

# The TRIBAL LAW AND ORDER ACT: *Enhanced Sentencing Provisions*

## Presentation & Materials By:

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## Hosted in Partnership With:

National Tribal Judicial College, National Judicial College  
American Probation & Parole Association



## NTJC – Webinar instructions

### Welcome & Introductions

#### Faculty:

- Michelle Rivard Parks, Associate Director, Tribal Judicial Institute, UND School of Law
- Brent Leonhard, Confederated Tribes of Umatilla Indian Reservation
- Norena Henry, Senior Policy Advisor for Tribal Affairs, Bureau of Justice Assistance, U.S Department of Justice

## OVERVIEW OF WEBINAR

Provide participants with an introduction to Section 234 of the TLOA pertaining to enhanced sentencing.

- Discuss the prerequisites to utilizing the enhanced sentencing provisions of the TLOA.
- Discuss how to prove a prior conviction
- Discuss appointment of legal counsel and qualifications of legal counsel
- OJP Resources
- Question/Answer Session

## Indian Civil Rights Act of 1968

25 U.S.C. §§ 1302

- 1302 - Constitutional rights
  - General Individual Rights (similar to Bill of Rights) prohibiting tribes from passing laws which interfere with or impose:
    - Freedom of speech
    - Search & Seizure
    - Double jeopardy
    - Self-incrimination
    - Unlawful taking of property
    - Speedy & public trial
    - Assistance of Counsel (at defendant's expense)
    - Sentences not to exceed 1 year in prison or fines of \$5,000 or both
    - Due process

## ICRA after TLOA

- 1302 - Constitutional rights
  - General Individual Rights (similar to Bill of Rights) prohibiting tribes from passing laws which interfere with or impose:
    - Freedom of speech
    - Search & Seizure
    - Double jeopardy
    - Self-incrimination
    - Unlawful taking of property
    - Speedy & public trial
    - Assistance of Counsel (at defendant's expense)
    - Sentences not to exceed of 1 year in prison or fines of \$5,000 or both
    - Sentences **MAY not exceed 3 years in prison or fines of \$15,000 or both (upon satisfaction of specified conditions)**
    - Due process

## TLOA Impacts on the ICRA

**IF Tribes want to continue under their current laws then there is no change, HOWEVER IF Tribes want to be able to sentence defendants in criminal cases to more than 1 year &/or a fine of more than \$5,000 THEN**

- **The TLOA amends ICRA to enable those tribes wanting to increase terms of imprisonment and fines to do so as long as those tribes have met specific requirements as set forth in the TLOA**
- **The specific requirements of TLOA that must be satisfied are set forth in Section 234 (a) (b) & (c) of the Act. We will be discussing those provisions today**



Faculty Member:  
Michelle Rivard Parks,  
Associate Director, Tribal Judicial Institute, UND School of Law

## SECTION I: INTRODUCTION TO SEC. 234 (A)(1),(2) OF TLOA

AMENDING 1302 (A) AND 1302 (7) OF THE ICRA

### TLOA Sec. 234 (a)(1)(2)

- In general tribes are limited to imposing sentences for a term of 1 year or a fine of \$5,000 or both for a conviction in tribal court
- As amended there is an exception enabling tribes to impose higher sentences if:
  - Defendant is provided **effective** assistance of counsel **at least equal to that under the United States Constitution, and at the expense of the tribes for indigent defendants. Must be licensed by any jurisdiction that applied appropriate licensing standards, ensure competency, and has rules of professional responsibility.**
  - Defendant is not subject to excessive bail, excessive fines or cruel and unusual punishment
  - **Presiding Judge has sufficient legal training for a criminal proceeding and licensed in any jurisdiction**
  - **All laws, rules of evidence, rules of procedure etc. are publicly available**
  - **Maintain a record of criminal proceedings (usually audio recording)**
- Imprisonment cannot exceed a term of 9 years *per proceeding*

## Tribal Considerations

Enhanced sentencing provisions did not come with funding therefore Tribes will need to consider how to fund the criminal defense program

- Many tribes contract with attorneys on a part-time basis
- Some tribes contract with legal services organizations
- Some tribes hire a full-time public defender or an entire public defense office
- May need to contract for judges or otherwise ensure presiding judge meets the new requirement

Tribal Codes may also need to amend or develop codes and procedures that specify rights for the defendant namely:

- Right to Effective Assistance of Counsel (at the Tribe's expense if they are indigent)
- Right to Judge that is trained and licensed
- Bail or pre-trial release provisions that are not excessive
- Fines and other forms of punitive remedies that are not considered cruel or unusual



Faculty Member:

