

United States Sentencing Commission
TRIBAL ISSUES ADVISORY GROUP

*Honorable Ralph Erickson, Chair
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February 20, 2024

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 December 14, 2023, and published in the Federal Register on December 26, 2023. See 88 Fed. Reg. 89142 (December 26, 2023); see also 28 U.S.C. § 994(o).

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6. Proposed Amendment No. 7—Simplification of the Three-Step Process

Consistent with its identification of a policy priority for “exploration of ways to simplify the guidelines,” the Commission has proposed an Amendment that would revisit the three-step process for sentencing calculation that has existed since *United States v. Booker*, 543 U.S. 220 (2005). The familiar three-step process requires the sentencing court to (1) calculate the appropriate guideline range and determine the sentencing options related to probation, imprisonment, supervision conditions, fines, and restitution; (2) consider the Commissions statements and guidance related to departures and specific personal characteristics that might warrant consideration in imposing a sentence; and (3) consider the applicable factors found in 18 U.S.C. § 3553(a).

In recognition of the decline of the use of guideline-based departures under step two of the three-step process in favor of variances under step three by sentencing courts post-*Booker*, the Commission seeks comment on its proposal to eliminate all provisions of Chapter Five, Part H and most of the provisions of Chapter 5, Part K and create a New Chapter Six that generally lists the previous departure conditions that are currently considered for guideline calculations and instructs the sentencing court to consider them in its 18 U.S.C. § 3553(a) analysis.

TIAG believes that there are many reasons why departures have fallen into less favor with many sentencing courts. Among them are the more stringent standard of review (de novo as a question of law) to guidelines determinations as opposed to the standard of review applied to a consideration of the sentencing factors found in 18 U.S.C. § 3553(a)(abuse of discretion). In addition, the requirement that the court give notice that it is contemplating a departure as found in Rule 32(h), Fed. R. Crim. P., whereas no such obligation is found in imposing a variance under 18 U.S.C. § 3553(a), likely plays at least some role.

TIAG finds the simplification of the three-step process an intriguing proposal but unanimously believes that the change is so substantial that more time is necessary to study the proposal than is possible in this amendment

cycle. At the outset, TIAG believes that whether the references to departures, which are found in at least two places in the statutes related to sentencing (28 U.S.C. § 994 and the duties of the Chief Judge related to statements of reasons for the sentence and 18 U.S.C. § Section 3553(b)(2)(ii)(I) relating to sentences in crimes involving child crimes and sexual offenses), might impose some limitation on the proposed amendments is an issue that is worthy of some study.

In addition to the general size of and number of amendments, TIAG is concerned that departures it has previously suggested and supported in the past, particularly §§ 4A1.2 and 4A1.3 related to tribal history as a basis or consideration for a departure based on Inadequacy of Criminal History Category and §5H1.1 Age, which allows youth to be considered, are not inadvertently impacted by amendment.

It is the position of TIAG that the proposal is worthy of serious consideration, but it requests that the Commission consider extending the time to study the proposal in detail. If this is done, TIAG would intend to appoint a subcommittee of its members to study the impact of the proposal in Indian Country and would be in a much better position to provide the Commission with meaningful comment.

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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 in continuing our collaboration in the future.

Sincerely yours,



Ralph R. Erickson, Chair