

1 He was also sentenced on October 17, 2007, for the Thomas case. That sentencing
2 included four 360-day jail terms and one 60-day jail term for five separate offenses; all
3 consecutive but all suspended for five years of probation. *See* Plea Agreement;
4 Sentencing Order.

5 Mr. Valdez was not represented by counsel at any time through sentencing. Also,
6 the Nation and Defendant stipulate, and the Court takes judicial notice, that the
7 sentencing judge was not a state-licensed attorney.

8 ***B. Probation Revocation***

9 Mr. Valdez served his 720 days in jail for the Poola Case (see Trial Record Entry
10 for Release). Upon release, he signed probation orders on July 1, 2009.

11 The record shows no further contact between Mr. Valdez and the Court from the
12 time he signed his probation orders in 2009 until his recent arrest, despite multiple
13 attempts by the Nation’s Probation department. *See* Petition to Revoke Probation;
14 Memorandum from Adult Community Service Supervisor to Deputy Probation Officer
15 (Oct. 19, 2009).

16 On July 7, 2010, the Nation filed a Petition to Revoke Probation. It recommended
17 that Mr. Valdez serve the previously suspended 1,500 days in jail for the Thomas Case.
18 That is the present case, 2010-1926CR (“Probation Revocation Proceeding”).

19 A bench warrant for Mr. Valdez’s arrest was issued on July 10, 2010. The warrant
20 was executed February 24, 2022. He is in custody now pending this and other
21 proceedings.

22 ***C. Current Posture***

23 Mr. Valdez has counsel in this Probation Revocation Proceeding. Through counsel,
24 Mr. Valdez filed “Defendant’s Position on Sentencing”, with a supporting Memorandum
25 of Points and Authorities (together, “Defendant’s Position”).

1 Defense argues that the sentences imposed in the Poola Case and the Thomas Case
2 violated the Indian Civil Rights Act of 1968, 25 U.S.C. § 1301 *et. seq.*, (ICRA), as
3 amended by the Tribal Law and Order Act of 2010 (TLOA). The stated grounds are that
4 the presiding judge at the plea agreement hearing and sentencing was not qualified for
5 sentences exceeding one year for a proceeding, and that Mr. Valdez was not represented
6 by counsel.

7 The Nation then filed “Nation’s Brief Regarding Defendant’s Original Sentence”
8 (the “Nation’s Brief”). It largely agrees with the Defendant’s Position. But it added the
9 assertion that Mr. Valdez’s sentences violated the Tohono O’odham Code as well, also
10 on the grounds that the sentencing judge was not qualified.

11 A hearing on the matter was held on June 13, 2022. Mr. Valdez, his counsel, and
12 counsel for the Nation were present.

13 The Defendant’s Position, as supplemented in open court during the June 13
14 hearing, asks the Court to vacate Mr. Valdez’s 1,500-day jail sentence for the Thomas
15 Case. The Nation’s Brief requests the same.

16 **II. ISSUE & BRIEF ANSWER**

17 The issue before the Court is whether the sentences imposed on Adrian Valdez in
18 the Poola Case and the Thomas Case violated the Indian Civil Rights Act and the Tohono
19 O’odham Code, on the grounds that they imposed over one year in jail for each
20 proceeding, and therefore Mr. Valdez should have been represented by counsel, and the
21 sentencing judge should have been law-licensed.

22 The Court concludes that the sentences did not violate either law on these grounds
23 because these requirements were enacted *after* Mr. Valdez’s sentencing, and therefore do
24 not apply. Instead, ICRA and Tohono O’odham law as in effect at the time of sentencing
25 apply, and both laws permitted these sentences as imposed.

1 **III. ANALYSIS**

2 **A. ICRA and Tohono O’odham Law Before TLOA**

3 TLOA became law almost three years after Mr. Valdez’s plea agreement and
4 sentencing, on July 29, 2010. Tribal Law and Order Act of 2010, Pub. L. No. 111-211,
5 124 Stat. 2258.

6 The Nation made some conforming changes to its laws in 2013. Tohono O’odham
7 Legis. Council Res. 13-390 (Oct. 3, 2013) [hereinafter *2013 T.O. Resolution*].

