

REPORT OF THE
TRIBAL ISSUES
ADVISORY GROUP

May 16, 2016



United States Sentencing Commission
TRIBAL ISSUES ADVISORY GROUP

Honorable Ralph Erickson, Chair
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Suite 2-500, South Lobby
Washington, D.C. 20002*



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May 16, 2016

Honorable Patti B. Saris, Chair
United States Sentencing Commission
One Columbus Circle N.E.
Suite 2-500, South Lobby
Washington, DC 20002

Re: Tribal Issues Advisory Group Final Report

Dear Chair Saris,

On behalf of the Tribal Issues Advisory Group (TIAG) membership, I want to thank the Commission for the opportunity to provide the Commission its views on federal sentencing issues relating to American Indian defendants and victims, and offenses committed in Indian country. While the TIAG membership is amazingly diverse with a broad range of tribal and federal backgrounds, the TIAG membership shares a commitment to working together to improve the status quo in Indian country and the federal-tribal relationship across judicial systems.

The enclosed Report is the product of many months of meetings, analysis, deliberations, and consensus-building to arrive at solutions for how to improve the delivery of justice in Indian country. While the scope of the Commission's interests is focused narrowly on federal sentencing, the TIAG Charter is considerably broader in scope, and this Report includes recommendations for legislative and executive branch changes, in addition to very practical changes to federal sentencing guideline application in Indian country cases.

The TIAG is extremely grateful to the judicial staff and leadership of the Standing Rock Sioux Tribe and the Pasqua Yaqui Tribe. Both tribes hosted the TIAG during separate site visits to their reservations and tribal courts. The experiences at both sites were extremely valuable to the TIAG's policy-making work, and the TIAG is immeasurably grateful for the gesture of time and resources by both tribes.

The TIAG also would like to thank the staff at the following state agencies that provided sentencing data to support our work, specifically: the Minnesota Sentencing Guidelines Commission, the North Dakota Department of Corrections and Rehabilitation, the State of Oregon Criminal Justice Commission, and the South Dakota Unified Judicial System. The TIAG learned much from the data it received, especially regarding the development of future data collection in order to analyze the perception of sentencing disparity affecting American Indian defendants in federal cases.

I would be remiss if I did not also thank the Commission for two crucial contributions to our work. First and foremost I want to thank the Commission for the thought and effort that went into selecting the membership of the TIAG. You gave me a group of highly committed, intelligent, thoughtful men and

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women from a broad spectrum of experience who were willing to work together in a way that consistently placed the best interests of building a fair and cogent sentencing scheme in Indian country above their personal and institutional interests. I am exceptionally proud of the willingness of people from diverse backgrounds to set aside their stakeholder interests to see that the best product possible has been produced. Secondly, I want to thank you for the capable and competent staff that you assigned to staff the TIAG. They were, to a person, remarkably talented, committed and helpful. Their patience, attention to detail, and commitment to getting us the information we needed on short notice is deeply appreciated by the TIAG. You can be rightfully proud of the staff that you have assembled—it is of the highest quality.

I am available to answer any questions about the TIAG's Report, and I remain grateful for the opportunity to make an impact in Indian country through the enclosed recommendations.

Sincerely,

A handwritten signature in blue ink that reads "Ralph R. Erickson".

Ralph R. Erickson
Chair, Tribal Issues Advisory Group
Chief U.S. District Judge, District of North Dakota

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EXECUTIVE SUMMARY

The Tribal Issues Advisory Group (“the TIAG”) makes several recommendations to the United States Sentencing Commission (“the Commission”) for revisions and additions to the Sentencing Guidelines (“the Guidelines”), for tribal consultation, and for other changes. The TIAG suggests that the following revisions be made to the Guidelines:

- (1) Adding an application note and commentary to USSG §4A1.3 to guide when tribal court convictions may be considered for a possible upward departure in the defendant’s criminal history category;
- (2) Including in USSG §1B1.1 a definition of “court protection order;”
- (3) Amending USSG §5H1.1 regarding the “age” policy statement; and
- (4) Adding a departure concerning juvenile and youthful offenders as USSG §5K2.25.

The TIAG recommends that the Commission adopt certain policy changes including:

- (1) Establishing a standing advisory group on tribal issues to assist the Commission on changes to the Guidelines impacting American Indian defendants, to advise on and assist in tribal consultation, and to form the basis for a new TIAG when appropriate;
- (2) Creating a process for the collection of better data on federal court sentencing to allow for study of the protection order provisions of the Guidelines and analysis of sentencing disparity concerns as detailed herein; and
- (3) Considering the recommendations of other working groups regarding juvenile offenders, including possibly collapsing sentencing zones A, B, and C into a single zone.

The TIAG also recommends that the Commission support changes in federal law and practice including:

- (1) Congressional action that incentivizes states and requires appropriate federal agencies to collect data on state court sentencing of defendants generally and Native American defendants in particular so that better data exists to analyze whether and where there truly are sentencing disparities;
- (2) Increased use of pretrial diversion agreements by United States Attorneys' offices;
- (3) Increased use by law enforcement in Indian country of misdemeanor statements of charges and Central Violations Bureau misdemeanor citations to non-Indians in Indian country;
- (4) Better training of federal employees who work in Indian country about Native American history and culture; and
- (5) Revisions to the Juvenile Delinquency Act, 18 U.S.C. § 5032, to require federal consultation with tribes in certain juvenile case prosecutions.

This Report provides the basis for and an explanation of these and other recommendations.

THE TIAG'S AUTHORIZATION, PURPOSE, AND WORK

The Commission established the TIAG as an *ad hoc* advisory group to the Commission under 28 U.S.C. § 995 and Rule 5.4 of the Commission's Rules of Practice and Procedure. The Commission specified the purpose of the TIAG to be:

- (1) to assist the Commission in carrying out its statutory responsibilities under 28 U.S.C. § 994(o);
- (2) to provide to the Commission its views on federal sentencing issues relating to American Indian defendants and victims and to offenses committed in Indian Country;
- (3) to study—
 - (A) the operation of the federal sentencing guidelines as they relate to American Indian defendants and victims and to offenses committed in Indian Country, and any viable methods for revising the guidelines to (i) improve their operation or (ii) address particular concerns of tribal communities and courts;
 - (B) whether there are disparities in the application of the federal sentencing guidelines to American Indian defendants, and, if so, how to address them;
 - (C) the impact of the federal sentencing guidelines on offenses committed in Indian Country in comparison with analogous offenses prosecuted in state courts and tribal courts;
 - (D) the use of tribal court convictions in the computation of criminal history scores, risk assessment, and for other purposes;
 - (E) how the federal sentencing guidelines should account for protection orders issued by tribal courts; and
 - (F) any other issues relating to American Indian defendants and victims, or to offenses committed in Indian Country, that the TIAG considers appropriate;
- (4) to recommend to the Commission means to establish regular and meaningful consultation and collaboration with tribal officials in the development of sentencing policies that have tribal implications; and
- (5) to perform any other related functions as the Commission requests.

The TIAG's members, who are listed at Appendix A hereto, have met at least monthly through conference calls and in person in Washington D.C. on May 19 and 20, 2015; in Bismarck and on the Standing Rock Sioux Reservation in North Dakota, on October 8 and 9, 2015; and on the Pascua Yaqui Reservation in Arizona, on February 23 and 24, 2016. The TIAG formed the following four subcommittees to focus on particular areas: (1) Tribal/Federal Working Group; (2)

Tribal Convictions/Criminal History/Court Protection Orders; (3) Sentencing Disparities; and (4) Juvenile Justice/Youth Offenders/Crimes Against Children. These TIAG subcommittees have met multiple times both by teleconference and in person in Washington D.C., North Dakota, and Arizona. All members of the TIAG considered recommendations from the subcommittees. The TIAG formed a fifth subcommittee responsible for report drafting.

This Report uses the word “Indian,”¹ because that is a legal term that appears in statutes of the United States to mean a person with Native American heritage who is an enrolled member of a federally recognized tribe or whose relationship with a tribe is such that the federal government recognizes that person as an Indian.² This Report at times uses “Native American” or “American Indian” to refer to those who have ancestors who predated arrival of Europeans in the Americas. Not all Native Americans or American Indians are “Indian” within the legal meaning of that term because, among other things, the federal government has terminated some Indian tribes and relationships with some members of such tribes.³ Federal court criminal jurisdiction over Native Americans typically requires proof that the defendant is an “Indian” and that the offense occurred in “Indian country,” unless the criminal offense is within the general federal criminal jurisdiction for offenses such as drug crimes.

¹ See *F.T.C. v. Payday Financial, LLC*, 935 F.Supp.2d 926, 929 n.1 (D.S.D. 2013) (noting that the legal term “Indian” is not meant to be pejorative, but rather it derives from the mistaken belief of early European explorers in North America that they had encountered people in the East Indies).

² *United States v. Stymiest*, 581 F.3d 759, 762-764 (8th Cir. 2009).

³ See *St. Cloud v. United States*, 702 F.Supp. 1456, 1461-66 (D.S.D. 1988).

REPORT AND RECOMMENDATIONS

I. Tribal/Federal Working Group Recommendations

The Commission's Charter creating the TIAG, in Section 7, states:

The TIAG shall be guided by the principle that the federal government has a unique legal relationship with tribal governments and has recognized the right of tribes to self-government. Further, in making recommendations to the Commission and in conducting any official business, the TIAG shall respect tribal self-government and sovereignty and, where possible, consult with tribal officials to preserve the prerogatives and authority of tribes.

Consistent with the Commission's directive, the TIAG conducted formal tribal consultation using a protocol that was guided by procedures used within the executive branch. The TIAG announced and then conducted tribal consultation through a conference call held on August 13, 2015, and through inviting written comment until August 31, 2015, on the scope and specifics of the TIAG's work. The announcement of the tribal consultation is Appendix B hereto, and a transcript of the call was part of Appendix B to the TIAG's Status Update of November 1, 2015 to the Commission. Those American Indians and tribal government representatives who participated in the tribal consultation appreciated the opportunity and expressed gratitude that the Commission is studying these issues.

The history of American Indians and the development of Indian law underscores the need for such tribal consultation on changes to law and policies affecting American Indians. "Tribal consultation is an important governmental policy aimed at respecting tribal sovereignty and self-determination of tribal members in government decision-making in a country whose development and governmental decision-making often was at the expense of tribal sovereignty and self-

determination of tribal members.”⁴ As the Presidential Memorandum on Tribal Consultation put it:

History has shown that failure to include the voices of tribal officials in formulating policy affecting their communities has all too often led to undesirable and, at times, devastating and tragic results. By contrast, meaningful dialogue between Federal officials and tribal officials has greatly improved Federal policy toward Indian tribes. Consultation is a critical ingredient of a sound and productive Federal-tribal relationship.⁵

A copy of the Presidential Memorandum and Executive Order 13175 are at Appendix C hereto.

The Commission’s charter creating the TIAG appropriately directs the TIAG to “respect tribal self-government and sovereignty and, where possible, consult with tribal officials to preserve the prerogatives and authority of tribes.” The TIAG recommends that the Commission itself strive to do the same in the future by consulting with tribes and tribal members on revisions of the Guidelines impacting Indian country crimes. The TIAG has three suggestions how the Commission should accomplish this.

First, the TIAG recommends that the Commission establish a standing advisory group on tribal issues consisting of six to eight members to advise the Commission on proposed changes to the Guidelines that impact defendants from Indian country. The Charter establishing the TIAG in Section 2 called for no more than 20 voting members comprised of no more than five federal judges, no more than four executive branch officials, one federal public defender, and no more than ten at large members. The TIAG recommends a similar cross-section for the standing advisory group on tribal issues of one or two federal judges, one official from the Department of Interior, one representative of the Department of Justice, one federal public defender

⁴ *Sisseton-Wahpeton Oyate v. U.S. Army Corps of Eng’rs*, No. 3:11-CV-3026-RAL, 2015 WL 4931152, at *9 (D.S.D. Aug. 18, 2015) (citing President Barack Obama, Tribal Consultation: Memorandum for the Heads of Executive Department and Agencies, 74 Fed. Reg. 57881 (Nov. 5, 2009)).

⁵ Tribal Consultation, 74 Fed. Reg. at 57881.

representative, one tribal judge, and one or two at large members who are Native Americans or work in Indian country. The standing advisory group on tribal issues can advise on whether proposed Guideline revisions impact Indian country crimes and when formal tribal consultation is appropriate, and it could assist in the consultation process or conduct the tribal consultation on behalf of the Commission.

Second, the TIAG recommends that approximately every decade the standing advisory group on tribal issues should be transformed into a larger group to study issues similar to what the TIAG now is addressing and to make recommendations to the Commission. Indian law and sentencing on Indian country criminal offenses are dynamic and evolving areas that merit periodic examination and evaluation. As explained in this Report, limited data on sentences imposed stymied some of the TIAG's analysis of possible sentencing disparities, and better data on state sentencing ought to be available in another decade.

Third, the TIAG suggests that when the Commission holds a hearing on future changes to the Guidelines directly impacting Indian country, like those prompted by the Tribal Law and Order Act of 2010 (TLOA)⁶ or the Violence Against Women Reauthorization Act of 2013 (VAWA Reauthorization),⁷ the Commission consider holding such a hearing in or near Indian country.

The TIAG also has discussed how best to improve tribes' and tribal members' faith in the fairness of the federal criminal justice system and to increase the sensitivity and understanding of those who work in the federal criminal justice system in Indian country districts. Many federal court personnel in Indian country districts, including at times district judges and magistrate judges, lack experience or familiarity with Indian law and Indian peoples. The TIAG recommends that

⁶ Pub. L. 111-211, 124 Stat. 2258 (2010).

⁷ Pub. L. 113-4, 127 Stat. 54 (2013).

the standing advisory group on tribal issues as one of its functions identify and work with those federal judges with Indian country criminal caseloads to encourage those judges to visit Indian country, to meet with tribal court judges and employees, and to ensure that federal court personnel—including federal magistrate judges, law clerks, and probation officers working with American Indians—understand the history, traditions, and culture of tribes in their districts. There is a need for a coordinated effort to provide education about Indian law, history, challenges, and culture to federal court personnel in Indian country districts. Separately, TIAG has discussed the merit of having specialized training or a mentorship program for federal judges who handle a large volume of Indian country cases. Certain members of the TIAG have contacted the Federal Judicial Center (FJC) and the Administrative Office of the United States Courts (AO) about creating an Indian law working group. The FJC and the AO have responded positively to that concept, with one reaction being that such a working group is long overdue. Accordingly, some members of the TIAG have volunteered for a possible working group in coordination with the FJC and the AO.

With the limited exception for certain tribes and certain crimes under the VAWA Reauthorization, tribal courts lack criminal jurisdiction over non-Indians, even when their victims are Indians.⁸ The absence of such jurisdiction not only is a public safety concern in Indian country, but also reduces the faith of tribal members in the fairness of the American criminal justice system. Such jurisdiction exists in federal court, but very few prosecutions of non-Indians for Indian country crimes against Indians occur in federal court. The Department of Justice in recent years has shown increased interest in prosecuting Indian country crimes, but needs to be encouraged to continually undertake efforts to train Assistant United States Attorneys (AUSAs), Special

⁸ There has been some interest in the Senate to further modify the limitations on tribal court jurisdiction. For example, Senators Jon Tester (D-MT) and Al Franken (D-MN) recently introduced legislation which would extend tribal court jurisdiction over certain drug crimes and crimes against children committed by non-Indians in Indian country. See Tribal Youth and Community Protection Act of 2016, S.2785, 114th Cong. (2016).

Assistant United States Attorneys (SAUSAs), FBI agents, and United States Marshal officials who work in Indian country. One initiative to address illegal activity by non-Indians who victimize Indians in Indian country is to use misdemeanor “statement of charges” and the Central Violations Bureau (CVB) process for misdemeanor and petty offense prosecutions before federal magistrate judges. SAUSAs and the Department of the Interior’s Bureau of Indian Affairs (BIA) or tribal police would need to receive training, certification, and CVB citation booklets to initiate such cases and be educated about when and how to issue such citations. Federal magistrate judges unfamiliar with the CVB process also would need training on the process.

II. Tribal Court Convictions/Criminal History/Court Protection Orders Recommendations

A. Tribal Court Convictions—USSG Chapter Four Issues

What to do with prior tribal convictions in formulating sentences for American Indian defendants in federal court has been a question since the Guidelines were created. Comments at the time the Guidelines were initially promulgated reflect a split of opinion on how to treat tribal court convictions: some said they should count for criminal history purposes, at least as many said they should not, and others advocated something in between. The TIAG members continued this debate with some — particularly those affiliated with the executive branch of government — believing that tribal court convictions should contribute to criminal history points, but with a significant majority favoring a more modest modification of the current guideline approach to tribal court convictions. Throughout the life of the Guidelines, tribal convictions have been treated like convictions from foreign nations and not counted in criminal history calculations, although tribal convictions provide a ground for a possible upward departure. Specifically, USSG §4A1.2(i) states: “Sentences resulting from tribal court convictions are not counted, but may be considered under §4A1.3 (Adequacy of Criminal History Category).”

The BIA reports that there are 567 federally recognized Indian tribes. Of these tribes, BIA reports that 351 have tribal courts while the remaining 215 tribes presumably are Public Law 280 tribes or otherwise rely on state courts as their criminal courts. The 351 tribal courts vary widely in how they function. While many tribes have adopted an adversarial tribal court system similar to that in state and federal courts, some have not. Some retain traditional reconciliation courts. Some have hybrid models.

Tribal courts have inherent criminal jurisdiction over their own tribal members and, as affirmed by Congress in 1991,⁹ over non-member Indians. The Indian Civil Rights Act¹⁰ (ICRA) imposes certain requirements on tribal courts, but it does not require them to provide the full protections set forth in the Bill of Rights or in the Fourteenth Amendment for criminal prosecutions. In particular, ICRA does not require tribes to provide appointed counsel, as does the Sixth Amendment; nonetheless, many tribes do so. ICRA also limits tribal courts' sentencing authority to no more than one year.

In recent years, Congress has provided tribes the opportunity to expand their jurisdiction under TLOA and the VAWA Reauthorization. Both statutes authorize tribes to impose longer sentences, and the VAWA Reauthorization allows prosecution of non-Indians for certain domestic violence offenses. To exercise the expanded jurisdiction under TLOA and the VAWA Reauthorization, tribes must provide expanded due process protections such as law-trained judges, publicly available law codes, defense counsel (including at tribal expense under the VAWA Reauthorization), and trial by jury. While some tribes have exercised expanded jurisdiction under TLOA and the VAWA Reauthorization, most have not done so. Given the lack of tribal resources,

⁹ Pub. L. No. 101-511, 104 Stat. 1856 (codified at 25 U.S.C. §1301(2)).

¹⁰ 25 U.S.C. § 1302.

and the absence of significant additional funding under TLOA and the VAWA Reauthorization to date, it is not certain that more tribes will be able to do so any time soon. Even setting that practical issue aside, some tribes may choose not to adopt these systems, preferring to maintain their current systems of justice.

The experience of the TIAG's members with tribal courts is widely varied. Many tribal courts are adequately funded and staffed. Many are not. Some tribal courts do not have judicial officials who are independent of other branches of government; some tribal judicial officers are politically appointed, which may lead to perceptions of judicial bias or political influence. In many tribal courts, criminal defendants are either unrepresented or represented by a lay advocate. In some tribal courts, the prosecutor, defender, or judge may lack a law degree or formal legal training. In addition, court processes may include traditional forms of dispute resolution not widely recognized by state or federal courts or, as previously discussed, not provide a guaranteed right to counsel. These differences make it often difficult for a federal court to determine how to weigh tribal court convictions in rendering a sentencing decision.

The view of tribes toward federal prosecutions varies significantly. Prosecutors report that some tribal officials are frustrated about prosecution declination rates being too high and believe that more cases should be federally prosecuted, while other tribal officials believe that there is too much federal prosecution in Indian country and more cases should be solely referred for tribal prosecution. Tribal views of federal prosecution may affect the interaction between tribal and federal courts. For example, many tribal courts provide United States Probation officers with tribal criminal histories and court documents for release decisions and preparation of Presentence Reports. However, some tribal courts refuse to provide such information. At times, tribal justice

systems lack databases or technologies to adequately maintain tribal court records which impacts their ability to share information with federal or state courts.

In short, with 351 different tribal courts across the country, the TIAG believes that taking a single approach to the consideration of tribal court convictions would be very difficult and could potentially lead to a disparate result among Indian defendants in federal courts. Importantly, federal courts must apply constitutional principles in rendering sentencing decisions. Moreover, the Supreme Court of the United States has granted certiorari on a case¹¹ that may clarify the extent to which uncounseled tribal court convictions may be relied upon by federal courts.

The TIAG recommends that tribal convictions not be counted under USSG §4A1.2. The TIAG believes that the current use of USSG §4A1.3 to depart upward in individual cases continues to allow the best formulation of “sufficient but not greater than necessary” sentences for defendants, while not increasing sentencing disparities or introducing due process concerns. However, the TIAG believes that providing guidance and a more structured analytical framework under USSG §4A1.3, particularly following TLOA and the VAWA Reauthorization, would improve the process. As a result, the TIAG recommends the addition of the following application note and commentary to existing USSG §4A1.3:

4. Tribal court convictions

In considering a departure based on convictions obtained in tribal court, the following considerations may be relevant, although no single factor shall be determinative, in addition to those set forth in §4A1.3(a) above:

- (1) Whether the defendant was represented by a lawyer, had the right to a trial by jury, and received other due process protections consistent with those provided to criminal defendants under the United States Constitution;
- (2) Whether the tribe was exercising expanded jurisdiction under the Tribal Law and Order Act and the Violence Against Women Act Reauthorization of 2013;

¹¹ *United States v. Bryant*, 769 F.3d 671 (9th Cir. 2014), cert. granted, 84 U.S.L.W. 3200 (U.S. Dec. 14, 2015) (No. 15-420). Oral argument occurred on April 19, 2016.

