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

October 10, 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 August 25, 2017. In this letter, TIAG addresses two amendments: First Offenders/Alternatives to Incarceration and Tribal Issues. The TIAG takes no position on the remainder of the proposed amendments published for comment.

1. FIRST OFFENDERS / ALTERNATIVES TO INCARCERATION[1]

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).

For the definition of "first offender" the currently proposed amendment offers a choice between individuals who receive no criminal history points and those with no prior convictions of any kind. TIAG believes that a middle course would best reflect the reality of practice in Indian Country while reserving the first offender reduction for individuals without a history of violence.

[1] The Department of Justice's (DOJ) representative on the TIAG advises that the DOJ does not support the proposed new §4C1.1 guideline, nor does it support the proposed new §5C1.1(g). Accordingly, the DOJ representative on the TIAG does not join the other TIAG members in the comments on this amendment.

TIAG recommends that "first offender" be defined in §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 definition includes a bracketed paragraph (2) requiring that the defendant have no convictions of any kind in order to qualify as a first offender. TIAG understands 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. Status offenses such as public intoxication, vagrancy, or protective custody are very common offenses of conviction, often as a means to provide protective services. TIAG believes that there should be emphasis 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, TIAG also believes that individuals who have been convicted of a crime of violence in tribal court or a foreign court, should not qualify as a "first offender."

TIAG also supports the proposed additional subsection in § 5C1.1:

(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.

TIAG believes that this language appropriately draws the distinction based on a history of violence that we encourage the Commission to implement above for §4C1.1(a). Even with this requested delineation, the new language will remind the sentencing court that a non-incarceration sentence is an appropriate alternative under the Guidelines. TIAG recognizes that are cases in which a term of imprisonment remains the most appropriate choice. By way of example, incarceration may be chosen for a defendant who has a history of violence or an extensive history of significant unscored violations in foreign or tribal courts.

2. TRIBAL ISSUES

TIAG supports the proposed commentary to § 4A1.3(a) intended to provide courts with guidance on whether an upward departure is appropriate based on tribal court convictions. The commentary includes five relevant factors that the court may consider in making this determination, and the Commission has asked how these factors should interact with one another. TIAG believes that no factor should be a threshold requirement or determinative and that their weighting should be left to judicial discretion in the individual case. TIAG believes that the current approach to tribal convictions remains appropriate with the additional guidance

the proposed commentary provides for considering possible departures based on tribal court criminal history.

Additionally, TIAG makes the following additional observations about the first, second and fifth factors (subsections (i), (ii) and (v)). Proposed 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 shall consider the factors set forth in §4A1.3(a) above and, in addition, may consider relevant factors such as the 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 Commission has asked for comment on whether due process should be a threshold factor to apply §4A1.3(a). TIAG recommends that it should not. Imposing the due process requirements set forth in subpart (i) as a mandatory threshold ignores the diversity and historical culture of tribal courts as well as applicable statutes and Supreme Court precedent. Critically, it also undercuts tribal sovereignty.

In the United States there are approximately 351 tribal courts of varying capacity.[2] Imposing subpart (i) as a threshold requirement could be read as mandating a western court model on all tribal courts. Tribal courts vary in capacity and model based on a variety of local factors beginning with purposeful policy choices by individual sovereign tribes and including other factors like geography, population, and tradition or cultural practice. Tribal nations are not political subdivisions of the United States; each federally recognized tribe is a separate sovereign. Imposing subpart (i) as a threshold requirement above all others may be viewed as paternalistic and a rejection of tribal sovereignty.

The term "due process protections" in this section also must be considered in light of the distinction between certain rights which are protected by the United States Constitution and those protections afforded under the Indian Civil Rights Acts of 1968 (ICRA). Those rights are not identical. Due process, as it is known in federal and state courts, 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 (1978).

As a further reflection of this reality, the United States Supreme Court has affirmed the use of uncounseled tribal court domestic violence convictions as predicate offenses for habitual domestic offender prosecutions under 18 U.S.C. §117(a). *See United States v. Bryant* 136 S. Ct. 1954 (2016). The Court reaffirmed that the Sixth Amendment did not extend to tribal courts. Making subsection (i) a threshold would preclude consideration of tribal court conditions on their own terms, effectively excluding any consideration of convictions from tribal courts which,

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

although complying with the requirements of their own law and the Indian Civil Rights Act, did not provide all the protections applicable to state or federal courts.

