

October 20, 2014

**Statement of the Michigan State University College of Law Indigenous Law and Policy Center on the formation of a Tribal Issues Advisory Group for the United State Sentencing Commission**

***Summary of the Indigenous Law and Policy Center's Statement***

In this Statement, we argue that a Tribal Advisory Group would be beneficial to analyzing and establishing meaningful sentencing reform when dealing with Indian offenders. This statement has a focus on the specific problem facing Native Youth. We recommend that, if this advisory group is formed, it include a juvenile justice expert.

***The Lack of Sufficient Studies and Data Concerning Sentencing Disparities of Native American Populations***

In 1984 Congress attempted to address the disparity in sentencing by passing The Sentencing Reform Act (“SRA”); the legislation aimed to achieve honesty, uniformity, and proportionality in sentencing. 18 U.S.C. § 3553. The Supreme Court subsequently excised certain provisions of the SRA, making the once mandatory federal sentencing guidelines advisory in nature. *United States v. Booker*, 543 U.S. 220 (2005). According to the Department of Justice, there are indications that the “race effect” has begun to reappear in federal sentencing (post-*Booker*). U.S. Sentencing Comm’n, U.S. Dep’t of Justice, Final Report on the Impact of United States v. Booker on Federal Sentencing (2006). Further, the report concluded the reemergence of the “race effect” that followed the *Booker* decision was not present before *Booker*. *Id.* A Tribal Issues Advisory Group could provide current and accurate data to help determine the impact *Booker* has had on the continued disparity in sentencing Native Americans receive.

The most concerning and devastating impact to the Native American community is the disparity in sentencing for Native American juveniles. Native

American youth inherit a legacy of incarceration, poverty, violence, and intergenerational trauma. The Att’y Gen. Nat’l Task Force on Children Exposed to Violence, Pub. Hearing 2: Children’s Exposure to Violence in Rural and Tribal Communities 30-32 (Jan. 31, 2012) (written testimony of Ivy Wright-Bryan, Nat’l Dir. of Native American Mentoring, Big Brothers Big Sisters of Am.).<sup>1</sup> A Tribal Issues Advisory Group would help combat the viscous cycle unique to Native American children, and improve the long-term prospects of eliminating this disparity. Thus, it is imperative a Tribal Issues Advisory Group include a juvenile justice expert.

Native American children live in poverty at a rate double that of the general population; 26% of Native American children live in poverty. Neelum Arya & Addie Rolnick, *A Tangled Web of Justice: American Indian and Alaska Native Youth in Federal, State, and Tribal Justice Systems* 4 (2008) (Campaign for Youth Justice Policy Brief).<sup>2</sup> High school graduation rates for Native American youth are 17% lower than other American youth. *Id.* at 5. Native American children rates for cigarette use, binge drinking, and illegal drug use are higher than any other racial group. *Id.* at 4. Also, Native American youth are more than twice as likely to die by the age of 24 as their non-Indian peers. Ryan Seelau, *Regaining Control Over the Children: Reversing the Legacy of Assimilative Policies in Education, Child Welfare, and Juvenile Justice That Targeted Native American Youth*, 37 AM. INDIAN L. REV. 63, 69 (2012). These select examples are some of the factors that influence delinquent and criminal behavior: physical health, mental health, and substance abuse are all related. *Id.* These factors all contribute to the disparity Native American children face in the juvenile justice system. *Id.*

One of the most egregious factors Native American youth are forced to overcome is their high level of exposure to violence and loss. The Att’y Gen. Nat’l Task Force on Children Exposed to Violence, Pub. Hearing 2: Children’s Exposure to Violence in Rural and Tribal Communities 108-18 (Jan. 31, 2012) (written testimony of Gil Vigil, Nat’l Indian Child Welfare Ass’n Bd. Members). Native youth are disproportionately exposed to, or are a victim of domestic and intimate partner violence, child abuse, homicide, suicide, sexual violence, and community violence. *Id.* at 108-11. Native Americans also have the highest per capita rate of violent victimization of any racial group. *Id.* at 111. Native women experience the highest rate of sexual assault and domestic violence in the United States. *Id.* Native youth are 2.5 times more likely to commit suicide than non-Indian youth. Dolores BigFoot et al., *Trauma Exposure in American Indian/Alaska Native Children* 1-4 (2008) (Indian Country Child Trauma Center).<sup>3</sup> Even more alarming,

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<sup>1</sup> This material is available at <http://www.justice.gov/defendingchildhood/abq-hearing-binder-for-webposting.pdf>.

