

United States Sentencing Commission
TRIBAL ISSUES ADVISORY GROUP

*Honorable Ralph Erickson, Chair
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September 7, 2022

Hon. Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500 South Lobby
Washington, DC 20002

Re: Priorities for TIAG

Dear Judge Reeves:

The Tribal Issues Advisory Group would like to welcome and congratulate the members of the Commission on their recent confirmation and express our deep gratitude for the opportunity to continue the important work on Indian Country sentencing issues.

The TIAG recently conducted an informal survey of a number of district judges who are heavily involved in Indian Country sentencing. Our consultation shows two areas of great concern that judges throughout Indian Country are interested in having the Commission address as priorities in the upcoming cycle.

- 1. Guidance under USSG § 2X5.1 related to undefined assimilated crimes under the Assimilative Offenses Act.** Under 18 U.S.C. §§ 13 and 1153 certain undefined state crimes are assimilated in Indian Country. USSG § 2X5.1 instructs the sentencing court to use the “most analogous” guideline to the charged crime. Judges are encountering a number of state felonies (most commonly child neglect and abuse offenses) that do not have a closely related analog in the federal guidelines. The current guidance leaves sentencing judges in a position of great uncertainty as to the appropriate base offense level in these situations.
- 2. Lack of an “Indian Country Safety-Valve” that would allow greater flexibility in sentencing drug offenders with limited criminal histories.** Sentencing judges and tribal leaders in Indian Country have expressed frustration that youthful offenders and others with limited or no criminal history face much longer sentences for crimes than non-Indians committing the same offenses in the same place. Tribal leaders frequently complain to judges and DOJ officials that the harshness of federal sentencing policy is causing youthful offenders with little history to be unjustly sentenced and removed from the community for longer than necessary to meet the legitimate goals of federal sentencing policy. A second concern expressed by some is that the lack of alternative sentencing for offenders with limited criminal

histories can result in some cases being retained in tribal courts who may not have the ability to provide the level of rehabilitative services and supervision that are available in the federal courts. They suggest that the adoption of an Indian Country Safety Valve Provision would be helpful in addressing both identified problems.

In addition, the TIAG has identified several other issues that may be worthy of study and could lead to future amendments to the guidelines or relevant commentary. Those include:

- A. Small scale drug offenses in Indian Country.** Several tribal leaders and judges have inquired about a possible guideline departure designed to address the sorts of street level drug trafficking that is common in state prosecutions but are, for the most part, limited to Indian Country and Federal Enclave prosecution. These cases usually involve small quantities of drugs where prosecution is delayed and the drugs are then subjected to quantitative and qualitative lab testing resulting in sentences that are four or five times as long as they would have been without the testing, which is rarely done in state court prosecutions.
- B. Further guidance on application of § 4A1.3—Tribal Court Histories.** Several sentencing judges report difficulty obtaining complete and accurate tribal court records, a concern about the variability of prosecution and defense standards across various tribal courts. Concerns are exacerbated when charged defendants have histories of violence in the tribal courts, but the records are incomplete or unavailable. The result is that violent offenders are treated similarly to those without a criminal history.
- C. Vehicular Homicide, Voluntary Manslaughter and Second-Degree Murder guidelines.** Sentencing in the areas of vehicular homicide, manslaughter, and murder have evolved substantially since the guidelines were first established. At this point, the guideline ranges are substantially less than the sentences imposed in virtually all state courts, resulting in sentences that are not viewed by the public, especially the victim's families, as just.

The TIAG appreciates the opportunity to participate in the selection process for study priorities for the upcoming cycle. If you have any questions, concerns, or need further information or clarification, please do not hesitate to contact us.

Sincerely,



Ralph R. Erickson
Chair, Tribal Issues Advisory Group
Circuit Judge, 8th Circuit Court of Appeals