8 Before TLOA, courts of the Tohono O’odham Nation and the U.S. Ninth Circuit
9 allowed tribal court judges, whether law-licensed or not, and without providing counsel
10 to defendants, to sentence defendants under ICRA for up to one year for *each offense*,
11 with multiple year-long sentences to run consecutively. *See Nation v. Antone*, 3 TOR3d
12 67 (Tr. Ct. 2007); *Miranda v. Anchondo*, 684 F.3d 844 (9th Cir. 2012); *Bustamante v.*
13 *Valenzuela*, 715 F. Supp. 2d 960 (D. Ariz. 2010); *Ramos v. Pyramid Tribal Court*, 621 F.
14 Supp. 967, 970 (D. Nev. 1985); *see* 25 U.S.C. § 1302(7) (pre-TLOA version).

15 Similarly, before TLOA and the 2013 T.O. Resolution, the Tohono O’odham
16 Code did not prevent this “stacking”, nor require that a defendant be provided counsel or
17 that a presiding judge be law-licensed. *See* Tohono O’odham Code, 1st Ed. (2006), Tit. 6
18 (Courts) & Tit. 7 (Crimes), Chapt. 1 (Criminal Code).

19 Accordingly, under both ICRA and Tohono O’odham law, Mr. Valdez’s sentences
20 were lawful when imposed.

21 **B. ICRA and Tohono O’odham Law After TLOA**

22 **1. Stacking Separate Offenses Still Allowed**

23 TLOA and the 2013 T.O. Resolution changed things. Stacking separate offenses is
24 now expressly allowed in ICRA itself, though now with a maximum of 9 years for a
25

1 proceeding. *See* 25 U.S.C. § 1302; *Nation v. Frank*, 2021 TOR Supp. 238, 242 (Tr. Ct.
2 2016) [hereinafter *Trial Ct. Frank*].

3 Stacking is also now expressly allowed under the amended Tohono O’odham
4 Code, though also with a maximum of 9 years for a proceeding. *See* 7 T.O.C. Chapt. 1,
5 §§ 1.11(A)-(B).

6 **2. New Defense Counsel and Judge Requirements for Proceedings**
7 **Where Over 1 year in Jail is Imposed**

8 However, TLOA added that for any *proceeding* in which a tribe imposes a *total*
9 jail term of over 1 year, the tribe must

- 10 (1) provide a defendant with the right to effective
11 assistance of counsel;
12 (2) at the tribe’s expense, provide an indigent defendant a
13 licensed defense attorney; and
14 (3) require the presiding judge to have sufficient legal
15 training and be licensed to practice law.

16 25 U.S.C. § 1302(c).

17 As described in *Trial Ct. Frank*, 2021 TOR Supp. at 242-43, “proceeding” for
18 these requirements addresses “a prosecution of a crime(s) that arose from a single
19 transaction or incident” and is functionally equivalent to an incident (noting the Court of
20 Appeals’ implicit addressing of the definition in *Frank v. Nation*, 2021 TOR Supp. 13, 16
21 (Ct. App. 2014) [hereinafter *Appeals Ct. Frank*].

22 Similarly, the 2013 T.O. Resolution amended the Tohono O’odham Code, largely
23 conforming to the TLOA provision on judge qualifications:

24 “A judge presiding over a criminal proceeding in which a
25 total term of imprisonment of more than one year is imposed
shall be a state-licensed attorney with sufficient legal training
to preside over the criminal proceedings.”

6 T.O.C. Chapt. 1, § 1103(D); *see* 2013 T.O. Resolution.

1 The Court agrees that the Poola Case and the Thomas Case would each constitute a
2 “proceeding” under post-TLOA ICRA and under the amended Tohono O’odham Code, *if*
3 either applied. And because a total sentence of over one year in jail was imposed for each
4 case, the new requirements would apply. However, for the reasons below, the Court finds
5 that the laws applicable to Mr. Valdez’s sentences are the laws that were in effect at the
6 time of his sentencing: ICRA *before* TLOA, and Tohono O’odham law *before* the 2013
7 T.O. Resolution. And under both laws, his sentences were lawful.¹

8 ***C. Prospective v. Retroactive Application***

9 **1. Tohono O’odham Law**

10 Reviewing the language of the 2013 T.O. Resolution, our Court of Appeals stated
11 that the 2013 changes to the Tohono O’odham Code were prospective, to be applied to
12 “new cases or any pending criminal proceeding in which a trial is scheduled within 30
13 days of the effective date of the resolution, October 3, 2013.” *Appeals Ct. Frank*, 2021
14 TOR Supp. at 16; *see 2013 T.O. Resolution*.

