 (2009).

Felony Comparability References: Ariz. Rev. Stat §13-1404.

## Pre-TLOA Criminal Complaint at GRIC

Prior to the TLOA changes, GRIC had no formal rules of criminal procedure.

### 5.1302. Criminal Complaint.

The complaint is a written statement of the essential facts constituting the crime charged, which shall include the name of the defendant, a description of the offense, and a list of the Code provisions which prohibit the conduct. A complaint may be signed by a Community Prosecutor or a duly authorized law enforcement officer on information and belief that a crime has been committed. A complaint may be signed by a complaining witness who observes the commission of a crime in his presence and the complaint must also be signed by a Community Prosecutor.

## Post-TLOA GRIC Criminal Complaint

### 5.1501. Criminal Proceedings.

A. Criminal proceedings are commenced by filing a criminal complaint with the court.

B. The criminal complaint is a written statement of the essential facts constituting the crime charged, which shall include the name of the defendant, a description of the offense, and a list of Code provisions which prohibit the conduct. The complaint shall be signed and prosecuted by an authorized prosecutor, including but not limited to a special prosecutor or legal aide.

## Post-TLOA Rules of Criminal Procedure Added at GRIC

### Rule 2.1. Commencement of Criminal Proceedings.

Criminal proceedings are commenced by the filing of a criminal complaint with the court as set forth in Rule 2.2. Criminal proceedings include any hearings before the court during which a defendant is charged by a criminal complaint, filed with the court.

#### COMMENT:

GRIC Code §5.1501.



Rule 2.2. Criminal Complaints.

a. Complaint Against an Arrested Person. If a Person is arrested without a warrant, a prosecutor shall file a complaint bearing a prosecutor's signature 72 hours, excluding legal holidays and weekends, after initial appearance under Rule 4. If a complaint has not been filed within 72 hours, the person shall be released immediately.



b. Contents of Criminal Complaints.

1. The complaint shall be subject to the requirements in the GRIC Code § 5.1501.B.
2. A criminal complaint may allege more than one offense arising from a single event or criminal transaction, in which case each such offense alleged shall be listed as a separate count of the criminal complaint.
3. A criminal complaint shall designate within parentheses either "misdemeanor" or "felony" after the GRIC code citation, shall indicate whether the prosecutor seeks more than one year of incarceration per criminal proceeding, shall identify if a bail hearing is required, and shall identify any aggravating factors for purposes of GRIC Code § 5.407.1.

4. Technical errors in the complaint that do not deprive the defendant of fair notice of the offense(s) charged shall not be grounds for dismissal and the complaint may be amended for technical errors.

c. Confidential Information

Information shall be kept confidential as subject to the requirements in the GRIC code § 5.1537.A. A copy of the redacted and the unredacted criminal complaint shall be provided to the court, and an unredacted criminal complaint provided to the defendant.

d. Other Information Regarding the Defendant

If known, the prosecutor shall inform the court of the defendant's aliases or fictitious name(s); date and birth and social security number; the mailing addresses; the street address or reasonable description of the location of the residence, including, but not limited to, house color, name or roadway or subdivision, District number; GPS coordinates or other identifying information for location of the residence; physical description; tribal membership or affiliation.

e. Amendment of Criminal Complaints.

1. Upon motion, the judge shall permit the complaint to be amended for technical errors at any time before verdict if no additional or different offense is charged and if the substantial rights of the defendant are not prejudiced.

2. Amendments shall conform to the requirements in the GRIC Code §§ 5.1506.E and 5.1511.1.

3. The defendant's right to a speedy trial will be computed from the date of the arraignment, less any time tolled under Rule 8, and shall not be recalculated by the filing of an amended complaint.

f. Prosecution of Criminal Complaints.

Prosecutions shall be subject to the requirements in the GRIC Code § 5.1501.B.

g. The effective date for any references to felony offenses or felony procedure shall be May, 2014.

