United States Sentencing Commission

TRIBAL ISSUES ADVISORY GROUP

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

February 21, 2017

Honorable William H. Pryor, Jr., Acting Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002

Dear Judge Pryor:

On behalf of the Tribal Issues Advisory Group (TIAG), we submit the following comments in response to the Commission's proposed amendments published on December 19, 2016. The Tribal Issues Advisory Group (TIAG), chaired by the Honorable Ralph Erickson, met on January 17, 2017, in Washington D.C. at the United States Sentencing Commission. During the course of the January 17 meeting, the TIAG concluded that there was not sufficient time for the TIAG to conduct a meaningful tribal consultation on the proposed amendments. In lieu of formal consultation, TIAG decided that its members would send direct, targeted emails to individual contacts in certain stakeholder groups with an interest in these issues, inviting those groups to submit public comment to the Commission about the Proposed Amendments.

In this letter, the TIAG addresses three amendments (1) First Offenders/Alternatives to Incarceration; (2) Tribal Issues; and (3) Youthful Offenders. The TIAG takes no position on the remainder of the proposed amendments published for comment.

1. FIRST OFFENDERS / ALTERNATIVES TO INCARCERATION

Part A of this amendment addresses first offenders and sets forth a new Chapter Four guideline at §4C.1.1. The TIAG offers the following comment on §4C.1.1, subparts (a) and (g)(3).

At page 4: the TIAG recommends that the Commission revise §4C1.1(a) as follows:

(a) A defendant is a first offender if (1) the defendant did not receive any criminal history points from Chapter Four, Part A, and (2) the defendant has no prior

> convictions of any kind, except convictions from tribal or foreign jurisdictions which are not for violent crimes.

The Commission's published first offender definition includes a bracketed paragraph (2) requiring that the defendant have no convictions of any kind in order to qualify as a first offender. The TIAG understand the term "no conviction of any kind" to include tribal convictions and believes that this exclusion would operate too broadly. Many tribal courts have misdemeanor jurisdiction and routinely handle a wide variety of criminal matters ranging from petty offenses to crimes of violence. The TIAG felt great emphasis should be placed on distinguishing between petty offenses and crimes of violence in determining whether a person with tribal court convictions qualifies as a "first offender." The term "first offender" should not be interpreted to exclude a person who has prior convictions for petty offenses from tribal or foreign courts. However, the TIAG feels strongly that if a person has been convicted of a crime of violence in tribal court or a foreign court, he / she should not qualify as a "first offender." Thus, the TIAG felt that application of the proposed first offender guideline should not apply to a defendant that has prior crimes of violence in his / her criminal history from a tribal court or foreign court.

At page 6:

> (g) ....and (3) the guideline range applicable to that defendant is in Zone A or B of the Sentencing Table, the court ordinarily should impose a sentence other than a sentence of imprisonment in accordance with the other sentencing options set forth in this guideline.

Even with the requested delineation between defendants with tribal court status convictions and defendants with tribal court violent crime convictions, there are cases in which a term of imprisonment remains the most appropriate choice. By way of example, it might be appropriate to impose a period of incarceration if an examination of the entire sentencing record reveals the defendant has a history of significant unscored violations in foreign or tribal courts or a history of unscored violent behavior.

The TIAG feels that the additional language will remind the sentencing court should be reminded that a non-incarceration sentence is an appropriate alternative in some circumstances under the guidelines. The TIAG recognizes that there may be defendants in Indian Country who are in Zone A or B who are not appropriate for non-incarceration sentences because of extensive tribal court criminal history.

2. TRIBAL ISSUES

The Commission published commentary intended to provide the courts with guidance on whether an upward departure based on a tribal conviction is appropriate. The commentary includes five relevant factors that the court may consider in arriving at this determination, (subsections (i) – (v) at pages 25-26) and the Commission asked how these factors should interact with one another. The TIAG believes that subsection (iii) and (iv) should continue to be

listed, and offers no other comments to those factors. The TIAG makes the following observations about the first, second and fifth factors (subsections (i), (ii) and (v)).

