

***Enhanced Sentencing and
the Tribal Law and Order Act:
is it worth the expense?***

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Tribal Law and Order Act

- Congress passed the Tribal Law and Order Act in July 2010 and the President signed it into law on July 29, 2010.
- TLOA is a comprehensive statute focused on all aspects of investigating and prosecuting crime in Indian country.
- One aspect of the TLOA that has garnered a great deal of attention is the enhanced sentencing procedures.



Major Obstacles Stem From 4 Factors

- Criminal Jurisdiction in Indian country
- Sentencing Limitations Imposed by ICRA
- Right to Counsel Provisions Contained in ICRA
- Funding for Government Infrastructure



Criminal Jurisdiction in Indian Country

- “Jurisdiction” is all about power and allocations of power
- Jurisdiction is usually tied to territory and the power of a government over its territory
 - Criminal prosecution is People vs. Defendant
- Criminal Jurisdiction in Indian Country centers on power over people; not territory
 - Creates fractured process and confusion



Sentencing Limitations in ICRA

- Indian Civil Rights Act (after amendment) limited tribes to imposing
 - One year imprisonment and/or
 - \$5000 fine
 - Query: Stacking?
- Note: ICRA does not limit community service, restitution, etc
- Not always an effective deterrent



Right to Counsel Provisions in ICRA

- “No Indian tribe in exercising powers of self-government shall ... deny to any person in a criminal proceeding the right . . . at his own expense to have the assistance of counsel for his defense...”
- Sixth Amendment as applied to states
 - Requires defense counsel for felony prosecutions
 - For misdemeanors, required only if defendant sentenced to jail time
- U.S. Supreme Court has repeatedly referenced the lack of a right to indigent defense counsel in cases limiting both tribal civil and criminal jurisdiction



Funding for Government Infrastructure

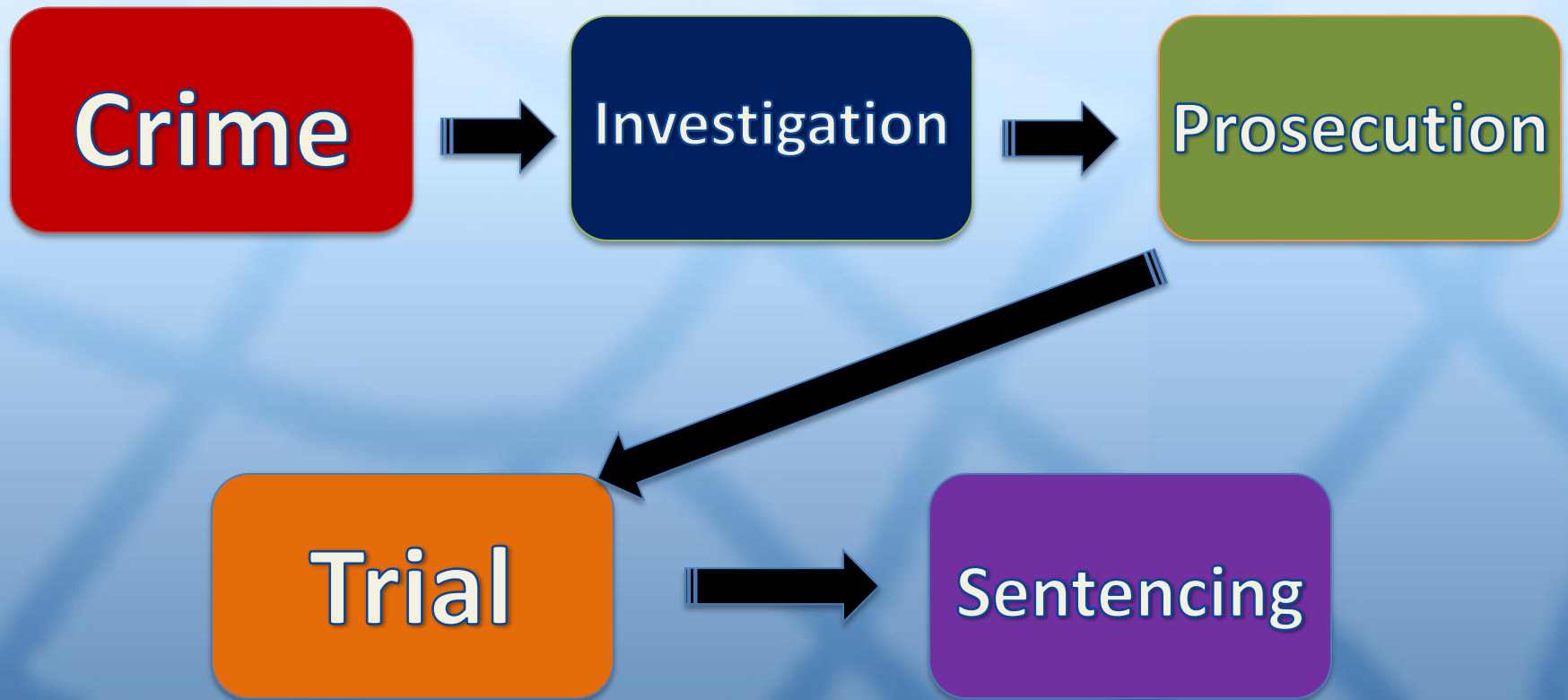
- The federal and state governments rely on taxes to raise revenue to fund government operations
- As a result of federal Indian policy, tribes lack the necessary tax base and taxation authority
- Results in dependency on economic development and on federal funding



