

# VICTIMS ADVISORY GROUP

A Standing Advisory Group of the United States Sentencing Commission



**T. Michael Andrews, Chair**

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February 21, 2017

United States Sentencing Commission  
One Columbus Circle, N.E.  
Suite 2-500, South Lobby  
Washington, D.C. 20002

RE: VAG's Response to the 2017 Proposed Amendments to the Sentencing Guidelines.

Dear Chairman Saris and Members of the Commission:

The Victims Advisory Group (VAG) appreciates the opportunity to provide written response to the Commission on the proposed amendments regarding tribal issues, youthful offenders, criminal history, acceptance of responsibility, and miscellaneous (Use of a Computer Enhancement in §2G1.3). The VAG urges the Commission to consider the specific concerns addressed below especially with regard to the impact on victims.

## **I. Tribal Issues**

The VAG recommends the Commission adopt the recommendations that lists the relevant factors that courts may consider when considering a §4A1.2(i) upward or downward departure with regard to Criminal History Category VI. The VAG supports that each relevant factor be given equal weight. However with regard to whether the defendant was represented by a lawyer, had the right to a trial by jury, and received other due process protections consistent with the those provided to criminal defendants under the Constitution, the VAG urges the Commission to follow the holding in *United States v. Bryant*, 136 S.Ct. 1954 (2016), which held that since Bryant's tribal-court convictions occurred in proceedings that complied with the Indian Civil Rights Act and were valid when entered, and used as predicate offenses it did not violate the Constitution. As the Commission recalls, the ICRA does not require the accused to be represented by counsel. As a result, the VAG recommends that the Commission treat tribal court convictions the same as state and local offenses when computing criminal history points. With regard to the tribal sovereignty question on whether Tribes should opt in and provide the criminal history for tribal defendants, the VAG's position is

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that in cases where a victim is involved and the defendant has prior convictions in tribal court, those tribal convictions should be counted as any other conviction and be part of any criminal history calculation.

With regard to court protection orders, the VAG supports the commentary of § 1B1.1 (Application Instructions) and the definition of court protection order derived from 18 USC § 2266(5) which is consistent with 18 USC § 2265(b). The most important factor for court protection orders, especially tribal court protection orders, is that they should be given the same full faith and credit as state or federal courts.

## **II. Youthful Offenders**

The VAG recommends that the Commission not adopt any changes on how the guidelines account for juvenile adjudications for the purpose of determining the defendant's criminal history. Specifically, the VAG is concerned that eliminating juvenile adjudications prior to age 18 will not give the court complete information for determining whether that defendant engaged in prior criminal conduct, especially where those adjudications involve victims. The VAG is concerned that this amendment will limit consideration to only those juvenile convictions which occur prior to age 18 and are treated like adult convictions. While the VAG recognizes a sentencing court may consider certain adjudications or convictions differently than others, such a limitation as that proposed would be too severe and would fail to adequately inform the sentencing court of the defendant's full background. Alternatively, if the Commission implements this change, the VAG strongly encourages all juvenile adjudications that involve victims to be disclosed to the sentencing court. Failure to do so discounts the impact the defendants' crime had on the previous victim as well as the impact the defendant's apparent continuing criminal history has had on the community.

## **III. Criminal History**

The VAG recommends that the Commission not change the counting of the revocation sentences for the purpose of calculating criminal history points. The VAG is concerned that by changing the calculation, the resulting criminal history category would not accurately reflect the seriousness of the defendant's criminal history. Therefore, the VAG believes that all sentences upon revocation of probation, parole, supervised release, special parole or mandatory release should include the original term of imprisonment in addition to any term of imprisonment imposed upon the revocation, especially crimes involving victims. This allows a sentencing court to more accurately assess any patterns in the defendant's criminal history, as well as his amenability to alternatives to incarceration.

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## **IV. Acceptance of Responsibility**

The VAG recommends that the Commission not amend the Commentary with regard to acceptance of responsibility under §3E.1 to include a non-frivolous challenge for relevant conduct. The VAG is concerned that the term “non-frivolous” is not defined and thus would not provide the clarity the Commission is seeking. This change would not be victim friendly. It could result in forcing the victim to testify in a type of mini-trial with regard to the defendant’s challenge of an Acceptance of Responsibility adjustment. Moreover, this change would undermine finality for the victim. Furthermore, the VAG is concerned that there is not enough data or evidence to support this proposed change.

## **V. First Offenders**

The VAG recommends that the Commission adopt the proposed first offenders definition under §4C11(a). The VAG wants to maintain the status for a pattern of offenses. The VAG would like to exclude the following crimes from the operation of the proposed amendment.

Exclusion: Any offense which meets the definition of a crime of violence, as set out in §§4B1.2(a)(1) and (a)(2); §2B1.1 in which a specific victim or group of victims has been identified; §2B1.6; §2B2.1 (burglary of a residence); §2D2.3; §2G1.1; §2G1.3; §2G2.1; §2G2.2; §2G2.3; §2G2.6; §2G3.1 as it pertains to the transfer of obscene matter to a minor; §2H4.1; §2L1.1; and, §2X6.1. Any defendant who has prior criminal convictions for offenses which meet the definition of a crime of violence or which are the same or similar to an offense included in this listing but whose convictions are not used in the calculation of the criminal history category are excluded from consideration as a first time offender.

In light of all the proposed amendments, especially the amendment to the guideline sentencing table, it is the VAG’s assessment that the noted exceptions to the first time offender amendment should be applied. First time offenders who engage in crime(s) of violence, as defined under §4B1.2(a) have engaged in offenses which are clearly different from first time offenders whose offense of conviction has no element of violence and no victim(s) associated with their criminal conduct. The additional listing of specific sections of Chapter 2 of the Sentencing Guidelines has been provided because not all offenses involving victims fall into the definition of a crime of violence. In addition, as is presently proposed, a first time offender can be an individual who has engaged in serious criminal conduct but has not been criminally charged or convicted as a result of that behavior (i.e., college students who engage in repeated sexual assaults on campus and who are disciplined by the school but whose conduct has not been

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reported to law enforcement would technically be a first time offender under the proposed amendment. Likewise, individuals who purchase, view, and/or distribute child pornography may not have been previously convicted and would, again, technically qualify as a first time offender.)

Defendants who have a pattern of criminal behavior which includes crimes of violence or which are similar to the conduct listed in the recommended exclusion provision have demonstrated that they are not first time offenders and therefore should not be given another bite as a first time offender.

More importantly, the use of the exclusion provision provides the sentencing court with a mechanism that insures the victim's right to have all harms caused by the defendant's offense conduct taken into full consideration. The placement of the defendant in CHC I recognizes the defendant's status as a first time offender. The exclusion provision helps insure that a true distinction is drawn between first time offenders whose offense conduct does not seek to harm any individual and those offenders who specifically seek to harm others.

Finally, if the Commission does not support the new VAG proposed commentary the VAG supports option 1 to decrease the offense level by 1.

## **Conclusion**

The VAG appreciates the opportunity to address the victim related issues in relation to the impact of offenses. We hope that our collective views will assist the Commission in its deliberations on these important matters of public policy.

Should you have any further questions or require any clarification regarding the suggestions, please feel free to contact us.

Respectfully,

Victims Advisory Group  
February 2017