- (3) Whether the conviction arose from conduct giving rise to a conviction in another jurisdiction which is counted;
- (4) Whether the conviction is for an offense that would otherwise be counted under §4A1.2 based on the type and age of the offense;
- (5) Whether the tribal government has formally expressed a desire that convictions from its courts should or should not be counted in determining federal court sentences.

BACKGROUND

Tribal courts occupy a unique and valuable place in the criminal justice system. Tribal courts range in style from traditional justice systems to court systems that meet the standards under the Tribal Law and Order Act and the Violence Women Act Reauthorization of 2013 as providing due process rights, and all such courts deserve respect. Federally recognized Indian tribes are more similar to foreign nations than states in many respects. As United States citizens, tribal members are potentially subject to the jurisdiction of federal, state, or tribal courts depending on the circumstances of the offense. Convictions from tribal courts have not been included in the criminal history calculations under §4A1.1 since the inception of the Guidelines, but have long been a basis for potential upward departures under this section. In considering a possible departure under §4A1.3, none of the factors listed in Note 4 is intended to be determinative, but collectively they reflect important considerations for sentencing courts to balance the rights of defendants, the unique and important status of tribal courts, the need to avoid disparate sentences in light of disparate tribal court practices and circumstances, and the goal of accurately assessing the severity of any individual defendant's criminal history.

B. Court Protection Orders

The Commission asked the TIAG to consider whether the Guidelines should account for tribal court protection orders. Violating a court protection order already triggers an enhancement under USSG §§2A2.2, 2A6.1, and 2A6.2. How to treat protection order violations in sentencing implicates policy concerns beyond the scope of the TIAG. Discussion of this issue resulted in consensus on two recommendations: (1) defining “court protection order” within the Guidelines; and (2) collecting data to make an appropriate assessment of the use of protection orders.

The Guidelines lack a consistent definition of “court protection order.” A clear definition of that term will ensure that orders used for sentencing enhancements are the result of court

proceedings assuring appropriate due process protections, that there is consistent identification and treatment of such orders, and that such orders issued by tribal courts receive treatment consistent with that of other issuing jurisdictions. Statutory provisions at 18 U.S.C. §§ 2265¹² and 2266¹³ provide a definition of “protection order” that is familiar and understandable, are already used in other settings to identify orders entitled to full faith and credit, and set forth appropriate due process protections. The TIAG therefore recommends that the Commission adopt the following definition of the term “court protection order” in USSG §1B1.1 or other appropriate location:

“Court protection order” means any order that satisfies the requirements of 18 U.S.C. § 2265 and that meets the definition of “protection order” included in 18 U.S.C. § 2266.

The TIAG also believes that adequate data is necessary to assess the use of protection orders in federal sentencing and is presently not available. In particular, the TIAG believes data should be collected on the following topics: (1) the frequency of use of protection orders as

¹² Section 2265(a) of Title 18 calls for full faith and credit to be given to state, tribal, and territorial protection orders. Section 2265(b) provides:

(b) Protection order.—A protection order issued by a State, tribal, or territorial court is consistent with this subsection if—

- (1) such court has jurisdiction over the parties and matter under the law of such State, Indian tribe, or territory; and
- (2) reasonable notice and opportunity to be heard is given to the person against whom the order is sought sufficient to protect that person’s right to due process. In the case of ex parte orders, notice and opportunity to be heard must be provided within the time required by State, tribal, or territorial law, and in any event within a reasonable time after the order is issued, sufficient to protect the respondent’s due process rights.

¹³ Section 2266 of Title 18 contains definitions including in § 2266(5):

(5) Protection order.—The term “protection order” includes—

- (A) any injunction, restraining order, or any other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence, or contact or communication with or physical proximity to, another person, including any temporary or final order issued by a civil or criminal court whether obtained by filing an independent action or as a pendent lite order in another proceeding so long as any civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection; and
- (B) any support, child custody or visitation provisions, orders, remedies or relief issued as part of a protection order, restraining order, or injunction pursuant to State, tribal, territorial, or local law authorizing the issuance of protection orders, restraining orders, or injunctions for the protection of victims of domestic violence, sexual assault, dating violence, or stalking.

enhancements under the Guidelines; (2) the race of the defendant and victim in those cases; (3) the court that issued the applicable protection order; (4) whether protection orders are being sought, obtained, and considered from all tribal, territorial, and state courts and if they are not, the reasons for that; and (5) whether notice was provided to the defendant prior to issuance of the protection order and whether mutual protection orders were issued against both parties. Given the absence of reliable data and the real potential for disparate impact on Indian defendants, the TIAG recommends that the Commission collect and study the data before considering any expansion of the use of court protection orders as enhancements under Chapters Two or Three.

III. Sentencing Disparities Working Group Recommendations

A. Summary of Recommendations

The TIAG reaches the following conclusions and makes the following recommendations to the Commission concerning sentencing disparity issues:

(1) The TIAG concludes there is a widespread perception among Native Americans, many federal prosecutors, federal defenders, and some federal and state judges that Indians are subject to sentencing disparities. In other words, there is a widespread perception that Indians receive longer or shorter sentences than non-Indians for the same or similar offenses.

(2) The TIAG concludes that sentencing data currently does not exist to conduct meaningful sentencing disparity analysis.

(3) The TIAG recommends that the Commission work with the Judicial Conference to revise the Presentence Reports to include the following data:

(A) the legal status of the defendant and the victim as an Indian person under federal law;

- (B) whether the crime occurred in Indian country;
 - (C) the federal statute that provides federal jurisdiction (18 U.S.C. §§ 1153, 1152, and 13); and
 - (D) the federal statute for the crime of conviction and any assimilated state crime pursuant to 18 U.S.C. § 13.
- (4) The TIAG recommends that all states and appropriate federal agencies collect the following data for crimes charged under state law:
- (A) legal status of the defendant as an Indian person under federal law;
 - (B) whether the crime occurred in Indian Country;
 - (C) race and/or ethnicity;
 - (D) the statute of conviction;
 - (E) the sentence imposed;
 - (F) the time actually served or expected to be served by each defendant;
and
 - (G) dispositions that do not exist under federal law including those that result in no criminal history.

(5) The TIAG recommends that the Commission proactively consult with Indian tribes and nations on a government-to-government basis to address disparities both real and perceived.

Set forth below are the background and the rationales for these recommendations.

B. Background

The requirement of race and national origin neutrality in the Commission's organic act (28 U.S.C. § 994(d)) is not implicated by the adoption of guidelines, policy statements, and

commentary addressing “Indians” and “Indian country.” These terms express the legal status and jurisdictional realities resulting from the government-to-government relationship between the United States and Indian tribes. Section 1151 of Title 18 defines “Indian country” and provides the geographic basis of federal criminal jurisdiction in Indian country. The Major Crimes Act, 18 U.S.C. § 1153, lists and defines most of the crimes over which the federal government has jurisdiction in Indian country. As the Supreme Court of the United States recognized in *Morton v. Mancari*,¹⁴ it is the legal status of Indian people in treaties and federal law, and not their race or national origin, that separate them from the prohibitions of § 994(d).

Congress’ decision in 1990 to make the federal sentencing guidelines applicable to the Major Crimes Act and other offenses arising in Indian country¹⁵ stimulated concerns that Native American defendants would be treated more harshly by the federal sentencing system than if Indian defendants were prosecuted by their respective states for the same or similar offenses.¹⁶

In 2002, the Commission created an *ad hoc* Advisory Group on Native American Sentencing Issues (the “Advisory Group”) and charged it “to consider any viable methods to improve the operation of the federal sentencing guidelines in their application to Native Americans

¹⁴ 417 U.S. 535, 554-55 (1974).

¹⁵ See 18 U.S.C. § 3551(a).

¹⁶ See Jon M. Sands, Departure Reform and Indian Crimes: Reading the Commission’s Staff Paper with ‘Reservations’, 9 Fed. Sent. R. 144, 145 (1996). Similar concerns are reflected in written submissions and public hearing testimony when the Commission was developing the Guidelines in the late 1980s. Several experts, noting the unavailability of parole in the federal system and other comparative structure disparities in sentencing, urged the Commission to consider the special circumstances of Indian offenders and to be sensitive to the concerns of tribal governments. See, e.g., Tova Indritz, Testimony before U.S. Sentencing Commission, Denver, CO (Nov. 5, 1986); Letter from Frederic F. Kay, Fed. Public Defender, Dist. of Ariz., to the Hon. William W. Wilkins, Chair, USSC (Aug. 9, 1989). When the Guidelines were finally issued, however, the only special consideration given to Indians and their communities concerned the treatment of prior tribal court convictions. See USSG §4A1.2 (providing that while tribal court convictions will not be counted for purposes of criminal history calculations, they may be considered under §4A1.2 “adequacy of Criminal History Category”).

under the Major Crimes Act.”¹⁷ Despite the Advisory Group’s desire to develop comprehensive recommendations for the Commission’s consideration that would be truly national in scope, it obtained useable criminal justice data from just three states. Data from other states with large Indian populations were simply unavailable.¹⁸ While considerable anecdotal evidence of inequity motivated the Advisory Group’s research, the dearth of state sentencing data hampered its ability to document actual sentencing disparities between states and the federal system. At best, the Advisory Group’s published 2003 findings underscored the variegated nature of sentencing disparities for Native Americans (note: not “Indian” defendants). Comparing federal sentencing outcomes to sentencing outcomes in the limited and non-representative three-state sample, it appeared that given similar conduct, Native American aggravated assault defendants received longer sentences in federal courts, and Native American manslaughter defendants received shorter sentences in federal court, than in state courts.¹⁹

In 2015, the Commission created the TIAG. Similar to the 2002 Advisory Group’s charge, one of the stated purposes of the TIAG was to determine: “whether there are disparities in the application of the federal sentencing guidelines to American Indian defendants, and, if so, how to address them; [and] the impact of the federal sentencing guidelines on offenses committed in Indian Country in comparison with analogous offenses prosecuted in state courts and tribal courts.”²⁰ To this end, the TIAG considered published literature, anecdotal information, and empirical data on the sentencing of Native American defendants. In particular, repeating the

¹⁷ USSC, Report of the Native American Advisory Group 9 (Nov. 4, 2003) [“Report”], available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20031104_Native_American_Advisory_Group_Report.pdf.

¹⁸ Id. at 12.

¹⁹ Id. at 14-19. Twelve years later, the TIAG confirmed these findings. See infra Part III.C.

²⁰ TIAG Charter at § 1(b)(3)(B)-(C).

exercise of the Advisory Group in 2002-2003, the TIAG attempted to gather and consider comparable data from states with large Indian populations. The TIAG's conclusions and recommendations for the Commission stem from this research.

C. Perceptions of Inequity

Since 2003, the perception that Indians are subject to sentencing disparities has persisted, if not grown. Today, many Native Americans, federal prosecutors, federal defenders, and some federal and state judges continue to believe that Indians receive different sentences than do non-Indians who commit the same or similar crimes.²¹

For example, Judge Myron H. Bright of the United States Court of Appeals for the Eighth Circuit, in letters to the Department of Justice and to members of Congress, has called for action to address actual and perceived federal-state sentencing disparities impacting Native Americans.²² Judge Bright points in particular to the ten-year federal guideline sentence imposed on a 25-year-old Native American mother of three children in *United States v. Deegan*²³ for the homicide of a newborn; in the same year, in the same state (North Dakota), and for an identical crime, a non-Indian woman received a probationary sentence of three years from the state court. In yet another case in the North Dakota court that same year, Glum, a non-Indian, was sentenced to serve two

²¹ For example, United States Attorneys for the Districts of Colorado, Montana, South Dakota, and Wyoming report that during annual consultations with Indian tribes and nations, tribal leaders express concerns that their citizens are sentenced more harshly in the federal criminal justice system, versus their respective state systems, for similar criminal conduct, particularly with respect to assault offenses. However, the United States Attorney for the District of Arizona reports citizens, including Native Americans, are sentenced more harshly under the Arizona state sentencing system as compared to the federal sentencing system.

²² See Appendix D, letter to Senator Heidi Heitkamp (May 22, 2013); letter to Acting Assistant Attorney General Mythili Raman (Feb. 27, 2014); letter to Director Tracy S. Toulou, Office of Tribal Justice, DOJ (May 22, 2013).

²³ 605 F.3d 625, 635, 656 (8th Cir. 2010).

years for the death of her infant child.²⁴ Various academic studies also fuel the perception that Native Americans are subject to harsher sentences for Indian country offenses prosecuted in federal court than occur for similar criminal conduct committed in states.²⁵

Regardless of the existence of supporting statistics, widespread perceptions of unfair sentencing merit serious discussion. Indeed, the Commission has recognized this principle, albeit in a different setting, in the Commission's Cocaine and Federal Sentencing Policy of May 2002 Report to Congress: "[T]he Commission finds even the perception of racial disparity to be problematic. Perceived improper racial disparity fosters disrespect for and lack of confidence in the criminal justice system among those very groups that Congress intended would benefit from the heightened penalties for crack cocaine."²⁶ Unlike the crack cocaine disparity, however, sentencing disparities affecting Indian country defendants are not tied to one offense type. The wide range of conduct made punishable by the Major Crimes Act and the Assimilated Crimes Act²⁷ subjects Native Americans to sentencing realities very different from those occurring in the state court justice systems bordering reservations.

D. The TIAG's Data Review

In analyzing the available empirical data, the TIAG focused on two possible sources of sentencing disparity:

²⁴ Jenny Michael, Glum to Serve Two Years for Infant Death, Bismarck Trib., Dec. 16, 2009, available at http://bismarcktribune.com/news/local/glum-to-serve-two-years-for-infant-death/article_9b1332a2-ea7a-11de-a460-001cc4c002e0.html.

²⁵ Timothy J. Droske, Correcting Native American Sentencing Disparity Post-Booker, 91 Marq. L. Rev. 723 (2008); BJ Jones & Christopher J. Ironroad, Addressing Sentencing Disparities for Tribal Citizens in the Dakotas: A Tribal Sovereignty Approach, 89 N.D. L. Rev. 53 (2013).

²⁶ Cocaine and Federal Sentencing Policy, USSC 103 (May 2002), available at http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/200205-rtc-cocaine-sentencing-policy/200205_Cocaine_and_Federal_Sentencing_Policy.pdf

²⁷ 18 U.S.C. §§ 1152, 1153, and § 13.

- (1) *Differences in sentencing arising from differential treatment within the federal system itself.* This is the question of whether tribal citizens who commit federal crimes on tribal lands under the Major Crimes Act, 18 U.S.C. § 1153, receive different sentences than other federal offenders convicted of comparable crimes.
- (2) *Differences in sentencing arising from the different ways federal and state law treat the same crime.* One way to understand this distinction is to consider Indian lands where 18 U.S.C. § 1153 applies and ask, “What difference in sentencing arises from a tribal citizen’s commission of a crime on the reservation, as opposed to commission of that same crime on state lands immediately adjacent to this reservation?”

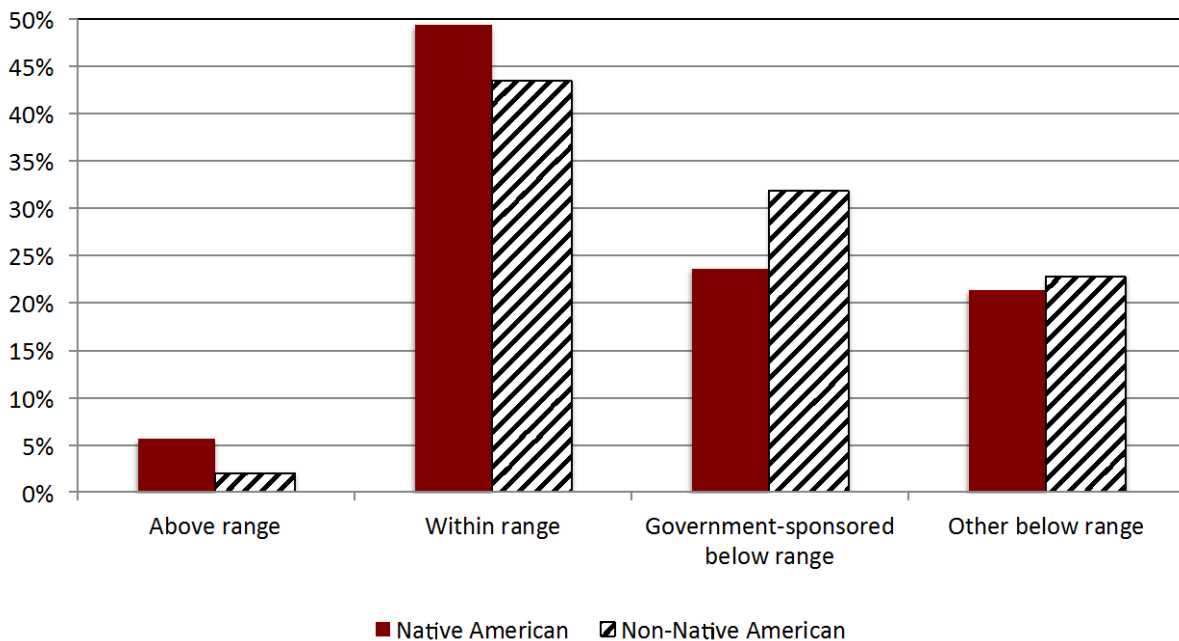
Unfortunately, data limitations still prevent a systematic and comprehensive exploration of these key questions. As was the case in 2003, the lack of meaningful demographic and sentencing data from all relevant states, along with the difficulties inherent in attempting to compare the elements across federal and state crimes, make it virtually impossible to complete a robust comparison of the sentences received or served by non-Indian and Indian defendants in federal and state courts.

With regard to the first area of inquiry, the Commission’s data has been coded only for racial/ethnic identity and not for the offenders’ legal status; that is, it is possible to tell if an offender is Native American but not if the offender has legal status as an Indian under federal law. Nor does the Commission generally collect data on the location of the crime, that is, whether it was committed in Indian country. In the TIAG’s opinion, analysis of the Commission’s data hints at disparity and underscores the need for more targeted information.²⁸

²⁸ To facilitate the TIAG’s analysis of federal sentencing data, the Commission’s Office of Research and Data provided information on sentence length over time for the period 2003 to 2014, data from the Commission’s 2012 Special

For example and as shown in Figure 1,²⁹ a review of sentences imposed shows that Native Americans were sentenced above the range 5.6 percent of the time.³⁰ This is more than double the above-range sentences for non-Native American defendants. In addition, Native Americans were less likely to receive any type of below-range sentence.³¹

Figure 1.
Sentence Imposed and Position Relative to Guideline Range, Fiscal Year 2014
Comparing Natives and Non-Natives



Coding Project (which was related to Congress’s 2013 VAWA Reauthorization), and a variety of stratifications of Commission data for fiscal year 2014. Unique among other Commission data, the 2012 special coding project reflected information on offenses committed in Indian Country and on tribal convictions.

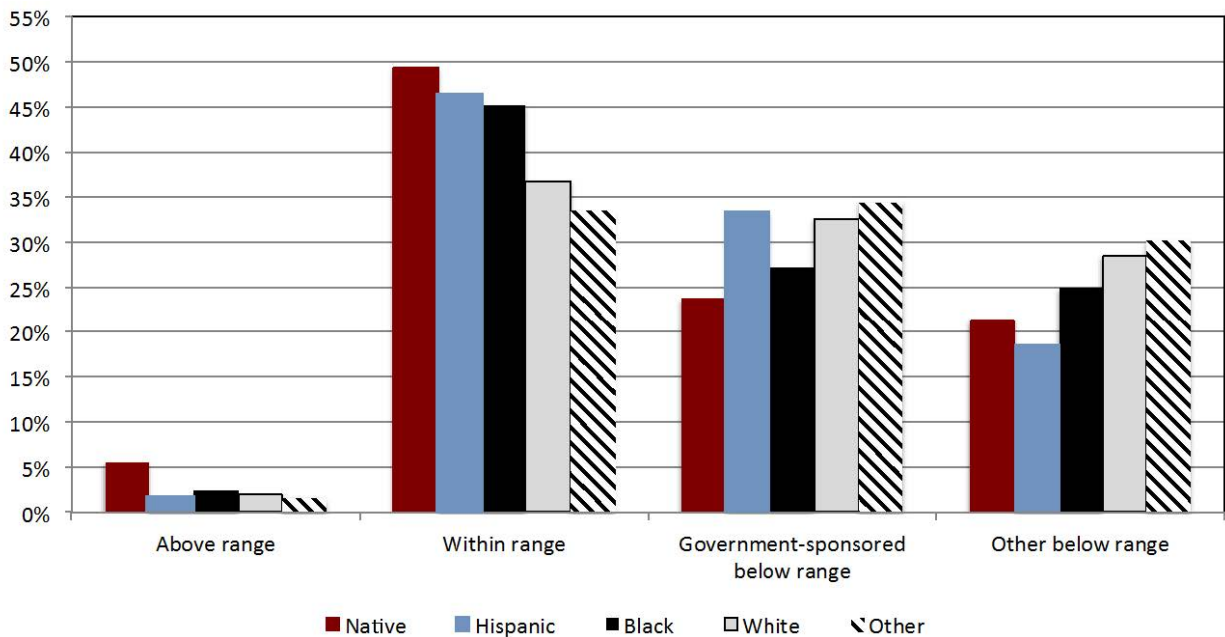
²⁹ SOURCE: United States Sentencing Commission 2014 Data file USSCFY2014.