As published, subsection (i) provides as follows:

(C) **Upward Departures Based on Tribal Court Convictions**—In determining whether, or to what extent, an upward departure based on a tribal court conviction is appropriate, the court may consider the factors set forth in §4A1.3(a) above and, in addition, may consider the following:

* * *

(i) The defendant was represented by a lawyer, had the right to a trial by jury, and received other due process protection consistent with those provided to criminal defendants under the United States Constitution.

The USSC asked whether due process should be a threshold factor before other factors are considered. The TIAG Feels that it should not. Further, the TIAG strongly opposes the idea that the due process requirements set forth in subpart (i) as a mandatory threshold necessary for the court to consider an upward departure based on tribal court convictions. Such reading of subpart (i) ignores the diversity and historical culture of tribal courts, is not consistent with federal statute (Indian Civil Rights Acts of 1968) or the United States Supreme Court precedent. Finally, it undercuts the sovereignty of each tribe.

In the United States, there are approximately 351 tribal courts of varying capacity.[1] Subpart (i) could be read as mandating a western court model on all tribal courts which may not be the intent of this section. In Indian Country, tribal courts vary in capacity and models and imposing the forgoing requirement as a mandate may be deemed paternalistic and a rejection of tribal sovereignty. Tribal nations are not political subdivisions of the United States. Each federally recognized tribe is a separate sovereign.

The use of the term "due process protections" in this section with the affirmative statement of certain rights which are protected by the United States Constitution are not consistent with protections afforded to Native Americans under the Indian Civil Rights Acts of 1968 (ICRA). The rights afforded citizens under the United States Constitution and the ICRA are not identical. Due process, as it is known in federal and state court, should not serve as a litmus test under this proposed amendment. ICRA governs tribal court proceedings and provides safeguards to tribal court defendants that are "...similar to, but not identical to those contained in the Bill of Rights and the Fourteenth Amendments." *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 57.

The United States Supreme Court, in *United States v. Bryant* 136 S. Ct. 1954 (2016) addressed whether an uncounseled tribal court misdemeanor conviction could be used as a

[1] Report of the Tribal Issues Advisory Group May 16, 2016, p.12.

predicate offense for the felony offense of domestic assault in Indian Country by a habitual offender. 18 U.S.C. §117(a). The Ninth Circuit disallowed the use of uncounseled tribal court convictions as a predicate offense which was contrary to decisions in the Eighth and Tenth Circuits. The Eighth and Tenth circuits held tribal-court "convictions, valid at their inception and not alleged to be otherwise, unreliable, may be used to prove the elements of §117." *United States v. Cavanaugh*, 643 F. 592, 594 (8th Cir. 2011); see *United States v. Shavanaux,* 647 F. 3d 993, 1000 (10th Cir. 2011). Under ICRA, neither Bryant nor any other Native American, is afforded Sixth Amendment protection and therefore, does not have a right to counsel in tribal court proceedings. The Supreme Court reconciled the spilt in the circuits and said that a defendant convicted in a tribal court proceeding without counsel "...suffers no Sixth Amendment violation in the first instance and, "use of tribal convictions in a subsequent prosecution cannot violate [the Sixth Amendment]." 'anew." citing *Shavanaux,* 647 F. 3d 993, 998 (10th Cir. 2011). The court also stated that the tribal court convictions are reliable. *Bryant* at 1966.

In light of the foregoing, the TIAG believes that subpart (i) should be included, but weighed equally with the other factors.

The TIAG opines that the Commission should continue to include, as separate subparts, subpart (i) and subpart (ii). The two sections are different. Subpart (ii) states:

> (ii) The tribe was exercising expanded jurisdiction under the Tribal Law and Order Act (TLOA) of 2010, Pub. L. 111-211 (July 29, 2010) and the Violence Against Women Reauthorization Act (VAWA) of 2013, Pub. L. 113-4 (March 7, 2013).

