VICTIMS ADVISORY GROUP

A Standing Advisory Group of the United States Sentencing Commission

February 8, 2018

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002

RE: VAG's Testimony 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 and acceptance of responsibly. 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, especially with regard to whether the defendant had the right to a trial by jury, and received other due process protections consistent with those provided to criminal defendants under the Constitution. With regard to the issue of whether a defendant was represented by a lawyer, the VAG reminds the Commission that the Indian Civil Rights Act (ICRA) does not require the accused to be represented by counsel for the purpose of calculating prior convictions. This issue is now settled law by the Supreme Court decision in *US v Bryant*, 579 US___(2016) which held that the use of tribal-court convictions as predicate offenses in a subsequent prosecution does not violate the Constitution when the tribal-court convictions occurred in proceedings that complied with ICRA and were therefore valid when entered.[1] 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 policy behind the *Bryant* Case and Congressional action is based on empirical studies that have demonstrated that Native American women experience domestic violence at higher rates than other racial groups.[2] A Center for Disease Control study found that 45.9% of Native

[1] See *United States v Bryant*, 579 US__(2016)
[2] *See* Michele C Black Et al., Ctr for Disease Control and Prevention, Nat'l Ctr for Injury Prevention & Control, Division of Violence Prevention, National Intimate Partner and Sexual Violence Survey 2010 Summary Report 40 (2011)

American women are victims of domestic assault, as compared to 31.7% of white women.[3] Likewise, a Department of Justice study found that 30.7% of Native American women and 21.3% of white women experience domestic assault at some point in their lifetime.[4] Recognizing this domestic violence disparity, Congress amended the Violence Against Women Act to criminalize domestic assault by habitual offenders.[5]

The purpose of this Act was in large part to reduce domestic violence within Indian Country involving Native American victims. Congress was fully informed when passing §117, that although the Sixth Amendment has been interpreted to require appointed counsel when a defendant is sentenced to any term of imprisonment,[6] the Bill of Rights does not apply to defendants in tribal courts.[7] Instead, the Indian Civil Rights only requires counsel if the defendant is incarcerated for a maximum of 1 year for each possible charge.[8] This excludes consecutive sentences.

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[3] *See* Michele C Black Et al., Ctr for Disease Control and Prevention, Nat'l Ctr for Injury Prevention & Control, Division of Violence Prevention, National Intimate Partner and Sexual Violence Survey 2010 Summary Report 40 (2011)

[4] Patricia Tjaden & Nancy Thoennes, US Dept. of Justice, Extent, Nature and Consequences of Intimate Partner Violence (2000)

[5] 18 U.S.C § 117(a)(Supp. II 2014)

[6] See, *Scott v Illinois*, 440 U.S 367,373-74(1979)

[7] See. *Tom, v Sutton*. 533 F.2d 1101 (9th Cir. 1976)

[8] *Id* § 1302(c)

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 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.

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.

I look forward to answering any of your questions.

Respectfully,

Chair, Victims Advisory Group

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