Intersecting Laws: the Tribal Law and Order Act and the Indian Civil Rights Act

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I. INTRODUCTION

A. The Indian Civil Rights Act[1]

Civil rights laws, in general, set limitations on governmental actions as a means to protect individuals from actual or potential abuse by a government.[2] The U.S. Constitution and, more specifically, the Bill of Rights provide such protections against abuses by federal, state, and local governments. However, prior to 1968, and due to the U.S. Supreme Court decision in *Talton v. Mayes* that the federal constitution did not apply to tribal governmental action, there was no federal legislation protecting individual tribal members against abuses by tribal governments.[3] In 1968, with the enactment of the Indian Civil Rights Act (hereinafter "ICRA"), Congress set forth specific civil rights that would serve to protect tribal members, other persons, and Indian communities from civil rights abuses by tribal governments.[4] ICRA, as subsequently amended, mandated that no Indian tribe exercising powers of self-government shall:

> (1) [M]ake or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances; (2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized; (3) subject any person for the same offense to be twice put in jeopardy; (4) compel any person in any criminal case to be a witness against himself; (5) take any private property for a public use without just compensation; (6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense; (7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one

[1] 18 U.S.C. § 1302.
[2] Stephan L. Pevar, *The Rights of Indians and Indian Tribes* (4th Edition 2014). Pg. 221.
[3] Id.
[4] Ed Hermes, *Law & Order Tribal Edition: How The Tribal Law and Order Act Has Failed To Increase Tribal Court Sentencing Authority*, Arizona State Law Journal (Summer 2013). Pg. 685.

> year and a fine of $5,000, or both; (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law; (9) pass any bill of attainder or ex post facto law; or (10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.[5]

ICRA incorporated many of the same provisions set forth in the Bill of Rights and made them applicable to tribal governments and judicial systems.[6] In *Talton v. Mayes* (1896), the U.S. Supreme Court held that because Indian tribes predated the U.S. Constitution and did not derive their authority from it, they were not subject to the constitutional limitations of the Fifth Amendment.[7] Furthermore, because tribes are not states, the constitutional restrictions on state actions under the 14th Amendment were not applicable.[8] In 1978, the Supreme Court, analyzing a congressional hearing that preceded the passing of ICRA, stated, "[w]e note at the outset that a central purpose of ICRA and in particular of Title I was to secur[e] for the American Indian the broad constitutional rights afforded to other Americans, and thereby to protect individual Indians from arbitrary and unjust actions of tribal governments."[9]

Although ICRA guaranteed substantive personal rights to defendants under tribal jurisdiction, some of the constitutional protections not incorporated in ICRA included the requirement of the separation of church and state, the right to a jury trial in civil cases, and the requirement to provide indigent defendants with appointed counsel.[10] ICRA also placed restraints on tribal courts' imposition of punishment, originally limiting tribal court sentences to six months. However, in 1986, Congress expanded Indian tribes' sentencing authority under ICRA to one year and a $5,000 fine.[11] Under these amendments, it was assumed that a tribe could impose a sentence of longer than one year when the suspect was also charged, and convicted, of discrete offenses arising out of the same criminal enterprise. For example, an individual who committed both a kidnapping and an aggravated assault of another person could be sentenced to the maximum of one year on each charge. However, the federal courts have been very restrictive of this right of Indian tribes to stack maximum sentences under ICRA with at least one

[5] 25 U.S.C. § 1302.
[6] The only exceptions were the Second Amendment right to bear arms, the right to a civil jury trial, the right to indictment in criminal proceedings, and the prohibition against the establishment of a religion.
[7] Robert Probasco, *Indian Tribes Civil Rights, and Federal Courts*, Texas Wesleyan Law Review (Spring 2001). Pg. 126.
[8] Id.
[9] Santa Clara Pueblo v. Martinez, 436 U.S. 49, 61 (1978); quoting, S.Rep. No. 841, 90th Cong., 1st Sess., 5–6 (1967).
[10] When ICRA was originally enacted in 1968, the U.S. Supreme Court had not yet held that the Fifth Amendment right to counsel included the right to court-appointed counsel for indigent defendants in misdemeanor cases, but rather such right would only be required in felonies. Gideon v. Wainwright, 372 U.S. 335 (1963). It was not until 1972 that the Court decided this right to counsel would also extend to misdemeanors. See Argersigner v. Hamlin, 407 U.S. 25, 37, 32 L. Ed. 2d 530, 92 S. Ct. 2006 (1972)("No person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.").
[11] Hermes, supra, pg. 685; see also 25 U.S.C. § 1302(7).

concluding that a tribe was foreclosed from punishing separate crimes that were committed as part of one transaction.[12]

Despite the 1986 amendments to ICRA and the efforts of federal and tribal courts, statistics continued to show that crime in Indian Country was well above the national average. Contributing to the high crime rates were the sentencing restrictions imposed by ICRA and the high declination rates by federal prosecutors.[13] These factors placed tribal governments in a difficult position in trying to protect their communities.[14] In light of these issues, Congress passed the Tribal Law and Order Act of 2010, a law aimed at decreasing criminal activity in Indian Country.[15]

B. The Tribal Law and Order Act of 2010

The Tribal Law and Order Act of 2010 (hereinafter "TLOA") was signed into law on July 29, 2010.[16] The purpose of TLOA was to clarify governmental responsibilities regarding crimes in Indian Country; increase and improve collaboration among jurisdictions; support tribal self-governance and jurisdiction; reduce the prevalence of violent crime in Indian Country; combat crimes such as domestic violence, sexual assault, and drug trafficking; reduce the rates of substance abuse in Indian Country; and support the collection and sharing of crime data among jurisdictions.