Brent Leonhard, Confederated Tribes of Umatilla Indian Reservation

## SECTION II: INTRODUCTION TO SEC. 234 (A)(3) OF TLOA

AMENDING 1302 (B)(C)(D)(E) AND (F) OF THE ICRA

## TLOA Sec. 234 (a)(3)

### (b) Offenses Subject to Greater than 1 year imprisonment or a fine greater than \$5,000

- The person accused of the criminal offense must be someone who:
  - Has been previously convicted of the same or comparable offense by any jurisdiction in the United States; or
  - Is being prosecuted for an offense comparable to an offense that would be punishable by more than 1 year of imprisonment if prosecuted by the United States or any of the States

## Tribal Considerations

In order for a crime to carry with it an “enhanced sentence”, the crime charged by the Tribe must be the same or comparable offense to:

1. an offense for which the defendant was previously convicted; or
  2. an offense punishable by more than a year in federal or state jurisdiction(s)
- Tribes will need to revisit the crimes identified in their criminal codes
  - The elements of the tribal crime need not be exactly the same but must be comparable
  - **How can you meet this requirement of proof of prior conviction?**
    - through tribal code;
    - preliminary procedural matter on the part of the prosecution –like a probable cause hearing for example; would require defendant be placed on notice that the prosecution is seeking an enhanced sentence for the crime charged and prosecution would produce evidence of prior; OR
    - If based on prior, prove the existence of a prior at trial or indicate in statement on plea of guilty and judgment and sentence.

## TLOA Sec. 234 (a)(3)

### (c) Rights of Defendants

- In order to impose a sentence of more than 1 year of imprisonment the Indian tribe shall---
  - Provide effective assistance of counsel (equal to that guaranteed by the U.S. Constitution)
  - Provide indigent defense (must be a licensed attorney and provided at expense of the Indian Tribe)
  - Ensure that the presiding Judge has sufficient legal training to preside over criminal proceedings & is licensed to practice law by any jurisdiction in the United States
  - Make criminal laws publicly available prior to charging defendant (including rules of evidence, rules of criminal procedure, rules pertaining to recusal of judges)
  - Maintain a record of the criminal proceeding (including audio or other recording)

## Tribal Considerations

- What is effective assistance of counsel? What is the standard?
- Who shall be considered "indigent"—what guidelines will be followed by the Court?
- Licensure of Attorneys and Judges – What standards shall be followed? Will the Tribe develop their own? If so, what should such standards include?
- Judicial and Attorney Qualifications– Will the Tribe require that Judges and Attorneys possess a Juris Doctorate degree? Will some other form of education be relied upon? If so what might such qualifications look like?
- How will laws be published? Will hard copies be available? Will online forums be used to publish? Will it be a combination of methods?
- How will the Tribe maintain a record of proceedings? Will court reporters be used? Will audio recording devices be used? Will audio and visual record be maintained?

## Effective Assistance of Counsel

- Under federal standards, effective assistance of counsel means:
  - 1) attorney performance was deficient;
  - 2) the deficiency prejudiced the defendant; and
  - 3) but for the deficiency the result of the trial would have been different.
  - *Strickland v. Washington*, 466 U.S. 668 (1984)

## Indigent Status

- Tribes will want to consider what standards will apply in determining whether a defendant is indigent and thus eligible for indigent defense.
  - Will national poverty guidelines be applied?
  - Will the Tribe develop its own guidelines for indigent status?
  - What will the tribe consider as income &/or debt for purpose of assessing eligibility?
  - Who will assess for eligibility? (Court Clerk, Court Administrator/ Public defenders Office/ Judge)
  - Consider the guidelines in your local, state and federal jurisdiction.



## Qualifications

*If Tribes opt to establish qualifications outside of a Juris Doctorate for attorneys and judges, consideration should be given to the development of written rules to define such qualifications. For example:*

- Will there be age requirements?
- Will there be cultural competency requirements?
- How will “Law Trained” be defined? Will such a definition include:
  - Juris Doctorate
  - Informal education through continuing education providers
  - Tribal legal education pertinent to culture, custom &/ tradition
  - Consideration should be made as to how a federal judge reviewing a habeas corpus petition would interpret the definition

## Licensure

*professional licensing standards applied should ensure competency and professional responsibility of attorneys... can include tribal licensure*

*If Tribes opt to “license” attorney & or judges, consideration should be given to the development of written rules applicable to attorney licensure & judicial licensure*

- *Such rules should address:*
  - *How to become licensed / the procedure*
    - *Application*
    - *Election/ appointment*
    - *Bar examination*
  - *Qualifications for licensure might include:*
    - *Some sort of course of study followed by examination*
    - *Juris Doctorate or other formal education*
    - *Bar Examination score (tribal or other jurisdiction)*
    - *Age, knowledge of tribal law, customs. traditions*

## Competency

- This goes beyond a degree and / or a license and moves into mechanisms that are designed to make sure that the services provided are competent. There are a variety of ways to accomplish this, including, but not limited to:
  - Requirements for continuing legal education
  - Forums where attorney misconduct can be reported and where disciplinary action can be take if necessary

## Appointment of Legal Counsel

- Be sure that tribal codes set for the procedures applicable to the appointment of legal counsel in criminal cases. For example:
  - Will court be required to inform defendant of right to indigent defense (at tribal expense)?
  - Will defendants have to apply for counsel?
  - How will cases be screened for indigency (what guidelines will determine whether a defendant is indigent?)