In light of the foregoing, the TIAG believes that subpart (i) should be included, but not made a threshold requirement.

TIAG also believes that the Commission should continue to include, as separate subparts, subpart (i) and subpart (ii). They address different things. 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 ICRA to permit a tribe to opt in to enhanced sentencing authority of up to 3 years or a fine of $15,000 for any one offense, up to a total of nine years, if the tribe met certain requirements. Those requirements include providing indigent defendants a licensed defense attorney at the tribe's expense, the presiding judges being licensed and law trained, a published criminal law code, and that any custody be served at a facility that meets minimum federal requirements.

VAWA 2013 was enacted to allow tribes 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 if certain rights are afforded. Those rights include those that are described in TLOA as well as requirements that jury pools include a fair cross-section of the community and not systematically exclude non-Indians and that defendants detained by a tribal court be informed of their right to file federal habeas corpus petitions.

Because they address different types of prosecutions and different protections for defendants, subparts (i) and (ii) are ultimately different considerations. TIAG therefore recommends that both remain included.

Lastly, TIAG believes that the inclusion of subpart (v) is appropriate but requires additional clarification in application notes.[3] Subpart (v) provides:

> (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.

TIAG believes that obtaining the input of tribes is a critical acknowledgment of their sovereignty. 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.[4] Each of these tribes is a

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[3] The DOJ does not support inclusion of this fifth factor. Accordingly, the DOJ representative on the TIAG does not join the other TIAG members in the comments on this fifth factor.

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

separate sovereign. 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.

TIAG recommended a formal consultation with tribal governments and other interested groups on the issue of how tribal governments could "formally express a desire" for their convictions to be considered as well as other proposed amendments. A transcript of that consultation session is attached. Additionally, other tribes and interested parties indicated that they could comment directly to the Commission. Although the transcript and those comments will speak for themselves, they reflect the reality that each tribal government is unique and has unique perspectives and policy views. TIAG believes that those views should be heard and considered.

The practical aspect of how tribes may "formally express" their position on considering tribal court convictions is difficult. TIAG believes that additional application notes or commentary may be appropriate to clarify this. TIAG believes that any expression of the tribe's position must be made through a resolution or other enactment of the tribal council or other governing body. TIAG also believes that such a resolution should be accompanied by a mechanism to provide information about tribal court convictions to the court.

Comments in the consultation and the professional experience of TIAG members also suggest that any expression of whether convictions should or should not be considered must be general and cannot be made on a case by case basis. TIAG believes that this subsection should be a mechanism to respect tribal sovereignty and policy on criminal justice issues generally, not to weigh in on appropriate sentences in a particular case.

Lastly, the consultation process again brought up the real possibility that, given the disparate circumstances and approaches of different tribal courts, adopting a "one size fits" all approach to tribal court convictions can exacerbate unwarranted disparity. Not all tribal courts are the same. Judges who serve in districts with significant Indian Country caseloads develop familiarity with the practices of local tribal courts and can best weigh these factors in deciding how to approach a history of tribal court convictions. The proposed guidance under § 4A1.3(a) allows them to consider the impact of those convictions in a structured, measured, and equitable manner.

On behalf of our members, we appreciate the opportunity to offer TIAG's input.

Sincerely,

Ralph R. Erickson

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

cc: Honorable Charles R. Breyer
Honorable Danny C. Reeves
Rachel E. Barkow
Zachary Bolitho
Patricia Wilson Smoot
Kathleen Grilli
Ken Cohen

TRIBAL ISSUES ADVISORY GROUP

Moderator: Judge Ralph Erickson
September 25, 2017
12:00 pm CT

Ralph Erickson: Good afternoon. I would like to just make a couple of brief comments. I want to welcome all of you who are participating in this consultation. A couple of just initial ideas. The purpose of the consultation is for us to get information from the Indian nations and their representatives and so we would like to hear as much as possible about the pending amendments to the sentencing guidelines as well as any areas of concern on the part of the representative of the various Indian nations.

And so if you're not a representative of an Indian nations we are more than willing to hear from you but we'd like you to keep your comments brief at least until we've exhausted the comments that the people with whom we are obligated to consult have had an opportunity to consult with us. And so if you just bear that in mind I would appreciate it.

I want to thank all of you for joining us today and I want to thank everyone for being part of this tribal consultation.