In addition to the foregoing, TLOA amended ICRA by providing the option for tribes to expand their sentencing authority within tribal courts.[17] By enacting TLOA, Congress recognized that the sentencing provisions imposed by ICRA were having a negative impact on tribes' abilities to protect their territory because tribal judicial systems could not impose sentences that corresponded to the severity of the crimes being committed. Under pre-existing law, tribes were restricted to sentences of up to one year in prison and a fine of up to $5,000; however, with the amendments to ICRA, tribes now have an option to enhance sentences in criminal cases by imposing sentences not to exceed three years in prison or fines of $15,000 or both for qualifying crimes so long as the tribe has met the specific requirements set forth in TLOA and ICRA as amended. Sentences may include a combination of incarceration and community corrections such as probation and halfway houses. Under no circumstance can the term of the sentence

[12] See Spears v. Red Lake Band, 363 F. Supp 2d 1176 (D. Minn. 2005).
[13] Id. for example, from 2005-2010, federal prosecutors declined to prosecute roughly 50% of the violent crimes alleged to have occurred on tribal lands and roughly 75% of the sex crimes alleged to have been committed against women and children on Indian reservations.
[14] Id. at 666; see also *Jails in Indian Country*, U.S. Department of Justice. Accessed at: http://www.bjs.gov/index.cfm?ty=pbdetail&iid=5070.
[15] U.S. Department of Justice, Tribal Law and Order Act. Accessed at: < http://www.justice.gov/tribal/tloa.html>.
[16] Public Law 111–211, 124 Stat. 2258.
[17] Public Law 90–284, 82 Stat. 73 (as amended).

exceed nine years. Tribes are under no obligation nor mandate to implement enhanced sentencing authority.

For those tribes opting to enhance sentencing authority within their tribal courts, section 234 (a) (b) and (c) of TLOA mandates that specific requirements be satisfied by the tribe, namely:

- Defendant is provided effective assistance of counsel at least equal to that under the U.S. Constitution, and at the expense of the tribes for indigent defendants. The tribe must be licensed by any jurisdiction that applies appropriate licensing standards, ensure competency, and have 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 is licensed in any jurisdiction.
- All laws, rules of evidence, rules of procedure, etc. are publicly available.
- Tribe must maintain a record of criminal proceedings (usually audio recording).[18]

In order for offenses to be subject to greater than one 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 one year of imprisonment if prosecuted by the United States or any of the states.[19]

Finally, should a tribe impose a sentence for a qualifying offense that is greater than one year of imprisonment or a fine greater than $5,000, certain detention criteria must be met, namely:

- The facility must be approved by the Bureau of Indian Affairs (BIA) for longterm incarceration, in accordance with guidelines developed by BIA (in consultation with Indian tribes).
- The facility is the nearest appropriate federal facility, at the expense of the U.S. Bureau of Prisons (BOP) tribal prisoner pilot program described in section 304(c)[1] of TLOA.

[18] See TLOA Public Law 11–211, Sec. 234 (a)(1)(2); 234 (c); see also 25 U.S.C. §1302 (c).
[19] See TLOA Public Law 111–211, Sec. 234 (a) (3); 25 U.S.C. §1302 (b).

- The facility is a state or local government-approved detention or correctional center pursuant to an agreement between the Indian tribe and the state or local government, or
    - The facility is an alternative rehabilitation center of an Indian tribe, or
    - The defendant may be required to serve another alternative form of punishment, as determined by the tribal court judge pursuant to tribal law.[20]

[20] See TLOA Public Law 111–211, Sec. 234; 25 U.S.C. §1302 (d).

II. RIGHTS OF DEFENDANTS AND INMATES

ICRA extends protections similar to the Eighth Amendment to Indian tribes. This means that any tribal member incarcerated in a tribally operated prison or detention center cannot be subjected to "cruel and unusual punishments," "excessive bail," or "excessive fines."[21] There is a significant body of case law regarding cruel and unusual punishment in the context of incarceration in state and federal facilities, including a number of U.S. Supreme Court decisions. However, it is not clear that these decisions would apply to tribal incarcerations because there is little or no interpretation of the cruel and unusual punishment clause in ICRA.

The Supreme Court decision of *Santa Clara Pueblo v. Martinez* has stymied federal court intervention into ICRA violations that do not involve custodial claims, such as jail conditions or other challenges to methods of incarceration rather than the incarceration itself. In the *Santa Clara Pueblo v. Martinez* case, Jennifer Martinez, an enrolled female member of the Santa Clara Pueblo, sued the Pueblo to enjoin the enforcement of a tribal ordinance.[22] The ordinance in question denied tribal membership to the children of women who married outside of the Pueblo.[23] Martinez had in fact married outside of the Pueblo and her daughter was thus denied membership.[24] She claimed that the ordinance violated ICRA's guarantee of equal protection because she was being discriminated against on the basis of her gender.[25]

In *Santa Clara Pueblo v. Martinez,* the Supreme Court stated that the protections afforded by ICRA are "similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment."[26] The Court held that since the only remedy in federal court for violations of ICRA was the habeas corpus remedy under section 1303, it could not reach the merits of Martinez's equal protection argument. The Supreme Court strongly implied that the tribal courts would have the right to provide remedies for non-custodial claims in tribal court, although its decision in that case that Indian tribes are typically immune from such suits belies any clear intent that tribal courts could hear such lawsuits.

Similarly, federal courts have not had jurisdiction since *Santa Clara Pueblo* to address conditions lawsuits involving tribal prisoners, resulting in this being a very unclear area of the law. If the federal court decisions interpreting the Eighth Amendment apply to Indian tribes, tribes would have to ensure adequate ventilation, nutrition, space, access to medical care, access

[21] 25 U.S.C. 1302(7).
[22] Id. at 51.
[23] Id. at 52.
[24] Id.
[25] Id. at 51.
[26] Id. at 57.

to legal services, access to exercise, protection from violence from other inmates, and a panoply of other rights that inmates in federal and state facilities enjoy.

Despite the holding in *Santa Clara Pueblo*, other courts have held that constitutional standards do apply for certain violations of ICRA. For example, in *United States v. Lester*,[27] the court held that constitutional standards can apply to alleged violations of ICRA's search and seizure provision (the equivalent of the Fourth Amendment).[28] [29] Similarly, in *Ramos v. Pyramid Tribal Court, Bureau of Indian Affairs*,[30] the court declared that, in considering alleged violations of ICRA's cruel and unusual punishment provision, judges can refer to constitutional standards as guidance, but this cannot be the exclusive consideration.[31] Clearly, if tribes are incarcerating persons for up to nine years of detention, certain Eighth Amendment standards would have to apply. To what degree such standards might be deemed applicable remains an unsettled matter.