## Publication of Laws

- Publication of laws can be achieved in a number of ways including:
  - Making laws available to the general public in hard copy and upon request
  - Housing copies at tribal libraries (including those maintained by tribal colleges)
    - \* *Also consider how to make such laws available to inmates*
- Online forums have provided an inexpensive means to achieve publication. Some ways tribes are using online forums include:
  - Publication on tribal government website
  - Publication through the Indian Law Library housed by the Native American Rights Fund (NARF)
  - Publication through non-profit or other technical assistance provider websites such as Tribal Court Clearinghouse; National Judicial College

## Maintaining Records of Proceedings

- In terms of maintaining records of proceedings there are financial considerations which may vary greatly depending upon the means chosen to maintain a record. For example:
  - **Court reporter:** require a salary or perhaps contract; may require equipment
  - **Audio record:** will require reliable recording devices to ensure that a proper record is maintained.
  - **Audio / Visual record:** may require significant technological updates to the courtroom

Also making sure that codes or rules set forth the means for capturing, maintaining and transmitting records on appeal

Note: as tribes consider options it is also important to consider whether there might exist any cultural concerns depending upon the means chosen to maintain a record (for example capturing images may be prohibited in some cultures)

## TLOA Sec. 234 (a)(3)

### **(d) Sentences– tribal court may require the defendant to**

- Serve sentence in a tribal facility;
- Serve sentence in a federal facility (nearest appropriate);
- Serve sentence in a State or local government-approved facility;  
or
- Serve sentence in an alternative rehabilitation center

## Tribal Considerations

- If the Tribe intends to house inmates in facilities owned and operated by either the Tribe or the Bureau of Indian Affairs (BIA), U.S. Department of Interior then the Tribe should consider:
  - Whether the facilities meet the BIA guidelines for long-term incarceration that were developed in December of 2010 (draft)

## Tribal Considerations

If the Tribe intends to house inmates in facilities other than those owned and operate by either the Tribe or the BIA then the Tribe should consider:

- Whether contractual agreements are necessary
- Whether the Tribe might participate in a pilot project pertaining to detention
- If tribes opt to house prisoners off the reservation and in federal or state facilities are there jurisdictional concerns or transportation issues that might arise during the term of incarceration



Faculty Member:  
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## SECTION III: BUREAU OF PRISONS TLOA PILOT PROGRAM

## Federal Bureau of Prisons TLOA Pilot Program

- TLOA includes a four year pilot program that allows any federally recognized tribe to request that the Bureau of Prisons (BOP) incarcerate a tribal member convicted under the terms of section 234 of the Act.
- By statute, the pilot program began to accept referrals on November 26, 2010 and is set to conclude on November 26, 2014. The pilot program can accept a maximum of 100 offenders at any time.

## Offender Eligibility

**To be eligible, the offender must be:**

- Convicted of a violent crime
- Sentenced to a term of 2 or more years of imprisonment with a minimum of 2 years left to serve at the time of referral to the Bureau for pilot participation
- At least 18 years of age at the time of the offense, and medically able to be transported via standard inmate transportation, although exceptions may be made for wheelchair-bound offenders on a case-by-case basis
- Offenders must have a clinician-read tuberculosis skin test (also known as the tuberculin test or PPD test (purified protein derivative) within six months of transfer to the BOP. The test must be found to be clear.

## Request to participate

**Must be made by a Judge of a tribal court who shall certify that the following conditions have been met:**

- The sentence must have been issued by a tribal court of a federally recognized tribe
- The sentence must have been issued on or after July 29, 2010.
- The sentence must have been issued after conviction in conformity with the restrictions of 25 U.S.C. 1302 of the Indian Civil Rights Act as amended by Section 234 of the Tribal Law and Order Act of 2010
- The conviction must have been for a violent crime comparable to the violent crimes described in 18 U.S.S 1153(a) commonly referred to as the Major Crimes Act
- The sentence must include a term of imprisonment of two or more years.