I am Ralph Erickson I'm a United States District Judge and I am the Chair of the United States Sentencing Commissions Tribal Issues Advisory Group which we're referred to a TIAG.

Now as you may know the Sentencing Commission formed TIAG as a permanent advisory group to provide the commission with its view on federal sentencing issues that relate to American Indian and Alaska native defendants and victims, and to offenses committed in Indian country and to engage in meaningful consultation and outreach with the tribes, tribal governments, and tribal organizations related to federal sentencing issues that have tribal impact and implications.

The TIAG is comprised of nine members who come from a diverse professional and tribal backgrounds and I think we have most of the TIAG members with us on the call today. Joining me to represent the Sentencing Commission are Wendy Bremner, Winter Martinez, Chief Judge Mekko Miller, Tim Purdon, Gretchen Shappert and Sam Winder. In addition to my work as Chair of the TIAG, I am a Judge in the District of North Dakota I think I might have mentioned that.

There are four Indian reservations in our state and as a result I've presided over a great number of cases involving Native American defendants. I grew up in North Dakota and like most of you, I have a lifelong appreciation and concern for the application of federal laws to Native Americans. I grew up near two reservations. I can't remember a time in my life where Native American people were not important in our family and the businesses that my family were involved with and I just can't imagine anything more important for us as a group than the work that we're doing here.

I would really like to hear from each of you about what your thoughts are as to how the Sentencing Commission can improve the sentencing guidelines and to make them more responsive for the needs of your citizens and your governments. I want to thank you for participating in the tribal consultation. This is a listening session and it marks the second time that the Sentencing Commission has engaged in a government to government consultation with the tribes.

I also want to thank and commend the Commission for this effort and for their support of TIAG. I know I speak on behalf of all of my colleagues on TIAG to say that we hope that this is the beginning of a long-term relationship with the tribes on federal sentencing matters.

Now with that I want to remind you that we should try to limit our content of today's consultation to the topics that are relevant to TIAG's work. You may know from the consultation materials that were circulated ahead of the call that we're looking into a number of questions that are related to proposed amendments to Chapter Four of the Sentencing Guidelines. Now the proposed amendment includes a list of criteria that courts should consider in determining whether an upward departure from the guidelines is appropriate based on the defendant's record of tribal court convictions.

The TIAG seeks tribal input to inform its work about the criteria listed in the proposed amendment. In particular we seek information on the – what the criteria should be included and we seek information about a requirement that the tribal preference about the use of its convictions should be taken into consideration. And if that criteria is included in the amendment, how would the tribes express their preference to the federal courts. And these answers are crucial for us they'll inform our work.

We hope that you will address those topics and anything else in the proposed Sentencing Guideline amendments that may be relevant to you.

If possible I'd like everyone to limit their remarks to 5 minutes to that we can hear from as many people as possible. I'm going to put the call into listening session mode and then you will have the opportunity to provide comments. Once that happens you will hear a recording that will provide instructions to you about how to alert the operator that you have a comment and how to enter the queue. It's actually very simple. If you wish to make a comment press 1 and zero on your telephone and you will automatically enter the queue.

I will take the comments in the order that they enter the queue and when it is your turn – turn to speak you will hear, "Please ask your question after the tone." Once you've heard that prompt your line will be unmuted and we very much look forward to hearing your comments.

I want to thank you again for participating in our listening session and with these instructions out of the way I'm going to place this call into listening mode if I can do that and I'll do it to the best of my ability and then you'll have an opportunity to speak.

Ralph Erickson: All right. So if there's anyone that wants to ask a question or actually consult with us. As I said this is mostly a listening conference and it's our purpose to really get your input. And really the primary area that TIAG has concerns about are the use of tribal court convictions what the tribes position is on that and how they would go about notifying the courts of their decision. So if anyone has any comments on anything I'd love to hear from you.

Jason D'Avignon: Hi this is Jason D'Avignon for the Colville tribes.

Ralph Erickson: Yes.

Jason D'Avignon: And one question I guess I have is in terms of notifying the court of willingness, you know, would this be I guess it's the idea that it would be we might send a letter or some sort of official notification or would we rely on maybe the US Attorneys or whomever contacting the tribe and asking us? And, you know, what sort of information would we need to I guess need to provide in terms of, you know, are we compliant with TLOA or VAWA or any of those things?