15 Mr. Valdez’s sentencing occurred almost six years before that effective date. On
16 that 2013 effective date, neither the Poola Case nor the Thomas Case was a “new case” or
17 a “pending criminal proceeding in which a trial is scheduled within 30 days”.
18 Accordingly, the 2013 changes do not apply, and his sentences remain legal under
19 Tohono O’odham law. *See also Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994)

20
21 ¹ Though similar to the TLOA changes, the parties did not raise, and the Court does not
22 address, the 2013 addition to the Tohono O’odham Code regarding a defendant’s right to counsel
in certain cases, 6 T.O.C. Chapt. 1, § 1108.

23 Also, as laid out above, TLOA does not flatly require that a defendant be represented in over
24 1-year in jail proceedings. Rather, a tribe must provide to an *indigent* defendant a licensed
25 defense attorney at the tribe’s expense, but the tribe must provide to any other defendant only the
right to effective assistance of counsel. 25 U.S.C. § 1302(c)(1)-(2). Mr. Valdez would have to
show that he was either indigent or that he was not indigent and the Nation denied his right to
retain his own counsel to prevail on this claim if TLOA did apply. But since the Court finds
TLOA does not apply here, it does not make any factual finding on why he was not represented.

1 (when the legislature has expressly stated whether a statute is to apply prospectively or
2 retroactively, “of course, there is no need to resort to judicial default rules.”).

3 **2. TLOA**

4 *(a) TLOA also applies to pending pre-trial and new proceedings only.*

5 TLOA, however, did not expressly state its reach. When that happens with a
6 federal statute, there is a strong presumption that it applies only to future actions. The key
7 test is whether applying it retroactively would impose new legal consequences to events
8 completed before enactment. *Vartelas v. Holder*, 566 U.S. 257, 273 (2012); *Landgraf*,
9 511 U.S. at 269-70, 280; *see generally* Antonin Scalia & Bryan A. Garner, *Reading Law:
10 The Interpretation of Legal Texts* 261-65 (2012) (Presumption Against Retroactivity).

11 Here, applying the TLOA requirements which became effective in 2010, to Mr.
12 Valdez’s sentencing in 2007, would clearly attach new legal consequences to events
13 completed before enactment: It would transform sentences that had been legal for almost
14 three years into illegal sentences.

15 Because Congress did not include clear direction that was the intent, under
16 *Vartelas* and *Landgraf* (and the many cases cited therein and relied upon afterwards),
17 TLOA does not apply to Mr. Valdez’s sentences here. They remain legal under pre-
18 TLOA ICRA.

19 *(b) Defendant’s cited cases do not change that result.*

20 Defendant’s Position relies on two cases: *Appeals Ct. Frank*, 2021 TOR Supp. 13,
21 and *Johnson v. Tracy*, 2012 WL 4478801 (D. Ariz. 2012). The Court also finds relevant
22 to that argument *Trial Ct. Frank*, 2021 TOR Supp. 238.

1 This Court agrees with all three of those cases. However, the Court finds them
2 inapplicable here. The issue in those cases was whether to apply TLOA² to plea
3 agreements, trials, and sentencing occurring *after* TLOA became effective.

4 By contrast, the issue here is whether to apply TLOA to a plea agreement and
5 sentencing that occurred *before* TLOA became effective. That is a crucial difference, and
6 the Court concludes TLOA does not apply in such a case.

7 Because these TLOA provisions address the proceedings themselves and not the
8 underlying crimes, applying TLOA to pre-sentence proceedings like those in *Johnson* and
9 the *Frank* cases fits with *Vartelas* and *Landgraf*. It does not attach new legal
10 consequences to events completed before enactment. It only changes the procedural
11 requirements going forward to address those completed events. *See Johnson*, 2012 WL
12 4478801 at *3 (“a procedural change to a statute ‘would ordinarily govern in trials
13 conducted *after* its effective date’ ”) (emphasis added) (quoting *Landgraf*, 511 U.S. at
14 280). *See also Trial Ct. Frank*, 2021 TOR Supp. at 241 (“This Court agrees with the
15 reasoning in *Johnson* in so much as the rights listed in 25 U.S.C. § 1302(c) apply to
16 criminal proceedings conducted *after* TLOA was enacted[.]”) (emphasis added), and
17 *Appeals Ct. Frank*, 2021 TOR Supp. at 15 (“The ICRA as amended by the TLOA has
18 been held applicable in cases tried *after* it became a law, even if a defendant was charged
19 before law took effect.”) (emphasis added). *See generally* Scalia & Garner, *supra*, at 266-
20 67 (Pending-Action Canon: “When statutory law is altered during the pendency of a
21 lawsuit, the courts at every level must apply the new law unless doing so would violate
22 the presumption against retroactivity.”).

