United States Sentencing Commission

TRIBAL ISSUES ADVISORY GROUP

Honorable Ralph Erickson, Chair
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February 27, 2023

Hon. Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Judge Reeves,

On behalf of the Tribal Issues Advisory Group, we submit the following views, comments, and suggestions in response to the Proposed Amendments to the Federal Sentencing Guidelines, Policy Statements and Official Commentary approved by the U.S. Sentencing Commission on January 12, 2023, and published in the Federal Register on February 2, 2023. See 88 Fed. Reg. 7180 (Feb. 2, 2023); see also 28 U.S.C. § 994(o).

1. **Proposed Amendment No. 6 – Career Offender**

TIAG acknowledges that this amendment has broad—and important—application beyond the unique environment of Indian County. We provide our view on the administrability of eliminating the categorical approach and modified categorical approach in determining whether an offense is a "crime of violence" or "controlled substance offense" under §4B1.2.

Rather than look to the elements of the offense to determine whether a prior state law conviction meets the definitions under §4B1.2, the proposed amendment directs the sentencing judge to determine "the most appropriate" corresponding guideline if the defendant had been sentenced in federal court. If the most appropriate guideline "matches up" with one of the guidelines listed in the proposed amendment, the prior conviction is countable as an eligible offense under §4B1.1.

Something very similar has been happening in federal courts throughout Indian Country for some time now, and without dire consequences. Under §2X5.1 (Other Felony Offenses), federal judges are instructed on how to apply the Guidelines in a case involving a defendant who has been convicted under a statute that is not expressly addressed by the Guidelines. In such a case, §2X5.1 directs the sentencing judge to "apply the most analogous offense guideline."

Under the Major Crimes Act, it is not uncommon for a tribal member to appear in federal court on charges that stem from a what would typically be considered a "state law" violation. See 18 U.S.C. §§ 1152, 1153(a). Likewise, the Assimilative Crimes Act allows the borrowing of state law for crimes committed in Indian Country when there is no applicable federal statute. See 18 U.S.C. § 13. For this reason, federal judges in Indian Country jurisdictions are very familiar with finding the best "fit" within the Guidelines framework for any number of state law crimes.

In our experience, and after discussing with federal judges and attorneys practicing throughout Indian Country jurisdictions, we think the proposal is a very workable method. Federal judges in Indian Country have found the application of §2X5.1 to be much simpler and more practical than, for example, the very complex requirements of the categorical approach. And, because a district court has the most complete understanding of a given defendant's criminal history, the sentencing judge can best ensure that prior eligible offenses "match up" with the Guidelines set forth in the proposal.

We do not foresee any administrative hurdles or extensive problems with understanding how to apply the new method. If our experience with §2X5.1 throughout Indian Country is any measure, the proposal is an improvement over the current complexities and limitations of the categorical approach.

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Thank you for consideration of our views and for being responsive to our concerns regarding how the Commission's sentencing priorities may impact defendants who are tribal members. As

always, we look forward to working with you during the remainder of this amendment cycle and to continue our collaboration in the future.

Sincerely yours,

Ralph R. Erickson

Ralph R. Erickson
Chair