A. Cruel and Unusual Punishment

Courts have found that a number of punitive conditions can be considered "cruel and unusual punishment" and thus constitute a violation of the Eighth Amendment. These conditions include:

1) **Overcrowding**[32] – In *Rhodes v. Chapman*,[33] the Supreme Court held that an Ohio maximum-security prison operating at 38% above its designed capacity did not inflict cruel and unusual punishment upon the inmates lodged therein solely on the basis of its overcrowding.[34] However, other courts have held that severe overcrowding can violate the Eighth Amendment. For example, in *Battle v. Anderson*,[35] the Court held that when prison "…crowding offends the contemporary standards of human decency," it is per se unconstitutional under the Eight Amendment.[36]

[27] 647 F.2d 869, 872 (8th Cir. 1981).
[28] Id. at 872 ("In light of the legislative history of the Indian Civil Rights Act and its striking similarity to the language of the Constitution . . . we consider the problem before us under fourth amendment standards."). See also People v. Ramirez, 148 Cal. App. 4th 1464, 1471 (2007) ("[B]y act of Congress, Indian tribal governments have no more power to conduct unreasonable searches and seizures than do the federal and state governments under the Fourth Amendment.")
[29] In Lester, an Indian man suspected of murder on the Standing Rock Sioux Reservation was imprisoned in Fort Yates jail pending further investigation of the crime. Id. at 871-72. While incarcerated, his clothes were removed and he was given coveralls, which was said to be standard practice at the jail. Id. at 872. Bloodstains were noticed on Lester's clothing, so the clothing was transferred to the FBI to be inspected. Lester motioned to suppress the clothing as evidence at his trial, arguing they were the fruit of an unconstitutional search and seizure.
[30] 621 F.Supp. 967 (D. Nev. 1985).
[31] Id. at 970 ("This Court should not merely look at the construction of the Eighth Amendment to the U.S. Constitution. We can, however, look to construction under the Eighth Amendment for guidance….").
[32] See generally Susanna Y. Chung, *Prison Overcrowding: Standards in Determining Eighth Amendment Violations*, 68 Fordham Law Review (2000). 2351.
[33] 452 U.S. 337 (1981).
[34] Id. at 352 ("The double celling made necessary by the unanticipated increase in prison population did not lead to deprivations of essential food, medical care, or sanitation. Nor did it increase violence among inmates or create other conditions intolerable for prison confinement.").
[35] 564 F.2d 388 (10th Cir. 1977).
[36] Id. at 395 (quoting Trop v. Dulles, 356 U.S. 86, 114 (1958).

2) **Inadequate Living Space** – This is related to overcrowding, but somewhat different. Several courts have held that inadequate living space for inmates can constitute cruel and unusual punishment. It has been stated that as a general rule, inmates must be afforded a minimum of 60 square feet of living space.[37] This includes prisons where multiple inmates are housed within the same cell or unit. In the case of *Ramos v. Lamm*,[38] the court held that it was cruel and unusual punishment to confine prisoners to cells smaller than 60 square feet and provide them less light than a thirty-foot candle would provide.[39]

3) **Denationalization** – In *Trop v. Dulles*, the Supreme Court declared that revoking a criminal's citizenship as punishment for an offense constituted a violation of the Eighth Amendment.[40] It stated that denationalization results in "the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development."[41] Thus, loss of citizenship is no longer a constitutional form of punishment in the United States.

B. The Tribal Law and Order Act's Application of Constitutional Standards

When TLOA was passed in 2010, it was silent for the most part on prisoners' rights, but it did clarify some existing ambiguities regarding the application of ICRA. As a condition precedent to sentencing enhancements under TLOA, a tribe must meet a number of requirements, namely:[42]

1) If a tribal court wishes to impose a sentence *longer* than one year, either:
   a) The defendant had to have been previously convicted of the *same crime*, or
   b) The elements of the offense are *comparable* to a state or federal equivalent.
2) Defendants are entitled to effective assistance of counsel *at least* equal to that guaranteed by the U.S. Constitution. The Sixth Amendment states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of

[37] See Chung, supra note 16, at 2369.
[38] 520 F.Supp. 1059 (D. Colo. 1981).
[39] Id. at 1062-63.
[40] Trop, 356 U.S. at 104.
[41] Id. at 101.
[42] See M. Brent Leonhard, *Umatilla's Experience With TLOA Felony Sentencing*, accessed at http://www.tribal-institute.org/2012/Pre%20conference%20MBL%20ppt%20pre-conference.pdf .

Counsel for his defence [sic]." As stated previously, the *Martinez* case created serious doubts about the jurisdiction of the federal courts to apply constitutional Eighth Amendment standards to tribes. TLOA remedied these doubts by expressly stating tribes must meet constitutional standards of effective counsel in order to employ heightened sentencing. The leading Supreme Court case on effective counsel is *Strickland v. Washington*.[43] In that case, the Court stated that a criminal defendant may not obtain relief on a claim of ineffective counsel under the Sixth Amendment unless he/she can show: 1) that counsel's performance fell below an objective standard of reasonableness, *and* 2) that counsel's performance gave rise to a reasonable probability that if counsel had performed adequately, the result would have been different.[44] Attorney counseling that meets these two standards is thus considered a violation of the Sixth Amendment. Therefore, under TLOA, counsel to Indian defendants in tribal courts must meet at least the *Strickland* standard.

3) Indigent defendants must be provided counsel that is:
    a) At the expense of the tribe, and
    b) Licensed by any jurisdiction that applies appropriate professional licensing standards and ensures competence and professional responsibility of lawyers. As mentioned previously, the Sixth Amendment is applied to Indian tribes through ICRA; however, ICRA amends the "assistance of counsel" requirement by stating that counsel shall only be provided to the accused "at his own expense." TLOA thus further modifies this requirement for indigent defendants.
4) Judges must be:
    a) Sufficiently trained to preside over criminal trials, and
    b) Be licensed in *any* jurisdiction. TLOA does not specify what sort of licensing is required, so the presumption is that tribal licensing is just as credible as state or federal bar licensing.
5) Laws, rules of evidence, and procedures must be made publicly available, and all tribal court proceedings must be recorded in some fashion.

[43] 466 U.S. 668 (1984).
[44] Id. at 694.

Thus far, at least eight tribes have elected to enact the heightened sentencing protocols of TLOA and several more tribes are close to implementation. The Eastern Band of Cherokee in North Carolina and the Confederated Tribes of the Umatilla Indian Reservation in Oregon were among the first tribes to implement heightened sentencing protocols. Both tribes chose to participate in the BOP's TLOA Pilot Project, which allowed for tribes to imprison criminals sentenced under the heightened standards of TLOA in federal prisons.[45] Section 234(c) of TLOA states that the BOP *shall* accept a prisoner convicted by a tribal court into one of its facilities under the following conditions:[46]

- The tribal court must petition the BOP for the prisoner's placement by submitting a request to the Attorney General (or a person designated to accept such a request).[47]
- Requests for confinement must be limited to those offenders convicted of a violent crime for which the sentence includes a term of imprisonment of two or more years.
- The maximum number of tribal offenders in the pilot program cannot exceed 100.
- The BOP's incarceration of pilot program participants shall be subject to the conditions described in 18 U.S.C. section 5003,[48] except that the offender shall be placed in the nearest available and appropriate facility, at the expense of the United States.

