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# Swinomish Indian Tribal Community

A Federally Recognized Indian Tribe Organized Pursuant to 25 U.S.C. § 476
* 11404 Moorage Way * La Conner, Washington 98257 *

October 9, 2017

*By electronic mail only*
Public_Comment@ussc.gov
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002
Attention: Public Affairs

RE: Public Comment on the Proposed Amendments to the Sentencing Guidelines

Dear Sentencing Commission Chair and Members:

The Swinomish Indian Tribal Community submits these comments on the proposed amendments to the federal sentencing guidelines. First, I would like to extend my appreciation to the Honorable Ralph Erickson, District Court Judge for the District of North Dakota and Chair of the U.S. Sentencing Commission Tribal Issues Advisory Group (TIAG), for the telephonic consultation on September 25, 2017 in which the comments and concerns of many tribal representatives were received.

We can certainly all agree that fair and just sentencing of tribal members is to be expected in every case that is presented in federal court. With that, we commonly understand that a tribal member should expect the same sentence as would a non-tribal member being sanctioned for the same offence. This can be a difficult task to accomplish given the jurisdictional issues where a non-tribal member who commits the same offense is brought to justice in a state court system where sentencing guidelines tend to be more lenient than federal guidelines. I appreciate that the Tribal Issues Advisory Group is taking these issues into consideration when proposing these amendments.

The Swinomish Indian Tribal Community offers the following responses to the Issues for Comment:

1. As written, there is a potential for disparate sentencing between tribal member defendants. The amendments allow the court to increase a sentence based on tribal court convictions. (§4A1.3, comment 2(C)). Some tribes may rightfully deny access to information concerning tribal court convictions. In contrast, some tribes utilize the Tribal Access Program (TAP) to enter tribal convictions into the National Crime Information Center database. As a result, a tribal member co-defendant who has been convicted of a crime within a tribe that utilizes TAP would have higher sentences than the tribal member co-defendant who committed possibly even more

heinous crimes, but within a tribal jurisdiction that has not granted the federal government access to the tribal conviction history. In conclusion, until such time as the sentencing court has access to *all* tribal members' criminal history from *all* tribal jurisdictions, the consideration of these convictions for upward departure at the sentencing is improper due to these disparate treatment issues.

2. If Tribal convictions are considered, the comments should be amended to allow consideration of convictions where the defendant was represented by a tribal advocate. Many tribes proudly utilize the expertise and wisdom of tribal members who have not graduated from law school, but have passed a tribal bar exam, abide by the ethical rules and are under the continued regulation of a tribal court bar association. These tribal advocates represent criminal defendants with care and integrity and ensure that all due process rights are met. These convictions should be weighed with the same integrity that all other tribal court convictions are weighed. Therefore, comment 2(C) on §4A1.3 should be amended to state: "The defendant was represented by a ~~lawyer~~defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys, had the right to a trial by jury…"

3. These amendments fail to recognize the need for downward departures based on disparate treatment due to tribal membership or affiliation. In the Synopsis of Proposed Amendments it is recognized that the TIAG was tasked with studying how federal sentencing guidelines for crimes committed in Indian Country compared with similar crimes that were prosecuted in state courts. Evidence of this disparity has been widely studied. A primer to that disparity is well documented in Timonthy J. Droske's Marquette Law Review article "Correcting Native American Sentencing Disparity Post-Booker" which recounts the finding that in South Dakota, for example, the average state sentence for assault is twenty-nine (29) months in comparison to the forty-seven (47) month average a tribal member would face in federal court for the same offense. The solution to this disparity does not appear to exist in these proposed amendments. A federal court should be authorized by the sentencing guidelines to examine state statutory sentencing lengths and allow for a downward departure to correct disparities. This requires recognition that Indian status is a relevant consideration in sentencing and tribal membership can be its own grounds for a downward departure when sentencing disparities are shown among non-tribal defendants in analogous state court proceedings.

Thank you for considering these comments. We look forward to continuing to work with the Commission to address these important issues.

Sincerely,

M. Brian Cladoosby, Chairman
Swinomish Indian Senate