Ralph Erickson: The thing that if you'll if you have in front of you the Section 4A1.3 which is for departures based on the inadequacy of criminal history category. And if you look at the application notes it says that at the time the defendant is sentenced the tribal government had formally expressed the desire that convictions from its courts should be counted for purposes of computing criminal history pursuant to the guidelines manual.

Originally within our the original TIAG we had contemplated that that formal expression would be in the form of a tribal commission resolution or other formal government action that would not be undertaken on a case by case basis but, you know, just that we, you know, want them or not want them scored. There was some question whether that was appropriate and what might be the best method for the tribes to inform the courts what their government's position is.

And so that's really the question we've got for you. You just asked us the question we're looking for the answer to. And I would just tell you that originally we had talked about a formal expression and we had contemplated a commission resolution or something like that or an ordinance. So what are your thoughts?

Jason D'Avignon: And I think we have maybe some concern with a broad open up of our files. I think a resolution might work and I think we would need to work on how to interface, you know, provide access to those records. You know, because sometimes there's a lot of defendants who maybe have committed violent crimes on the reservations that have not been prosecuted in the state or federal system and so their, you know, their criminal history is certainly under-reported. There's others that maybe it's I think the tribe may have concerns with basically they're just allowing the federal government to take a look anytime it wants.

Ralph Erickson: That's interesting. You know, our experience here in the District of North Dakota is that virtually all of our tribes when our probation officers ask for a pre-sentence investigative revealing of the criminal history of a particular defendant we seem to get it all the time. And so your concern is and it's not like any member of my staff the probation officers go through and rifle through the tribal court records it's that the probation officer makes a request for the criminal history just like you would for the state criminal history through the national crime reporting system.

So that's kind of the system that we use here. And you have some concerns about that process?

Jason D'Avignon: I mean not serious concerns just I guess not quite sure what to think about it yet.

Ralph Erickson: Okay.

Jason D'Avignon: There are things that we've been talking about. I have one other I guess concern as well though.

Ralph Erickson: Okay.

Jason D'Avignon: And that and then I'll let anyone else who wants to jump in jump in.

Ralph Erickson: Thank you.

Jason D'Avignon: Let me get this citation my apologies. On the commentary for upward departures or 4A13 and then it talks about the defendant was represented by a lawyer had a right to trial by jury and received other due process protections. And I was I guess I have a comment on the use of the word "lawyer." I know TLOA uses a slightly different formulation which is, you know, licensed to practice law in a jurisdiction that has suitable governess over the profession which I have read to include tribal court bars.

Here at Colville we have a strong tradition of providing advocates for defendants and in particular non-lawyer advocates. You know, has there been any consideration of, you know, protecting sort of those positions in tribal courts, you know, and how they might play a role in this?

Ralph Erickson: Yes we've had some discussion about that. And the question of being a lawyer I think we've talked about it and I think part of the question that we had was that, you know, going to law school is not a magical piece of being a lawyer because if you think about it up until recently many states allowed non-law trained persons to sit for the bar and become licensed as lawyers. And, you know, California still allows you to go to a unaccredited law school and still be licensed as a lawyer if you can pass the bar.

And so I think that the whole issue of lawyer is something that is an open question for the individual trial judges on the federal level as they go through

this four-part balancing because in this commentary it's not the black letter of the law it's the things that the courts supposed to take into consideration. And frankly in our tribes we have both law trained public defenders and non-law trained public defenders and I think that that's what weight to put on that would depend on what the federal judge actually knows about the court system and how it's functioning.

Jason D'Avignon: Okay thank you…

Ralph Erickson: That…

Jason D'Avignon: …Judge.

Ralph Erickson: …make sense?

Jason D'Avignon: Yes…

Ralph Erickson: (Okay).

Jason D'Avignon: …it does.

Ralph Erickson: Thanks.

Justin Eason: Good afternoon. Justin Eason Tribal Prosecutor for the Eastern Band the Cherokee Indians. I'm also a Special Assistant US Attorney and I was just wondering why there's even a requirement that the tribal government expressed a desire that their convictions be used in these cases? Have you guys had a lot of experience where tribal courts or tribal governments have asked you not to consider the convictions of people they're sending to federal court?

