

# VICTIMS ADVISORY GROUP

To the United States Sentencing Commission

T. Michael Andrews, Chair



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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 Pryor and Members of the Commission:

The Victims Advisory Group (VAG) appreciates the opportunity to provide a written response to the Commission on the proposed amendments to the Sentencing Guidelines regarding tribal issues, first offenders/alternatives to incarceration, and acceptance of responsibility. 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 respect to Criminal History Category VI. The VAG supports the recommendation 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 those provided to criminal defendants under the Constitution, the

VAG urges the Commission to follow the holding in *US v Bryant*, 579 US\_\_ (2016), which held that since Bryant’s tribal-court convictions occurred in proceedings that complied with the Indian Civil Rights Act were valid when entered, and used as predicate offenses, did not violate the Constitution. The ICRA does not require the accused to be represented by counsel. Consequently, the VAG recommends that Commission treat tribal court convictions the same as state and local offenses to be used to compute criminal history points. The VAG’s position on the tribal sovereignty question of whether Tribes should opt in and provide the criminal history for tribal defendants is that for those cases where a victim is involved and the defendant has prior convictions in tribal court, those tribal convictions should be mandatory and part of any criminal history calculation.

As for court protections 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). In our view, this definition is appropriate and should it to be used. The most important factor with tribal court protection orders is that they should be given the same full faith and credit as state or federal courts.

## **II. 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. It also presents a situation where a victim may have to testify in a mini-trial regarding to the defendant’s challenge of an Acceptance of Responsibility adjustment consideration, which would prevent finality for the victim. Furthermore, the VAG is concerned that there is not yet enough data or evidence to support this proposed change.

## **III. First Offenders**

The VAG recommends that the Commission adopt the proposed first offenders definition under §4C1.1 (a). The VAG wants to maintain the status for a pattern of offenses and proposes 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 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 is similar to the conduct listed in the recommended exclusion provision have demonstrated that they are not first-time offenders, as the Commission would envision.

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 commentary the VAG supports option 1 to decrease the offense level by one.

### **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  
September 2017