³⁰ Commission data indicates that, where reasons for departure have been provided by the sentencing judge, in cases involving a Native American defendant, the most common reasons for upward departures included dismissed or uncharged conduct and criminal history reasons (including the existence of prior tribal court convictions).

³¹ Overall Native Americans received a government-sponsored below range sentence in 23.7% of cases, as compared with all others who received government-sponsored sentences in 31.9% of cases. See USSC, 2014 Data file USSCFY2014.

Figure 2³² shows that these results are true when Native American sentences are compared to other racial categories.³³

Figure 2.
Sentence Imposed and Position Relative to the Guideline Range, Fiscal Year 2014,
Comparing Natives to All Other Races

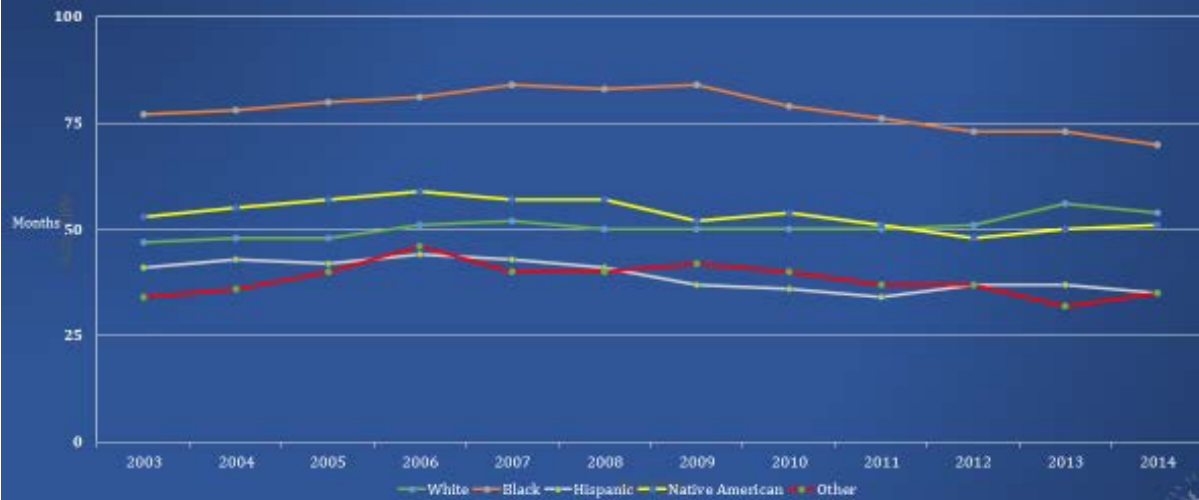


Other data show that from fiscal year 2003 to fiscal year 2011, Native American defendants received higher sentences than all other races, with the exception of Black defendants; for the period of 2011 to 2014, Native Americans' aggregate sentences were close to aggregated sentences for Whites, and higher than those for Hispanics and other races.

³² SOURCE: United States Sentencing Commission 2014 Data file USSCFY2014.

³³ Native Americans received above range sentences in 5.6% of the cases. Compare with Whites 2.0%; Black 2.4%; Hispanic 1.8% Other 1.7%. See USSC, 2014 Data file USSCFY2014.

Sentence Lengths by Race Fiscal Years 2003* to 2014



* 2003 offenders only include those sentenced after the enactment of the PROTECT Act (April 30, 2003).

SOURCE: United States Sentencing Commission 2003 - 2014 Data files, OPAFY03 - OPAFY14

Thus, while aggregate data strongly suggest that more Native Americans have been subject to departures and variances in the sentencing calculation, and as a result, may sometimes serve longer sentences than defendants of other races, they say nothing about bias against tribal citizens (Indians as defined by federal law). Moreover, because the available data do not support an analysis of outcomes that takes account of (controls for) key characteristics such as crime committed, defendant age, defendant criminal history, the location of the crimes, and any departures or variances granted by the court, it is impossible to know whether these basic averages actually reflect systemic bias.

As for the second area of inquiry — the federal-state sentence length comparison — data are even sparser, and problems persist in trying to compare the elements of state and federal crimes. For a meaningful analysis, the TIAG desired sentencing data from three types of jurisdictions: federal judicial districts that have large American Indian populations and prosecute the majority of federal felonies under 18 U.S.C. § 1153; the states where those federal judicial districts reside

(including Arizona, Montana, New Mexico, North Dakota and South Dakota); and states where Indian country largely falls outside federal jurisdiction because of Public Law 83-280 (such as Minnesota and Oregon).

For the first category, the TIAG used Commission data from representative federal jurisdictions. For the second and third categories, the TIAG requested data from multiple state jurisdictions, and it received data from four: Minnesota, North Dakota, Oregon, and South Dakota. The TIAG learned that in Arizona, Montana, and New Mexico, there is a complete absence of centralized data, including demographic data, maintained by the state judicial and correctional systems.³⁴ Other state jurisdictions such as Minnesota, North Dakota, Oregon, and South Dakota, individually collect a large amount of sentencing data — and they have generously shared that data with the TIAG — but it is of limited usefulness when trying to compare state crimes to federal crimes. And, absent information from the other federal judicial districts in which the majority of Indian country crime occurs, the data are not comprehensive enough to support the desired analysis.

As an example, Minnesota collects detailed and meaningful data for the purpose of informing its own Minnesota Sentencing Guidelines Commission and other state policy-making bodies, including the Minnesota legislature. These data allow some limited comparisons to federal data, but because there is a lack of consistent variables collected across state jurisdictions, the Minnesota data are of diminished utility for a broader analysis.

³⁴ As compared to 2002-2003, it seems even fewer states with Indian country are tracking the criminal justice data needed to make meaningful, statistically valid comparisons between Indians and non-Indians committing the same or similar state offenses. Whether this stems from state budget reductions or other considerations is unclear. The TIAG determined that the greatest continuing obstacle to comparing federal and state sentencing impacts to Native American defendants is the persistent lack of robust and available recordkeeping and information-sharing systems by the vast majority of state governments.

Nonetheless, the available Minnesota data demonstrate the complexity of the state's own criminal sentencing system and the flexibility a state sentencing judge can have when fashioning sentences. State sentencing options in Minnesota may include diversion, deferred prosecution agreements, staying the imposition or execution of sentence, probation, and parole. In addition, states may utilize specialty courts, such as driving while intoxicated courts, drug courts, and veterans' courts.³⁵ Because of the near certainty of punishment following federal convictions, each of these state court alternatives to traditional sentencing contribute to the disparity, real and perceived, between sentencing outcomes in federal and state systems.

Despite these data limitations, the TIAG did confirm the findings of the 2003 Advisory Group with regard to manslaughter and assault sentencing. Specifically, for the time periods studied and across the states for which comparable data were available, the federal sentences imposed on Native Americans in both voluntary and involuntary manslaughter cases were lower than the sentences imposed on Native Americans in comparable state manslaughter cases. For aggravated assault cases, only Minnesota data provided meaningful comparisons. The TIAG determined that, for the time periods studied, Minnesota defendants who were convicted of aggravated assault involving a weapon received a lower sentence than similarly situated federal defendants. Minnesota defendants who were convicted of aggravated assault that resulted in serious to permanent injury received a comparable, if not higher, sentence than similarly situated federal defendants. These findings are set forth in Appendix F; the TIAG continues to stress, however, that among other limitations, these findings are basic averages that do not control for important differences between cases or defendants, report on results for Native Americans rather

³⁵ See Appendix E – Minnesota Case Study.

than for Indians under federal law, do not take account of diversion or other dispositions available at the state level but unavailable under federal law, and are based on data from a single state.

In sum, the virtual absence of usable empirical data, and challenges associated with comparing state and federal crimes for the analysis, prevented the TIAG from undertaking a comprehensive review of potential sentencing disparity issues within the federal system and between the state and federal systems. This lack of data presents precisely the same dilemma that the Commission's Advisory Group faced in 2003 when it studied these matters.³⁶ Any future Commission advisory committee or task force will face the very same challenge unless and until changes are made to federal and state-level criminal justice data collection.

E. Future Data Collection and Research

For the reasons discussed above, changes in data collection are highly desirable in order to support appropriate future research and potential policy and legal reform. Here, the TIAG points to the types of data collection and analysis that truly would plumb the questions of disparity:

- (1) *For comparisons within the federal system:* Data collection should include the offender's status as an Indian under federal law, the location of the crime (whether it occurred in Indian country or not), the statute that provides jurisdiction, the statute of conviction, the sentence imposed, and the actual or expected sentence to be served (including periods of probation or supervised release). Using this information, it would be possible to compare the sentences of offenders with legal status as Indians who commit crimes on Indian lands with the sentences received by non-Indians. Moreover, these data would allow researchers to build models of Guidelines calculations that take account of departures and variances, the location

³⁶ See Report, supra note 17, at 12.

of the crime, and offenders' ethnicity and/or legal status as Indians and thereby gain a more accurate understanding of the incidence of sentencing disparity experienced by Indians within the federal system.

- (2) *For comparisons between the federal and state systems:* Data collection should include the offender's ethnicity, status as an Indian under federal law, and gender; the location of the crime; the statute of conviction; sentence imposed; and actual or expected time served. Additionally, the data should capture alternatives to sentencing for state offenders, such as certain first- and second-time offenders, whose criminal acts do not result in a sentence. Finally, system data should provide for an easier alignment of state-defined crimes with federally defined crimes. Such data would enable researchers to create models that, holding relevant conditions constant, allow a direct comparison of offenders' sentencing experiences in the federal and state systems in terms of pronounced sentence and the duration of time served.

F. Strengthening Data Collection and Integration

Because of the absence of reliable data available to study sentencing disparity issues affecting Indian people, the TIAG recommends that the Commission urge Congress to require that federal funding used to operate state prison and correctional systems be tied to sentencing data collection by the states. Congress, through its appropriations authority, should require states that are recipients of appropriated federal funding, to collect and maintain sentencing and demographic data on each defendant convicted and sentenced in the state judicial system. As noted above, this data collection for each defendant should include, but not be limited to, ethnicity, tribal citizenship, gender, crime of conviction, length of sentence imposed, length of term served, and post-

incarceration provisions such as supervision in the community or reductions in the pronounced sentence. It is only reasonable that such a federal mandate be accompanied by sufficient federal financial support to accomplish its intended purpose, which is truly national in scope: Providing a federal criminal justice system that is free of unintentional sentencing disparities toward Native Americans, both real and perceived.

The perception of disparity in the sentencing of Native Americans in federal court is at least as old as the Guidelines themselves. Understanding and eliminating any disparities is part of the TIAG's Charter. The need for scrupulous attention to identify and eliminate such disparities in the Guidelines flows from the federal trust responsibility to Indian tribes, which has been a foundational premise of federal law since the early days of our republic.³⁷ Federal agencies and the states should capture more and better criminal sentencing data to enable comprehensive and meaningful comparisons between sentencing systems, and doing so would advance the federal government's trust responsibility to Indian tribes and nations. The lack of available data need not distract the Commission from vigorously consulting with Indian tribes and nations on a government-to-government basis to address disparities both real and perceived.

IV. Juvenile Justice/Youth Offenders/Crimes Against Children Recommendations

A. Background and Research in Support of Departures and/or Commentary to the Guidelines for Youthful Offenders in Indian Country and in General

The TIAG explored issues regarding sentencing of juveniles³⁸ and youthful offenders from Indian country in federal court. This group includes juveniles charged as adults. Of specific

³⁷ Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) (1831).

³⁸ This Report uses the term "juvenile" to mean a juvenile defendant who has been transferred to adult status for purposes of prosecution pursuant to 18 U.S.C. § 5032. Staff at the Federal Bureau of Prisons reported that currently there are approximately 75 juveniles in federal detention, some of whom may be adjudicated as an adult. It is estimated that 95-98% of these juveniles are Indian. The detention facilities used to detain juveniles nationally are limited, at any given time, to facilities in Idaho (scheduled to close within 90 days) and South Dakota, and a non-secure facility in North Dakota. A facility in New Mexico accepts juvenile probation cases.

concern was the severity of sentences for youthful Native American offenders in the federal system.

The incidence of criminal activity increases between preadolescence and late adolescence, peaks at about age 17 (slightly younger for nonviolent crimes and slightly older for violent crimes), and declines thereafter. Criminologists commonly call this the age-crime curve. Multiple studies show that the vast majority of adolescents who commit anti-social or criminal acts desist from such activity as they mature into adulthood and that only a small percentage—between five percent and ten percent, according to most studies—become chronic offenders.³⁹

Sentencing Commission data for 2014 shows that 21.3 percent of Native American offenders are men age 24 and younger, a much higher percentage than for Hispanic offenders (14.2%), Black offenders (14.0%), and White offenders (7.0%). In 2011, Native American youth were nearly twice as likely to be petitioned for status offenses as white youth.⁴⁰

There are several factors sentencing courts should consider in determining a sentence for youthful offenders from Indian country, as well as for youthful offenders in general. First, adolescence is a period of transition psychosocially and cognitively. Adolescents are different from adults with respect to several aspects of brain and psychosocial development. Many studies have shown that brain maturation continues well into young adulthood. Although individuals, on average, perform at adult levels on tests of basic cognitive ability by the time they are 16, most do not attain adult-like levels of social and emotional maturity until very late in adolescence or early in adulthood. Of particular relevance to psychosocial development, a youth is more susceptible to

³⁹ See, e.g., Laurence Steinberg, Adolescent Development and Juvenile Justice, Ann. Rev. of Clinical Psychol. (2009).

⁴⁰ American Indian/Alaska Native Youth and Status Offense Disparities: A Call for Tribal Initiatives, Coordination, and Federal Funding, Coal. For Juvenile Just. 1 [hereinafter American Indian/Alaskan Native Youth] (citing Charles Puzzanchera & Sarah Hockenberry, Juvenile Court Statistics 2011, Nat'l Cent. for Juvenile Just. (July 2014)).

peer influence, less oriented to the future, more sensitive to short-term rewards, and more impulsive than when an adult.⁴¹

Native American youth experience a higher rate of trauma and exposure to violence than other youth. Native American youth are more likely to be exposed to violence by witnessing, learning of, or being the victim of violence and are more likely to experience loss of peers due to violence. They are more than twice as likely to die from unintentional injuries as non-Native American youth. According to the Centers for Disease Control and Prevention, Native American youth experienced suicide rates 50 percent higher than non-Native American youth from 1999 to 2009. Some research indicates that Native American youth may experience higher rates of trauma-related symptoms and Post-Traumatic Stress Disorder (PTSD) than non-Native American youth. The prevalence of trauma-related symptoms and PTSD among Native American youth reflects not only their higher rates of trauma exposure, but also some of their unique mental health needs.⁴²

A judge sentencing a youthful defendant from Indian country ought to consider the defendant's criminogenic needs, psychiatric history and possible trauma-related symptoms, cognitive and psychosocial development, and the extent to which influence by peers or social groups caused the criminal activity. Studies of the impact of punitive sanctions on adolescent

⁴¹ Steinberg, *supra* note 39 (citing Sandra Hale, A Global Developmental Trend in Cognitive Processing Speed, Wash. Univ. (1990)); Child Dev. 61:653–63; D. Keating, Cognitive and Brain Development, Handbook of Adolescent Psychol., 45–84 (Lerner & Steinberg eds. 2004); William F. Overton, Reasoning, Necessity, and Logic: Developmental Perspectives 1–32 (2d ed. 1990)).

⁴² American Indian/Alaskan Native Youth, *supra* note 40, at 1 (citing Indian Health Focus 2002-2003 Edition, Indian Health Servs., U.S. Dep't of Health Hum. Servs., (2011), available at http://www.ihs.gov/dps/files/IHS-FOCUS_Injuries2002-2003a.pdf; Centers for Disease Control and Prevention. (2014); American Indian and Alaska Native Death Rates Nearly 50 Percent Greater Than Those of Non-Hispanic Whites, Ctr. for Disease Control and Prevention (2014), available at <http://www.cdc.gov/media/releases/2014/p0422-natamerican-deathrate.html>; A Roadmap for Making Native America Safer, Indian Law & Order Comm'n 151 (last updated May 2015), available at <http://www.aisc.ucla.edu/iloc/report/index.html>; Invisible Wounds of War: Psychological and Cognitive Injuries, Their Consequences, and Services to Assist Recovery, Ctr. for Mil. Health Pol'y Network (Tanielian & Jaycox, eds., 2008); Mental Health: Culture, Race, and Ethnicity Supplement to Mental Health: A Report of the Surgeon General, Office of the Surgeon Gen. (1999)).

development and behavior, including prosecuting and sanctioning adolescents as adults, indicate that longer prison sentences do not deter adolescents from breaking the law and may in fact increase recidivism.⁴³ Thus, there are reasons to treat juveniles and youthful offenders different from adults in terms of punishment and deterrence.

Sanctions and punishment—such as detention or imprisonment, placement in juvenile facilities, or placement in halfway houses—may expose juveniles and youthful offenders to other anti-social peers and thus may increase their risk to reoffend. This is especially true for youthful offenders who are either low-risk offenders or not cognitively and psychosocially developed. In addition to exposing them to anti-social peers, these sentences or placements disrupt already established pro-social behaviors, activities, or relationships such as jobs, school, parenting, or religious and cultural observances, and can also increase the risk of reoffending.⁴⁴ This can be particularly harmful to those Native American youth who are removed from close-knit families, delayed in educational progress, and deprived of the traditional, cultural, and spiritual benefits of their community and elders within that community.

As recently as July 2015, the Senate Indian Affairs Committee heard testimony from leaders, educators and experts on juvenile justice issues in Indian country. Indeed, Sen. John Barrasso (R-Wyoming), who chairs the Committee, observed that the reports of the Indian Law and Order Commission and the Attorney General’s Task Force on American Indian and Alaska Native Children Exposed to Violence underscore the simple fact that changes must be made.⁴⁵

⁴³ Steinberg, supra note 39.

⁴⁴ Roger K. Warren, Evidence-Based Practice to Reduce Recidivism: Implications for State Judiciaries, U.S. Dep’t of Justice, Nat’l Inst. of Corrs. 21 (Aug. 2007) (quoting Christopher T. Lowenkamp & Edward J. Latessa, Understanding the Risk Principle: How and Why Correctional Interventions Can Harm Low-Risk Offenders, Nat’l Inst. of Corrs. Ann. Issue (2004)).

⁴⁵ A Roadmap for Making Native America Safer, Indian Law & Order Comm’n (Nov. 2013) [hereinafter Roadmap]; Attorney General’s Advisory Committee on American Indian/Alaska Native Children Exposed to

The TIAG thus recommends efforts to focus on the rehabilitative nature of the juvenile justice system and not abandon those considerations for youthful offenders from Indian country. Research has shown that rehabilitative strategies that address the specific criminogenic needs of youth in the community are less expensive and more effective in preventing reoffending compared with punitive sanctions such as incarceration.⁴⁶

The TIAG recommends greater tribal participation in delinquency decisions, as states have under the Juvenile Delinquency Act.⁴⁷ Alternatives to prosecutions, such as pretrial diversion, ought to be considered for youthful Indian country offenders. Finally, where the Juvenile Delinquency Act does not apply, an adjustment to the Guidelines can address the nature and characteristics of youthful offenders in fashioning more parity and fairness.

B. Recommended Amendment to USSG §5H1.1, Age (Policy Statement)

USSG §5H1.1 currently reads:

Age (including youth) may be relevant in determining whether a departure is warranted, if considerations based on age, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines. Age may be a reason to depart downward in a case in which the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration. Physical condition, which may be related to age, is addressed at §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction).

The TIAG recommends that the Commission consider that the following language be included by way of addition to USSG §5H1.1 guideline or commentary to §5H1.1.

Violence Report: Ending Violence so Children Can Thrive, U.S. Dep't of Just. (Nov. 2014), available at http://www.aisc.ucla.edu/iloc/report/files/A_Roadmap_For_Making_Native_America_Safer-Full.pdf.

⁴⁶ Oversight Hearing on “Juvenile Justice in Indian Country: Challenges and Promising Strategies”, U.S. Sen. Comm. on Indian Affairs (July 15, 2015, 2:15 P.M.), available at <http://www.indian.senate.gov/hearing/oversight-hearing-juvenile-justice-indian-country-challenges-and-promising-strategies>.

⁴⁷ 18. U.S.C. § 5031 et seq.

The youthful age of the defendant may be a reason to depart downward, after consideration of the factors set forth in 18 U.S.C. § 3553(a), in a case in which a sentence of imprisonment or detention may expose the defendant to anti-social peers or may disrupt already established pro-social behaviors, activities, or relationships (e.g., employment, school, positive family involvement, or religious/cultural observances). The mental health of a youthful offender also may be relevant in determining if a departure is warranted as it relates to exposure to violence or trauma as a juvenile or young adult.

