



October 10, 2017

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The Honorable Ralph Erickson, Chair
Tribal Issues Advisory Group
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002

Dear Judge Erickson:

This correspondence is in response to the letter of August 28, 2017 from the Tribal Issues Advisory Group ("TIAG"), seeking consultation with and comments from tribal nations regarding proposed amendments to the Federal Sentencing Guidelines that would affect defendants who are enrolled members of a federally-recognized tribe.

Regarding use of tribal court convictions in federal sentencing, the Kalispel Tribe of Indians supports leaving tribal court convictions out of the base criminal history calculation, and instead consider tribal court convictions for a potential upward departure from the recommended sentencing range. The Kalispel Tribe shares the concerns of TIAG with regard to tribal court record access. If tribal court convictions were included in the base calculation of a defendant's criminal history score, then members of tribes willing to share court records would be treated more harshly by having a higher criminal history score than members of tribes not willing to share court records. While there is some concern this disparity may occur by including tribal court convictions at all, the use of such records in justifying an upward departure from the recommended sentencing range provides less of a risk than automatically including tribal court convictions in a base calculation.

However, in reviewing the proposed amendments to the policy statement in using tribal court convictions, the Kalispel Tribe objects to inclusion of the first relevant factor. This language instructs sentencing judges to consider whether the defendant "received due process protections consistent with those provided to criminal defendants under the United States Constitution." The Kalispel Tribe objects to inclusion of this language for two reasons. First, the United States Supreme Court recently ruled a defendant's uncounseled tribal court convictions for domestic violence may be used as predicate offenses for the federal charge of being a habitual domestic violence offender. (See *United States v. Bryant*, 579 U.S. ____ 2016.) The Supreme Court specifically found that tribal courts are not bound by the United States Constitution, rather by the Indian Civil Rights Act, which affords some but not all of the same protections as the Bill of Rights. By adding this relevant factor into the policy statement, a sentencing judge could give less credence to a tribal court conviction where the defendant was not represented by an attorney, even though the Supreme Court has said

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representation by an attorney is not required in tribal courts. Second, under the terms of enhanced sentencing of the Tribal Law & Order Act of 2010 (TLOA) or the special domestic violence jurisdiction of the Violence Against Women Act of 2013 (VAWA), a tribe must afford a criminal defendant with nearly all of the due process protections outlined in the United States Constitution. Thus, in these cases, the first relevant factor is made irrelevant if a tribe has purposely chosen to adopt either the enhanced sentencing under TLOA 2010, the special domestic violence jurisdiction under VAWA 2013, or both.

Regarding the proposed revision of the sentencing guidelines to clarify the definition of “court protection order” by incorporating references from 18 U.S.C. § 2266(5) and 18 U.S.C. § 2265, the latter of which requires automatic full faith and credit of court protection orders issued by courts in all 50 states, all United States territories and all tribal jurisdictions, without requiring prior registration of the protection order. It is logical to adopt this language as the purpose of these sections is to erase the jurisdictional lines that have prevented court protection orders from providing widespread protection outside the issuing court’s jurisdiction. The Kalispel Tribe therefore supports the proposed revision to the definition of “court protection order.”

Thank you for your time and attention in this matter.

Sincerely,



Glen Nenema, Chairman
Kalispel Tribe of Indians

GN/tsf