ONEIDA INDIAN NATION

ONEIDA NATION COURT

October 10, 2017

Hon. William H. Pryor, Jr.
Acting Chair, United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002

RE: Comments of the Oneida Indian Nation on Proposed Amendments to U.S. Sentencing Guidelines

Dear Judge Pryor:

As a sitting judge for the Court of the Oneida Indian Nation, and a former judge of the New York State Supreme Court, Appellate Division, I write on behalf of the Oneida Indian Nation (the "Nation") to offer the Nation's comments to the Commission's proposed amendments to the commentary to §4A1.3 of the U.S. Sentencing Guidelines. The Nation commends the Commission for the spirit of government-to-government cooperation and respect for tribal sovereignty that is reflected in both the work of the Tribal Issues Advisory Group and the Commission's current request for public comment.

Overall, the proposed amendments to §4A1.3 highlight the simple yet important fact that tribal court judgments and criminal convictions are integral to the exercise of tribal self-governance, and should validly be recognized as such. By providing additional guidance to U.S. courts on whether and how to consider prior tribal court convictions in sentencing decisions, the approach reflected in the proposed amendments reflects a careful balance between respect for the important role that tribal courts play in tribal self-governance, and the reality that the each tribal court, and each tribe's underlying substantive law, is unique. The proposed amendment reflects a respect for these differences between tribes by maximizing the U.S. sentencing court's ability to take the unique structure and function of each tribe into account.

Though the overall approach of the proposed amendment is prudent, the Nation has specific comments to the bracketed text currently set forth in subsection 2(C)(v) of the proposed amendment to the commentary. First, as noted by a commenter on the September 25, 2017 consultation call, the text as currently drafted appears to imply that each of the 567 federally recognized tribes must take governmental action to "formally express[] a desire that convictions from its courts should be counted for purposes of computing criminal history" in order for U.S. sentencing courts to consider making an upward departure based on the tribal court conviction. The Nation agrees with that commenter that this "opt in" provision places a significant and unnecessary burden on tribal governments. Instead of this formulation, the

commentary should reflect a presumption that the U.S. court may consider the tribal court judgment, unless a tribal government has expressed a formal desire that convictions from its courts should not be counted for purposes of computing criminal history. In the absence of tribal governmental action to express a contrary

desire, there should be a presumption that tribal court convictions will be accorded the dignity of consideration by the U.S. court.

Second, even if the text of subsection 2(C)(v) is revised to reflect the comment above, the current placement of this subsection as merely one factor among many for the U.S. court's consideration raises significant concerns with respect to tribal sovereignty. As currently drafted, the formal expression of a tribal government that it did or did not desire convictions from its courts to be counted under the Guidelines would merely be a non-binding factor for consideration by the U.S. sentencing court. As such, a situation could arise where a tribal government has clearly expressed a desire that convictions from its courts not be counted for the purposes of computing criminal history, but a U.S. court could nonetheless choose to ignore that desire, and count the tribal court conviction for purposes of making an upward departure on the basis of other factors. Thus, as currently drafted, the proposed amendment pays mere lip service to the idea that the Guidelines will respect the strongly held and clearly expressed wishes of tribal governments on this issue.

To resolve this concern, the proposed amendment should be revised to clarify that if the tribal government has formally expressed a desire that convictions from its courts should not be counted for purposes of computing criminal history, the U.S. sentencing court should end the inquiry there and may not count the tribal court conviction for purposes of making an upward departure. The tribal government's determination on this question should be binding on the U.S. court. To achieve this, subsection 2(C)(v) should be deleted from the proposed amendment to the commentary, and the substance of that section should be incorporated into the body text of subsection 2(C) 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 shall first determine whether, at the time the defendant was sentenced, the tribal government had formally expressed a desire that convictions from its courts should not be counted for purposes of computing criminal history pursuant to the Guidelines Manual. If the tribal government had made such a formal expression, the court shall not make an upward departure based on the tribal court conviction. If the court determines that the tribal government had not made any such formal expression, it shall consider the factors set forth in §4A1.3(a) above and, in addition, may consider relevant factors such as the following: […]

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Thank you for your consideration of these comments, and for your continued commitment to strengthening respect for tribal sovereignty and tribal self-governance within the U.S. Sentencing Commission and the U.S. court system.

Sincerely,

Hon. Robert G. Hurlbutt

RGH/kab

Cc: Ray Halbritter, Nation Representative
Peter Carmen, Chief Operating Officer
Meghan Murphy Beakman, General Counsel