**PROBLEMS ARISING
FROM THESE FOUNDATIONS**



Problems arise at all five stages of a criminal proceeding





Crime

- Lack of good data specific to Indian country
- Alcohol use reported by 62% of offenders, as compared to 42% for population as a whole



Investigation

- Who investigations (Tribes, States, or Feds)
- Public Law 280
- Number of officers in Indian country
- Communication between governments
- Training of officers
- Collection of Evidence



Prosecution

- Federal declination rates
- Communication delays in receiving information (if it is received at all)
- Distance between courthouse and reservation



Trial

- Subpoenas issued to federal employees to testify at state and tribal trials
- Various factors affecting judicial independence
- Reliance of tribal courts on federal funds
- Lack of funds to hire and retain personnel
- Limited capacity to conduct jury trials



Sentencing

- Restrictions contained in ICRA
- Cannot be imposed on non-Indians
- Lack of facilities to incarcerate
- Release of prisoners into Indian country
 - Inadequate probation/parole services
 - Lack of notification to Tribal law enforcement



Enhanced Sentencing: A Closer Look

- Tribes which satisfy prerequisites possess ability to impose enhanced sentences
- These tribes can impose a maximum of 3 years and/or \$15,000 fine; and can stack up to 9 years
- Defendants
 - previously convicted of same or comparable offense by any jurisdiction in U.S.; 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 U.S. or any of the States



Prerequisites

- provide indigent defense counsel licensed to practice law by any jurisdiction in the U.S. that applies appropriate professional licensing standards
- provide to defendant the right to effective assistance of counsel at least equal to that guaranteed by the U.S. Constitution
- require that the judge presiding over the criminal proceeding (A) has sufficient legal training to preside over criminal proceeding; and (B) is licensed to practice law by any jurisdiction in the U.S.
- prior to charging the defendant, must make publicly available the tribe's criminal laws, rules of evidence, and rules of criminal procedure; and
- maintain record of the criminal proceeding, including audio or other recording of trial proceeding



Issues and Questions

- What do these prerequisites mean?
- How are tribes satisfying them?
- Where are defendants incarcerated?
- All this costs money – how are tribes funding?
 - *Will turn it over to other panelists to discuss how they have addressed these issues, with one final comment: exercising enhanced sentencing authority may not be right for every tribe, but we are going to have to watch the connections between TLOA and pending VAWA Reauthorization*



THANK YOU