[45] Memorandum from Charles E. Samuels, Jr., Director, Bureau of Prisons, to Peter J. Kadzik, Assistant Attorney General, Office of Legislative Affairs (May 7, 2014) (on file with the National Indigenous Women's Resource Center).

[46] Id.

[47] The BOP requires the following information in order to process a request and safely designate a tribal offender to the nearest appropriate federal prison:

- Name;
- Gender;
- Date and place of birth;
- Tribal enrollment/affiliation;
- Offense of conviction and a description of the criminal conduct;
- Sentencing information;
- Court-ordered financial obligations (such as child support);
- Prior record, including descriptions of arrests and convictions;
- Detainers, pending charges, and outstanding warrants;
- Personal and family data (marital status, children, etc.);
- Physical, mental, and emotional health;
- History of substance abuse;
- Educational/vocational history;
- Gang affiliation (if applicable);
- Separation concerns (any person or group whom the offender must not contact);
- Victim information; and
- Current place of incarceration, including address and contact information.

[48] 18 U.S.C. § 5003 provides in relevant part that:

"(a) (1) The Director of the Bureau of Prisons when proper and adequate facilities and personnel are available may contract with proper officials of a state or territory, for the custody, care, subsistence, education, treatment, and training of persons convicted of criminal offenses in the courts of such state or territory.

(2) Any such contract shall provide—

(A) for reimbursing the United States in full for all costs or expenses involved;

* * * *

(c) Unless otherwise specifically provided in the contract, a person committed to the Attorney General hereunder *shall be subject to all the provisions of law and regulations applicable to persons committed for violations of laws of the United States* not inconsistent with the sentence imposed." (Emphasis added.)

It should be noted that tribal governments retain the authority to rescind their requests for confinement of offenders imprisoned in BOP facilities at any time during an offender's sentence.[49] As of May 7, 2014, only four inmates have been lodged in federal facilities as part of the pilot project.[50] For those tribal inmates imprisoned in federal facilities pursuant to the BOP TLOA Pilot Project, their right to be free from cruel and unusual punishment arises not from ICRA (even though they were convicted under it) but from the Eighth Amendment. Thus, TLOA has clarified how certain constitutional standards are to be applied in Indian Country, but it has not shone much light on how cruel and unusual punishment ought to be addressed in tribal jails.

[49] Memorandum, supra note 24.
[50] Id.

III. TRIBAL CONSIDERATIONS WHEN IMPLEMENTING ENHANCED SENTENCING

Tribes seeking to implement heightened sentencing under TLOA may face a number of challenges. Lack of adequate or accessible funding and resources may interfere with the ability of many tribes to comply with the statutory prerequisites necessary to implement heightened sentencing. Furthermore, if the aforementioned case law regarding prisoner's rights and the Eighth Amendment were to be applied today in Indian Country, some tribes might find themselves unable to withstand challenges brought about by the assertion of such rights.

A. Prison or Detention Facility Considerations

There are any number of issues that might give rise to a cause of action for prisoners being held on a longterm basis, and these issues are exacerbated in a tribal system wherein the condition of existing jails has included complaints from short-term inmates let alone longterm ones. Some of the issues that might warrant immediate care and attention pertain to:

1) **Overcrowding** – As mentioned previously, the Supreme Court has held that a prison operating at 38% above its designed capacity may not be considered overcrowded to the point of cruel and unusual punishment. However, compare this with the Tohono O'odham Adult Detention Center in Arizona, which consistently operated at over 213% of its designed capacity in 2013.[51] Is it fair to assume that this type of overcrowding would offend the contemporary standards of human decency?

2) **Inadequate Living Space** – In 2010, BIA's Office of Justice Services authored a draft entitled BIA Adult Detention Facilities Guidelines (hereinafter "Guidelines").[52] The Guidelines are by and large a wholesale adoption of the American Correctional Association's Core Jail Standards, "modified to reflect unique characteristics of Indian country detention." The Guidelines were designed to assist tribal jails in attaining a level of equality with state and federal facilities so as to allow them to comply with the TLOA. Interestingly, the Guidelines provide that single-occupancy cells must provide at least 35 square feet of unencumbered floor space.[53] For inmates who are confined in their cells longer

[51] Todd D. Minton, *Jails in Indian Country, 2013*, Bureau of Justice Statistics (Dec. 31, 2014, 2:09 P.M.), accessed at http://www.bjs.gov/index.cfm?ty=pbdetail&iid=5070.
[52] Bureau of Indian Affairs, *BIA Adult Detention Facilities Guidelines*, National Congress of American Indians (Dec. 31, 2014, 2:05 P.M.), accessed at http://tloa.ncai.org/documentlibrary/2011/02/BIA%20Adult%20Detention%20Facility%20Guidelines%20Dec%202010%20SOL.pdf.
[53] Id. "Unencumbered" is defined in the Guidelines as meaning "usable space that is not encumbered by furnishings or fixtures."

than 10 hours per day, at least 60 square feet of floor space must be provided. For multi-occupant cells,[54] 25 square feet of floor space must be provided to each individual inmate, or 35 square feet for those inmates who are confined for more than 10 hours per day. Do these standards seem valid when compared to the 60 square feet that were found to be the absolute bare minimum needed to satisfy the Eighth Amendment in *Lamm*?