## Referral Process

- Tribe must submit a referral
- The BOP will review for eligibility within 30 days
- The BOP will determine proper security level for the offender & designate a location
- Tribal authorities are responsible for transportation of the offender to a drop-off location where the inmate will be transferred to the custody of the U.S. Marshals Service

## Return to Custody

- The tribal government retains the authority to rescind the request for confinement of a tribal offender by the BOP at any time during the sentence of the offender
- The tribal government must notify the BOP in writing at the address below of any such requests

For more information see the Bureau of Prisons- Tribal Law and Order Pilot Program

TLOA Pilot Program  
Designation and Sentence Computation Center  
Grand Prairie Office Complex  
U.S. Armed Forces Reserve Complex  
346 Marine Forces Drive  
(p) 972-352-4400  
(f) 972-352-4395  
GRA-DSC/TLOA~@BOP.GOV



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## SECTION IV: OJP & OTHER RESOURCES



## Office of Justice Programs Resources

- Coordinated Tribal Assistance Solicitation (CTAS)
- Second Chance Act Programs
- Office of Juvenile Justice and Delinquency Prevention
- Other BJA Administered Programs
- BJA Training and Technical Assistance

## Coordinated Tribal Assistance Solicitation (CTAS)

- The U.S. Department of Justice (DOJ) launched CTAS in Fiscal Year 2010 in direct response to concerns raised by Tribal leaders about the DOJ's grant process that did not provide the flexibility tribes needed to address their criminal justice and public safety needs.
- *Eligibility:* Federally-recognized Tribes and Tribal consortia submit a single application for most of the DOJ's Tribal grant programs.
- *Design:* A comprehensive approach to save time and resources and allow tribes and DOJ to gain a better understanding of the Tribes' overall public safety needs.
- For more information, 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                      Release Date: **Mid December 2013**  
Due Date: **Mid March 2014**  
Awards: **September 30, 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.

## Office of Juvenile Justice & Delinquency Prevention

[www.ojjdp.gov](http://www.ojjdp.gov)

- In addition to grants provided under CTAS, the OJJDP offers grants for court development, including:
- Child Abuse Training for Judicial and Court Personnel
- Child Protection Division
- Community-Based Violence Prevention Demonstration Program
- Court Appointed Special Advocates (CASA) Membership and Accreditation Program
- Family Drug Court
- Juvenile Drug Courts/Reclaiming Futures

## 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)
- Justice Mental Health Collaboration Program  
[www.bja.gov/ProgramDetails.aspx?Program\\_ID=66](http://www.bja.gov/ProgramDetails.aspx?Program_ID=66)
- National Drug Court Program  
[www.bja.gov/ProgramDetails.aspx?Program\\_ID=58](http://www.bja.gov/ProgramDetails.aspx?Program_ID=58)

## Training & Technical Assistance

- Implementation of the Expansion of Sentencing Authority authorized in TLOA – TCCLA Training and Technical Assistance  
[http://www.appa-net.org/eweb/Dynamicpage.aspx?webcode=IV\\_ProjectDetail&wps\\_key=49d0989a-0f8a-4644-ba62-2cedacc704bc](http://www.appa-net.org/eweb/Dynamicpage.aspx?webcode=IV_ProjectDetail&wps_key=49d0989a-0f8a-4644-ba62-2cedacc704bc)
- CTAS Training and Technical Assistance  
[www.justice.gov/tribal/tta.html](http://www.justice.gov/tribal/tta.html)
- Tribal Probation Academy  
[http://www.appa-net.org/eweb/Dynamicpage.aspx?webcode=IV\\_ProjectDetail&wps\\_key=7414391d-e5db-4bf6-b9b1-5648c496bdc7](http://www.appa-net.org/eweb/Dynamicpage.aspx?webcode=IV_ProjectDetail&wps_key=7414391d-e5db-4bf6-b9b1-5648c496bdc7)
- BJA National Training and Technical Assistance Center  
<http://bjatraining.org/>

## BJA & Other Resources

### BJA Resources

- *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)
- *Improving the Administration of Justice in Tribal Communities through Information and Resource Sharing*  
[https://www.bja.gov/publications/appa\\_tribalinforesourcesharing.pdf](https://www.bja.gov/publications/appa_tribalinforesourcesharing.pdf)
- National Reentry Resource Center (NRRC)  
<http://csjjusticecenter.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)
- *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)
- *Project TEAM: Helping Tribes and State/Local Governments Create Joint Jurisdictional Collaborations; December 2, 2013 Webinar, Request for Proposal and Application*  
[www.ohsu.edu/xd/research/centers-institutes/evidence-based-policy-center/stakeholder-engagement/project-team.cfm](http://www.ohsu.edu/xd/research/centers-institutes/evidence-based-policy-center/stakeholder-engagement/project-team.cfm)

### Federal & Other 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)



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## SECTION V: QUESTION/ ANSWER

## 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
- American Probation and Parole Association
- National Tribal Judicial College, National Judicial College
- Tribal Judicial Institute, University of North Dakota

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