C. Recommendation Amendment in Part K – Departures

The TIAG recommends that the Commission consider the following departure be added to

Part K:

§5K2.25 Juvenile and Youthful Offenders (Policy Statement)

A downward departure may be warranted if (1) the defendant is a juvenile or youthful offender; (2) such departure would be consistent with the factors set forth in 18 U.S.C. § 3553(a); and (3) a sentence of imprisonment will disrupt or interfere with established pro-social behaviors, activities, or relationships (employment, education, positive family members, religious/cultural observances).

Commentary

Background: This policy statement recognizes sanctions and punishment such as detention or imprisonment, placement in juvenile facilities, or in placements in halfway houses, exposes juveniles and youthful offenders to other anti-social peers and to their beliefs, and thus may increase their risk to reoffend. This is especially true for youthful offenders who are not cognitively and psychosocially developed and low-risk offenders. In addition to exposing them to anti-social peers, these sentences or placements may disrupt already established pro-social behaviors, activities, or relationships such as jobs, school, parenting, or religious/cultural observances, and can also increase the risk of reoffending.

D. Pretrial Diversion

The TIAG encourages the Commission's support of pretrial diversion programs for youthful/juvenile offenders in Indian country in communications and consultation with the United States Attorney, the AO, and tribal governments. The deleterious effect of felony convictions for youthful offenders contributes to recidivism, poverty, and hopelessness. United States Attorneys who oversee prosecution of offenses in Indian country can screen more Indian country juveniles

and youthful offenders into pretrial diversion as an appropriate sanction. A proposed model pretrial diversion agreement is Appendix G hereto.

E. Alternatives to Incarceration

The TIAG supports the Commission's efforts to encourage the use of alternatives to incarceration and respectfully recommends that the Commission consider the recommendations of the following groups submitted in response to the Commission's request for public comments on possible proposed priorities. Having reviewed Commission data and the recommendations cited below, the TIAG finds that addressing Youthful Offenders more flexibly and with a view toward rehabilitation can impact the criminal justice system positively. This approach shows fidelity to the sentencing factors provided by 18 U.S.C. § 3553, as well as maintains the policies of the Guidelines to promote fair and just sentencing.

1. The Practitioners Advisory Group (PAG) Support of Alternative Sentencing for Youthful Offenders

The TIAG supports the PAG's position on alternatives to incarceration, specifically diversion options, deferred adjudication, community supervision programs, and community based treatment for not only low-risk or first-time offenders, but for youthful offenders. The PAG suggested that:

[T]he Commission collect and distribute information about existing alternative sentencing programs that are designed and intended to result in sentences that do not include prison terms, including community supervision programs, deferred adjudication, deferred sentencing and diversion options, and community-based treatment. Some of these programs, which are currently employed in a few districts, have incorporated into the federal system approaches that have been successfully utilized by state courts. In many instances, defendants entering these programs are diverted from the criminal justice system entirely because the charges against them are dismissed upon successful completion of the program.⁴⁸

⁴⁸ Letter from David Debold, Chair of PAG & Eric A. Tirschwell, Vice Chair of PAG, to Hon. Patti B. Saris, USSC Chair, (July 27, 2015) [hereinafter PAG Letter I] at 10, [available at http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20150727/PAG.pdf](http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20150727/PAG.pdf).

The PAG referenced *United States v. Leitch*,⁴⁹ which described two programs established in the Eastern District of New York, and stated the following:

The opinion notes that other programs have been initiated by courts in California, Connecticut, Illinois, South Carolina, Washington and others. These programs were developed through collaborations among representatives from the U.S. District Courts, U.S. Attorney's Office, Federal Defenders and Pretrial Services. The PAG suggests that the Commission recommend that every district implement or at least consider developing similar programs.⁵⁰

Based on the youthful age of many offenders who are sentenced from Indian Country, these considerations could significantly impact the sentencing of youthful Native Americans. Finally, the PAG also encouraged “the Commission to consider guideline amendments to provide for noncustodial sentences when appropriate, especially within Zones A and B. In the past, the Commission has noted that a significant percentage of offenders in Zones A and B do not receive the non-custodial sentences for which they are eligible.”⁵¹

2. The Probation Officers' Advisory Group (POAG) Recommendations for Simplifying the Guidelines and Allowing Greater Sentencing Options for Youthful Offenders

The TIAG also encourages the Commission to consider the POAG's recommendation to promote greater simplicity of the Guidelines as well as the use of alternative sentencing options. Many of the factors noted by the POAG to encourage the use of alternatives to incarceration apply to the youthful offenders identified by the TIAG. The POAG addressed the impact of relatively short periods of incarceration and detention for low-risk offenders, citing disruptions in their “already established pro-social behaviors, activities, or relationships (such as jobs, school,

⁴⁹ Nos. 11-CR-00609 (JG), 11-CR-00457 (JG), 11-CR-00039 (JG), 2013 WL 753445 (E.D.N.Y. Feb. 28, 2013).

⁵⁰ PAG Letter I, *supra* note 48 at 10.

⁵¹ *Id.* at 11.

parenting, or religious observances) as well as exposing them to anti-social attitudes” and peers.⁵²

The TIAG joins the POAG’s recommendation that the Commission consider simplifying the Sentencing Table to a two-zone system. Specifically, the recommendation, which is somewhat similar to that outlined by the PAG:

It is respectfully recommended that the Commission consider simplifying the Sentencing Table to a two-zone system. Within the new Zone B (current Zone D), there would be no changes to current operation. . . . The new Zone A, however, would encompass current Zones A-C and would authorize imposition of a probationary term anywhere in the zone. Probation could be imposed alone or in combination with any of the sentencing alternatives that exist within current Zones B and C.⁵³

Furthermore:

POAG believes that the Commission should consider expanding judicial authority to impose probation-only dispositions. By providing more judicial discretion within a two-zone system, courts would have increased flexibility to use an array of alternatives to incarceration and tailor those sentences commensurate with the risks presented. A system of this nature could have an impact on the number of offenders who are incarcerated within the Federal Bureau of Prisons and increase the number of sentences imposed within the guideline system.⁵⁴

Ultimately, the TIAG feels this will provide sentencing courts with flexibility to impose a guideline probation sentence based on the sentencing factors outlined in 18 U.S.C. § 3553(a)—including the personal history and characteristics previously outlined as they relate to Native American offenders.

⁵² Letter from PAG to Hon. Patti B. Saris, USSC Chair (July 17, 2015) at 4, [available at](http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20150727/POAG.pdf) <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20150727/POAG.pdf>.

⁵³ *Id.* at 5.

⁵⁴ *Id.* at 6.

3. The Campaign for the Fair Sentencing of Youth (CFSY), the Federal Bar Council (FBC) and the New York Council of Defense Lawyers (NYCDL) Recommendations for Revisions of the Guidelines Regarding Youthful Offenders

The TIAG also supports the public comment provided by CFSY, FBC, NYCDL regarding requests made to the Commission to update the Guidelines as they pertain to youth—specifically juveniles who have been transferred to adult court and subject to the Sentencing Guidelines. Guidance, in the form of commentary or amendments to the Guidelines, by the Commission to sentencing courts, prosecutors, and defense counsel on how age-related mitigating factors should be considered at the time of sentencing would benefit youthful offenders nationally, and particularly in Indian Country.

The CFSY, noted that:

[It] believes it is critical for the U.S. Sentencing Commission to address the role of the Sentencing Guidelines in circumstances where youth are convicted of crimes as adults. Both judges and prosecutors utilize the Sentencing Guidelines in making decisions that have long-term implications for both defendants and the community. Judges, prosecutors, and youthful defendants would all benefit from guidance as to how judges should properly consider age-related mitigating factors at the time of sentencing. Therefore, the Campaign for the Fair Sentencing of Youth respectfully request that the Commission revise the Sentencing Guidelines to account for the ways in which youth differ from adults and the means by which judges should consider these differences at sentencing. Alternatively, the Commission should explicitly preclude application of the Sentencing Guidelines to individuals who committed offenses while under age eighteen.⁵⁵

The FBC, in support of the NYCDL urged the Commission to reexamine how to “properly account for youth during sentencing and to determine, after thorough study, whether it is most appropriate to (a) meaningfully incorporate youth into the current Guidelines, (b) develop separate

⁵⁵ Letter from Jody Kent Lavy, Dir. & Nat'l Coord. for CFSY, to Chief Judge Patti B. Saris, USSC Chair (July 27, 2015) at 4, [available at](http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20150727/CFSY.pdf) <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20150727/CFSY.pdf>.

guidelines formulated specifically for juvenile offenders, or (c) declare juvenile offenders to be outside the scope of the guidelines regime entirely.”⁵⁶

F. TLOA Implementation and Extension to Juveniles

TIAG supports the Commission’s continued efforts to implement the provisions of TLOA. In the TLOA report, the Indian Law and Order Commission devoted an entire chapter to juvenile justice, introducing the subject with the following grim statement:

Indian country juvenile justice exposes the worst consequences of our broken Indian country justice system. At the same time, juvenile justice illustrates the fundamental point and promise of this report—greater Tribal freedom to set justice priorities, supported by resources at parity with other systems and full protection of Federal civil rights of all U.S. citizens, will produce a better future for Indian country and, importantly, for Native youth.⁵⁷

These findings are consistent with other reports—both recent and decades old: “Native youth are among the most vulnerable group of children in the United States.”⁵⁸ While many recommendations center on the need to recognize and empower tribal authority over Native youth, amendment of the Juvenile Delinquency Act must occur to accomplish this goal. The TIAG’s suggested amendments to the Juvenile Delinquency Act carry no funding requirement and establish a federal-tribal working relationship involving juveniles that the federal government already has with states.

Section 5032 requires that federal prosecutors certify, prior to proceeding against a juvenile, that they have consulted with state authorities and that (1) the state does not have jurisdiction or refuses to assume jurisdiction; (2) the state does “not have available programs and

⁵⁶ Letter from Villa B. Hayes, President of FBC, to Hon. Patti B. Saris, USSC Chair (June 26, 2015) at 3, available at <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20150727/FBC.pdf>.

⁵⁷ Roadmap, *supra* note 45, at 149.

⁵⁸ Id. at 149–151.

services adequate for the needs of juveniles,” or (3) the offense is a serious drug crime or crime of violence, such that there is a federal interest in assuming federal jurisdiction. There is no similar deference given to tribes, although states exercising PL-280 jurisdiction in Indian country would be entitled to such consultation whether the offender is Native American or not. In non-PL-280 states, the federal government has primary authority for prosecuting felony crimes and serious juvenile offenses where an Indian victim and/or perpetrator are involved.⁵⁹ States have no jurisdiction, so the first two requirements of § 5032 are irrelevant. Only when the federal government seeks to transfer a juvenile under the age of 15 for prosecution as an adult must a tribe “opt in.” The exclusion of tribes from consultation under the Juvenile Delinquency Act prior to prosecuting juveniles ought to change.

TIAG requests that the Commission make a recommendation to Congress that § 5032 be amended as follows:

A juvenile alleged to have committed an act of juvenile delinquency, other than a violation of law committed within the special maritime and territorial jurisdiction of the United States for which the maximum authorized term of imprisonment does not exceed six months, shall not be proceeded against in any court of the United States unless the Attorney General, after investigation, certifies to the appropriate district court of the United States that (1) the State or, if applicable, Indian tribe does not have jurisdiction over said juvenile with respect to such alleged act of juvenile delinquency; or (2) the State or Indian tribe where it has jurisdiction over the juvenile does not have available programs and services adequate for the needs of juveniles; or (3) the offense charged is a crime of violence that is a felony or an offense described in section 401 of the Controlled Substances Act . . . or the Controlled Substances Import and Export Act . . . and there is a substantial Federal interest in the case or the offense to warrant the exercise of Federal jurisdiction, when an Indian tribe has jurisdiction, the Attorney General must certify that the Attorney General has sought the guidance of the appropriate prosecuting authorities of the tribe of which the juvenile is a member or over which the tribe has custody. If the Attorney General does not so certify such juvenile shall be surrendered to the appropriate legal authorities of the Indian Tribe of which the juvenile is a citizen or the Tribe has custody or to the State if it has jurisdiction over the juvenile.

⁵⁹ See 18 U.S.C. §§ 1152–1153.

CONCLUSION

The TIAG membership appreciates the Commission's interest in exploring ways to improve federal court sentencing of Native American defendants. The TIAG believes that adoption of the recommendations contained in this Report would enhance the administration of justice in Indian country.

APPENDICES

- A – List of TIAG Members and Brief Biographies
- B – Tribal Consultation Announcement
- C – Presidential Memorandum on Tribal Consultation and Executive Order 13175
- D – Letters from Judge Myron H. Bright
- E – Minnesota Case Study
- F – Sentencing Data
- G – Sample Pretrial Diversion Form

Appendix A

U.S. Sentencing Commission

Tribal Issues Advisory Group Members

Chair

Hon. Ralph Erickson
Chief U.S. District Judge
District of North Dakota

Judicial Appointees

Hon. Diane Humetewa (Hopi)
U.S. District Judge
District of Arizona

Hon. Roberto Lange
U.S. District Judge
District of South Dakota

Hon. Brian Morris
U.S. District Judge
District of Montana

Hon. Jeffrey Viken
Chief U.S. District Judge
District of South Dakota

Department of the Interior Appointee

Eric Shepard
Associate Solicitor
Division of Indian Affairs

Department of Justice Appointees

Hon. Michael Cotter
U. S. Attorney
District of Montana

Tracy Toulou (descendant of the Colville Confederated Tribes)
Director
Office of Tribal Justice

Federal and Community Public Defenders Appointee

Neil Fulton
Federal Defender
Districts of North and South Dakota

Standing Advisory Group Liaisons (Non-Voting)

Angela Campbell
Practitioners Advisory Group Liaison

Lori Baker
Probation Officers Advisory Group Liaison

T. Michael Andrews
Victims Advisory Group Liaison

At-Large Members

Dave Archambault II (Standing Rock Sioux)
Chairman
Standing Rock Sioux

Judge Robert Blaeser (White Earth Nation)
Chief Judge
White Earth Nation

Kathleen Bliss Quasula (Cherokee Nation)
Kathleen Bliss Law Group, PLLC
Commissioner for Nevada Indian Commission

Judge William Boyum (Eastern Band of Cherokee Indians)
Chief Justice
Cherokee Supreme Court

Wendy Bremner (Confederated Tlingit and Haida Indian Tribes of Alaska and descendant of the Blackfeet Nation)
Victim Specialist
Bureau of Indian Affairs

Barbara Creel (Pueblo Jemez)
Professor of Law, University of New Mexico School of Law
Director, Southwest Indian Law Clinic

Troy Eid
Shareholder
Greenburg Traurig LLP

Miriam Jorgenson, Ph.D.
Professor Public Policy, University of Arizona
Research Director, Native Nations Institute

Brent Leonhard
Tribal Attorney
Confederated Tribes of the Umatilla Indian Reservation

Edward Reina (Salt River Pima Indian Community)
Director, Public Safety (retired)
Tohono O'odham Nation

Honorable Kevin Washburn (Chickasaw)
Professor of Law
University of New Mexico School of Law

*The TIAG also recognizes the prior membership and dedication of Rick Holloway (Probation Officers Advisory Group Liaison) and Mike Berrigan (Department of the Interior), whose combined service to the TIAG was invaluable.



These photographs capture the TIAG members during meetings and presentations on the Standing Rock Sioux Reservation (October 2015) and the Pascua Yaqui Reservation (February 2016).

Appendix B

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



Voting Members

Chairman Dave Archambault II
Mike Berrigan
Honorable Robert Blaesus
Honorable William Boyum
Wendy Bremner
Honorable Michael Cotter
Barbara Creel
Troy Eid
Neil Fulton
Honorable Diane Humetewa

Miriam Jorgenson, Ph.D.
Honorable Roberto Lange
Brent Leonhard
Honorable Brian Morris
Kathleen Bliss Quasula
Edward Reina
Director Tracy Toulou
Honorable Jeffrey Viken
Honorable Kevin Washburn

July 2, 2015

Dear Tribal Leader,

Earlier this year, the United States Sentencing Commission announced the formation of a Tribal Issues Advisory Group (TIAG) which will consider methods to improve the operation of the federal sentencing guidelines as they relate to American Indian and Alaska Native defendants, victims, and tribal communities.

As part of its work, the TIAG will examine several topics such as whether disparities exist in the application of federal sentencing guidelines to defendants from tribal communities, or in the sentences received by such defendants as compared to similarly situated state defendants. The group will also examine whether the guidelines should be changed to better account for tribal court convictions, tribal court orders of protection, youthful offenders, or child victims. Finally, the TIAG will consider how the Commission should engage with tribal communities in an ongoing manner, and how to better facilitate communication and relationship-building among federal and tribal representatives in the sentencing process. The TIAG will report to the Commission on its findings and recommendations no later than May 16, 2016.

The Commission invites you to consult with the TIAG about the scope and specifics of its work on these subjects. The attached framing paper provides additional background on the Commission, the federal sentencing guidelines, and topics relevant to the sentencing of defendants from American Indian and Alaska Native tribes.

The telephonic consultation will occur on **Thursday, August 13, 2015, at 2:00 p.m. EDT**. To register and receive call-in information, please send an email with your name and Tribal affiliation to consultation@ussc.gov. In addition, the Commission will accept written comments until the close of business on **Monday, August 31, 2015**. Written comments can be submitted via email to consultation@ussc.gov or (if necessary) via regular mail to:

U.S. Sentencing Commission
Office of Legislative and Public Affairs
One Columbus Circle NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

If you have any questions about the consultation, or if you have trouble with registration or submitting comments, please contact the Commission's Public Affairs Officer, Jeanne Doherty, at 202-502-4502 or jdoherty@ussc.gov.

I hope that you will be able to participate in this important government-to-government consultation, and I look forward to working with you on these important issues.

Very truly yours,

A handwritten signature in black ink that reads "Ralph R. Erickson". The signature is written in a cursive style with a long, sweeping horizontal line extending to the right.

Ralph R. Erickson
Chief Judge, District of North Dakota
Chair, Tribal Issues Advisory Group

**TRIBAL CONSULTATION ON THE WORK OF THE
U.S. SENTENCING COMMISSION'S TRIBAL ISSUES ADVISORY GROUP,
RELATING TO THE IMPACT OF FEDERAL SENTENCING GUIDELINES ON
DEFENDANTS FROM TRIBAL COMMUNITIES**

Background on the Commission and the Sentencing Guidelines

The United States Sentencing Commission (Commission) is an independent agency in the judicial branch. Its principal purposes are: (1) to establish sentencing policies and practices for the federal courts, including guidelines to be consulted regarding the appropriate form and severity of punishment for offenders convicted of federal crimes; (2) to advise and assist Congress and the executive branch in the development of effective and efficient crime policy; and (3) to collect, analyze, research, and distribute a broad array of information on federal crime and sentencing issues, serving as an information resource for Congress, the executive branch, the courts, criminal justice practitioners, the academic community, and the public.

The U.S. Sentencing Commission was created by the Sentencing Reform Act provisions of the Comprehensive Crime Control Act of 1984. The sentencing guidelines established by the Commission are designed to:

- incorporate the purposes of sentencing (i.e., just punishment, deterrence, incapacitation, and rehabilitation);
- provide certainty and fairness in meeting the purposes of sentencing by avoiding unwarranted disparity among offenders with similar characteristics convicted of similar criminal conduct, while permitting sufficient judicial flexibility to take into account relevant aggravating and mitigating factors;
- reflect, to the extent practicable, advancement in the knowledge of human behavior as it relates to the criminal justice process.

How the Guidelines Work

The sentencing guidelines take into account both the severity of the offense and the defendant's criminal record to assign a guideline range for a criminal sentence. The guideline range is determined by consideration of several factors unique to the crime (to determine the "offense level") and the defendant (to determine the "criminal history category"). Using the Sentencing Table, a copy of which is attached to this paper, the intersection of the defendant's offense level and criminal history category will determine the applicable guideline range in a criminal case. The Supreme Court of the United States has stated that the guidelines must serve as "the starting point and initial benchmark" for the sentencing of a federal defendant.

A judge may depart upward or downward from the guideline range if the judge determines that the range fails to adequately meet the purposes of sentencing, and after consideration of several statutory factors set forth in 18 U.S.C. § 3553(a), namely: (1) the nature and circumstances of the offense, and the history and characteristics of the defendant; (2) the purposes of sentencing; (3) the kinds of sentences available; (4) the sentencing guidelines; (5) the guideline policy

statements; (6) avoiding unwarranted sentencing disparities; and (7) the need to provide restitution.

The Tribal Issues Advisory Group

Under the Sentencing Reform Act, the Commission is charged with the ongoing responsibilities of evaluating the effects of the sentencing guidelines on the criminal justice system, recommending to Congress appropriate modifications of substantive criminal law and sentencing procedures, and establishing a research and development program on sentencing issues.

As part of those duties, in February 2015, the Commission announced the formation of a Tribal Issues Advisory Group (TIAG), to consider methods to improve the operation of the federal sentencing guidelines as they relate to American Indian and Alaska Native defendants, victims, and tribal communities.

