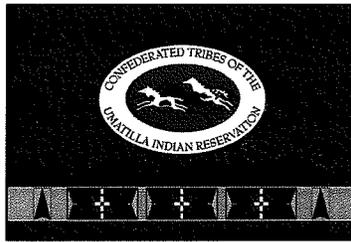


**Confederated Tribes *of the*  
Umatilla Indian Reservation**

Board of Trustees



46411 Timine Way  
Pendleton, OR 97801

www.ctuir.org  
Phone 541-429-7030

email: bot@ctuir.org  
Fax: 541-276-3095

October 13, 2014

Attn: Public Affairs – Tribal Issues Comment  
United States Sentencing Commission  
One Columbus Circle, NE, Suite 2-500, South Lobby  
Washington, DC 2002-8002

Email: pubaffairs@ussc.gov

To Whom It May Concern:

The Confederated Tribes of the Umatilla Indian Reservation (CTUIR) submits this letter in response to the United States Sentencing Commission's request for public comment on the possible formation of a Tribal Issues Advisory Group.

The CTUIR strongly supports the formation of a continuing Tribal Issues Advisory Group to assist the Sentencing Commission in addressing any issue within the Commission's authority concerning Indians, Tribal Nations, or Indian Country in general.

Public safety in Indian Country is a complex issue and warrants the formation of a specialized group consisting of individuals who have significant experience with public safety in Indian Country. Membership should include citizens of federally recognized Indian tribes, representatives or employees of tribal nations with substantive experience in public safety issues, victim's advocates with significant experience in Indian country, tribal judges, federal judges, tribal prosecutors, federal prosecutors, tribal defense attorneys, and federal defense attorneys.

Three initial areas of focus for such a group should be: whether sentencing disparity exists for Indian defendants in the federal system, what can be done to address disparity if one exists, and consideration of tribal court convictions in calculating a convict's criminal history.

In addressing whether sentencing disparity exists the group should first determine what constitutes disparity, or at least identify the different types of disparity that can arise. Due to the complex nature of Indian country criminal jurisdiction it is not clear what does, or should, count as disparity. The problem of disparity is generally one of fairness centered on individuals in the same or substantially similar circumstances being treated differently. Disparate treatment of individuals in different circumstances is not in itself problematic. The group should focus on matters involving the first category, rather than the latter – at least when it comes to issues of fairness in sentencing.

If one person is treated differently than another in the same judicial system and under the same or substantially similar laws, this should clearly count as disparity. For example, if an Indian committing the same crime as a non-Indian receives a different sentence under the Major Crimes Act than a non-

Indian under the General Crimes Act, disparity exists (Major Crimes Act/General Crimes Act disparity).

It is less clear that different treatment of the same individuals by different jurisdictions under different laws (state vs. federal) should be considered disparate treatment or otherwise problematic, particularly if the criminal conduct being compared occurs in different geographic areas (geographic disparity). Rather than being an issue of disparate treatment of Indians in federal sentences, geographic disparity may more appropriately be seen as an indicator as to whether existing guideline sentencing recommendations are independently appropriate for the particular crime.

Nonetheless, due to *McBratney* it is possible for the same individuals to commit substantially similar crimes arising in the same location and yet be subject to the jurisdiction of different governments, which may yield very different sentences that should be of concern to the Commission. This is particularly so because the factors causing this disparity are the race/citizenship of the convict and victim, as well as federal Indian law itself (*McBratney* disparity).

Finally, it is possible that disparity exists in sentencing between Indians and non-Indians for crimes of nationwide applicability (generally applicable crime disparity). It is unlikely this is occurring, but the study should still determine if it is.

Once clarification is made as to what should be considered as constituting disparity, or separate categories of disparity are identified, a comprehensive scientific study needs to be conducted to determine if disparity exists, and if so, what type of disparity it constitutes. Such a study should limit itself to convictions that have occurred since the Supreme Court handed down the *Booker* decision in 2005, which eliminated the mandatory nature of the sentencing guidelines. It is possible that federal courts have internalized perceived Indian sentencing disparity and incorporated that into sentencing decisions post-*Booker*.

After a study has been conducted, the group can focus on developing recommendations to eliminate or reduce any existing disparity. In cases of geographic disparity, the group may want to consider whether the recommended sentence for a particular crime is independently appropriate regardless of how other jurisdictions may treat the same or similar criminal conduct. The fact that a state may treat the same or similar conduct more or less harshly is not in itself a good reason to change a federal sentencing guideline. However, the underlying reasons why a state treats the same or similar conduct differently may be appropriate to consider in determining if changes to federal guidelines should be made.

In addition to the above the group should consider whether, under what conditions, and how tribal court convictions should be counted in calculating a convict's criminal history score. The common perception is that the Sentencing Commission does not consider tribal court convictions in sentencing calculations due to unfounded misconceptions about the fairness of tribal court systems. This should be reconsidered particularly in light of enactment of the Tribal Law and Order Act of 2010 and the Reauthorization of the Violence Against Women Act in 2013. Some Tribes that have opted to implement enhanced sentencing authority under these laws afford defendants greater rights than some defendants in some state court systems. For those who have implemented TLOA, most rights afforded to defendants in state and federal court systems must be afforded to defendants in tribal court

systems. For those implementing VAWA 2013, all rights similar to those guaranteed by the US Constitution must be given to tribal defendants. In the case of the CTUIR these rights were already given to defendants in tribal court before these federal laws were enacted.

The failure to consider prior violent criminal convictions from tribal court when calculating a person's criminal history is particularly problematic as it further creates an unsafe community in Indian country. However, there are 566 tribal nations in this country and tribes may differ in their opinions as to whether or not convictions from their court systems should be counted in a defendant's criminal history score. As such, the group should consider whether tribal convictions should be counted only if a tribal nation affirmatively requests that their court convictions be generally considered for federal sentencing criminal history calculations. This could be accomplished by developing an opt-in mechanism in the guidelines.

Thank you for the opportunity to offer the CTUIR's views on whether a Tribal Issues Advisory Group should be formed and the issues it should consider. If you have any questions feel free to contact M. Brent Leonhard, an Attorney within our Office of Legal Counsel. He can be reached by phone at 541.429.7406 or by email at [brentleonhard@ctuir.org](mailto:brentleonhard@ctuir.org).

Sincerely,

A handwritten signature in cursive script that reads "Gary Burke".

Gary Burke  
Board of Trustees Chairman