Ralph Erickson: There within in the TIAG committee – maybe I should tell you a little bit about. TIAG started off as a working group and we've presented a final product which then has resulted in the formation of a standing committee and it's also resulted in the proposed Sentencing Guidelines amendments. During the course of our discussions there was actually some deep concern about tribal sovereignty and that various tribes may have different opinions on the propriety of counting tribal convictions.

Some tribes have taken a position and frankly we have some tribal members on the original group that indicated that the federal sentencing structures were unduly harsh to start with and they were opposed to anything that made them more harsh. And so that's kind of the underlying reason why we wanted the tribes to have input and mainly we did not want to infringe on their sovereignty so that was a purpose. Did that answer your question?

Justin Eason: It did just would seem to me that if you – it seemed to me that a better way might be to ask the tribe to explicitly request an exemption rather than let it be included. I mean it's putting the onus on the tribe to ask for something that by rights if these tribes are already engaged in the other things that you wish them to be engaged in as far as the Tribal Law and Order Act and Violence Against Women Act go that probably ought to be done just as a matter of policy at that point is should be accepted in my estimation. But why do you make it that they have to opt in rather than opt out?

Ralph Erickson: You know, we never really discussed that and I think that's a really good point and something that we will take back to our working group and discuss and then move on from there. I mean I don't now maybe it was talked about and I just don't recall it but I do not have recall us having any in depth discussion about opt out versus opt in.

Woman 1: (Unintelligible).

Justin Eason: Okay thank you that answers my questions.

Ralph Erickson: Thank you. At this point I have no questions in the queue so if anybody has a question or a comment we will take it up. And so far it looks like we've got a couple of things that will provide some round for discussion by our working group. But if there's anybody else that wants to be heard. I continue to have no questions remaining so what I'll do is I'll wait one minute here and if somebody's got a question now is your chance or a comment.

Kathleen Grilli: Judge perhaps it might be helpful if I give a little historical background on the Commission and the treatment of tribal convictions in the past perhaps that…

Ralph Erickson: Okay.

Kathleen Grilli: …might prompt another question. This is Kathleen Grilli, I'm the Commission's General Counsel. When the Commission originally created the guidelines and was thinking about criminal history, tribal convictions were excluded from the computation of the criminal history score. In large part there was some concern about the court's ability to get information. I think the Commission's experience with tribal convictions and the court's willingness to provide the information shows that it varies by tribe.

Tribes are a separate sovereignty - they are not required to provide this information. And in some instances they're willing to provide it; in other instances they were not. And so there's always been concerns about the disparities that might result if the Commission decided to include tribal

convictions as countable convictions that would be scored in the same way as any other state or felony conviction is generally scored in the criminal system.

I think with the TIAG's work suggested or at least the TIAG ad hoc group that created the report that led to the creation of this advisory group went back and forth and debated the issue and thought that this proposed amendment with criteria for the courts to use might provide some guidance to the courts on how and when to use tribal convictions. But, you know, I heard the one caller mention sort of the tribes opt out and certainly that's an interesting comment. I wonder if others on the call have a feeling about that one way or the other.

You know, are there others on the call who think that the Commission should always consider tribal convictions or at least should instruct sentencing judges to always consider them or not.

Ralph Erickson: Thank you Kathleen.

Kathleen Grilli: Judge, I just received an email from Tamera Begay from the Navajo nation. She says she has a question but the phone is not letting her into the queue. I'm going to email her back and ask her to email me the question; to try again but to email me the question.

Ralph Erickson: All right.

Kathleen Grilli: All right Judge she has emailed me that question and the question is, "How does the Tribal Access program play into Chapter Four?"

Ralph Erickson: I am a little bit confused about what is meant by the Tribal Access Program. And maybe I'm supposed to know what that is but I'm a little bit confused. Does anybody and do any of our members know?

Kathleen Grilli: I've just emailed the the questionor back, Judge. So perhaps the question is how were the tribal convictions based on the proposed amendment going to be taken into consideration under Chapter Four of the guidelines?

Ralph Erickson: Well the way that they'll be taken into consideration is that they are not scorable the same as state convictions; they're treated more closely akin to what we would do with foreign convictions. And so they may be used for bases for an upward departure based on the inadequacy of the criminal history. What we would do at that point is we would look at the criteria that are proposed and they generally have to do with the type of process that was afforded the right to representation the right to a trial by jury.

Whether the tribal court was exercising its standard jurisdiction under TLOA and VAWA that the tribal court conviction is not for the same conduct that's being charged in federal court that the offense is one that would be otherwise scorable under the guidelines so certain non-scored tribal convictions could not be considered.