The TIAG is comprised of 23 individuals, including representation from a number of tribal nations. The membership includes five federal judges, two appointees each from the Department of Justice (DOJ) and Department of the Interior (DOI), a Federal Defender representative, a tribal Chairman, two tribal judges, a tribal prosecutor, a tribal victim specialist, a former tribal law enforcement leader, and several academics and practitioners of Indian law. In addition, each of the Commission's standing advisory groups has designated a non-voting liaison to the TIAG. The complete list of TIAG members is attached to this paper.

As part of its work, the TIAG will examine several topics such as:

- whether disparities exist in the application of federal sentencing guidelines to defendants from tribal communities, or in the sentences received by such defendants as compared to similarly situated state defendants;¹
- whether the guidelines should be changed to better account for certain factors such as:
 - a defendant's frequency and severity of prior tribal court convictions;
 - whether the crime was committed while the defendant was subject to a tribal court order of protection;
 - the age of the defendant, with special attention on youthful offenders;
 - whether the crime involved a child victim;
- how the Commission should engage with tribal communities in an ongoing manner, and how to better facilitate communication and relationship-building among federal and tribal representatives in the federal sentencing process.

The TIAG will consider and develop Commission data on the sentencing of Native American defendants as part of its study. As background, a recent Commission publication on this topic is attached to this paper.

¹ To ascertain whether such disparities exist, and the extent of those disparities, the TIAG will analyze sentencing data from the following state jurisdictions: Minnesota, North Dakota, Oregon, and South Dakota. Despite high numbers of federal cases involving Native American defendants in other states, such as Arizona and New Mexico, data from those jurisdictions is either unavailable or unusable for purposes of this study, because those states do not record certain necessary demographic information, including race.

The TIAG must report to the Commission on its findings and recommendations no later than May 16, 2016. The TIAG now seeks tribal input to inform its work on the topics listed above, and other topics relevant to the impact of the federal sentencing guidelines on defendants from tribal communities.

SENTENCING TABLE

(in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points)					
	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
Zone A	1	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	0-6	2-8
	4	0-6	0-6	0-6	2-8	4-10
	5	0-6	0-6	1-7	4-10	6-12
	6	0-6	1-7	2-8	6-12	9-15
	7	0-6	2-8	4-10	8-14	12-18
	8	0-6	4-10	6-12	10-16	15-21
Zone B	9	4-10	6-12	8-14	12-18	18-24
	10	6-12	8-14	10-16	15-21	21-27
	11	8-14	10-16	12-18	18-24	24-30
Zone C	12	10-16	12-18	15-21	21-27	27-33
	13	12-18	15-21	18-24	24-30	30-37
	14	15-21	18-24	21-27	27-33	33-41
	15	18-24	21-27	24-30	30-37	37-46
	16	21-27	24-30	27-33	33-41	41-51
	17	24-30	27-33	30-37	37-46	46-57
	18	27-33	30-37	33-41	41-51	51-63
	19	30-37	33-41	37-46	46-57	57-71
	20	33-41	37-46	41-51	51-63	63-78
	21	37-46	41-51	46-57	57-71	70-87
	22	41-51	46-57	51-63	63-78	77-96
	23	46-57	51-63	57-71	70-87	84-105
	24	51-63	57-71	63-78	77-96	92-115
	25	57-71	63-78	70-87	84-105	100-125
	26	63-78	70-87	78-97	92-115	110-137
	27	70-87	78-97	87-108	100-125	120-150
Zone D	28	78-97	87-108	97-121	110-137	130-162
	29	87-108	97-121	108-135	121-151	140-175
	30	97-121	108-135	121-151	135-168	151-188
	31	108-135	121-151	135-168	151-188	168-210
	32	121-151	135-168	151-188	168-210	188-235
	33	135-168	151-188	168-210	188-235	210-262
	34	151-188	168-210	188-235	210-262	235-293
	35	168-210	188-235	210-262	235-293	262-327
	36	188-235	210-262	235-293	262-327	292-365
	37	210-262	235-293	262-327	292-365	324-405
	38	235-293	262-327	292-365	324-405	360-life
	39	262-327	292-365	324-405	360-life	360-life
	40	292-365	324-405	360-life	360-life	360-life
	41	324-405	360-life	360-life	360-life	360-life
	42	360-life	360-life	360-life	360-life	360-life
	43	life	life	life	life	life

U.S. Sentencing Commission
Tribal Issues Advisory Group Members

CHAIR

Honorable Ralph Erickson

Chief U.S. District Judge, District of North Dakota

JUDICIAL APPOINTEES

Honorable Diane Humetewa (Hopi)

U.S. District Judge, District of Arizona

Honorable Roberto Lange

U.S. District Judge, District of South Dakota

Honorable Brian Morris

U.S. District Judge, District of Montana

Honorable Jeffrey Viken

Chief U.S. District Judge, District of South Dakota

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Associate Solicitor for DOI, Division of Indian Affairs

Honorable Kevin Washburn (Chickasaw)

Assistant Secretary for Indian Affairs

DEPARTMENT OF JUSTICE APPOINTEES

Honorable Michael Cotter

United States Attorney, District of Montana

Tracy Toulou (descendant of the Colville Confederated Tribes)

Director of the Office of Tribal Justice

FEDERAL PUBLIC AND COMMUNITY DEFENDER APPOINTEE

Neil Fulton

Federal Defender for South and North Dakota

AT-LARGE MEMBERS

Dave Archambault II (Standing Rock Sioux)

Chairman, Standing Rock Sioux

Honorable Robert Blaeser (White Earth Nation)

Chief Judge, White Earth Nation

Kathleen Bliss Quasula (Cherokee Nation)

Partner, Lewis Brisbois Brisgard & Smith LLP
Commissioner for Nevada Indian Commission

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Bureau of Indian Affairs, Victim Specialist

Barbara Creel (Pueblo Jemez)

Professor of Law, University of New Mexico School of Law
Director, Southwest Indian Law Clinic

Troy Eid

Shareholder, Greenburg Traurig LLP

Miriam Jorgenson, Ph.D.

Professor Public Policy, University of Arizona
Research Director, Native Nations Institute

Brent Leonhard

Tribal Attorney, Confederated Tribes of the Umatilla Indian Reservation

Edward Reina (Salt River Pima Indian Community)

Director, Public Safety Tohono O'odham (retired)

STANDING ADVISORY GROUP LIAISONS (NON-VOTING)

Angela Campbell

Practitioners Advisory Group Liaison

Rick Holloway

Probation Officers Advisory Group Liaison

T. Michael Andrews

Victims Advisory Group Liaison

▶ THERE WERE 75,836 CASES REPORTED TO THE UNITED STATES SENTENCING COMMISSION IN FISCAL YEAR 2014.

▶ OF THESE CASES, 1,316 INVOLVED NATIVE AMERICAN OFFENDERS.

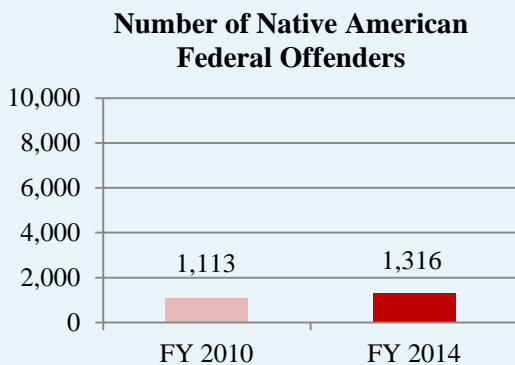
▶ NATIVE AMERICANS ACCOUNTED FOR 1.9% OF ALL OFFENDERS AND 4.9% OF UNITED STATES CITIZEN OFFENDERS.

Quick Facts



Native Americans in the Federal Offender Population

Native American offenders account for a small, but increasing portion of federal offenders. The number of Native American offenders has increased by 18.2% over the last five years.



Offender and Offense Characteristics

- In fiscal year 2014, most Native American offenders were male (78.6%).
- Almost all Native American offenders (99.6%) were United States citizens.
- The average age of these offenders at sentencing was 35 years.
- Almost half of Native American offenders (45.7%) had little or no prior criminal history (i.e., assigned to Criminal History Category I)¹. The proportion of Native American offenders in other Criminal History Categories was as follows:
 - ◆ 14.9% of these offenders were in Category II;
 - ◆ 17.6% were in Category III;
 - ◆ 8.2% were in Category IV;
 - ◆ 5.2% were in Category V; and,
 - ◆ 8.4% were in Category VI.
- Districts with the highest proportion of their overall caseload comprising Native American offenders were:
 - ◆ District of South Dakota (56.5% of overall caseload);
 - ◆ District of Montana (32.9%);
 - ◆ Eastern District of Oklahoma (26.1%);
 - ◆ District of North Dakota (18.0%); and,
 - ◆ Northern District of Oklahoma (12.6%).
- Weapons were involved in 19.3% of offenses involving Native American offenders, compared to 8.4% of all cases in fiscal year 2014.

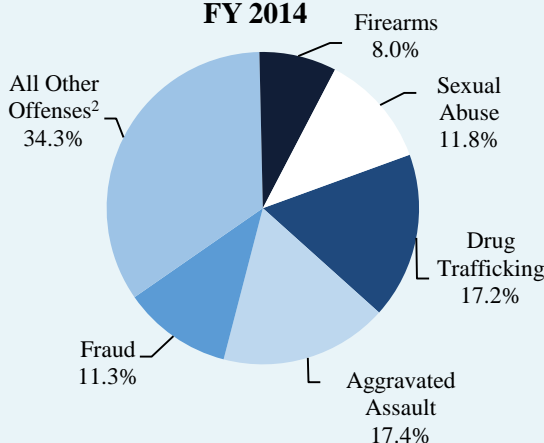
Punishment

- The majority of Native American offenders were sentenced to imprisonment (88.1%), which is slightly lower than the rate for all offenders in fiscal year 2013 (89.2%).
- Native American offenders were convicted of an offense carrying a mandatory minimum penalty at almost half the rate (11.2%) of offenders as a whole (21.9%).
- The average sentence length for Native American offenders was 51 months, compared to 47 months for offenders generally, and 60 months for all United States citizens.
 - ◆ The average sentence length for Native Americans convicted of an offense carrying a mandatory minimum penalty was 132 months.
 - ◆ The average sentence length for Native Americans not convicted of an offense carrying a mandatory minimum penalty was 41 months.

Top Five Districts Native American Federal Offenders FY 2014

District of South Dakota (N=293)
District of Arizona (N=272)
District of New Mexico (N=105)
District of Montana (N=99)
District of North Dakota (N=60)

Most Common Offenses Native American Federal Offenders FY 2014



¹ Tribal offenses are not counted in determining the criminal history score under the sentencing guidelines. See USSG §4A1.2(i).

² No other type of offense accounted for more than 3% of all offenses.

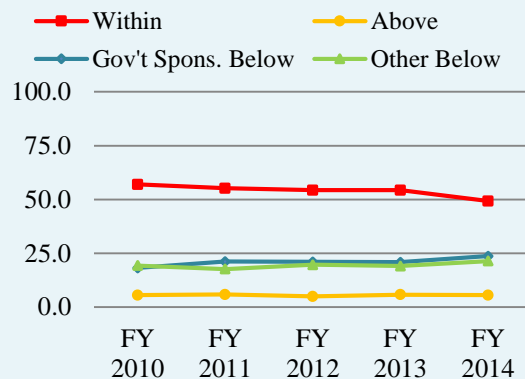
Quick Facts

Native Americans in the Federal Offender Population

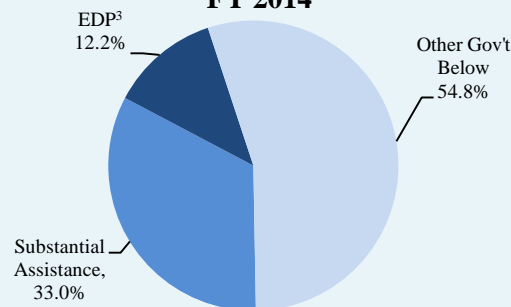
Sentences Relative to the Guideline Range

- The rate of within range sentences for Native American offenders has steadily decreased over the last five years (57.0% in fiscal year 2010 decreasing to 49.3% in fiscal year 2014).
- The rate of government sponsored below range sentences has increased over the last five years (from 18.2% in fiscal year 2010 to 23.7% in fiscal year 2014).
 - ◆ Substantial assistance departures were granted in 7.8% of cases involving Native American offenders in fiscal year 2014. This represents 33.0% of all government sponsored below range sentences for these offenders.
 - In fiscal year 2014, these offenders received an average reduction in their sentence of 54.2%.
 - ◆ Native American offenders received a below range sentence sponsored by the government for reasons other than substantial assistance or participation in an Early Disposition Program³ in 13.0% of cases in fiscal year 2014.
 - In fiscal year 2014, these offenders received an average reduction in their sentence of 47.7%.
- The percentage of Native American offenders that received a non-government sponsored below range sentence increased over the last five years (from 19.3% of these cases in fiscal year 2010 to 21.4% in fiscal year 2014).
 - ◆ In fiscal year 2014, these offenders received an average reduction in their sentence of 44.8%.
- The average guideline minimum for offenses involving Native American offenders has increased over the last five years, from 58 months in fiscal year 2010 to 60 months in fiscal year 2014.
- The average sentence imposed on Native American offenders has slightly decreased over the last five years, from 54 months in fiscal year 2010 to 51 months in fiscal year 2014.

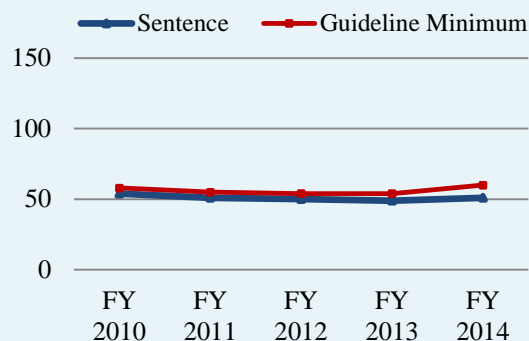
Sentence Relative to the Guideline Range



Government Sponsored Below Range Sentences FY 2014



Average Sentence and Average Guideline Minimum (in months)



³“Early Disposition Program (or EDP) departures” are departures where the government sought a sentence below the guideline range because the defendant participated in the government’s Early Disposition Program, through which cases are resolved in an expedited manner. See USSG §5K3.1.

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Appendix C

the *WHITE HOUSE* PRESIDENT BARACK OBAMA



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The White House

For Immediate Release

November 05, 2009

Presidential Memorandum on Tribal Consultation

THE WHITE HOUSE

Office of the Press Secretary

For Immediate

Release

November 5, 2009

**MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND
AGENCIES**

SUBJECT: Tribal Consultation

The United States has a unique legal and political relationship with Indian tribal governments, established through and confirmed by the Constitution of the United States, treaties, statutes, executive orders, and judicial decisions. In recognition of that special relationship, pursuant to Executive Order 13175 of November 6, 2000, executive departments and agencies (agencies) are charged with engaging in regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, and are responsible for strengthening the government-to-government relationship between the United States and Indian tribes.

History has shown that failure to include the voices of tribal officials in formulating policy affecting their communities has all too often led to undesirable and, at times, devastating and tragic results. By contrast, meaningful dialogue between Federal officials and tribal officials has greatly improved Federal policy toward Indian tribes. Consultation is a critical ingredient of a sound and productive Federal-tribal relationship.

My Administration is committed to regular and meaningful consultation and collaboration with tribal officials in policy decisions that have tribal implications including, as an initial step, through complete and consistent implementation of Executive Order 13175. Accordingly, I hereby direct each agency head to submit to the Director of the Office of Management and Budget (OMB), within 90 days after the date of this memorandum, a detailed plan of actions the agency will take to implement the policies and directives of Executive Order 13175. This plan shall be developed after consultation by the agency with Indian tribes and tribal officials as defined in Executive Order 13175. I also direct each agency head to submit to the Director of the OMB, within 270 days after the date of this memorandum, and annually thereafter, a progress report on the status of each action included in its plan together with any proposed updates to its plan.

Each agency's plan and subsequent reports shall designate an appropriate official to coordinate implementation of the plan and preparation of progress reports required by this memorandum. The Assistant to the President for

Domestic Policy and the Director of the OMB shall review agency plans and subsequent reports for consistency with the policies and directives of Executive Order 13175.

In addition, the Director of the OMB, in coordination with the Assistant to the President for Domestic Policy, shall submit to me, within 1 year from the date of this memorandum, a report on more (OVER) 2 the implementation of Executive Order 13175 across the executive branch based on the review of agency plans and progress reports. Recommendations for improving the plans and making the tribal consultation process more effective, if any, should be included in this report.

The terms "Indian tribe," "tribal officials," and "policies that have tribal implications" as used in this memorandum are as defined in Executive Order 13175.

The Director of the OMB is hereby authorized and directed to publish this memorandum in the Federal Register.

This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person. Executive departments and agencies shall carry out the provisions of this memorandum to the extent permitted by law and consistent with their statutory and regulatory authorities and their enforcement mechanisms.

BARACK OBAMA



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Statement on Signing the Executive Order on Consultation and Coordination With Indian Tribal Governments

November 6, 2000

Today I am pleased to sign a revised Executive order on consultation with Indian tribal governments. This Executive order, itself based on consultation, will renew my administration's commitment to tribal sovereignty and our government-to-government relationship.

The first Americans hold a unique place in our history. Long before others came to our shores, the first Americans had established self-governing societies. Among their societies, democracy flourished long before the founding of our Nation. Our Nation entered into treaties with Indian nations, which acknowledged their right to self-government and protected their lands. The Constitution affirms the United States' government-to-government relationship with Indian tribes both in the Commerce Clause, which establishes that "the Congress shall have the Power To . . . regulate commerce . . . with the Indian Tribes," and in the Supremacy Clause, which ratifies the Indian treaties that the United States entered into prior to 1787.

Indian nations and tribes ceded lands, water, and mineral rights in exchange for peace, security, health care, and education. The Federal Government did not always live up to its end of the bargain. That was wrong, and I have worked hard to change that by recognizing the importance of tribal sovereignty and government-to-government relations. When I became the first President since James Monroe to invite the leaders of every tribe to the White House in April 1994, I vowed to honor and respect tribal sovereignty. At that historic meeting, I issued a memorandum directing all Federal agencies to consult with Indian tribes before making decisions on matters affecting American Indian and Alaska Native peoples.

Today, there is nothing more important in Federal-tribal relations than fostering true government-to-government relations to empower American Indians and Alaska Natives to improve their own lives, the lives of their children, and the generations to come. We

must continue to engage in a partnership, so that the first Americans can reach their full potential. So, in our Nation's relations with Indian tribes, our first principle must be to respect the right of American Indians and Alaska Natives to self-determination. We must respect Native Americans' rights to choose for themselves their own way of life on their own lands according to their time honored cultures and traditions. We must also acknowledge that American Indians and Alaska Natives must have access to new technology and commerce to promote economic opportunity in their homelands.

Today, I reaffirm our commitment to tribal sovereignty, self-determination, and self-government by issuing this revised Executive order on consultation and coordination with Indian tribal governments. This Executive order builds on prior actions and strengthens our government-to-government relationship with Indian tribes. It will ensure that all Executive departments and agencies consult with Indian tribes and respect tribal sovereignty as they develop policy on issues that impact Indian communities.

**Executive Order 13175—
Consultation and Coordination
With Indian Tribal Governments**

November 6, 2000

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, to strengthen the United States government-to-government relationships with Indian tribes, and to reduce the imposition of unfunded mandates upon Indian tribes; it is hereby ordered as follows:

Section 1. Definitions. For purposes of this order:

(a) "Policies that have tribal implications" refers to regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution

of power and responsibilities between the Federal Government and Indian tribes.

(b) "Indian tribe" means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a.

(c) "Agency" means any authority of the United States that is an "agency" under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(5).

(d) "Tribal officials" means elected or duly appointed officials of Indian tribal governments or authorized intertribal organizations.

Sec. 2. Fundamental Principles. In formulating or implementing policies that have tribal implications, agencies shall be guided by the following fundamental principles:

(a) The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. The Federal Government has enacted numerous statutes and promulgated numerous regulations that establish and define a trust relationship with Indian tribes.

(b) Our Nation, under the law of the United States, in accordance with treaties, statutes, Executive Orders, and judicial decisions, has recognized the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory. The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, tribal trust resources, and Indian tribal treaty and other rights.

(c) The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination.

Sec. 3. Policymaking Criteria. In addition to adhering to the fundamental principles set forth in section 2, agencies shall adhere, to the extent permitted by law, to the following

criteria when formulating and implementing policies that have tribal implications:

(a) Agencies shall respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.

(b) With respect to Federal statutes and regulations administered by Indian tribal governments, the Federal Government shall grant Indian tribal governments the maximum administrative discretion possible.

(c) When undertaking to formulate and implement policies that have tribal implications, agencies shall:

- (1) encourage Indian tribes to develop their own policies to achieve program objectives;
- (2) where possible, defer to Indian tribes to establish standards; and
- (3) in determining whether to establish Federal standards, consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes.

Sec. 4. Special Requirements for Legislative Proposals. Agencies shall not submit to the Congress legislation that would be inconsistent with the policymaking criteria in Section 3.

Sec. 5. Consultation. (a) Each agency shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications. Within 30 days after the effective date of this order, the head of each agency shall designate an official with principal responsibility for the agency's implementation of this order. Within 60 days of the effective date of this order, the designated official shall submit to the Office of Management and Budget (OMB) a description of the agency's consultation process.