COMMENT:

GRIC Code §§ 5.1501, 5.1504, 5.1506, 5.1511, 5.1537

## Pertinent Issues

### Faculty member:

Christine Folsom-Smith, *Director, The National Tribal Judicial Center at The National Judicial College*



## Have you considered?

- \* Does your Constitution require Bureau of Indian Affairs approval for code changes?
- \* How will you identify and include all the appropriate tribal stakeholders in decision-making process? Did you include everyone you should?
- \* Internal tribal challenges –
  - \* Getting your tribal executive branch to focus on proposed changes
  - \* Determining cost to prosecute these cases
    - \* Finding funding sources

## Is Your Court Ready?

- \* Are you a “court of record”?
  - \* Court Reporter/Stenographer
    - \* How will you handle the costs?
  - \* Recording equipment
    - \* High tech and high-priced
    - \* High tech enough and not high-priced

## Published Laws

Are your laws publicly available?

- \* Costs involved?
- \* On the Internet?
- \* In a Book?
- \* CD-ROM?
- \* Email?
- \* All laws or just criminal case-related laws?



## The Judge

- \* Judge must be “licensed to practice law”
  - \* Licensed where?
    - \* Any Jurisdiction
  - \* Can a tribe set its own standards?
    - \* How can the tribe accomplish this?

## Qualifications for the Judge

- \* Judge must be adequately trained
  - \* What does that mean?
  - \* Cost in terms of salary and education
    - \* Do you have to do this for all cases?
    - \* How can you limit costs?
    - \* Is your tribe providing this already?

## Defense Counsel Costs

- \* Do you have to provide counsel for all cases?
- \* How can you limit costs?
- \* Is your tribe providing this already?
- \* What if a defendant wants to represent himself/herself?

## Defense Counsel Standards

### Defense counsel must be an attorney

- \* Licensed where?
  - \* Any Jurisdiction
- \* Can a tribe set its own standards?
  - \* How can the tribe accomplish this?
  - \* What will your educational standards be and will you provide funding for education?

## Self-Evaluation: Consider the Pros and Cons of Adopting TLOA

- \* Where does your tribe fall on the “readiness scale”?
  - \* Judge
  - \* Defense Counsel
  - \* Court of Record
  - \* Publicly available laws
- \* What financial resources do you have?
  - \* What financial burdens do you face?
  - \* How to finance the changes? If you make changes under grant funding, do you have a plan to continue if and when the funding runs out?

## How Did Other Courts Accomplish the Change?

- \* Building community support
  - \* Elders; tribal women who were victims
  - \* Working to establish tribal council’s focus on the changes proposed
- \* Using federal rules of procedure
- \* Adding codes to tribal website
- \* Bringing tribal stakeholders together
- \* *Realizing it is a big change, for a handful of cases*
- \* Sentence may be less than 1 year even if crime permits higher sentence (probation)
- \* Sending the proposed changes for federal approval

## Gila River Indian Community and TLOA

Faculty member:

Hon. Jan Morris, *Chief Court Administrator,  
Gila River Indian Community*



## Gila River Indian Community and TLOA

- \* GRIC amended their code in May of 2013.
- \* This was a two-year process involving the collaborative efforts of tribal attorneys and all tribal justice agencies and related service agencies.
- \* The effort included a complete revision/update of the criminal code and adoption of detailed rules of criminal procedure and evidence.
- \* 175 page criminal code includes 108 offenses with 50 potential felony offenses in three categories; also provides for presumptive sentences.

## Gila River Indian Community and TLOA

- \* Monthly Work Group meetings were open to the public.
- \* OGC and departments conducted outreach efforts at District meetings.
- \* Additional TLOA-specific outreach meetings were conducted.
- \* Also included Council and Work Group work sessions that were open to the public.
- \* Prosecution of felony offenses under this Code will begin on May 1, 2014.

## BJA Resources

*Norena Henry, Senior Policy Advisor for Tribal Affairs*  
Bureau of Justice Assistance  
U.S. Department of Justice



## Resources

- \* Coordinated Tribal Assistance Solicitation (CTAS) – only Indian tribes are eligible to apply
- \* Second Chance Act
- \* Other BJA Programs
- \* BJA Resources & Other Resources