<sup>2</sup> This report is available at <http://ssrn.com/abstract=1892959>.

<sup>3</sup> This material is available at <http://www.theannainstitute.org>.

Native American juveniles experience Post-traumatic Stress Disorder (PTSD) at a rate of 22%, nearly triple that of the general population, and is equivalent to the rates of PTSD in military personnel who served in the latest wars in Afghanistan, Iraq, and the Persian Gulf War. Dolores BigFoot, *Honoring Children, Mending the Circle: Cultural Adaptation of Trauma-Focused Cognitive-Behavior therapy for American Indian and Alaska Native Children*, 66:8 J. CLINICAL PSYCHOLOGY 847, 849 (Aug. 2010).

Native American youth are historically overrepresented in the juvenile justice system, and the *Booker* decision has proved ineffectual in remedying this disparity. Christopher Hartney, *Native American Youth and the Juvenile Justice System*, published in *FOCUS: Views from The National Council on Crime and Delinquency* 1 (Mar. 2008). The article analyzed whether there was disparity for Native American youth at key stages of the juvenile system, and concluded that there is a “cumulative impact” on Native American juveniles. *Id.* at 4. The study concluded that “racial or ethnic disproportion tends to increase as youth are processed through key stages or decision points” (critical points are arrest, diversions or referral to court, detention, formal processing, disposition, and waiver to adult court) which all require some sort of human decision making process). *Id.* At each key stage, the study compared Native American youth and White youth to determine whether there is a significant difference, and if disparity is problematic. *Id.* The findings suggest that there is a “consistent pattern of disparity and very serious differences at certain key stages. *Id.* The article concluded:

- Native American youth are about 30% more likely than White youth to be referred to court rather than having charges dropped.
- Native American youth are 10% more likely to be detained while awaiting trial, and Native American youth are 10% less likely to receive the comparatively lenient measure of diversion or the second chance of probation.
- Native American youth were committed to residential placement at a rate of over two and a half times that of White youth. Office of Juvenile Justice and Delinquency, *Census of Juveniles in Residential Placement 1997, 1999, 2001, and 2003* (2005).
- A post-*Booker* study concluded this disparity is even higher, the study reveals that Native American youth are 320% more likely to be committed to residential placement relative to White youth. Sickmund et al., *Census of juveniles in residential placement databook* (May 27, 2008).<sup>4</sup>

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<sup>4</sup> This study is available at <http://www.ojjdp.ncjrs.gov/ojstatbb/cjrp/>.

- Native American youth are more likely than White youth to receive the most punitive measures. For example, Native American youth are 50% more likely than White youth for out-of-home placement after adjudication, and 50% more likely for waiver to the adult criminal system. Snyder et al., *National Disproportionate Minority Contact Datebook* (2007) (developed by the National Center for Juvenile Justice for the Office of Juvenile Justice and Delinquency Prevention).<sup>5</sup>

At the 2011 Indigenous Law Conference, the featured speaker Troy Eid, gave a presentation to Indigenous Law scholars, tribal judges, and Tribal Law practitioners from across the United States concerning sentencing disparity between Native American and non-Native defendants. Troy A. Eid, Chair, Indian Law & Order Comm'n, Keynote Address at Michigan State University College of Law Indigenous Law Conference: Restructuring Justice in Indian Country: The Indian Law and Order Commission (Oct. 29, 2011). Eid synthesized the few available and pertinent studies, presented data to support his conclusion, and suggested possible solutions to eliminate this disparity. Eid Keynote. This synthesis showed a clear disparity in the sentences of Native Americans compared to other defendants, including, a majority of juvenile defenders in federal court being Indian, a lack of parole for Indian offenders, longer incarcerations, and an alarming percentage of youth being tried as adults. *Id.* These findings suggest there is a need for a Tribal Issues Advisory Group that includes a juvenile justice expert.

### ***The Recommendation of the Center***

The continuing concern over sentencing disparities amongst Native American populations shows the importance of a Tribal Issues Advisory Group. While the Advisory Group should study and report all critical issues within the Native American community, Juvenile Justice is an especially important issue that is essential to reduce, and eventually end this disparity. In young children, decades' worth of health and brain research show what happens as a young child will have an impact in adulthood, and in some cases will alter your body and mind for life. The Att'y Gen. Nat'l Task Force on Children Exposed to Violence, Pub. Hearing 2: Children's Exposure to Violence in Rural and Tribal Communities 10-17 (Jan. 31, 2012) (written testimony of Esta Soler, Founder, Futures Without Violence). In Addition, between the ages 11 and 14, the young person's brains and biological responses to stress and trauma are in a heightened developmental stage. *Id.* at 14. Bad or delinquent behavior we see in adults is a manifestation of untreated trauma in childhood. *Id.* Therefore, eliminating the disparity in

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<sup>5</sup> This report is available at <http://ojjdp.ncjrs.gov/ojstatbb/dmcdcb/>.

sentencing in Native American youth will help to reduce or eliminate many of the critical issues faced by Native American adults. Subsequently, equal justice for Native American adults will increase Native American children's chances of breaking the repressive cycle of incarceration, poverty, violence, and intergenerational trauma.