23
24 ² Specifically, the newly imposed requirements at issue here for proceedings imposing
25 more than one year total in jail: (i) right to counsel (*Appeals Ct. Frank*, 2021 TOR Supp. at 14;
Trial Ct. Frank, 2021 TOR Supp. at 244), and (ii) a state-licensed judge (*Johnson*, 2012 WL at
*2, *3). The Court does not express an opinion on any other ICRA provisions.

1 The *Johnson* court further explained, “as a general matter, ‘a court is to apply the
2 law in effect at the time it renders its decision[.]’ ”). *Johnson*, 2012 WL 4478801 at *3
3 (quoting *Landgraf*, 511 U.S. at 264).

4 In *Johnson* and in both *Frank* decisions, the courts were to apply the law in effect
5 at the time they rendered their decisions: TLOA. Here, the Court was to, and did, apply
6 the law in effect at the time it rendered its decisions in the Poola and Thomas Cases: pre-
7 TLOA ICRA.

8 (c) *Miranda v. Anchondo is more analogous.*

9 In *Miranda v. Anchondo*, 684 F. 3d 844 (9th Cir. 2012), the defendant Beatrice
10 Miranda was charged, tried, and convicted of eight separate offenses arising from one
11 criminal transaction. In one proceeding, the tribal court sentenced her to multiple
12 consecutive jail terms, for a total term of more than one year: 910 days. Like Mr. Valdez
13 here, Ms. Miranda had no counsel through sentencing. And as with Mr. Valdez, Ms.
14 Miranda was sentenced *before* TLOA was enacted. *Id.* at 846-47.

15 After TLOA was enacted, the Ninth Circuit Court of Appeals reviewed the legality
16 of Ms. Miranda’s sentences. The court acknowledged that TLOA was in effect at the time
17 of its review, but that Ms. Miranda’s sentencing, like Mr. Valdez’s sentencing here and
18 unlike the sentencing in the *Frank* cases and the *Johnson* case, occurred *before* TLOA’s
19 enactment. *Id.* at 846, n.1 and 849, n.4.

20 Though the court did not analyze the issue, it did apply only pre-TLOA ICRA to
21 Ms. Miranda’s case, “the version that was in effect when Petitioner was sentenced”). *Id.*
22 at 846 n.1. The court held that Ms. Miranda’s sentences, which like Mr. Valdez’s
23 sentences included a total jail term of more than one year for one proceeding, while she
24 was unrepresented, was legal under ICRA. *Id.* at 852.

1 Likewise, this Court applies the version of ICRA that was in effect when Mr.
2 Valdez was sentenced: pre-TLOA. Under that version, Mr. Valdez's sentences are also
3 legal, regardless of his being unrepresented and the sentencing judge not being law-
4 licensed.

5 IV. CONCLUSION

6 The TLOA requirements regarding defense counsel and a licensed judge for
7 proceedings in which over 1 year total jail time is imposed, and the similar Tohono
8 O'odham Code change regarding a licensed judge, apply to plea agreements, trials and
9 sentences conducted *after* their enactment. Mr. Valdez was sentenced *before* their
10 enactment. ICRA and Tohono O'odham law as in effect at the time of his sentencing
11 apply, and both laws allowed his sentences as imposed.

12 Accordingly, the Defendant's and the Nation's requests to vacate Mr. Valdez's
13 sentences for the Thomas Case are **DENIED** and this Probation Revocation Proceeding
14 may proceed.

15 A probation revocation hearing is set for July 1, 2022, at 8:15 a.m., to coincide
16 with Mr. Valdez's pretrial hearing in case 2012-2205-2209CR.

17
18 **SO ORDERED** this 16th day of June, 2022.

19 _____
20 /s/
21 Judge Joseph Hardy Jr.