3) **Denationalization** – A number of tribes have provisions in their judicial codes that enable them to strip a member of his or her enrolled status if found guilty of certain offenses. For example, the Tonawanda Band of Seneca Indians was able to strip Indian status from its members and "banish" them from the reservation if found guilty of treason. When a number of Tonawanda members were banished in 1996, they sued the tribal court issuing the order, leading to the case of *Poodry v. Tonawanda Band of Seneca Indians*.[55] In *Poodry*, the banished members argued that disenrollment was equivalent to the stripping of citizenship at issue in *Dulles*, thus amounting to cruel and unusual punishment under the ICRA. The Second Circuit Court considered the *Dulles* case and whether its holding should be applied to the ICRA to limit the ability of tribes to banish their own members. While the Court acknowledged that banishment may fall within the ICRA's prohibition against cruel and unusual punishment, it refused to definitively rule on the subject.[56] However, later circuit and district courts have been more concise in their holdings and rationale on the subject. For example, in *Jeffredo v. Macarro*,[57] the Ninth Circuit Court addressed the disenrollment of several members of the Pechanga Band of the Luisano Mission Indians for failing to prove their lineal descent. The Court explicitly held that *Dulles* could not apply to the case: "In [*Dulles*], the statute left the defendant stateless. Further, the statute was penal in nature. Here [the] Appellants have not been left stateless, and nothing in the record indicates that the disenrollment proceedings were undertaken to punish Appellants. Therefore, *Dulles* is not controlling."[58] Thus, it appears that no bright-line rule governs whether banishment or disenrollment is cruel or unusual

[54] Id. A multiple-occupancy cell is defined in the Guidelines as one that holds "between two and sixty-four occupants…."
[55] Poodry v. Tanawanda Band of Seneca Indians, 85 F.3d 874, 876 (2d. Cir. 1996).
[56] Id. at 898.
[57] 599 F.3d 913, 915 (9th Cir. 2009).
[58] Id. at 920-21.

punishment under the ICRA, but it is nonetheless an issue that tribes should be wary of.

With plenty of prisoner bed space still available in the BOP TLOA Pilot Project, tribes have a viable option for imprisoning criminals sentenced according to the higher TLOA standards, yet at the same time complying with the constitutional requirements of TLOA. Unfortunately, even for those tribes able to comply with the statutory prerequisites for higher sentencing, the law remains unclear as to how prisoners' rights are to be protected in Indian Country. Though tribes are not subject to suit for ICRA violations as per *Martinez*, tribal officials can still be sued.

B. Uncounseled Convictions and the Extent of the Right to Legal Counsel

Because TLOA permits Indian tribes to impose enhanced sentencing in one of two scenarios: 1) when the defendant has been convicted previously of the same offense, or 2) when federal or state law would call for a sentence in excess of one year and the question arises what standards will apply to a tribe's use of prior convictions.[59] For example:

1) Should a tribe be able to utilize a conviction of a defendant as a predicate for imposing an enhanced sentence when the prior conviction does not meet the standards of TLOA?

   Tribal defendants' many prior convictions may have been obtained without legal counsel being available for them. Under state law, a defendant who is receiving an enhanced sentence because of an earlier commission of the same offense is entitled to collaterally challenge the prior conviction by alleging that it was obtained in violation of the U.S. Constitution.

2) Should tribal defendants be able to similarly challenge prior tribal or state convictions if being used to impose sentences in excess of one year?

   TLOA is silent on this subject, so tribes will have to address it in their codes or case decisions. For example, the U.S. Court of Appeals for the Eighth Circuit recently held in *Cavanaugh v. United States*, in the context of the prosecution of a defendant in federal court for habitual domestic

[59] The United States Supreme Court in United States v. Bryant, 136 S.Ct. 1954 (2016), in a unanimous decision upheld the authority of the United States to utilize uncounseled tribal court convictions for domestic abuse as predicate offenses for felony prosecutions in federal courts, holding that since the Indian Civil Rights Act did not mandate the appointment of legal counsel for indigent defendants for tribal court misdemeanor offenses federal courts could consider these convictions; see also U.S. v. Cavanaugh, 643 F.3d. 592 (8th Cir. 2011) and U.S. v. Shavanaux, 647 F.3d 993 (10th Cir. 2011) (wherein both circuit courts held that a prior uncounseled tribal court conviction could be used as a predicate offense for a prosecution under 18 U.S.C. § 117(a) so long as the tribal conviction was valid from its inception).

of the prosecution of a defendant in federal court for habitual domestic abuse, that prior tribal convictions could be utilized as the basis for a federal prosecution even if the tribal conviction did not meet federal constitutional standards. However, TLOA has imposed certain constitutional standards upon Indian tribes so Cavanaugh may not be applicable in tribal courts.

C. The Right to Indigent Defense

Questions remain under TLOA as to how far the right to free legal counsel will extend. TLOA clearly states that an indigent defendant has the right to a court-appointed attorney. Section 1302(c)(2) of TLOA states:

> …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;

With no specific language limiting the extent to which an indigent defendant is afforded counsel, it can be presumed that a court-appointed attorney is necessary up to and through trial at the very least. For example, the Confederated Tribes of the Umatilla Indian Reservation are among a small group of tribes exercising enhanced sentencing. In their criminal code, they have interpreted this provision of TLOA to include trial and extend as far as the appeals process. Specifically, section 3.28(c) of their criminal code reads:

> The Tribes shall provide any indigent defendant, at trial and on appeal, the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States, including tribes, provided that jurisdiction applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys.

This is similar to the provision stated in TLOA, with added clarification that an indigent defendant will receive assistance via appointed counsel at trial, as well as on appeal. The Tulalip Tribes of Washington, on the other hand, do not specify in their statute if an indigent defendant's right to court-appointed counsel extends beyond trial. The Tulalip Tribes' Criminal Procedure section 2.25.070(3)(b) states:

> If the defendant is indigent, the Court shall, at the Tribes' expense, provide the defendant with an attorney meeting the qualifications in subsection (3)(a) of this section at all critical stages of the criminal proceeding.

This language is very similar to most state statutes. Typically, states have inferred that trial is considered a critical stage in a criminal proceeding. Thus, at the very least, an indigent defendant must be appointed counsel up to and through trial in jurisdictions exercising enhanced sentencing.

As noted above, tribal codes tend to lack in providing guidance as to whether an indigent person's right to counsel extends to appeals. With a similar right to counsel for indigent persons in criminal cases in the state and federal systems, we can use state and federal law as a guide to interpreting the limits an indigent person has on rights to counsel.

1. Federal Standards

In *Douglas v. People of the State of California*, the indigent petitioner's request for counsel was denied.[60] In doing so, the California District Court of Appeal stated it had reviewed the record, determining no benefit would come from appointment of counsel.[61] Such review by the District Court was permitted by the California Rules of Criminal Procedure, allowing appointment of counsel to be made only if such appointment would be of value to the court or indigent defendant. The court was faced with the issue of whether denial of counsel (on first appeal, granted as a matter of right) to an indigent person would constitute discrimination and be a violation of the 14th Amendment. The case made its way up to the U.S. Supreme Court, which found that indigent defendants were denied equal protection of the law. The Supreme Court reasoned that if a person is able to pay for the assistance of counsel, the appellate court judges his or her case only after submission of written briefs and oral arguments. However, if a defendant is unable to afford counsel, the appellate court is forced to prejudge the case before determining whether counsel should be provided. Thus, the Court determined that when the merits of the one and only appeal an indigent has is decided without the benefit of counsel, an unconstitutional division among rich and poor has arisen.

