



Criminal Sentencing in Tribal Courts and Post- Sentencing Options

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Disclaimer

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Overview

- Available sentencing options under Tribal law and the Indian Civil Rights Act both pre and post-TLOA
- Differences between executed sentences and suspended Sentences
- Exploring the pros and cons of sentencing options
- Discussion of Tribal court authority post-sentencing including commutations, sentence reductions, parole and pardons



Purpose of Criminal Sentencing

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- Criminal sentencing achieves both deterrence against future criminal activity and a sense of retribution for a victim and community
- Sentencing options in Tribal Court:
 - Allows a criminal Defendant to be held accountable to both victim and community
 - Affords the Defendant opportunities to change future behavior with the promise of sentence reduction or removal of the conviction from his record
- Since many Tribes have limited penal facilities, providing Tribal Judges with sentencing options helps preserve limited resources while still monitoring a criminal Defendant



Some Trends in Tribal Criminal Sentencing

- With the enactment of the Tribal Law and Order Act (TLOA) in 2010 with its emphasis on Tribes imposing enhanced sentences in excess of one year sentencing options have become increasingly important
- CONSIDERATIONS:
 - Native Americans are already a group that are incarcerated at higher rates
 - 38 times national average in federal and state prisons than other groups so Tribes are looking at alternatives to incarceration
 - <https://www.nicoa.org/new-report-reveals-high-incarceration-for-native-americans/>)
 - With some Tribes now imposing enhanced sentences, there needs to be ways to reduce those sentences either through commutations, paroles, or pardons; to restore the civil rights of criminal defendants who are reformed





Basic Sentencing Terminology

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- **Executed sentences**- a flat time sentence (30 days incarceration for example) that is served in total
- **Suspended sentences**- A sentence that is either totally or partially suspended on conditions (30 days incarceration, with 20 suspended on condition that Defendant complete a treatment program)
- **Suspended imposition of sentence**- An actual sentence is not imposed and instead a person is put on probation with certain conditions which if met could result in the judgment of conviction being expunged



Basic Sentencing Terminology Cont'd.

- **Sentencing modification or commutations**- The act of changing a sentence after it is imposed due to some changed circumstances or good behavior- Defendant gets 1 year in jail to be served but develops an illness and sentencing Judge can lower sentence or even commute it to time served
- **Pardons**- the act of forgiving a conviction in order to restore civil rights- Usually done by the executive branch but in Tribal systems many times the Court can exercise the authority
- **Expungement**- the act of erasing a conviction based on certain requirements





Common Sentencing Options

Tribal Criminal Sentencing Options

- Jail time
- Probation- can either be supervised or unsupervised but if there is a violation while still in effect either suspended sentence can be revoked or other penalties imposed
- Restitution- Either to the victim of the crime or to the Tribe itself
- Completion of evaluation (chemical dependency, victim offender, mental health, batterer's reeducation) and duty to follow through
- No-contact orders



Tribal Criminal Sentencing Options Cont'd.

- Fines and Court Costs- Fines governed by the Indian Civil Rights Act (ICRA)- maximum now is \$15,000 for sentences of 1-3 years and \$5000 for one year or less
- Excessive fines could violate ICRA, 25 U.S.C. §1302(7)
- Civil Forfeitures- Must be provided for in Tribal Code and provide some level of due process to innocent third party property owners
- Exclusion from Tribal Jurisdiction





Tribal Law and Order Act: Impact on Sentencing

Tribal Law and Order Act (TLOA)

- Signed into law in 2010
- In relevant part the TLOA amended the Indian Civil Rights Act by providing for enhanced sentencing options when:
 - There was a qualifying crime charged in Tribal Court
 - The Tribe had implemented specific due process protections for Defendants as prescribed by the Act



How TLOA Has Impacted Tribal Sentencing Authority

(b) OFFENSES SUBJECT TO GREATER THAN 1-YEAR IMPRISONMENT OR A FINE GREATER THAN \$5,000.

