

United States Sentencing Commission
TRIBAL ISSUES ADVISORY GROUP

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Testimony Before the United States Sentencing Commission
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Chairman Pryor, Members of the Commission, I want to thank you for the invitation to appear today on behalf of the Commission's Tribal Issues Advisory Group. The ability of the TIAG to provide comment to the Commission is becoming an important tool for stakeholders interested in fair sentencing in Indian Country. As I welcome a chance to answer your questions, I will be brief.

First, I will note that, additional to my testimony today, the TIAG filed written comments on October 19, 2017 addressing the proposed First Offender/Alternatives to Incarceration amendments to the Sentencing Guidelines.

As currently proposed, there are two alternate definitions of "first offender" in the amendment. One option defines a "first offender" as a defendant who receives no criminal history points. The second option defines a "first offender" as a defendant with no prior convictions of any kind. The TIAG believes either choice could create unintended consequences for Indian Country defendants. The TIAG believes that a blended, middle course definition of "first offender" would best reflect the reality of practice in District Courts that sentence Indian Country defendants.

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 and can be a means used to provide protective services in tribal communities. However, tribal courts can also handle cases that involve violent conduct, such as misdemeanor domestic violence charges. Currently, tribal court convictions are not scored under the Guidelines when determining a defendant's criminal history points.

The TIAG believes there should be a distinction between petty offenses and crimes of violence in determining whether a defendant with a prior tribal court conviction qualifies as a "first offender." Take the scenario of two defendants: one with two unscored prior tribal court convictions for public intoxication and one with two unscored prior tribal convictions for domestic violence.

- A definition of “first offender” that relies solely on criminal history points would allow both defendants to be treated as “first offenders” under the amendment.
- A definition of “first offender” that requires no criminal convictions of any kind would exclude both defendants from treatment as “first offenders” under the amendment.

The TIAG believes there should be a distinction between petty offenses and crimes of violence in determining whether a person with a tribal court conviction 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 courts. However, the TIAG also believes that individuals who have been convicted of a violent crimes in tribal court should not qualify as “first offenders.” Therefore, the TIAG suggests an alternate definition of “first offender” as follows:

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 for convictions from trial or foreign jurisdictions which are not for violent crimes.

The TIAG also supports proposed subsection (g) in §5C1.1. The TIAG believes that this proposed language appropriately draws the distinction based on a history of convictions for violent crimes we encouraged the Commission to implement for §4C1.1(a). Even with this requested distinction, the new language will remind the sentencing court that a non-incarceration sentence is an appropriate alternative under the Guidelines. The TIAG recognizes that there 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 tribal courts.

Thank you for the opportunity to address you today. I am happy to answer any questions you might have.