The U.S. Supreme Court cited *Johnson v. United States,* which states that in federal courts an indigent person must be afforded counsel on appeal regardless of what

[60] See Douglas v. People of State of Cal., 372 U.S. 353, 355 (1963).
[61] Id. at 353.

the court may think the merits of the case may be. Drawing upon the conclusion in *Johnson v. United States,* the Supreme Court held that states, too, are required to appoint counsel for an indigent defendant's "first-tier" appeals as of right.[62]

The Court afforded indigent defendants a constitutionally guaranteed right to counsel to appeals of right, but failed to address the issue regarding any other appeal. *Ross v. Moffitt* offered clarification on the matter. The Court in *Ross* was asked to decide whether the right to counsel for indigent state defendants on their first appeal as of right should be extended to require counsel for discretionary state appeals and applications for review by the Supreme Court.[63] The U.S. Supreme Court found that there is no statutory or constitutional right to "appointed counsel regarding collateral, tax or discretionary appeals." The Court stated that the rule in *Douglas*—requiring appointment of counsel for indigent state defendants on their first appeal as of right—does not extend to discretionary state appeals and for application for review in the Supreme Court, since a lack of such appointment of counsel is not a violation of due process and equal protection clauses of the 14th Amendment.

The U.S. Supreme Court recognized that the due process clause does not require states to provide the respondent with counsel on his or her discretionary appeal. It supported this finding by suggesting the vastly different circumstances between the trial and appellate stages of a criminal proceeding.[64] At the trial stage, an indigent person is being hauled into court and can only be assured fair trial if counsel is provided for him or her. The appellate stage, however, typically is invoked by the indigent defendant who seeks counsel not as a shield of protection from being hauled into court but rather to offset a prior finding of guilt. Thus, refusal of providing counsel to an indigent defendant does not invoke a due process violation.

The U.S. Supreme Court also analyzed the application of the equal protection clause, finding that it does not extend the indigent defendant's right to counsel. The Court stated that an indigent defendant seeking discretionary review in the State Supreme Court has already had his or her claims presented by a lawyer and passed upon at the appellate level. At this stage in the process, the defendant will have a brief (submitted by his or her attorney), court transcript, and a court of appeals opinion disposing of the case. Thus, the Court suggests that these materials, in addition to whatever the defendant may submit,

[62] Id.
[63] Ross v. Moffitt, 417 U.S. 600 (U.S.N.C. 1974).
[64] Id.

equal an adequate basis for a court to make its decision. An indigent defendant need not be appointed counsel for meaningful and equal access to the State Supreme Court. Furthermore, the Court stated that holding a state responsible for providing counsel to an indigent person petitioning the U.S. Supreme Court, simply because it initiated prosecution, is not only unsupported by authority but also by reason. Thus, the U.S. Supreme Court in *Ross* is narrowly construing an indigent person's right to counsel to appeals of right only.[65]

Given that the U.S. Constitution does not apply in Indian Country, applying these federal laws directly will serve no purpose. Instead of looking to the U.S. Constitution, one would look to ICRA and individual tribal constitutions instead.

2. State Standards

The U.S. Supreme Court in *Ross* suggested there is no federal statutory or constitutional right, compelling states to extend an indigent person's right to counsel beyond his or her first right to appeal. However, many states, including Connecticut, have chosen to go the opposite way and expand an indigent person's right to counsel. By incorporating a section on designation of a public defender for indigent defendants in the general statutes, Connecticut has been able to develop its interpretation of an indigent person's right to counsel, with no corresponding constitutional right or limitations.

In *Gipson v. Connecticut*, the U.S. Supreme Court was presented with the issue of whether an indigent criminal defendant has a "right to the assistance of counsel in connection with the filing of a petition for certification seeking a court's discretionary review."[66] The Connecticut Supreme Court held that "Conn. Gen. Stat. §51-296(a) affords indigent criminal defendants the right to appointed counsel in all appeals from their convictions or sentences, including both direct appeals from such convictions or sentences, and discretionary appeals to the supreme court, on petitions for certification, from the Appellate Court of Connecticut's rulings on direct appeal." Thus, the court in Gipson has expanded an indigent defendant's right to appointed counsel to appeals based on a statutory right and not a constitutional right.

Additionally, *Gipson* is a prime example of a court exercising its power to broadly interpret terms, which are undefined by the Connecticut statute. The Connecticut General

[65] Id.
[66] See Gipson v. Commr. of Correction, 778 A.2d 121 (Conn. 2001).

Statute section 51-296(a) fails to define "any criminal action," which is clarified by the broad interpretation of the Appellate Court of Connecticut to include all appeals—not just first appeals—as of right.[67] Similarly, tribal courts have the ability to broadly or narrowly construe undefined terms (by the application of maxims/canons of construction), directly affecting the extent to which an indigent person's right to counsel extends.

Connecticut does not stand alone in extending an indigent person's right to counsel. Iowa, for example, has included in its criminal code that "An indigent person is entitled to appointed counsel on the appeal of all cases."[68] Tennessee has included a similar provision, stating, "counsel appointed in the trial court to represent an indigent defendant shall continue to represent the defendant throughout the proceedings, including any appeals, until the case has been concluded or counsel has been allowed to withdraw by a court.[69] Thus, there is clear evidence that states have gone beyond the constitutional right by extending an indigent person's right to counsel to all types of appeals.

3. Tribal Standards

With few tribes exercising enhanced sentencing, there is limited law on the issue of whether legal counsel for an indigent person extends to appeals. As previously stated, the Confederated Tribes of the Umatilla Indian Reservation have broadly interpreted this provision of TLOA to include trial and extend as far as the appeals process. However, not all tribes have established such clear language in their codes. Currently, tribes vary on addressing the issue of extending an indigent defendant's right to counsel at the appeals stage.

The Fort Peck Assiniboine and Sioux Tribes' code is reflective of what most tribal codes look like for tribes currently exercising enhanced sentencing. Section 511 of their Criminal Procedure Code simply regurgitates the requirements for enhanced sentencing under TLOA. That is, section 511(b) reads:

> …The Tribal Court shall notify the defendant that the defendant is entitled to have counsel appointed for him/her at the expense of the Tribal Court.