(b) To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications, that imposes substantial direct compliance costs on Indian tribal governments, and that is not required by statute, unless:

- (1) funds necessary to pay the direct costs incurred by the Indian tribal government or the tribe in complying with the regulation are provided by the Federal Government; or
 - (2) the agency, prior to the formal promulgation of the regulation,
 - (A) consulted with tribal officials early in the process of developing the proposed regulation;
 - (B) in a separately identified portion of the preamble to the regulation as it is to be issued in the *Federal Register*, provides to the Director of OMB a tribal summary impact statement, which consists of a description of the extent of the agency's prior consultation with tribal officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and
 - (C) makes available to the Director of OMB any written communications submitted to the agency by tribal officials.
- (c) To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications and that preempts tribal law unless the agency, prior to the formal promulgation of the regulation,
- (1) consulted with tribal officials early in the process of developing the proposed regulation;
 - (2) in a separately identified portion of the preamble to the regulation as it is to be issued in the *Federal Register*, provides to the Director of OMB a tribal summary impact statement, which consists of a description of the extent of the agency's prior consultation with tribal officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and
 - (3) makes available to the Director of OMB any written communications submitted to the agency by tribal officials.
- (d) On issues relating to tribal self-government, tribal trust resources, or Indian tribal treaty and other rights, each agency should explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.
- Sec. 6. Increasing Flexibility for Indian Tribal Waivers.**
- (a) Agencies shall review the processes under which Indian tribes apply for waivers of statutory and regulatory requirements and take appropriate steps to streamline those processes.
- (b) Each agency shall, to the extent practicable and permitted by law, consider any application by an Indian tribe for a waiver of statutory or regulatory requirements in connection with any program administered by the agency with a general view toward increasing opportunities for utilizing flexible policy approaches at the Indian tribal level in cases in which the proposed waiver is consistent with the applicable Federal policy objectives and is otherwise appropriate.
- (c) Each agency shall, to the extent practicable and permitted by law, render a decision upon a complete application for a waiver within 120 days of receipt of such application by the agency, or as otherwise provided by law or regulation. If the application for waiver is not granted, the agency shall provide the applicant with timely written notice of the decision and the reasons therefor.
- (d) This section applies only to statutory or regulatory requirements that are discretionary and subject to waiver by the agency.
- Sec. 7. Accountability.**
- (a) In transmitting any draft final regulation that has tribal implications to OMB pursuant to Executive Order 12866 of September 30, 1993, each agency shall include a certification from the official designated to ensure compliance with this order stating that the requirements of this order have been met in a meaningful and timely manner.
- (b) In transmitting proposed legislation that has tribal implications to OMB, each agency shall include a certification from the official designated to ensure compliance with this order that all relevant requirements of this order have been met.

(c) Within 180 days after the effective date of this order the Director of OMB and the Assistant to the President for Intergovernmental Affairs shall confer with tribal officials to ensure that this order is being properly and effectively implemented.

Sec. 8. Independent Agencies. Independent regulatory agencies are encouraged to comply with the provisions of this order.

Sec. 9. General Provisions. (a) This order shall supplement but not supersede the requirements contained in Executive Order 12866 (Regulatory Planning and Review), Executive Order 12988 (Civil Justice Reform), OMB Circular A-19, and the Executive Memorandum of April 29, 1994, on Government-to-Government Relations with Native American Tribal Governments.

(b) This order shall complement the consultation and waiver provisions in sections 6 and 7 of Executive Order 13132 (Federalism).

(c) Executive Order 13084 (Consultation and Coordination with Indian Tribal Governments) is revoked at the time this order takes effect.

(d) This order shall be effective 60 days after the date of this order.

Sec. 10. Judicial Review. This order is intended only to improve the internal management of the executive branch, and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person.

William J. Clinton

The White House,
November 6, 2000.

[Filed with the Office of the Federal Register, 8:45 a.m., November 8, 2000]

NOTE: This Executive order was published in the *Federal Register* on November 9.

Statement on Signing the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2001

November 6, 2000

Today I am pleased to sign into law H.R. 4811, the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2001. As I have often said, there is a right and a wrong way to conduct budget negotiations. When we have worked together, we have unfailingly made progress. When there is a genuine spirit of cooperation and compromise, we can accomplish great things for our people. This Act, the result of just such a bipartisan effort, supports our efforts to promote peace and stability around the world, in turn helping to make our Nation more safe and secure.

I am particularly pleased that this legislation funds our landmark initiative to provide debt relief to the poorest of the world's nations. By fully funding our commitment to debt relief, the bill supports this historic effort to give these poorest countries a critical opportunity to effect reform while using funds to reduce poverty and provide basic health care and education for their people. I commend the bipartisan efforts in the Congress to fund this vital program, as well as efforts of all those across the political spectrum who joined forces to secure this critically important funding.

Likewise, I am pleased that this legislation dramatically increases funding to fight HIV/AIDS. In nations around the world, HIV/AIDS is a leading cause of death and is undermining decades of effort to reduce mortality, improve health, expand educational opportunities, and lift people out of poverty. The funds provided by the bill will significantly expand our prevention and treatment efforts in Africa and other regions of the world to turn the tide against this deadly pandemic.

This legislation also helps strengthen our efforts to support democracy and stability in Southeastern Europe, the Newly Independent States, and other key regions. In particular, it includes increased funding for our continued efforts to support democracy and reform in Kosovo, and to support the

Appendix D

May 22, 2013

Hon. Heidi Heitkamp
United States Senator
Dirksen Senate Office Building, SD-G55
Washington, D.C. 20043

RE: Disparity of Indian sentences compared to sentences
under similar crimes of state law

Dear Senator Heitkamp:

This letter is a follow-up of our meeting on Wednesday, May 15, at your office in Washington, D.C. I am going to discuss the problem of disparity in sentences to Native Americans who may commit major crimes on the reservation who are subject to sentences under federal law. Those sentences are disparate and very much heavier than usual sentences for similar crimes if those crimes were committed off the reservation under either North Dakota law or I think also South Dakota law. The disparity came to my attention in two cases that I will mention. The first case is United States v. Dana Deegan, 605 F.3d 625 reh'g denied, 634 F.3d 428 (8th Cir. 2010), cert. denied, 131 S.Ct. 2094 (4/18/2010). In that case, Dana Deegan allowed her newborn to die while Ms. Deegan was under severe mental strain. I will not go into all of the details of the crime but refer you to the case which I know you previously read.

Unfortunately, the prosecutor and the sentencing judge imposed a sentence under the sentencing guidelines of ten years and one month. This was a very heavy sentence for this sort crime and the guidelines never should have been the guide to the sentence in the first place, as I indicated in my dissent. As you know, I wrote a 65-page dissent in the case.

One of the matters that arose in the case related to a similar crime committed in the City of Fargo. A woman, who attended North Dakota State University, gave birth without attendance in a sorority house and then allowed the baby to die. Her sentence was probation. It so happens that my staff looked into that background in that state act and, certainly from our point of view, this outside-the-reservation crime was one in which the defendant criminal was not under the great pressures of Dana Deegan.

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Hon. Heidi Heitkamp
May 22, 2013

The other case that came to my attention is one that I also wrote a dissent in called United States v. Bryan Austin Boneshirt, 662 F.3d 509 (8th Cir. 2011). While that sentence imposed on an 18-year-old Indian was in the federal courts under a charge of second-degree murder, the heavy sentence was far greater than usual in the South Dakota federal courts and also, at least by implication and otherwise, far more severe than the state sentence for an adult for second-degree murder. In the Boneshirt case, the crime, a very serious one, was committed while Boneshirt was 17 years of age and the sentence was imposed at age 18 as an adult. That sentence amounted to 576 months (48 years). With whatever little good time there is in the federal courts, Boneshirt could serve to age 66, or with good time maybe 61 or 62 years, but it is a long, long time and far more severe than an ordinary sentence in state or even in federal court. These two cases pinpoint the disparity of sentencing, among other things, imposed on Native Americans. These cases brought the matter to my attention but there is a background to my interest and I will mention that background to you in this letter.

I wrote of my concern to the Assistant Attorney General in charge of federal criminal prosecutions in sentencing, a person by the name of Lanny Breuer, now retired. Enclosed is my letter to him of November 29, 2011, his response on January 12, 2012 and my response of January 24, 2012. In addition to the citations of authority, I want to mention two other very important sources for information. One is an article in the Hamline Law Review by Gregory D. Smith "Disparate Impact of the Federal Sentencing Guidelines on Indians in Indian Country: Why Congress Should Run the Erie Railroad into the Major Crimes Act," 27 Hamline L. Rev. 483 (2004).

Another very important source of the problem is the Final Report of the Native American Advisory Group of November 4, 2003. This report was given and made for the U.S. Sentencing Commission and is available on the Commission's website.¹ You could also get a copy from Director Tracy S. Toulou, Office of Tribal Justice for Indian Affairs, Dept. of Justice, 950 Pennsylvania Avenue NW, Washington, D.C.

¹[www.uscc.gov/Research and Statistics/Research Projects and Surveys/Miscellaneous/Final Report of Native American Advisory Group](http://www.uscc.gov/Research%20and%20Statistics/Research%20Projects%20and%20Surveys/Miscellaneous/Final%20Report%20of%20Native%20American%20Advisory%20Group)

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Hon. Heidi Heitkamp
May 22, 2013

I have written to Director Tracy S. Toulou today and attach a copy of that letter. I might mention that I previously sent Director Toulou the letters to and from Assistant Attorney General Breuer referred to above. Director Toulou therefore has all of the above information plus the Final Report of the Native American Advisory Group of which he is a member. As you know, I met with him on Tuesday, May 14, at his office. We had a very good conversation and discussed the issue of disparity.

From his standpoint, any possible remedy through the Department of Justice would probably have to be made through the United States Sentencing Commission. I mentioned my visit with Director Toulou when you and I got together at your office.

I have been working with Chief Tribal Judge B.J. Jones of the Turtle Mountain Tribal Court of Appeals for over a year discussing a possible approach to a remedy for the disparity suffered by American Indians on a reservation for their crimes with regard to sentencing.

At least at this time our tentative view is that we should aim for legislative corrective action which, in essence, would provide tribal opt-in provision so when a person of a tribe commits a crime on the Indian reservation which is subject to the Major Crimes Act or even the general federal jurisdiction, the sentence imposed should be one that would be the same or similar to a sentence which would be imposed for a similar crime outside the reservation under state law. This approach would take into account that under state law the sentence can be greatly reduced through parole and even through probation. Under federal sentencing procedures, that is not true.

I want to mention that the sentencing guidelines are now discretionary with a federal sentencing judge. But the fact that they are discretionary does not mean that they are not used almost all the time. My recollection is that the statistics from the sentencing commission show that about 85% of sentencing made in federal courts are under the guidelines. Why are they under the guidelines instead of resorting on other provisions of the law which set forth principles of sentencing (see, in particular, 18 U.S.C. Section 3553(a)(2)(A-D))? That section provides essentially that in sentencing the judge should consider various factors including the seriousness of the crime, deterrence, the public interest and other matters.

Page Four
Hon. Heidi Heitkamp
May 22, 2013

However, under the guidelines a sentence is almost always approved whether or not the imposition is at the lower end or the higher end of the guidelines. As a matter of fact, if a sentence is over the guidelines the circuit courts generally approve those sentences. Once in awhile circuit courts will reverse a sentence if it is below the guidelines, but the guidelines are the norm. It may well be that the district courts notice that the likelihood of reversal is practically nil if it imposes a guideline sentence, plus it is a lazy judge's way of getting his/her work done. The probation officer recommends a sentence under the guidelines and the judge doesn't concern himself/herself with the individual that may be entitled to leniency or not and says I will impose a guideline sentence and that's about the end of it.

I have made my objection to guideline sentencing. See my dissenting opinions in United States v. John Anthony Spencer, 700 F.3d 317 (8th Cir. 2012) and United States v. Donna Zauner, 688 F.3d 426 (8th Cir. 2012).

The persons working on the problem are: Judge Jeffrey Viken, U.S. District Judge in South Dakota, Chief Tribal Judge B.J. Jones, Attorney Christopher Ironroad, and this writer.

In the particular Deegan appeals, the federal public defender petitioned for writ of certiorari to the United States Supreme Court which was denied. I wrote a dissenting opinion to the denial of a rehearing en banc by our court in Deegan, 634 F.3d at 428, mentioning the importance of the disparity which was revealed in the opinion. The disparity, of course, was the non-Indian who got probation for the same crime as Ms. Deegan who got ten years.

That, in a way, is the reverse side of discrimination against African-Americans in this country. African-Americans are given equal rights under federal law but are discriminated under state laws of many states, particularly those in the south, of course. Here, we have discrimination against Native Americans in the federal courts but they are treated equally in the state courts. That may or may not be a violation of equal rights under the Constitution, but it certainly begs that sort of description. I am hopeful that someone will come forward and provide an opportunity for relief under post-conviction remedies for Ms. Deegan.

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Hon. Heidi Heitkamp
May 22, 2013

Also, I am forwarding a copy of a report of my meeting with Chief Tribal Judge B.J. Jones on May 14, 2012. We had planned to write an extensive article on disparity but concluded, after reading the Hamline Law Review article cited above, that it would be duplicative. The plan now is to write a short case comment on disparity for the North Dakota Law Review at the University of North Dakota School of Law just as soon as possible. I have talked to the managing editor of the North Dakota Law Review, who is interning at the Fredriksen Byron firm in Fargo. She agreed to expedite the article when completed.

Thank you very much for your interest.

Sincerely yours,

Myron H. Bright

MHB/ljs

Enclosures

CC: Tracy S. Toulou, Director, Office of Tribal Justice, DOJ

Hon. Jeffrey Viken

Hon. B.J. Jones

Christopher Ironroad, Esq.

February 27, 2014

Mythili Raman, Acting Assistant Attorney General
United States Department of Justice
950 Pennsylvania Avenue NW
Washington, D.C. 20530

RE: Disparity of sentences in North Dakota and South Dakota

Dear Ms. Raman:

We have corresponded previously. Now I write on an important matter concerning Native Americans in my state of North Dakota and the sister state of South Dakota. I request that you discuss the subject with Attorney General Eric H. Holder, Jr., and others of interest in the Department of Justice and in the Executive branch of government. I might mention that I visited with Office of Tribal Justice Director Tracy Toulou concerning this matter when I was in Washington, D.C., last spring.

Attorney General Holder, called attention to aspects of our “broken” federal criminal justice system in his powerful and timely speech of August 12, 2013, to the American Bar Association's House of Delegates.

In respect to that speech, I wrote Attorney General Holder on August 27, 2013:

I would like to call your attention to another sentencing disparity, one affecting Native Americans that is often overlooked and is particularly acute in the Dakotas. When a Native American is convicted of one of the major crimes enumerated in 18 U.S.C. § 1153 (the Major Crimes Act) for an act he or she commits on a reservation that is subject to federal jurisdiction, he or she is sentenced under the federal Guidelines. But others (predominantly white persons) committing similar crimes off the reservation are subject to state laws. These laws in many states in this country carry significantly shorter sentences often with options for probation and parole. The result is that Native American offenders are often subject to disproportionately harsh sentences simply because of their race and living on a reservation. That is simply wrong, and it

needs to be addressed and corrected.

I know that you have read the above letter.

Time for words alone have passed. Now is the time for action.

In my letter to Attorney General Holder, I referred to a graphic and important example of great disparity that came to my attention as a federal appellate judge. That example is the subject of a divided opinion in the U.S. Court of Appeals for the Eighth Circuit. I explained the Deegan case in my letter to the Attorney General:

[I]n United States v. Deegan, 605 F.3d 625, 636 (8th Cir. 2010), Ms. Deegan, a 25 year-old Native American woman with three young children who had literally suffered a lifetime of physical, mental, and sexual abuse and was in a desperate personal situation for many reasons, allowed her newborn baby to die shortly after she gave birth. Because she was Native American and committed the acts on a reservation, her crime was subject to federal jurisdiction. Id. at 627. Her homicide crime has been described as neonaticide (allowing a newborn to die in the first 24 hours after birth). This conduct is not a crime of federal jurisdiction except by an Indian on an Indian reservation. See id. at 636 (Bright, J. dissenting). Deegan was sentenced under the Guidelines to 10 years and one month in federal prison. Id. at 627.

Indeed, Dana Deegan's sentence is shocking compared to those imposed for similar crimes in North Dakota state courts. For example, a non-Indian woman, who committed neonaticide in the same year as Ms. Deegan (1998), received a sentence of three years of probation in state court. See Deegan, 605 F.3d 625, 656 (8th Cir. 2010). Another North Dakota woman who pled guilty to neonaticide after the Deegan case received a two-year prison sentence. See Glum to Serve Two Years for Infant Death, Bismarck Trib., Dec. 16, 2009.¹ Indeed, Dr. Phillip Resnick, an expert on neonaticide, testified at Ms. Deegan's trial that women who plead guilty to neonaticide are "infrequently sentenced to more than three years in prison." See

¹The article is available online at: http://bismarcktribune.com/news/local/glum-to-serve-two-years-for-infant-death/article_9b1332a2-ea7a-11de-a460-001cc4c002e0.html.

Deegan, 605 F.3d at 657.

The disparate treatment of Native Americans in the federal system has been very apparent in the Dakotas, and the federal judiciary is taking note. Judge Charles B. Kornmann, a senior district judge in the District of South Dakota, wrote:

Ask virtually any United States District Judge presiding over cases from Indian Country whether the Federal Sentencing Guidelines are fair to Native Americans; ask virtually any appellate judge dealing with cases from Indian Country the same question, and I believe the answer would largely be the same: No. Too often are we required to impose sentences based on injustice rather than justice, and this bothers us greatly.

See Timothy J. Droske, Correcting Native American Sentencing Disparity Post-Booker, 91 Marq. L. Rev. 723 (2008) (quoting Charles B. Kornmann, Injustices: Applying the Sentencing Guidelines and Other Federal Mandates in Indian Country, 13 Fed. Sent'g Rep. 71, 71 (2000)). Additionally, on January 2, 2014, Ralph R. Erickson, Chief Judge, United States District Court for the District of North Dakota, wrote me:

As you are aware, sentencing in Indian Country is simply one of the most difficult things that we are called to do as sentencing judges. A number of factors coalesce to render it nearly impossible to sentence in a just manner. No matter how long I have been sentencing in Indian Country, I find it gut-wrenching when I am asked by a family member of a person I have sentenced why Indians are sentenced to longer sentences than white people who commit the same crimes in the same location. It is most unedifying to have to report to them that differences between State and Federal sentencing law mandate the difference. While I appreciate that post-Booker the courts have greater discretion in sentencing, it remains true that the U.S. Sentencing Guidelines (USSG), to a large extent, inform and guide sentencing by the District Courts, and that injustice often results. The fact is that when an Indian commits, say a burglary on the reservation in Benson County, North Dakota, he is far more likely to spend a significant time in prison than a white person who burglarizes the house next door. No explanation of the disparity makes sense to the defendant or his family—and they are

convinced that they are being treated more harshly simply because of their race.²

The injustice described by Chief Judge Erickson can cause disrespect for, and mistrust of, our criminal justice system, particularly within Indian Country. The system is broken and needs change.

The sentence of Ms. Deegan at the bottom of the guidelines represents a usual, ordinary, typical sentence in the federal courts. Even though, since 2005, a sentencing judge has discretion to sentence below the guidelines, an examination of the statistics show that the standard sentence in the federal courts is a guideline sentence. Non-government sentencing below the guidelines account for only 12% to 17.8% of all persons sentenced between 2007 and 2010.³

Ms. Deegan, through Associate Professor Sarah Deer of William Mitchell College of Law in St. Paul, Minnesota, has filed a petition for clemency with the Office of Pardon Attorney. [Note: I plan to ask the Pardon Attorney's permission to share the petition with the Criminal Division of the Department of Justice. That petition #09703-059 has been or shortly will be filed with the Pardon Attorney]. I have written in support of that petition and refer you to my letter which is incorporated as an exhibit to that petition. For your ready information, I quote certain portions of that letter:

Let me be clear about the conduct. Letting a baby die is a serious matter. But in neonaticide cases, the medical profession and the law acknowledge the conduct results from extreme mental pressure or illness. As documented in the Deegan opinion and the medical testimony, Ms. Deegan suffered extreme emotional and physical abuse throughout her life. Plainly put, her situation was terrible [and her confused mental condition and conduct bordering on mental illness were important factors in the nature of the crime].

²Chief Judge Erickson's recent letter is of such significance that I have attached it in its entirety to this letter.

³See Sourcebooks of Federal Sentencing Statistics 2007 and 2010.

Two factors contributed to Ms. Deegan's disparate sentence: (1) the harshness of the applicable Sentencing Guidelines, as I discuss in this letter, and (2) her status as a Native American.

The second part of this disparity is Ms. Deegan's status as a member of a federally-recognized tribe. Federal sentencing discriminates in almost every prosecution of a Native American in the Dakotas by imposing harsher sentences on tribal members living on a reservation as compared to those imposed on his/her neighbor living across the reservation line and committing a similar act. The reason is simple: federal Guideline sentences in the Dakotas are much more harsh than state sentences for similar crimes.