## Coordinated Tribal Assistance Solicitation (CTAS)

- \* The Department of Justice launched CTAS in Fiscal Year 2010 in direct response to concerns raised by Tribal leaders about the Department's grant process that did not provide the flexibility tribes needed to address their criminal justice and public safety needs. Through CTAS, federally-recognized Tribes and Tribal consortia submit a single application for most of the Justice Department's Tribal grant programs. The Department of Justice designed this comprehensive approach to save time and resources and allow tribes and the Department to gain a better understanding of the Tribes' overall public safety needs.
- \* For more information on CTAS – see [www.justice.gov/tribal](http://www.justice.gov/tribal) and [www.justice.gov/tribal/open-sol.html](http://www.justice.gov/tribal/open-sol.html)
- \* Anticipated Application Due Date: 7:00 pm ET; March 24, 2014

## CTAS: Application Timeline

### Solicitation:

- \* Open: December 18, 2013
- \* Closes: 7:00 pm ET; March 24, 2014
- \* DOJ expects to award grants on or before September 30<sup>th</sup>, 2014.

## FY 2014 CTAS Purpose Areas

### FY 2014 Coordinated Tribal Assistance Solicitation Purpose Areas

1. Public Safety and Community Policing (COPS Tribal Resources Hiring Grant Program and Tribal Resources Grant Equipment/Training)
2. Comprehensive Tribal Justice System Strategic Planning
3. Justice Systems, and Alcohol and Substance Abuse (OJP/BJA—Tribal Courts Assistance Program (TCAP) and Indian Alcohol and Substance Abuse Prevention Program (IASAPP))
4. Corrections and Correctional Alternatives (OJP/BJA—Correctional Systems and Correctional Alternatives on Tribal Lands Program)
5. Violence Against Indian Women – Tribal Governments Program (OVW)
6. Children’s Justice Act Partnership for Indian Communities (OVC)
7. Comprehensive Tribal Victim Assistance Program (OVC)
8. Juvenile Justice (OJP/OJJDP—Tribal Juvenile Accountability Discretionary Program)
9. Tribal Youth Program (OJP/OJJDP—Tribal Youth Program – TYP)

## CTAS: Goals and Objectives Justice Systems and Alcohol and Substance Abuse (BJA)

- \* To develop, enhance, and continue Tribal justice systems including: alcohol and substance abuse prevention, law enforcement, pretrial services, risk and needs assessment development and implementation, diversion programming, tribal court services, healing to wellness courts, intervention and/or treatment, detention programming, community corrections, reentry planning and programming, justice system infrastructure enhancement, justice system information sharing, indigent defense, etc.
- \* To respond to and prevent alcohol- and substance abuse-related crimes.
- \* To implement enhanced authorities and provisions under the Tribal Law and Order Act.
- \* To develop, implement, and enhance substance abuse prevention and treatment programs including those that prevent and address the needs of drug-endangered children.
- \* To engage in comprehensive strategic planning to improve Tribal justice and community safety as it relates to Tribal courts and alcohol and substance abuse.

## CTAS: Education, Outreach, Training and Technical Assistance

- \* Visit DOJ's dedicated CTAS website for up-to-date information:
- \* [www.justice.gov/tribal](http://www.justice.gov/tribal)
- \* Teleconferences and Webinars are being scheduled
- \* Fact Sheets and Frequently Asked Questions are available on the website.



## The Second Chance Act BJA Reentry Funding Opportunities

The Second Chance Act of 2007 (Public Law 110-199) provides a comprehensive response to the increasing number of incarcerated adults and juveniles who are released from prison, jail, and juvenile residential facilities and returning to communities. There are currently more than 2.3 million individuals serving time in our federal and state prisons, and millions of people are cycling through local jails every year. Ninety-five percent of all offenders incarcerated today will eventually be released and return to communities. The Second Chance Act will help ensure that the transition individuals make from prison, jail, or juvenile residential facilities to the community is successful and promotes public safety.

BJA expects to provide funding opportunities under the following Second Chance Act programs:

- \* Career Technology Training (Section 115);
  - \* Adult Planning & Demonstration Projects (Section 101);
  - \* Adult Reentry Program for Offenders with Co-Occurring Substance Abuse and Mental Health Disorders (Section 201);
  - \* Adult Mentoring Grants (Section 211); and
  - \* Smart Probation .
- \* For more information, visit BJA's Second Chance Act web page:  
[www.bja.gov/ProgramDetails.aspx?Program\\_ID=90](http://www.bja.gov/ProgramDetails.aspx?Program_ID=90).