The code is silent as to how far in the criminal proceedings the defendant is entitled to counsel at the expense of the tribe, as well as defining the indigent status necessary to invoke this right. However, the holes in the Fort Peck code are filled in by

[67] Id.
[68] Iowa Code Ann. § 814.11.
[69] Tenn. Sup. Ct. Rule 13, § 1(e)(5).

the Federal Rules of Criminal Procedure. Section 510(b) states, "when necessary, the Tribal Court will supplement the Rules of Criminal Procedure of this Title with the Federal Rules of Criminal Procedure." Thus, it could be argued that, by default, the Fort Peck Tribes have availed themselves to federal law, which, as discussed above, extends an indigent person's right to counsel to appeal of right.

The Tulalip Tribes, however, have clearly attempted to limit an indigent person's right to counsel. Their code states, "Indigent persons charged with a felony crime shall be appointed an attorney at the Tribes' expense at all critical stages of a criminal proceeding, up to and through trial."[70] Including the additional language of "up to and through trial" suggests that the Tulalip Tribal Code only affords an indigent defendant counsel "up to and through trial" and not on appeals. It can be argued that if an indigent person's right to counsel extended to appeals, it would be clearly indicated in the code. Rather, the limiting language used by the Tulalip Tribes is highly suggestive that an indigent defendant does not have a right to counsel on appeals.

D. Post-Conviction Right to Counsel (Habeas Corpus)

Generally, an indigent defendant has no right to counsel in post-conviction proceedings. An indigent defendant has no constitutional right to an attorney for a habeas corpus petition.[71] However, if the defendant faces death, he or she is entitled to an attorney for a habeas corpus petition.[72] Thus, very few states provide court-appointed counsel for indigent defendants in post-conviction proceedings, since it is not mandated by law.[73] It can be inferred then that such a burdensome requirement has not attached with the enactment of TLOA.

Based upon the broad interpretations of state courts and the narrow interpretations of federal courts, the extent to which an indigent person's right to counsel varies depends upon the jurisdiction and type of appeal. However, at the very least, each state (and federal) court must afford counsel to an indigent person for his or her first right of appeal. Thus, using federal law as an analogue, and based upon interpretations of tribes currently exercising enhanced sentencing, it could be argued that an indigent defendant's right to legal counsel under TLOA should extend through trial up to the first appeal but not inclusive of post-conviction matters.

[70] Tulalip Tribal Code 2.05.030(8).
[71] See Pennsylvania v. Finley, 481 U.S. 551, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987).
[72] See McFarland v. Scott, 512 U.S. 849, 114 S. Ct. 2568, 129 L. Ed. 2d 666 (1994).
[73] See Mary S. Mergler et al., *The "Right-to-Counsel Term,"* ACS. 10 (Oct. 2001).

E. Determining Indigent Status

Each tribe must develop standards for determining who qualifies for indigent status. In doing so, tribes have various options available for determining indigent status, including but not limited to: (1) applying national poverty guidelines; (2) adopting local or neighboring state guidelines; or (3) creating their own tribal specific requirements for indigence. It is also helpful for tribes to establish what sources of assets will be considered as income or calculated in determining indigent status. Once a standard has been set, typically, the court or public defender's office determines the indigent status of a client seeking counsel.[74]

1. Federal Poverty Guidelines

The U.S. Department of Health & Human Services publishes annually the poverty guidelines for the 48 contiguous states and the District of Columbia in the Federal Register. The 2014 poverty guidelines for a household of one person are set at $11,670.[75] For each additional person, an additional $4,060 is added. A household income below 133% of the poverty line is deemed as indigent status. For a household of one, this would be a total household income of less than $15,521.10. Household incomes between 150% and 175% of the poverty line are considered "partial indigence." Household incomes above 185% are not recognized as indigent.

It should be noted that the poverty guidelines do not factor in the costs of childcare, housing, health care, transportation, or other necessary expenses.[76] Geographic location or specific family needs are also not accounted for.

2. State Guidelines

Some states rely exclusively on the Federal Poverty Guidelines for assessing who qualifies as an indigent person. Georgia, for example, follows this practice and defines an indigent person as an "individual who earns less than 100% of the Federal Poverty Guidelines."[77] In comparison with other states, this approach is limiting to who can qualify for indigent status, and thus makes it difficult for many defendants to receive court-appointed counsel.

[74] See paper prepared for the Texas Task Force on Indigent Defense: Rangita Silve-de-Alwis, *Determination of Eligibility for Public Defense*, ABA – Bar Info. Program. 1-2 (2002).
[75] See Federal Register, Vol. 79, No.14, January 22, 2014, pp. 3593-3594.
[76] See John P. Gross, *Redefining Indigence: Financial Eligibility Guidelines for Assigned Counsel* 11-12 National Association of Criminal Defense Lawyers (2014).
[77] *See* O.C.G.A. § 17-12-8 (2005).

Colorado utilizes a similar approach with a slight modification. Similar to the Federal Poverty Guidelines, Colorado sets its own standards in establishing income guidelines when determining indigent status. The yearly income guideline for a single person household in Colorado is set at $14,588, with an additional $4,060 per family member. The starting figure is slightly higher than the national poverty line, and thus allows more individuals to qualify for indigent appointment of counsel.

North Dakota determines eligibility in two ways—automatic qualification and not-automatic qualification.[78] Automatic qualification for indigent defense services applies to individuals who are receiving any governmental benefits. These benefits include Temporary Assistance for Needy Families (TANF), Supplemental Security Income (SSI), and Medical Assistance for the Elderly. Determinations for governmental benefits are based on the Federal Poverty Guidelines. If an individual does not automatically qualify as indigent (i.e., is not receiving any governmental benefits), North Dakota does not automatically declare the individual non-indigent. A number of factors are then considered, including: (1) income resources, (2) non-income resources, and (3) exceptional factors such as extraordinary financial conditions preventing an applicant from hiring an attorney. These factors are all weighed in determining if an individual qualifies for indigent status in North Dakota.

F. Posting Bond

The American Bar Association has stated that a defendant should not be denied counsel "because bond has been or can be posted." Its position is founded on the notion that a defendant should not have to choose between retaining counsel and posting bail—both are rights, which should be afforded, independent of one another. However, this has not prevented some states from taking into account the posting of bond as a factor when determining indigent status.[79]

G. Recovering Indigent Defendant Counsel Costs

The two main ways to pay for indigent defense are through recoupment and application fees. Each of these methods is discussed below:

[78] See North Dakota Commission on Legal Counsel for Indigents, *Guidelines to Determine Eligibility for Indigent Defense Services,* 6-7, (March 2014).
[79] See John P. Gross, *Redefining Indigence: Financial Eligibility Guidelines for Assigned Counsel* 11-12 National Association of Criminal Defense Lawyers (2014).