This sentencing problem has been presented to the Justice Department and the U.S. Sentencing Commission. The effort to correct disproportionate sentencing for South Dakota Natives can be seen in the 2003 Report of the Native American Advisory Group.⁴ Although relating only to South Dakota, the report discusses sentencing disparities for Native Americans in other states. The Report begins with some of the background history:

During the development of the guidelines the Commission was urged, at public hearings and in written submissions, to consider the special circumstances of Indian offenders and to be sensitive to the concerns of tribal governments. When the guidelines were finally issued however, with the exception of prior tribal offenses, special considerations of Indians and their communities were not addressed in the guidelines.

Adv. Grp. Report at 9. The Native American Advisory Group recommended some changes to the guideline system. I repeat the conclusion of the Report:

In order to accomplish the mission of improving the application of the federal sentencing guidelines to Native Americans under the Major Crimes Act, the Ad Hoc Advisory Group recommends changes

⁴A copy of the report can be found at:
http://www.ussc.gov/Research_and_Statistics/Research_Projects/Miscellaneous/20031104_Native_American_Advisory_Group_Report.pdf

to particular guideline sections. Perhaps more importantly, it also recommends that the Commission establish formal mechanisms for continuing to consult with the Native American communities most directly impacted by changes to the federal sentencing guidelines section covered by the Major Crimes Act. It is only through meaningful participation can the perceptions of bias expressed at the Rapid City hearings be prevented in the future.

Id. at 39. None of the changes recommended by the Advisory Group came about.

Most recently, two distinguished Native American scholars, Chief Judge BJ Jones⁵ and a Native American lawyer, Christopher J. Ironroad,⁶ have written another valuable perspective on the adversity of federal prison sentences on Native Americans. That article, entitled “Addressing Sentencing Disparities for Tribal Citizens in the Dakotas: A Tribal Sovereignty Approach,” 89 N.D. L. Rev. 53 (Feb. 2014).

This article graphically states the greatly detrimental effect that disparate sentences have on Native American defendants, and also on the tribal communities in which those defendants reside. Let me briefly repeat some key portions thereof, even though the full proposed article is attached:

This article draws attention to the disparate sentences of Native Americans in the Dakotas for crimes prosecuted by the United States under the Major Crimes Act, and federal subject matter jurisdiction statutes, as compared to sentences for similar offenses under state law.

⁵Director, Tribal Judicial Institute, University of North Dakota School of Law; Chief Judge, Sisseton-Wahpeton Oyate; Chief Judge, Prairie Island Indian Community; Chief Justice, Turtle Mountain Tribal Court of Appeals.

⁶Associate at the Washington, D.C. office of Sonosky, Chambers, Sachse, Endreson & Perry, LLP; J.D., University of North Dakota School of Law, 2012, an enrolled member of the Standing Rock Sioux Tribe, a former public defender for the Tribe, and a former law clerk to Chief Judge BJ Jones and the Tribal Judicial Institute at the University of North Dakota School of Law.

....

Because of congressional initiatives to exact harsher penalties for certain crimes as well as the impact of the federal sentencing guidelines—which in most situations forecloses sentence mitigation schemes such as parole—some Indian persons receive criminal sentences far out of proportion to what a non-Indian or Indian person would receive for similar criminal conduct prosecuted in a state forum. . . . [I]n many cases, [this will] result in criminal sentences that are far out of proportion to the "actual" sentence that would be served under a state court conviction.

Id. at 54-55.

In addition, footnote 6 of the article states:

Of course, one reason for [disproportionate sentences] is that prison sentences in the Dakotas are rarely served out in absolute time but are reduced by operations of parole, good time, and other sentence amelioration schemes that are not available for federal sentences because of the oftentimes harsh impact of the Sentencing Reform Act, passed in 1984 as part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976.

Id. at 55 n.6.

The article refers to two pertinent examples: the Deegan case, which I have previously discussed, and United States v. Boneshirt, 662 F.3d 509 (8th Cir. 2011). Boneshirt involved in 17-year-old man who committed second-degree murder and received a 48-year sentence—two times the average adult sentence in federal court for a similar violent crime, and obviously even a more grossly disproportionate sentence compared to a South Dakota state court conviction for a similar crime.

The authors also suggest what appears to be a non-complex remedy for the unfortunate and discriminatory policy toward the American Indian citizens. See Jones, 89 N.D. L. Rev. at 72-75. I quote a portion of that discussion:

Federal courts should be granted the authority, upon the exercise of an opt-in by an Indian tribe which exercises governmental authority over the Indian Country where a particular crime occurs, to depart downward and impose a sentence upon a Native offender comparable to a typical sentence imposed in a state court for a similar offense if the disparity in state and federal law is of a certain significance. . . . The federal probation officer could furnish the information pertaining to a comparable state court system, factoring in parole eligibility and good time computation, in a pre-sentence report, which will permit the federal judge to determine whether his discretion to depart downward is triggered.

. . . .

Permitting such tribal authority is not unheard of. Currently, under federal law, if a tribal citizen commits a crime that is prosecutable under either the Major Crimes Act or the General Crimes Act, and a potential penalty could be death under federal law, the death penalty is not an option unless the Indian tribe with jurisdiction over the territory where the crime occurred has opted in to the death penalty by tribal resolution. If the imposition of the death penalty for crimes in Indian Country is contingent upon some tribal input, why not the disparity issue raised by this article?

Id. at 72-73.

The article also explains why this remedy is a just solution:

The problem that this article addresses is not the fact that Indian citizens are sentenced to federal prison for significant time, but that sometimes the sentences they receive are so far out of proportion to what a person would receive in state court that an injustice occurs. This problem does not exist with regard to other federal crimes because it is only in Indian Country that the United States prosecutes certain crimes generally left to state jurisdictions everywhere else in the United States.

. . . .

Just as with the remedy for the disparities in sentencing for crack cocaine and powder cocaine, resentencing should be an option for those tribal citizens whom have felt the brunt of the disparities and are

currently serving federal sentences. Certainly for Ms. Deegan and Mr. Boneshirt, if the Rosebud Sioux Tribe and the Three Affiliated Tribes exercise the opt-in then resentencing could be made available to them under federal law. In short, the sentences imposed upon these defendants and other Native American defendants should be revisited. Absent some legislative fix, their cases certainly cry out for some clemency or resentencing.

Id. at 74-75.

Finally, I quote the authors' conclusion:

It has been nearly ten years since the United States Sentencing Commission received the Advisory Group Report detailing the disparate federal sentencing of Native Americans, an issue that the Report notes existed well before its issuance. However, despite the Report's findings and recommendations, Native Americans continue to be disparately sentenced when compared to others similar situated, who are sentenced for similar conduct under state law. Let the United States do justice for Native Americans by enacting legislation that will allow all Americans in this instance to be treated equally by permitting a tribal voice in the imposition of criminal sentences upon tribal citizens. Such legislation would be both just and would carry out the United States' trust responsibility to Indian nations and their citizens.

Id. at 75.

I recognize change in application of the sentencing guidelines to Native Americans will require executive and probably legislative action. I advise that North Dakota Senator Heidi Heitkamp knows of the problem. I have attached a copy of a letter I wrote to her on May 22, 2013.

I echo comment in Chief Judge Erickson's letter of January 2, 2014, relating to reactions of a defendant's family in a disparate sentencing situation. I have met the two youngest Deegan children at a session relating to the subject of disparate sentencing of American Indian citizens held at the University of North Dakota School of Law on October 14, 2013. A copy of the program is attached. These two very nice

young women, Sydney and Kamryn, and their older sister, Karcen, who now has two children, who are grandchildren of Ms. Deegan, may ask: Why is our mother serving much, much more prison time than other women not living on Indian reservation who have committed a similar crime?

Sincerely,

Myron H. Bright

Attachments:

- 1) Addendum, including a news report, "Woman changes plea to negligent homicide in infant's death," Forum News Service (Feb. 11, 2014);
- 2) Jones and Ironroad, "Addressing Sentencing Disparities for Tribal Citizens in the Dakotas: A Tribal Sovereignty Approach," 89 N.D. L. Rev. 53 (Feb. 2014);
- 3) Letter from Chief Judge Ralph R. Erickson dated Jan. 2, 2014;
- 4) Letter to Senator Heidi Heitkamp dated May 22, 2013;
- 5) "Panel Discussion on Native American Sentencing Disparity and the Case of Dana Deegan," October 14, 2013 program at University of North Dakota School of Law; and
- 6) Kevin Walking Eagle v. United States, 2014 WL 563572, *4 n.2 (8th Cir.) (a case of pertinent interest on mandatory drug sentencing affecting reservation Native Americans).

CC: Senator Heidi Heitkamp
James Cole, Deputy Attorney General
Honorable Kermit E. Bye
Honorable Ralph R. Erickson, Chief Judge
Honorable Jeffrey L. Viken, Chief Judge
Honorable Daniel L. Hovland
United States Attorney Tim Purdon
Honorable BJ Jones
Margaret Love, Esq.
Christopher Ironroad, Esq.
Associate Professor Sarah Deer

ADDENDUM

Please take special notice that in three instances at different locations throughout North Dakota, the state courts have recognized the special nature of neonaticide and the sentences warranted for that crime. In each instance, the punishment meted out, or that will be meted out, is far less than the federal sentence imposed on Ms. Deegan.

The statement previously made by this writer refers to two cases of neonaticide previously discussed: (1) that of a college woman from Fargo (eastern North Dakota) who gave birth unattended in a college sorority house and received a sentence of three years probation; and (2) following that, and after the completion of Ms. Deegan's case, Gennifer Glum in Bismarck (central North Dakota) received a two-year prison sentence with the balance of time suspended.

Now a third case has arisen in Bowman County (western North Dakota) and it appears likely that this defendant will receive a sentence much lower than Ms. Deegan received in federal court.

Alone in her home, Stephanie Lindstrom gave birth to a baby in her bathroom and subsequently drowned the child. She initially faced North Dakota's highest murder charge and a maximum sentence of life imprisonment without parole. Lindstrom has now entered a guilty plea in exchange for an amended charge of negligent homicide. The judge has conditionally accepted the plea subject to a presentence report. Unless adverse information surfaces about Ms. Lindstrom, the reduced charge will undoubtedly stand.

According to the news report, the prosecutor conferred with law enforcement, other attorneys, and medical professionals in drafting the plea agreement, and he specifically stated the importance of "the 'medical portion especially.'" The report also stated that "Lindstrom underwent a medical health evaluation at Jamestown State Hospital on Dec. 12."

Again, Ms. Lindstrom's mental health seems to be an important factor in her conduct, as it is in almost every neonaticide case including that of Ms. Deegan.

Attached is the aforementioned news report dated February 11, 2014, from The Forum, a newspaper published in Fargo, with statewide coverage. Again, this new development emphasizes the gross disparity of Ms. Deegan's federal sentence, approved under sentencing guidelines, as compared with state sentences for the same crime by the courts in the State of North Dakota.

Published February 11, 2014, 07:47 PM

Woman changes plea to negligent homicide in infant's death


DICKINSON, N.D. - A Bowman woman originally charged with murdering her newborn baby won't go to trial after pleading guilty Tuesday to a lesser charge.

By: **Katherine Lymn, Forum News Service, INFORUM**

Stephanie Lindstrom, right, and Erika Chisholm, her attorney



Stephanie Lindstrom, right, and her attorney, Erika Chisholm, listen to Southwest District Judge William Herauf during a pretrial conference Tuesday, Jan. 14, 2014, at the Stark County Courthouse in Dickinson, N.D. Lindstrom is accused of murdering her newborn baby last July. (Katherine Grandstrand/Dickinson Press)

 DICKINSON, N.D. - A Bowman woman originally charged with murdering her newborn baby won't go to trial after pleading guilty Tuesday to a lesser charge.

Stephanie Lindstrom was originally charged with murder in August after she allegedly gave birth to a baby in a home bathroom and then drowned it in July. Lindstrom pleaded not guilty at a preliminary hearing in September, where police testimony previewed what the state's case would show at trial.

But in a plea deal conditionally accepted by a judge Tuesday, Lindstrom changed her plea to guilty for negligent homicide.

A new hearing — added to the court calendar after Tuesday's hearing — was set for Feb. 18 to "amend charge and defendant's plea," according to the notice of hearing, but it was unclear late Tuesday what that meant for the agreement reached earlier in the afternoon.

At the Stark County Courthouse's basement courtroom, apparent family and friends of Lindstrom

lined the back row. Lindstrom appeared in street clothes alongside her attorney Erica Chisholm

Bowman County State's Attorney Andrew Weiss said he conferred with law enforcement, other attorneys and medical professionals in drafting the agreement — the "medical portion especially" was important, he said.

Lindstrom underwent a mental health evaluation at Jamestown State Hospital on Dec. 12, according to court records.

Weiss said after the hearing that he couldn't comment on what went into the agreement because the case is ongoing.

The original charge of murder is a Class AA felony in North Dakota, carrying a maximum sentence of life without parole.

The amended charge is a C Felony, which carries a maximum sentence of five years imprisonment and a \$10,000 fine.

Judge William Herauf's acceptance of the plea deal was conditional upon the completed pre-sentence investigation — if he finds out new information about Lindstrom's past in the report, he may toss the agreement.

"I don't have enough information before the pre-sentence investigation as to whether or not to accept the plea," he said.

The state has 90 days to complete the sentencing investigation.

A jury trial — that had been scheduled for the first week of March — was taken off the court calendar

May 22, 2013

Tracy S. Toulou, Director
Office of Tribal Justice, Department of Justice
950 Pennsylvania Ave. NW
Washington, D.C.

RE: Native Americans on the reservation – Disparity in sentencing

Dear Tracy:

This confirms our meeting on Tuesday morning, May 14, and our discussion about the above subject. As you know, I wrote to you and mentioned a couple of cases and law review articles dealing with the issue of disparity in sentencing of Native Americans, who are sentenced in federal court under the Major Crimes Act or general federal jurisdiction and the crime was committed on the reservation. If that person (or any person) had committed the same act outside the reservation, the prosecution and sentencing would be under state law.

As it stands in many states, including the two Dakotas, the usual sentences in federal court following the guidelines are much more severe and harsh than state sentences for the similar crime. Keep in mind that there is no probation or parole in the federal system for most crimes, but there is probation for some similar state crime and parole for many state crimes.

The subject discussed was the idea of the tribes having an opt-in provision as a remedy. That circumstance would allow the tribes to decide if the crime would be (1) in federal court because the crime had been committed on the reservation by a Native American and sentenced under the guidelines, or (2) by the judge using the guidelines, whether the sentence if the similar act had been prosecuted in state court would result in a more lenient sentence. I had cited to you several cases and law review articles discussing this subject in particular and some in general. The cases generally arise under the Major Crimes Act provision.

You were favorable to assisting in a remedy for such disparity. We discussed the possibility of obtaining a change in the sentencing aspects by having the federal judge and the probation officer determine what would be the actual sentence considering

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May 22, 2013

probation and parole for the similar crime under state law and use that as a basis for the sentencing for the crime which had been prosecuted in federal court. This would be very much like the crimes that are prosecuted in federal court under the statute as assimilated crimes. The opt-in provision would give tribes the choice.

We discussed two approaches. One approach would be an administrative approach through the Department of Justice and other groups seeking use of the option through the Sentencing Commission. As you know, this subject of disparity had been presented to the Sentencing Commission initially and had been disregarded.

The other alternative mentioned and discussed was the approach through the legislative process where, attached to some legislative bill, Congress would enact the opt-in suggested as above.

I want you to know that I discussed the same matter with my North Dakota Senator Heidi Heitkamp on Wednesday, May 15. She was very favorable to a possible legislative solution to the disparity problem affecting Native Americans. I have attached a copy of my letter to her. She agreed to take the matter up with counsel on the Committee on Indian Affairs. She serves on this U.S. Senate Committee. Thus a two-way approach to the problem may be followed. You are familiar with the cases that I have cited in the law review articles so I shall not repeat them in this letter. I do not know if Senator Heitkamp has a copy of the November 4, 2003 Final Report of the Native American Advisory Group. I suggested to her that you could provide her with a copy upon her request.

As you will note below, I am sending a copy of this letter to various other interested parties including Judge Jeffrey Viken and the U.S. Attorney in North Dakota Timothy Purdon. Tim, as you know, has worked with you in the past and is very interested in improving the situation with the Native American population.

I want to thank you for giving me some time to visit with you about this important legal matter. I feel that justice needs to be done and we need to start the process, not only in the State of North Dakota and perhaps in the State of South Dakota, but also with the Sentencing Commission and with the legislature. Some effort also should

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be made about educating federal district judges about the problem, particularly where those judges have Native American criminals that come before them.

I send you my warm regards. It was a real pleasure to meet and visit with you.

Sincerely,

Myron H. Bright

MHB/ljs

Enclosure

CC: Hon. Heidi Heitkamp
Hon. Jeffrey Viken
U.S. Attorney Timothy Purdon
Hon. B.J. Jones
Christopher Ironroad, Esq.

Appendix E

MINNESOTA—A CASE STUDY

Honorable Robert Blaeser (*retired*)
Judge, Fourth Judicial District Court, Hennepin County
Minneapolis, Minnesota
Member of the USSC TIAG (*2015-2016*)

There are a handful of states which maintain significant sentencing data that can stand as a model allowing comparisons between federal sentences and state sentences for sentences imposed on Native Americans for similar criminal conduct. For example, Minnesota, collects sentencing data that allows limited comparisons to federal data. When the Commission's professional staff analyzed crime definitions under federal and Minnesota law, this limited comparison highlighted a key problem with any approach that attempts to assess sentencing disparity based on the pronounced sentence alone. First, in Minnesota a defendant will generally serve the minimum term of incarceration of two-thirds of the pronounced sentence, with balance of the term served on supervised release. Under the federal sentencing scheme, there is no probation or parole and a defendant will serve 85% of the sentenced imposed. Also, it was noted that in the Minnesota sentencing scheme, defendants are often offered alternatives to sentencing requiring incarceration after a first or even subsequent offense. Alternatives include diversion, deferred prosecution agreements, staying the imposition and execution of sentence, probation and parole. The flexibility afforded state courts, as compared to federal courts, in sentencing schemes and for the alternative resolution of criminal cases may be the reason that when comparing pronounced sentences in Minnesota to pronounced sentences for like crimes in the federal system, federal sentences sometimes appear more severe. The Minnesota Sentencing Guidelines Grid below helps illustrate the point.

4.A. Sentencing Guidelines Grid

Presumptive sentence lengths are in months. Italicized numbers within the grid denote the discretionary range within which a court may sentence without the sentence being deemed a departure. Offenders with stayed felony sentences may be subject to local confinement.

SEVERITY LEVEL OF CONVICTION OFFENSE (Example offenses listed in italics)		CRIMINAL HISTORY SCORE						
		0	1	2	3	4	5	6 or more
<i>Murder, 2nd Degree</i> (intentional murder; drive-by-shootings)	11	306 <i>261-367</i>	326 <i>278-391</i>	346 <i>295-415</i>	366 <i>312-439</i>	386 <i>329-463</i>	406 <i>346-480</i> ²	426 <i>363-480</i> ²
<i>Murder, 3rd Degree</i> <i>Murder, 2nd Degree</i> (unintentional murder)	10	150 <i>128-180</i>	165 <i>141-198</i>	180 <i>153-216</i>	195 <i>166-234</i>	210 <i>179-252</i>	225 <i>192-270</i>	240 <i>204-288</i>
<i>Assault, 1st Degree</i> <i>Controlled Substance Crime, 1st Degree</i>	9	86 <i>74-103</i>	98 <i>84-117</i>	110 <i>94-132</i>	122 <i>104-146</i>	134 <i>114-160</i>	146 <i>125-175</i>	158 <i>135-189</i>
<i>Aggravated Robbery, 1st Degree</i> <i>Controlled Substance Crime, 2nd Degree</i>	8	48 <i>41-57</i>	58 <i>50-69</i>	68 <i>58-81</i>	78 <i>67-93</i>	88 <i>75-105</i>	98 <i>84-117</i>	108 <i>92-129</i>
<i>Felony DWI; Financial Exploitation of a Vulnerable Adult</i>	7	36	42	48	54 <i>46-64</i>	60 <i>51-72</i>	66 <i>57-79</i>	72 <i>62-84</i> ^{2,3}
<i>Controlled Substance Crime, 3rd Degree</i>	6	21	27	33	39 <i>34-46</i>	45 <i>39-54</i>	51 <i>44-61</i>	57 <i>49-68</i>
<i>Residential Burglary</i> <i>Simple Robbery</i>	5	18	23	28	33 <i>29-39</i>	38 <i>33-45</i>	43 <i>37-51</i>	48 <i>41-57</i>
<i>Nonresidential Burglary</i>	4	12 ¹	15	18	21	24 <i>21-28</i>	27 <i>23-32</i>	30 <i>26-36</i>
<i>Theft Crimes (Over \$5,000)</i>	3	12 ¹	13	15	17	19 <i>17-22</i>	21 <i>18-25</i>	23 <i>20-27</i>
<i>Theft Crimes (\$5,000 or less)</i> <i>Check Forgery (\$251-\$2,500)</i>	2	12 ¹	12 ¹	13	15	17	19	21 <i>18-25</i>
<i>Sale of Simulated Controlled Substance</i>	1	12 ¹	12 ¹	12 ¹	13	15	17	19 <i>17-22</i>

¹ 12¹=One year and one day



Presumptive commitment to state imprisonment. First-degree murder has a mandatory life sentence and is excluded from the Guidelines under Minn. Stat. § 609.185. See section 2.E, for policies regarding those sentences controlled by law.



