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October 20, 2014

The Honorable Patti B. Saris, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington DC 20002-8002

Dear Chief Judge Saris and Members of the United States Sentencing Commission:

The Department of Justice writes in response to the United States Sentencing Commission's call for comment on the formation of a Tribal Issues Advisory Group. As you know, the Department wrote the Sentencing Commission on March 6, 2014, requesting that such a group be formed. The Department's request was made through the United States Attorneys who serve on the Attorney General's Advisory Committee's Native American Issues Subcommittee and the Racial Disparities Working Group.

In the request, the Department sought the creation of an Advisory Group to investigate two issues:

- (1) Are there unwarranted disparities in the sentences received by American Indians/Alaska Natives prosecuted in federal courts under the Major Crimes Act and the sentences received for similar crimes by Indians and non-Indians in state court; and

(2) Are there unwarranted disparities in the sentencing of American Indian/Alaska Native defendants in federal court when compared to non-Indian defendants.

At the Commission's request, the Department now offers its suggestions as to the scope, duration, and potential membership of the proposed Advisory Group.

Scope

As we have urged previously, in light of the unique federal Jurisdiction in Indian Country and the expanded focus of federal law enforcement on crimes committed there, we believe that a Tribal Issues Advisory Group devoted to the study of the treatment of American Indian defendants and victims in federal courts is critical to the further development of trust and confidence in the federal sentencing system and the federal criminal justice system more broadly.

In 2004, the Bureau of Justice Statistics reported that the rate of violent crime victimizations among American Indians between the ages of 25 to 34 was more than 2½ times the rate for persons of other races of the same age. U.S. DEP'T OF JUSTICE, *American Indians and Crime, A BJS Statistical Profile, 1992-2002* (2004). Rates of violent victimization for both males and females were found to be higher for American Indians than for all races. *Id.*

The Department's call in its March 6, 2014, letter to the Sentencing Commission suggested the need to address the perception that American Indian/Alaska Native defendants in federal court face harsher sentences when compared to similarly-situated defendants in state court and/or with non-Indian defendants sentenced in federal court. This perception is the subject of ongoing academic debate. Several academic articles have ostensibly identified disparities between the sentences received by American Indians/Alaska Natives prosecuted in federal courts under the Major Crimes Act and the sentences received for similar crimes by defendants in state court. Timothy J. Droske, *Correcting Native American Sentencing Disparities Post-Booker*, 91 Marquette L. Rev. 723 (2008); Emily Tredeau, *Tribal Control in Federal Sentencing*, 99 California L. Rev. 1409 (2011); BJ Jones and Christopher J. Ironroad, *Addressing Sentencing Disparities for Tribal Citizens in the Dakota: A Tribal Sovereignty Approach*, 89 N.D. L. Rev. 53 (2014).

Additionally, other recent scholarship has raised a concern regarding potential disparities in the sentencing of American Indian/Alaska Native defendants in federal court and has expanded to include the additional issue that American Indian/Alaska Native defendants may experience disparate sentences when compared to defendants of other races within the federal sentencing system. Travis W. Franklin *Sentencing Native Americans in US Federal Courts: An Examination of Disparity*, Justice Quarterly, 30:2, 310-339 (2013) (study of Sentencing Commission data from fiscal years 2006 to 2008 found that American Indians are often sentenced more harshly in federal courts than white, African-American, and Hispanic federal offenders).

In addition to the studies and articles cited above, the Department can report that some United States Attorneys with responsibility for Indian Country prosecutions consistently hear concerns about sentencing disparities for American Indians in federal court from tribal leaders and from some members of the federal judiciary. However, we have not heard such reports from all apposite districts. These divergent views support the need to establish a Tribal Advisory Group and to conduct a thorough, empirical analysis.

Based on the foregoing, it is clear that a perception exists amongst academics and researchers, some tribal leaders and tribal members, and some members of the federal judiciary that American Indian defendants in federal court face unwarranted sentencing disparities. The Department believes that perceptions such as these are harmful to the administration of justice as, when left unaddressed, they can erode public confidence within the impacted communities and adversely affect the presumption of impartiality and fairness that form the bedrock of our system of justice. Therefore, the need for the advisory group to study the sentencing data around this issue and report its findings is clear.

Duration

We hope that a Tribal Issues Advisory Group will have access to extensive data so as to perform a deep and thorough analysis of processes affecting Native American crime victims and defendants. The time frame for completion of this initial task of studying the relevant data and reporting its findings is dependent on how long it will take to collect and analyze relevant data. Data should be gathered from a variety of sources: the states, the federal courts, and also Department of Justice components, like the Bureau of Justice Statistics which has conducted previous inquiries into sentencing disparities based on race and into crime victimization of Native Americans. In addition, in order to address the issue of crime victimization, the Commission should consider survey data of victimization and holding consultation sessions in the field with affected communities, to include Indian country crime victims.

Once this initial study and reporting phase are complete, the next steps should be clear. Certainly, if any unwarranted disparities are documented, the Advisory Group's scope of work and term of service should be extended to allow them to take on the important task of developing strategies to recommend to the Sentencing Commission to address any such disparities.

Membership

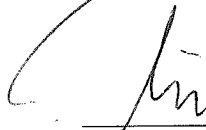
The Department suggests that the membership of an advisory group be broad, diverse and that it contain representation from the American Indian/Alaska Native community. Further, an advisory group should contain members and staff with the education, training, and experience to acquire and analyze the sentencing data necessary to produce meaningful scholarship in this area. We suggest that the committee be made up of members from the following Department components: (1) one current United States Attorney who is a member of the Native American Issues Subcommittee of the Attorney General's Advisory Committee, (2) a representative of the Department's Office of Tribal Justice, (3) the Department's Native American Issues Coordinator,

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and (4) a representative from the Bureau of Justice Statistics (BJS). The role of the representative from BJS could be limited to advice or discussion on data collection and analysis activity. In addition, we suggest that the group include a representative from the Bureau of Indian Affairs.

Should the Commission wish to further discuss the issues raised herein, the Department is available. The Department appreciates the Sentencing Commission's interest in this important issue and looks forward to working on these issues with the Sentencing Commission through the contemplated advisory group.

Sincerely,



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