To this end, we recommend the creation of a Tribal Issues Advisory Group, with a strong recommendation to include a juvenile justice expert.

## DESCRIPTION OF THE INDIGENOUS LAW AND POLICY CENTER

The Michigan State University College of Law founded the Indigenous Law and Policy Center under the directorship of Donald E. (Del) Laverdure in 2005. The Center currently is directed by Matthew L.M. Fletcher, Professor of Law at MSU, Wenona T. Singel, Associate Professor of Law at MSU, and Kathryn E. Fort, Staff Attorney to the Center. Ryan J. Mills is the 2014-2015 Fellow for the Center, and a member of the Sault Ste. Marie Band of Chippewa Indians. The Center staff also hosts, edits, and authors *Turtle Talk*, a frequently updated law blog on American Indian law and policy.

Professor Fletcher is Chief Justice of the Poarch Band of Creek Indians, and an appellate justice for the Grand Traverse Band of Ottawa and Chippewa Indians, the Hoopa Valley Tribe, the Nottawaseppi Huron Band of Potawatomi Indians, the Pokagon Band of Potawatomi Indians, and the Santee Sioux Nation. He is a member of the Grand Traverse Band. Professor Singel is an appellate justice for the Little Traverse Bay Bands of Odawa Indians, and a member of that tribe.

Professor Fletcher has authored several commentaries on Indian country criminal law and jurisdiction, including one commentary on the Tribal Law and Order Act, *see* Matthew L.M. Fletcher, *DOJ Takes Step Toward Addressing Violent Crime Against American Indian Women*, ACS Blog post (Aug. 4, 2011),<sup>6</sup> and another commentary for the Indian Law and Order Commission (Nov. 210, 2011).<sup>7</sup> Earlier writings on Indian country criminal law and jurisdiction by Professor Fletcher include: *Sovereign Comity: Factors Recognizing Tribal Court Criminal Convictions in State and Federal Courts*, 45:1-2 COURT REV. 12 (2009); *Addressing the Epidemic of Domestic Violence in Indian Country by Restoring Tribal Sovereignty*, American Constitutional Society Issue Brief (March 2009);<sup>8</sup> and *United States v. Lara: Affirmation of Tribal Criminal Jurisdiction over Nonmember Indians*, 83 MICH. B. J., July 2004, at 24.

Professors Fletcher, Fort, and Singel co-authored a short paper on Michigan Indian country public safety intergovernmental agreements. *See* Matthew L.M. Fletcher, Kathryn E. Fort, and Wenona T. Singel, *Indian Country Law Enforcement and Cooperative Public Safety Agreements*, 89 MICH. B.J., Feb. 2010, at 42. This paper was based on a MSU Indigenous Law and Policy Center study supervised by Professors Fort and Singel titled *Criminal Justice in Indian Country*:

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<sup>6</sup> This blog post is available at <http://www.acslaw.org/acsblog/doj-takes-step-toward-addressing-violent-crime-against-american-indian-women>.

<sup>7</sup> This commentary is available at <http://www.aisc.ucla.edu/iloc/featured-commentary/index-p=1.html>.

<sup>8</sup> This paper is available at <http://www.acslaw.org/files/Fletcher%20Issue%20Brief.pdf>.

*The Solution of Cross Deputization*, Indigenous Law & Policy Center Working Paper 2008-01 (July 2008).<sup>9</sup>

The MSU College of Law is one of only a few law schools in the country to offer an Indigenous Law Certificate. The College of Law offers traditional law classes on indigenous topics, and an experiential learning class offered through the Center, required for the Certificate. In this way, the College of Law, through the Indigenous Law and Policy Center, demonstrates its commitment to the education of Native law students as well as the training of lawyers prepared to work on behalf of tribes around the country, whether for tribal governments, private law firms or non-profit organizations.

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<sup>9</sup> This paper is available at <http://www.law.msu.edu/indigenous/papers/2008-01.pdf>.