Presumptive stayed sentence; at the discretion of the court, up to one year of confinement and other non-jail sanctions can be imposed as conditions of probation. However, certain offenses in the shaded area of the Grid always carry a presumptive commitment to state prison. See sections 2.C and 2.E.

² Minn. Stat. § 244.09 requires that the Guidelines provide a range for sentences that are presumptive commitment to state imprisonment of 15% lower and 20% higher than the fixed duration displayed, provided that the minimum sentence is not less than one year and one day and the maximum sentence is not more than the statutory maximum. See section 2.C.1-2.

³ The stat. max. for Financial Exploitation of Vulnerable Adult is 240 months; the standard range of 20% higher than the fixed duration applies at CHS 6 or more. (The range is 62-86.)

STAYED SENTENCES:

In the appropriate case, the Minnesota trial judge has the discretion to stay the imposition of sentence or stay the execution of the defendant's sentence. Such action will affect the defendant's record upon successful completion of the terms of the stay.

The darker boxes in the lower left-hand corner of the above chart are those sentences which are presumptively stayed by the trial judge. The defendants that fall within the upper right-hand corner are presumptively committed to state imprisonment by the trial judge. The criminal history score of the defendant goes across the top of the chart. A stayed sentence may be one of two major types. First, if the defendant has no or minimal criminal history, and this is his or her first felony (at a Level VII or below), it is likely the defendant would receive a stay of imposition of sentence. In other words, the court stays imposition of sentence, places the defendant on probation for a period of years, subject to all the rules and regulations of the probation department, and may add jail up to one year, fines, treatment, no use, random testing, and any other conditions of probation that the judge feels is appropriate.

A stay of execution of sentence occurs when the defendant may have a higher criminal history score, or it is his / her second felony conviction, yet the defendant falls in the presumptively stayed sentence boxes, the lower left-hand portion of the sentencing grid. Under a stay of execution, the defendant is committed to the state Corrections Department for a period of years, sentenced as a number of months, provided that the execution of the sentence is stayed, and the defendant is placed on probation for a period of years. Similar types of conditions imposed on a stay of imposition might be used on a stay of execution, including the condition that the defendant must remain law-abiding, and have no new charges.

If the defendant successfully completes the court imposed requirements during the stay of imposition of sentence, a gross misdemeanor is reported on the defendant's record, not a felony. If the defendant receives a stay of execution of sentence, however, that remains a felony conviction on his record, even if the defendant is successful during the stay.

PROBATION VIOLATION:

Under either of the foregoing stay scenarios, should the defendant violate the conditions of probation, the court may convene a probation violation hearing, or *Morrissey* hearing.¹ At a *Morrissey* hearing, the judge sits as the factfinder. The burden is on the state to prove by clear and convincing evidence that the defendant has violated a condition of probation. If the judge finds that the defendant has violated a specific condition of probation, that the violation was inexcusable or intentional, and that the need for confinement outweighs the policies favoring probation, then the judge can impose the sentence that was stayed and commit the defendant to the commissioner of corrections for the presumptive sentence, or impose a lesser sanction.

If the judge imposes a lesser sanction, the defendant may retain the benefits of a stay of imposition of sentence or a stay of execution of sentence, which could keep the felony conviction off his record, assuming he successfully completes probation. Should the court find that a revocation of probation is necessary and that imprisonment is necessary, the court must make specific findings: (1) that on the basis of the original offense and the intervening conduct of the offender confinement is necessary to protect the public from further criminal activity by the offender; or (2) the offender is in need of correctional treatment which can most effectively be provided if confined; or (3) it would unduly minimize the seriousness of the violation of probation if the defendant were not revoked.

¹ *Morrissey v. Brewer*, 408 U.S. 471 (1972), provides for a **hearing** to determine the factual basis for parole violations.

Both of these would result in first and second time felony offenders not having an executed prison sentence that may significantly differ from the Sentencing Guidelines in federal court, as the attached chart shows.

The Sentencing Guidelines grid gives examples of executed sentence length in months broken down by the time imprisoned and a specified maximum supervise release term. In Minnesota on an executed prison sentence, the good time credit allowed is one third of the executed sentence. If the defendant has not had any violations while imprisoned the one-third time is served on supervised release. The defendant is then on parole and can have the remaining one third revoked if he or she violates that parole.

There are also aggravating factors and mitigating factors that can affect the imposition of the sentence. Subject to a *Blakely* hearing,² the prosecutor can ask for an upward departure by the sentencing judge based on aggravating circumstances. A jury would have to find those aggravating circumstances in a *Blakely* hearing following the conviction on the main charge. For example, someone convicted of simple robbery and having a criminal history score of two is subject to a presumptive stayed sentence of 28 months. However, if that defendant had a criminal history score of three that would move him into the presumptive commit of somewhere between 29 and 39 months, the average being 33 months.

SPECIALTY COURTS:

² See *Blakely v. Washington*, 542 U.S. 296 (2004) (holding that in the context of mandatory sentencing guidelines under state law, the Sixth Amendment right to a jury trial prohibits judges from enhancing criminal sentences based on facts other than those decided by the jury or admitted by the defendant).

Currently, there are a number of specialty courts that exist in Minnesota, including Driving While Intoxicated (“DWI”) courts, drug courts, and veterans’ courts. At these courts, a defendant who has a second or 3rd degree DWI in the state of Minnesota may serve less jail time by agreeing to participate in DWI court. He will, however, be subject to much more frequent court appearances, a chemical health assessment, treatment, random testing, and other measure the court believes would help defendants maintain their sobriety. There are lesser sanctions given for violations, which could include some jail time. If the defendant fails the DWI court, he or she could have their sentence imposed.

Minnesota’s drug courts also work along similar lines. A defendant who has a high need and high risk profile with certain drug charges may agree to participate in drug court. Such defendants have frequent court appearances with both jail (if necessary) and positive reinforcement provided by the court.

PRONOUNCED SENTENCES AND TIME SERVED

Disparity in sentencing does exist between the Minnesota sentencing scheme and the federal sentencing scheme because of the flexibility afforded Minnesota judges at sentencing and the statutory sentencing framework under Minnesota law.

The chart below demonstrates the actual time served by defendants on a pronounced sentence under the Minnesota sentencing scheme. In Minnesota a defendant will generally serve the minimum term of incarceration of two-thirds of the pronounced sentence, with balance of the term served on supervised release. A defendant’s incarceration can be extended for disciplinary reasons while incarcerated or for violations of conditions of supervised release. Under the federal sentencing scheme, there is no probation or parole and a defendant serves 85% of the sentence

imposed. A disparity is created by the differences between the sentencing statutes.

**Examples of Executed Sentences (Length in Months) Broken Down by:
Term of Imprisonment and Supervised Release Term**

Under Minn. Stat. § 244.101, offenders committed to the Commissioner of Corrections for crimes committed on or after August 1, 1993 will receive an executed sentence pronounced by the court consisting of two parts: a specified minimum term of imprisonment equal to two-thirds of the total executed sentence and a supervised release term equal to the remaining one-third. The court is required to pronounce the total executed sentence and explain the amount of time offender will serve in prison and the amount of time the offender will serve on supervised release, assuming the offender commits no disciplinary offense in prison that results in the imposition of a disciplinary confinement period. The court must also explain that the amount of time the offender actually serves in prison may be extended by the Commissioner if the offender violates disciplinary rules while in prison or violates conditions of supervised release. This extension period could result in the offender's serving the entire executed sentence in prison.

Executed Sentence	Term of Imprisonment	Supervised Release Term	Executed Sentence	Term of Imprisonment	Supervised Release Term
12 and 1 day	8 and 1 day	4	78	52	26
13	8 2/3	4 1/3	86	57 1/3	28 2/3
15	10	5	88	58 2/3	29 1/3
17	11 1/3	5 2/3	98	65 1/3	32 2/3
18	12	6	108	72	36
19	12 2/3	6 1/3	110	73 1/3	36 2/3
21	14	7	122	81 1/3	40 2/3
23	15 1/3	7 2/3	134	89 1/3	44 2/3
24	16	8	146	97 1/3	48 2/3
27	18	9	150	100	50
28	18 2/3	9 1/3	158	105 1/3	52 2/3
30	20	10	165	110	55
33	22	11	180	120	60
36	24	12	190	126 2/3	63 1/3
38	25 1/3	12 2/3	195	130	65
39	26	13	200	133 1/3	66 2/3
42	28	14	210	140	70
43	28 2/3	14 1/3	220	146 2/3	73 1/3
45	30	15	225	150	75
48	32	16	230	153 1/3	76 2/3
51	34	17	240	160	80
54	36	18	306	204	102
57	38	19	326	217 1/3	108 2/3
58	38 2/3	19 1/3	346	230 2/3	115 1/3
60	40	20	366	244	122
66	44	22	386	257 1/3	128 2/3
68	45 1/3	22 2/3	406	270 2/3	135 1/3
72	48	24	426	284	142

Appendix F

Federal Native American Offenders Compared to State Native American Offenders

1

Manslaughter



Average Imprisonment: Voluntary Manslaughter (§2A1.3)

2



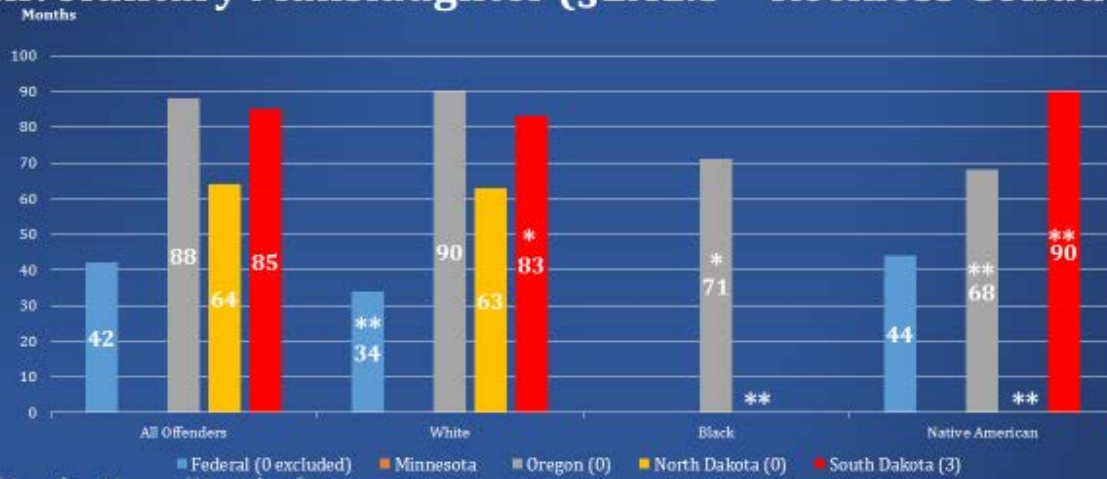
* Less than 10 cases; ** Less than five cases.

SOURCE: United States Sentencing Commission 2010 - 2014 Data files USSCFY2010 - USSCFY2014, Minnesota Sentencing Commission Calendar Year Data 2009 to 2013, Oregon Sentencing Commission Calendar Year Data 2009 - 2014, North Dakota Calendar Year Data 2010 - 2014, and South Dakota Calendar Year Data 2010 to July 2015.



Average Imprisonment: Involuntary Manslaughter (§2A1.3 - Reckless Conduct)

3



* Less than 10 cases; ** Less than five cases.

• SOURCE: United States Sentencing Commission 2010 - 2014 Data files USSCFY2010 - USSCFY2014, Minnesota Sentencing Commission Calendar Year Data 2009 to 2013, Oregon Sentencing Commission Calendar Year Data 2009 - 2014, North Dakota Calendar Year Data 2010 - 2014, and South Dakota Calendar Year Data 2010 to July 2015.



Federal Native American Offenders Compared to State Native American Offenders

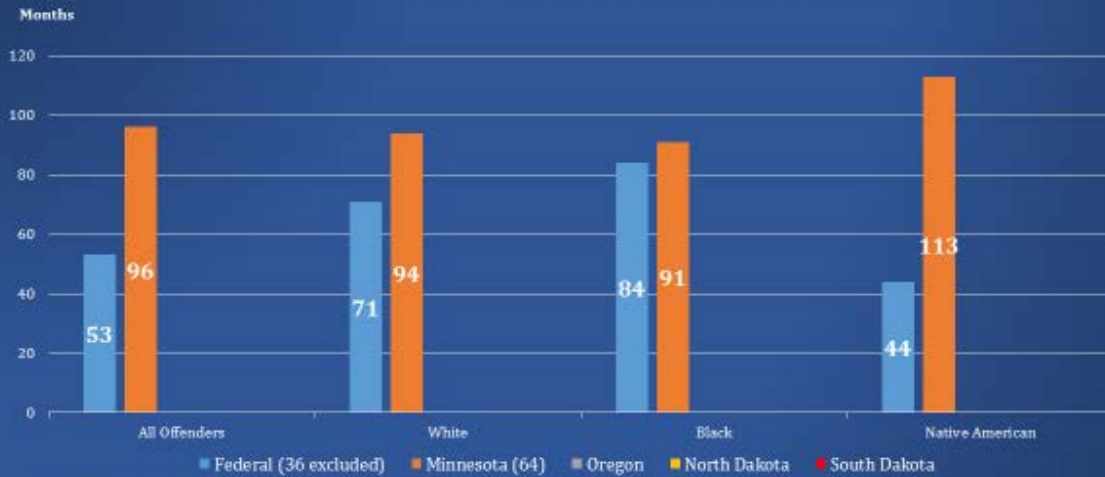
4

Aggravated Assault



Average Imprisonment: Aggravated Assault (§2A2.2 – Serious to Permanent Injury)

5

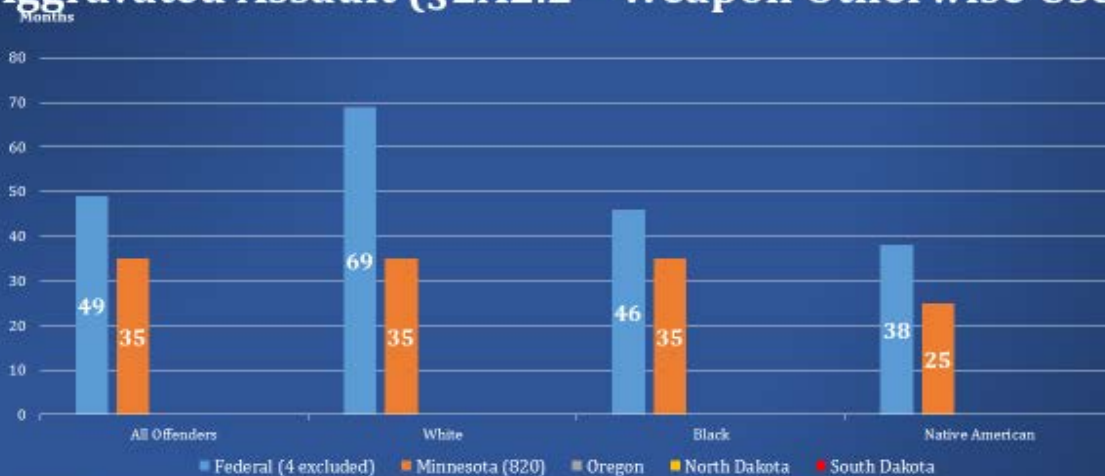


• SOURCE: United States Sentencing Commission 2010 - 2014 Data files USSCFY2010 - USSCFY2014, Minnesota Sentencing Commission Calendar Year Data 2009 to 2013, Oregon Sentencing Commission Calendar Year Data 2009 - 2014, North Dakota Calendar Year Data 2010 - 2014, and South Dakota Calendar Year Data 2010 to July 2015.



Average Imprisonment: Aggravated Assault (§2A2.2 – Weapon Otherwise Used)

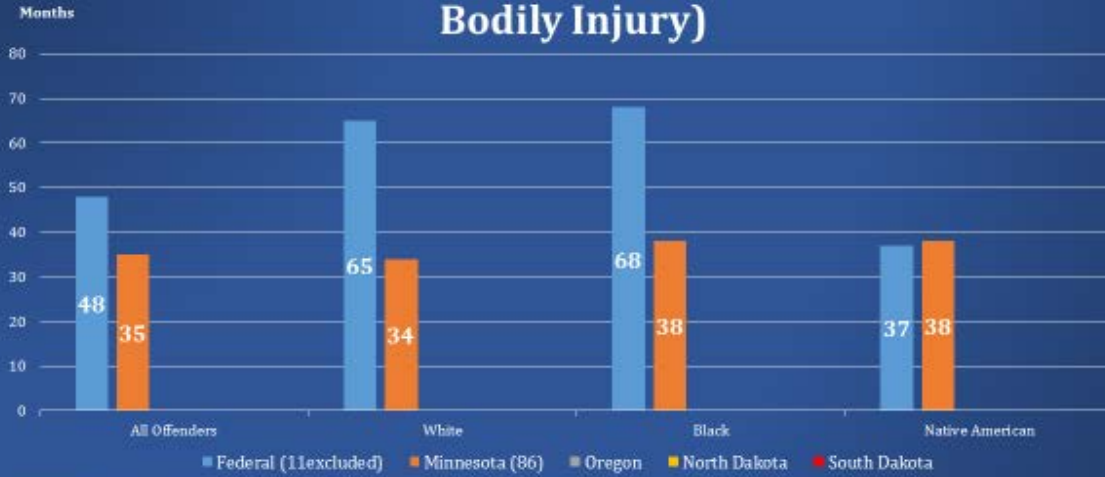
6



• SOURCE: United States Sentencing Commission 2010 - 2014 Data files USSCFY2010 - USSCFY2014, Minnesota Sentencing Commission Calendar Year Data 2009 to 2013, Oregon Sentencing Commission Calendar Year Data 2009 - 2014, North Dakota Calendar Year Data 2010 - 2014, and South Dakota Calendar Year Data 2010 to July 2015.



Average Imprisonment: Aggravated Assault (§2A2.2 – Weapon Otherwise Used and Bodily Injury)



• SOURCE: United States Sentencing Commission 2010 - 2014 Data files USSCFY2010 - USSCFY2014, Minnesota Sentencing Commission Calendar Year Data 2009 to 2013, Oregon Sentencing Commission Calendar Year Data 2009 - 2014, North Dakota Calendar Year Data 2010 - 2014, and South Dakota Calendar Year Data 2010 to July 2015.



Appendix G

(SAMPLE/MODEL)
PRETRIAL DIVERSION OPERATIONS AGREEMENT
FOR INDIAN COUNTRY DISTRICTS OR THOSE BORDERING INDIAN COUNTRY

I. PURPOSE OF AGREEMENT

The purpose of this agreement is to confirm the relationship between the United States Attorney's Office and the United States Probation and Pretrial Services Office in the (Insert District) for the operation of the Pretrial Diversion Program.

II. OBJECTIVES OF THE PROGRAM

The Pretrial Diversion Program, under the auspices of the United States Attorney's Office will provide an alternative to criminal prosecution for selected persons by placing them in a program of supervision administered by the United States Probation and Pretrial Services Office. The objectives of the Program are to preserve prosecutorial and judicial resources for serious criminal matters, and to provide alternative treatment and intervention to those individuals for whom traditional prosecution may be less effective. Those individuals may fall into the following categories:

- Youthful Offenders
- Offenders with Minimal Criminal History
- History on Non-Violence
- The Offense Could Have Been Prosecuted/Addressed in Tribal Court

III. RESPONSIBILITIES OF THE PARTIES

It is the responsibility of the United States Attorney's Office to notify selected candidates of their potential Program eligibility, and to refer them to the U.S. Probation and Pretrial Services Office. The U.S. Probation and Pretrial Services Office may also make preliminary recommendations to the United States Attorney's Office. The referral package submitted must include a copy of the law enforcement investigative report and a copy of the referral letter sent to the candidate. The USPO will interview the applicant and submit a written report and recommendation to the US. Attorney's Office no later than forty-five (45) days following the initial interview. The report will assess the candidate's appropriateness for participation in the Program and establish conditions tailored to the individual's needs and may include employment, counseling, education, job training, psychiatric care, etc. Innovative approaches are strongly encouraged.

If the candidate is accepted into the Program, the AUSA will prepare the Pretrial Diversion Agreement that specifies the terms of diversion and the general and special conditions of the Program. The AUSA will schedule the signing of the Agreement and notify all parties of the date and time no more than fourteen (14) days after receipt of the report.

During the period of diversion, it is the responsibility of the United States Probation and Pretrial Services Office to administer a program of supervision and to provide services that are appropriate for each divertee. The USPO will work with local/tribal agencies, services, and providers to implement community based rehabilitative services to address the needs of the divertee. The USPO will immediately notify the U.S. Attorney's Office of any breach of the conditions of the Agreement. The AUSA should determine the appropriate course of action and notify the parties no more than ten (10) days following receipt of the alleged violation(s).

The USPO will submit a final report to the AUSA no later than five (5) days before the scheduled termination of the Program. The report will assess the divertee's performance and describe any unfulfilled special conditions. If the divertee successfully completed the requirements, the officer will submit a memorandum certifying the divertee's Program completion. The AUSA should notify the divertee of the final disposition. It is the responsibility of both offices to communicate regularly in order to develop and modify procedures and guidelines for the efficient and effective operation of the Pretrial Diversion Program.

Date: _____

United States Attorney

Date: _____

Chief U.S. Probation and
Pretrial Services Officer