1. Recoupment

Recoupment is when defendants are ordered by the court to make payments for previously received representation.[80] Some defendants who qualify for a court-appointed attorney due to their indigent status may still earn enough to repay a portion of the fees at some later date. The main distinction between recoupment and application fees is the timing. Recoupment occurs much later in the court process than application fees and is initiated by the court at the end of its proceedings.

The U.S. Supreme Court in *Fuller v. Oregon* set the constitutional standards for recoupment of attorney fees from an indigent defendant in criminal cases. The Fuller Court states that each defendant has a right to: counsel without cumbersome obstacles, notice and a meaningful opportunity to be heard, not be exposed to more severe collection practices than an ordinary civil debtor, not be imprisoned for failing to repay attorney costs due to indigence, and the court being cognizant of his or her resources and overall financial situation.[81]

Typically, in a criminal case, a defendant may be required to repay the cost if convicted, or pleads guilty or no contest. Recoupment however comes with its own set of obstacles. Attorney's fees are the lowest priority on the statutory list of fees, falling below other court costs. It is also difficult to follow up and track an individual on unsupervised probation cases, making collection of funds difficult, which is why recoupment is no longer the primary means of recovering court costs.[82]

2. Application Fees

The burdensome and rather disappointing results of the recoupment method have propelled about half of the states to implement a new technique of up-front application fees. States that are exercising this method have created statutes that require application fees (ranging from $10 to $480) to be imposed upon each defendant, regardless of his or her indigent status. This approach is much easier for court clerks to manage, as the fee is imposed at the beginning of the court process. Keeping with constitutional limitations, failure to pay an application fee cannot prevent a defendant from being appointed counsel, and the court must then waive the fee. Thus, each jurisdiction's laws and ordinances include a waiver provision to assure that defendants will not be denied

[80] See James Downing, *Public Defender Application Fees* ABA – Bar Info. Program. 2 (2001).
[81] See Fuller v. Oregon, 417 U.S. 40 (1974).
[82] See James Downing, *Public Defender Application Fees* ABA – Bar Info. Program. 3 (2001).

counsel should they be unable to pay the application fee. However, states are able to conditionally appoint counsel to individuals who fail to pay the initial application fee. For example, in Minnesota, the application fee is subject to the Revenue Recapture Act, and thus allows the state to garnish future wages to cover the cost of the application fee.[83]

Other jurisdictions, such as Santa Barbara County, California, employ an up-front fee recovery process, slightly different than the traditional application fee. In these jurisdictions, a defendant who applies for indigent defense counsel falls into one of three categories: indigent, not eligible, and indigent but able to contribute. The county gives defendants the option of paying a flat up-front fee to avoid potentially being assessed a much greater fee later in the process (i.e., recoupment). The up-front recovery process is similar in nature to application fees, in that it is fixed or limited in range, and the fees are paid prior to the proceedings.[84]

North Dakota is another state exercising collection of application fees. A $25 up-front application fee is collected at the time an application for indigent defense counsel is submitted. The court can waive, reduce, or extend the amount of time given to pay the fee. North Dakota has set up an Indigent Defense Administration Fund into which all the money collected is deposited. The money in this fund is used by the judicial branch for the administration of the Indigent Defense System.[85]

New Mexico, on the other hand, does not allow for partial payments. Unlike in North Dakota, if the defendant is unable to pay the application fee ($10), the entire fee is waived. Typically, individuals who are incarcerated have the fee waived. New Mexico places these funds into the Public Defender Automation Fund, which is used to offset the technology costs for the Public Defender Department.[86]

Based upon the success various states and counties have had with the application fees, this would likely be an effective approach for tribes to utilize as a means to assist in covering the costs associated with court-appointed counsel for indigent persons.

H. Federal Habeas Review

Despite the fact that ICRA sets forth a number of rights to protect individuals and members against abuses of tribal governments, the Act itself authorizes a writ of habeas as the

[83] See Ronald F. Wright and Wayne A. Logan, *The Political Economy of Application Fees for Indigent Criminal Defense,* 47 Wm. & Mary L. Rev. 2045-46 (2006).
[84] See James Downing, *Public Defender Application Fees* ABA – Bar Info. Program. 22 (2001).
[85] Id. at 14.
[86] Id. at 13.

exclusive remedy for violations under the Act.[87] In its most simple form, a writ of habeas simply provides a means for an individual who is in "custody" to test the legality of that custody in a federal court. This remedy affords a relatively clear process for those in "custody"; however, it does little to remedy violations of ICRA that occur outside of a "custodial" situation, most of which are dismissed based upon sovereign immunity defenses.[88] This is not to say that there is no remedy at law for non-custodial ICRA violations; it simply means that such violations may be litigated in tribal court or the designated tribal forum.[89]

For purposes of enhanced sentencing, it is very likely that tribes will see an increase in petitions for writs of habeas and should be prepared to litigate the same. With heightened sentences, defendants are far more likely to pursue appeals and to pursue other legal procedures that might get them released from incarceration.

To be proactive, tribes may want to revisit existing tribal laws to provide a tribal habeas process, designate a tribal forum for ICRA violations, and define remedies that attach to both "custodial" and "non-custodial" ICRA violations.

[87] 18 U.S.C. § 1303.
[88] Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)(stating in part that by providing Habeas as the exclusive federal remedy for ICRA violations, the Congress was clear not to waive tribal sovereign immunity, and therefore non-custodial violations of ICRA cannot be adjudicated in federal court).
[89] Id. (there is no express language in ICRA providing a remedy for non-custodial violations; hence, tribes may consider codifying such rights within their own tribal codes or constitutions; many tribes that have codified such rights have limited the remedies available for such violations to injunctive or declaratory relief.)

IV. CONCLUSION

For tribes opting to implement the enhanced sentencing options provided for under TLOA, obstacles and challenges are likely. However, providing due process through services such as indigent defense should not be viewed as an obstacle. Though tribes must afford indigent defendants with court-appointed counsel in order to impose enhanced sentences (up to and including on first appeal), the standards utilized in determining indigent status are in each tribe's control. Also, because the implementation of enhanced sentencing may be costly for a tribe, it should consider all its options and carefully plan for implementation. Last, tribes can adapt a variety of methods currently employed by various states and counties that have had success in recovering the costs associated with indigent defense and other such services.

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