—A Tribal court may subject a defendant to a term of imprisonment greater than 1 year but not to exceed 3 years for any 1 offense, or a fine greater than \$5,000 but not to exceed \$15,000, or both, if the defendant is a person accused of a criminal offense who—

(1) has been previously convicted of the same or a comparable offense by any jurisdiction in the United States; or

(2) 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. 25 U.S.C. 1302 (b)



TLOA continued

- TLOA does not use the term “felony” but the common-law definition of felony is a sentence in excess of one year
- This raises lots of issues about collateral consequences if Tribes sentence persons to more than one year; making sentencing alternatives such as suspended impositions and post-sentencing remedies (such as modifications, commutations, and parole) much more important



Where Defendants May Serve Enhanced Sentences

25 USC §1302(d) SENTENCES.

—In the case of a defendant sentenced in accordance with subsections (b) and (c), a Tribal court may require the defendant—

(1) to serve the sentence—

(A) in a Tribal correctional center that has been approved by the Bureau of Indian Affairs for long-term incarceration, in accordance with guidelines to be developed by the Bureau of Indian Affairs (in consultation with Indian Tribes) no later than 180 days after July 29, 2010;



Where Defendants May Serve Enhanced Sentences Cont'd

(B) in the nearest appropriate Federal facility, at the expense of the United States pursuant to the Bureau of Prisons Tribal prisoner pilot program described in section 304(c) of the Tribal Law and Order Act of 2010;

(C) in 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

(D) in an alternative rehabilitation center of an Indian Tribe; or

(2) to serve another alternative form of punishment, as determined by the Tribal court judge pursuant to Tribal law.



Examples from the Field: Sentencing Provisions

Difference Between Consecutive and Concurrent Sentences

- When a person is convicted of more than one criminal offense the Court can impose a consecutive sentence (one sentence is served after the other) or a concurrent sentence (a person gets credit on each sentence for each day served) usually in the discretion of the sentencing Judge but sometimes regulated by Tribal law
- Gila River Tribal Code - 5.412.
- <https://www.gilariver.org/view/download.php/government/ordinances/gr-03-13-revised-title-5-criminal-code>



Suspended Imposition of Sentences *(also called deferred imposition of sentence)*

Ute Tribal Code- **18-2-1**

(b) The Court may suspend imposition of fines and imprisonment for the first offense and place the defendant on probation for not less than one (1) year. When a sentence is suspended there must be complete cooperation with the orders of the Court requiring cooperation with the domestic violence program and counseling as ordered.

Typically used in situations where Defendants are referred to Wellness Courts as the conviction can be expunged as part of graduation from Wellness Court



Sentence Modifications, Corrections or Reductions: Example from the Field

Correcting or Reducing a Sentence. Cherokee Tribal Code, Rule of Criminal Procedure 20(C)

- (1)*Clear Error*. Within seven (7) days after sentencing, the Court may correct a sentence that resulted from arithmetical, technical or other clear error.
- (2)*Clerical Error*. After giving any notice it considers appropriate, the Court may, at any time, correct a clerical error in a Judgment, Order or other part of the record, or correct an error in the record arising from oversight or omission.



Sentence Modifications, Corrections or Reductions Cont.

Cherokee Tribal Code, Rule of Criminal Procedure 20(C)

- (3)*Substantial Rehabilitation*. Within six (6) months after the entry of the Judgment, the Court may, upon written motion of the defendant, reduce the defendant's sentence if the defendant makes a showing of substantial rehabilitation.
- (4)*Substantial Assistance*. Within twelve (12) months after the entry of the Judgment, the Court may, upon written motion of either the Tribe or the defendant, reduce the defendant's sentence if either party makes a showing that the defendant provided substantial assistance in the investigation or prosecution of another person in a Tribal, State or Federal Court or jurisdiction.



Expungement of Conviction: Example from the Field

- *Expungement.* Upon motion of either party and a showing that the defendant has only one conviction in the Cherokee Court, and no other convictions in either State or Federal Court and that two or more persons of good character in the community attest in writing to the defendant's good character, after six months following the conclusion of any sentence imposed, the Court may Order that the conviction and all documents in the file be expunged. Only one expungement per defendant is permitted. The Clerk will maintain a list of all persons who have had an expungement.
- Cherokee Rule of Criminal Procedure Rule 20(E)



Pardon: Example from the Field

- Turtle Mountain Tribal Board of Pardons
 - <https://law.tmchippewa.com/us/nsn/tmchippewa/council/code/26.07.050->
- Usually granted by the Executive Branch but sometimes the Tribal Court given the authority

See <https://lco-nsn.gov/pardon-forgiveness-application/#:~:text=A%20Tribal%20member%20or%20onon,the%20individual%20ineligible%20for%20Tribal-> Lac Courtes Oreilles





Questions

Thank You!

Please email us at
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more questions



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