TLOA amended the Indian Civil Rights Act of 1968 to permit a tribe to opt into enhanced sentencing of up to 3 years or a fine of $15,000 for any one offense, or up to 9 years, subject to specified requirements. If imprisonment for more than 1 year the bill requires an indigent defendant be afforded a licensed defense attorney at the tribe's expense, the tribal judges must be licensed and law trained, the tribes criminal laws must be published and if sentenced, the facility must meet minimum federal requirements.

VAWA 2013 provisions were enacted to address tribal jurisdiction over perpetrators of domestic violence allowing tribes to exercise their sovereign power to investigate, prosecute, convict and sentence both Indian and non-Indians who assault Indian spouses or dating partners or violate protection orders against Indians and non-Indians. Tribes can prosecute non-Indians effective March 7, 2015, if certain rights are afforded defendants. Those rights include those that are described in TLOA (2010) by providing effective assistance of counsel for defendants, free, appointed licensed attorneys for indigent defendants, law-trained tribal judges who are licensed to practice law, publically available tribal criminal laws and rules and recorded criminal proceedings. Tribes should ensure that jury pools include a fair cross-section of the community and not systematically exclude non-Indians and inform defendants detained by a tribal court of their right to file federal habeas corpus petitions. With these rights available to perpetrators of domestic violence, tribes can assert jurisdiction over Indians and non-Indians.

* * *

The TIAG feels that the application of subpart (v) is premature for several reasons. As stated above, there is insufficient time for formal consultation with all tribes that is meaningful, how tribes would express a preference is not defined and most tribes do not understand how tribal court criminal history would impact a defendant if tribal court convictions counted as criminal history.

(v) At the time the defendant was sentenced, the tribal government had formally expressed a desire that convictions from its courts should be counted for purposes of computing criminal history pursuant to the Guidelines Manual.

The TIAG previously reported that there are 567 federally recognized Indian tribes. BIA reports that 351 have tribal courts while the remaining tribes presumably are Public Law 280 tribes or otherwise rely on state courts as their criminal courts.[2] Each of these tribes is a separate sovereign. The TIAG believes that both tribal governments and tribal courts have a varying working knowledge of the Sentencing Guidelines. Many tribes have a limited knowledge of the Sentencing Guidelines and their impact on Native American defendants in federal court and that increased knowledge of the Sentencing Guidelines by tribes and tribal courts would be beneficial.

Accordingly, the TIAG recommends with respect to subpart (v), that during the comment period tribal governments and other interested groups be consulted on the issue of how tribal governments would "formally express a desire" for their tribal convictions to count toward criminal history. The TIAG also recommends that in the months and years ahead, trainers from the United States Sentencing Commission engage in training for tribal governments, courts and staff on the Sentencing Guidelines to enhance knowledge and understanding of the Sentencing Guidelines, their impact Native American defendants in federal court, and on the impact of the adoption of section (C) (Upward Departures Based on Tribal Court Convictions).

3. YOUTHFUL OFFENDERS –

The TIAG made recommendations regarding youthful offenders to USSC in its 2016 report and found that there is a disparity in the severity of sentences imposed on Native American offenders as compared to Hispanic, Black and White offenders.[3] The TIAG strongly agrees with the USSC published amendments and recommends that the USSC adopt the proposed amendment to the Commentary, paragraph 3 Downward Departures, at pages 42-43.

[2] Report of the Tribal Issues Advisory Group May 16, 2016, p.12.
[3] Report of the Tribal Issues Advisory Group May 16, 2016, p. 30.

On behalf of our members, we appreciate the opportunity to offer TIAG's input for the 2016-2017 amendment cycle.

Sincerely,

Ralph R. Erickson

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

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