

United States Sentencing Commission
TRIBAL ISSUES ADVISORY GROUP

*Honorable Ralph Erickson, Chair
One Columbus Circle N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002*



*Voting Members
Manny Atwal
Neil Fulton
Jami Johnson
Jesse Laslovich*

*Tim Purdon
Gregory Smith
Carla Stinnett
Tricia Tingle*

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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2. Proposed Amendment No. 2—Youthful Offenders

In Part A of the proposed amendments with respect to juvenile sentences, the Commission seeks comment on how the guidelines should treat offenses committed prior to age eighteen and sets forth three alternatives. Essentially, Option 1 would amend §4A1.2(d)(2)(A) to exclude juvenile sentences from receiving two criminal history points, limiting this provision to adult sentences that involve imprisonment of 60 or more days. This would result in most juvenile sentences receiving at most one criminal history point.

Option 2 would exclude all juvenile sentences from being considered in the calculation of the criminal history score. It also includes bracketed language that such sentences may be considered for purposes of upward departure under §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

Option 3 would amend §4A1.2(d) to exclude all sentences resulting from offenses committed prior to age eighteen from being considered in the calculation of the criminal history score. It also included bracketed language that such sentences may be considered for purposes of upward departure under §4A1.3.

In Part B of the proposed amendments, the Commission proposes an amendment that amends the first sentence of §5H1.1 to provide: “Age may be relevant in determining whether a downward departure is warranted.” It also adds language specifically providing for a downward departure for cases involving a youthful offender and sets forth considerations for the court in determining whether a departure based on youth is warranted.

A majority of TIAG recommends that the Commission adopt Option 3 of Part A of the Proposed Amendment. One member dissented and recommended that no changes be made to the current counting of juvenile offenses. TIAG unanimously supports adoption of Part B of the Proposed Amendment.

TIAG identified certain consistent concerns with how juvenile adjudications are, or are not, accounted for in criminal history calculations. While TIAG members ultimately came to different conclusions about what policy these concerns support, they had consensus that several considerations must be accounted for.

First, TIAG recognizes the increasing consensus that youthful offenders are simply different from adults due to their brain development and socialization. Research has made clear that brain development continues into the mid-twenties. The Supreme Court has recognized this reality and that it must be considered in the realm of criminal sentencing. *Roper v. Simmons*, 542 U.S. 551 (2005); *Graham v. Florida*, 560 U.S. 48 (2010). Juveniles are more likely to succumb to peer pressure, engage in risky or impulsive behavior, and have emotional responses that are disproportionate to the stimulus. Coalition for Juvenile Justice, (2006) “*Applying Research to Practice Brief: What Are the Implications of Adolescent Brain Development for Juvenile Justice?*”(2006), http://www.juvjustice.org/sites/default/files/resource-files/resource_138_0.pdf. Additionally, youthful offenders have simply had less social engagement and development than adults. There is a greater potential for change and rehabilitation by virtue of that youth. TIAG uniformly believes that these realities must be accounted for in sentencing youthful offenders.

The juvenile justice system has very different purposes and structures for disposition and sentencing than that for adult offenders. Most juvenile justice systems focus on rehabilitation rather than other sentencing purposes. As a result, how and why juveniles enter the system, are evaluated within that system, and their eventual dispositions have entirely different motivations and purposes than adult sentences. In this respect, juvenile adjudications are simply different than adult sentences.

Likewise, in some instances juvenile dispositions may be structured to achieve purposes other than punishment. Juvenile custodial dispositions may be imposed because they provide an avenue to significant treatment, educational, or other rehabilitative resources. Several TIAG members shared

personal observations of custodial dispositions being imposed on juvenile offenders because it provided the only or most effective avenue to obtain services for those offenders. As a result, juvenile dispositions may, on their face, overstate both the criminal culpability of the offender and the level of punishment intended by the sentencing court.

TIAG members recognize that there certainly are instances of severe and sometimes recurrent criminal conduct by youthful offenders. As a result, there are instances in which leniency may not be warranted, just as with any group. A minority of TIAG expressed concern that changing the current criminal history calculation rules for juveniles would fail to account for these instances.

To a significant degree the question became what the default approach to juvenile offenses should be. TIAG members all acknowledged that departure and variance provide avenues to account for atypical circumstances, regardless of which default is chosen. TIAG members observed both willingness and reluctance to use those tools running in both directions. Concern with the reliability of those tools overcoming the default in atypical circumstances largely drove the final position of TIAG members.

A majority of TIAG believes that Option 3 of Part A provides the best baseline in light of all of these considerations. Given the predominant difference between juvenile adjudications and adult convictions, the majority concluded that excluding them from calculations entirely is the appropriate baseline. The majority group concluded that the default should be the exclusion of juvenile adjudications because of its better alignment with the nature of juvenile cases and that any anchoring effect of the default should be in favor of not including juvenile conduct. Several members of the majority also see Option 2 as a good option, but less so than Option 3.

One member of TIAG dissented from this position. That member believed that the current rules should not be changed based primarily on instances of severe and extensive juvenile conduct, particularly violent offenses, that have recently increased in their state.

TIAG agreed that Part B of the proposed amendment should be adopted. The ad hoc TIAG group encouraged revisions to this section in 2016. The current TIAG membership continues this position and supports the amendment.

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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