United States Sentencing Commission

TRIBAL ISSUES ADVISORY GROUP

Honorable Ralph Erickson, Chair
One Columbus Circle N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002

February 20, 2024

Hon. Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Judge Reeves,

On behalf of the Tribal Issues Advisory Group, we submit the following views, comments, and suggestions in response to the Proposed Amendments to the Federal Sentencing Guidelines, Policy Statements and Official Commentary approved by the U.S. Sentencing Commission on December 14, 2023, and published in the Federal Register on December 26, 2023. See 88 Fed. Reg. 89142 (December 26, 2023); see also 28 U.S.C. § 994(o).

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3. Proposed Amendment No. 3—Acquitted Conduct

While acquitted conduct is not specifically addressed in the *Guidelines Manual*, except for a reference in the parenthetical summary of the holding in *United States v. Watts*, 519 U.S. 148 (1997), consistent with the decision in *Watts*, acquitted conduct is permitted to be considered by the sentencing court as relevant conduct under USSG § 1.B1.3 in conjunction with §§ 1B1.4 and 6A1.3.

TIAG is generally opposed to the use of acquitted conduct in sentencing as its use is a source of surprise and great confusion and concern among Native American defendants and their families. It has long been recognized that a criminal defendant's guaranty of a right to a jury trial exists "in order to prevent oppression by the Government." *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968) (citing *Singer v. United States*, 380 U.S. 24, 31 (1965) ("The [Jury] Clause was clearly intended to protect the accused from oppression by the Government. . .")). This authority residing in the jury extends so far that the federal courts recognize the de facto power of jury nullification even though it is in contravention of the jury's sworn duty. *See Sparf v. United States*, 156 U.S. 51, 64 (1895) (citing *State v. Brailsford*, 3 U.S. 1, 4 (1794), which noted that while the jury had the power to decide both question of fact and law, questions of law were more properly in the domain of the court).

Even though TIAG opposes the use of acquitted conduct, it takes no position on the proposed amendments and instead urges the United States Sentencing Commission to prohibit the use of acquitted conduct in the calculation of the sentencing guidelines range in any manner. It is the opinion of TIAG that each of the proposed amendments creates its own concerns that could be best avoided by leaving the issues raised by *United States v. Watts* and 18 U.S.C. § 3553 to the sentencing court's consideration under § 3553. If a sentencing court is convinced that acquitted conduct must necessarily be considered in order to craft a sentence that is "sufficient, but not greater than necessary" with the sentencing purposes of 18 U.S.C. § 3553(a), then it is more appropriate for acquitted conduct to be considered under § 3553(a)(1) as the nature and circumstances of the offense or the history and characteristics of the defendant than within the formal calculation under the sentencing guidelines.

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Thank you for consideration of our views and for being responsive to our concerns regarding how the Commission's sentencing priorities may impact defendants who are tribal members. As always, we look forward to working with you during the remainder of this amendment cycle and in continuing our collaboration in the future.

Sincerely yours,

Ralph R. Erickson, Chair