## Other BJA Funding Programs

- \* Tribal Criminal and Civil Legal Assistance Program (TCCLA)  
[www.bja.gov/ProgramDetails.aspx?Program\\_ID=102](http://www.bja.gov/ProgramDetails.aspx?Program_ID=102)
- \* John R. Justice Student Loan Repayment Program  
[www.bja.gov/ProgramDetails.aspx?Program\\_ID=65](http://www.bja.gov/ProgramDetails.aspx?Program_ID=65)



## Training & Technical Assistance Announcement

For Tribal Indigent Defense and  
Tribal Law and Order Act's Enhanced Sentencing Authority

[http://www.appa-net.org/eweb/Dynamicpage.aspx?webcode=IV\\_ProjectDetail&wps\\_key=49d0989a-of8a-4644-ba62-2cedacc704bc](http://www.appa-net.org/eweb/Dynamicpage.aspx?webcode=IV_ProjectDetail&wps_key=49d0989a-of8a-4644-ba62-2cedacc704bc)

### Contact:

Kimberly Cobb  
American Probation & Parole Association  
Phone: 859/244-8015  
Email: [kcobb@csg.org](mailto:kcobb@csg.org)

## BJA & Other Resources

### BJA Resources

- \* *Improving the Administration of Justice in Tribal Communities through Information and Resource Sharing*  
[https://www.bja.gov/publications/appa\\_tribalinforeourcesharing.pdf](https://www.bja.gov/publications/appa_tribalinforeourcesharing.pdf)
- \* *Information Sharing in Criminal Justice – Mental Health Collaborations: Working with HIPAA and Other Privacy Laws*  
[https://www.bja.gov/publications/csg\\_cjmh\\_info\\_sharing.pdf](https://www.bja.gov/publications/csg_cjmh_info_sharing.pdf)
- \* *An Overview of BJA's Tribal Civil and Criminal Legal Assistance Program and Resources*  
[https://www.bja.gov/Publications/TCCLA\\_Overview.pdf](https://www.bja.gov/Publications/TCCLA_Overview.pdf)
- \* *National Reentry Resource Center (NRR)*  
<http://csgjusticecenter.org/nrrc>
- \* *Strategies for Creating Offender Reentry Programs in Indian Country*  
[http://www.aidainc.net/Publications/Full\\_Prisoner\\_Reentry.pdf](http://www.aidainc.net/Publications/Full_Prisoner_Reentry.pdf)

### Federal Resources

- \* Bureau of Justice Assistance Website  
(<https://www.bja.gov/Default.aspx>)
- \* BJA's National Training and Technical Assistance Center (NTTAC) (<http://bjatraining.org/>)
- \* DOJ Tribal Justice and Safety Website  
([www.justice.gov/tribal/](http://www.justice.gov/tribal/))
- \* Training and Technical Assistance Webpage, DOJ Tribal Justice Safety website  
(<http://www.justice.gov/tribal/tta.html>)
- \* Office of Justice Services, Bureau of Indian Affairs, U.S. Department of Interior  
<http://www.bia.gov/WhoWeAre/BIA/OJS/>
- \* Walking on Common Ground Website  
([www.WalkingOnCommonGround.org](http://www.WalkingOnCommonGround.org))

## Question & Answer Session

Christine Folsom-Smith, *Director*  
*The National Tribal Judicial Center at The National Judicial College*

Hon. Jan Morris, *Chief Court Administrator*  
*Gila River Indian Community*

Norena Henry, *Senior Policy Advisor for Tribal Affairs*  
*Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice*

Laurel Iron Cloud, *Criminal Law Specialist*  
*Office of Justice Services, Bureau of Indian Affairs, U.S. Department of Interior*

## Sponsors & Partners

The 6-part webinar series on Tribal Law and Order Act's Expansion of Sentencing Authority, will provide considerations for tribes and tribal justice systems as they move forward with planning and implementation, assist with identifying impacts on tribal resources and dispel myths of TLOA.

- \* **U.S. Department of Justice**, Bureau of Justice Assistance
- \* **U.S. Department of Interior**, Bureau of Indian Affairs
- \* American Probation and Parole Association
- \* National Tribal Judicial Center, The National Judicial College
- \* Tribal Judicial Institute, University of North Dakota

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