And then that whether or not the tribe had indicated a preference as to whether they wanted to have their convictions taken into consideration. And so the trial judge would balance all of those things out and then make a decision whether or not there was a bases for an upward departure all right.

And so it doesn't really mandate any particular resolve but it does give guidance to trial judges as to what factors they could consider. As the commentary and rule sits now the court is free to upward depart based on a tribal court conviction history for any reason and they don't have any guidance as to how they're supposed to take those tribal convictions into consideration. So that's what the problem was that was identified and we're

really looking at trying to provide guidance to judges particularly those who only occasionally have Indian country cases presented to them.

Kathleen Grilli: Judge, one of our participants on the call has very kindly forwarded me an email explaining Tribal Access programs. Apparently the Department of Justice is expanding the Tribal Access program for national crime information. I guess that's a way for them to participate in the crime information databases. And so the email says tribes interested in participating in TAP must submit a letter or resolution from the tribe's governing body by September 15, 2017.

So perhaps that's something where tribal records are going to be more widely available than they are currently, like NCIC…

Ralph Erickson: Yes once…

Kathleen Grilli: …records.

Ralph Erickson: …tribal – yes once the tribal records get on the national reporting systems they're going to be available to all the probation officers and that'll be reported in the pre-trial status of or the pre-sentencing report. And once that pre-sentence investigation report is received by the judge they'll just go in a separate category because there will be non-scorable offenses because they'll be tribal convictions rather than state court convictions. And so they'll be in the section with other convictions that would involve tribal courts, foreign courts and certain other courts of not of record that may out there.

And those will not go into the guideline calculation they will still simply be used I would assume for if we follow our guidelines as they are currently written for purposes of an upward departure based on that history.

Kathleen Grilli: Correct…

Ralph Erickson: Kathleen.

Kathleen Grilli: …TAPs might somehow that might be the way that the tribes would opt in to having their records more broadly available. So that may be something for the group to consider as well.

Ralph Erickson: Yes, that is because I think once they opt in and those records are being made available for all law enforcement agencies I think courts are going to look at them and say well there's been a determination by the tribe that they're participating and just in dispending their conviction histories anyhow. But that's something our committee needs to talk about.

Tamera Begay: Hello.

Ralph Erickson: Hi this is Judge Erickson.

Tamera Begay: Hi Judge this is Tamera the one that emailed the question.

Ralph Erickson: Oh okay.

Tamarah Begay: And you answered my question when I had pressed the number about how you were – you mentioned that POs go to - they request sort of a pre-sentencing report from NCIC and so if tribes already participating in TAP, those tribal convictions are there and so you answered that by saying that'll be non-scorable until.

Ralph Erickson: Yes they'll still be non-scorable because they'll be like under the guidelines they'd still be looking more like foreign court convictions than state court convictions. And…

Tamera Begay: Yes.

Ralph Erickson: …that has been the debate that our committee has had and like I said the sort of position that the advisory group came up with was is what's in the proposed rule.

Tamera Begay: Okay.

Ralph Erickson: Did that answer your question?

Tamera Begay: Yes that was basically my only questions so thank you…

Ralph Erickson: All right thank you.

Ralph Erickson: All right my phone continues to show that there is there are no remaining questions or comments and so I would just like to thank all of you for participating. Kathleen have you gotten any emails at this point?

Kathleen Grilli: I have not Judge. I'll remind the…

Ralph Erickson: (I)…

Kathleen Grilli: …callers Judge that we do still have an open comment period on this proposed amendment the comment period is open through October 10. So anyone who did not necessarily wish to make comments today during our call

our consultation is certainly free to submit public comment directly to the Commission.

Ralph Erickson: …yes so and if you would prefer to submit some sort of a comment to TIAG to consider to the subcommittee you can do that as well by sending it to Kathleen and she'll make sure that it gets distributed amongst us okay.

Kathleen Grilli: Correct, public comment can be sent to my email address as well and I'll make sure it gets to where it needs to go. Otherwise, any information about how to contact the Commission and submit public comment is also available on our Web site which is www.ussc.gov.

Ralph Erickson: All right, well thank you very much for participating and I hope you all have a fantastic day and hopefully we'll have a chance to talk again about issues that are of mutual interest in the near future so thank you.

END