*United States Sentencing Commission*

# TRIBAL ISSUES ADVISORY GROUP

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February 5, 2025

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 19, 2024, and published in the Federal Register on January 2, 2025. See 90 Fed. Reg. 128 (January 2, 2025); see also 28 U.S.C. § 994(o).

**Proposed Amendment No. 1—Career Offender**

In August 2024, the Commission identified as one of its policy priorities "[s]implifying the guidelines and clarifying their role in sentencing" particularly noting an intent to revise "the 'categorical approach' for purposes of the career offender guideline." The Commission proposes that § 4B1.1 be amended to address recurrent criticism of the categorical approach set forth in the career offender guideline.

TIAG supports the portion of the proposed amendment to § 4B1.1 that would define "controlled substance offense" in a way that excludes state drug offenses from the scope of its application but has concerns that new definition insufficiently mitigates the harsh application of the career offender guideline

with respect to low-level Indian defendants residing in Indian Country, all of whom are subject to federal and tribal—but not state—jurisdiction. For this reason, TIAG supports Option 3, which would limit qualifying prior convictions only to convictions that resulted in a sentence for which the defendant served five years or more in prison and that are counted under § 4A1.1(a).

TIAG has serious concerns about the portion of the proposed amendment that redefines "crime of violence." TIAG believes this portion of the proposed amendment needs additional study and further data development to understand its scope and its potential consequence to Native people and Native communities. TIAG is deeply concerned that the limited data included in the Commission's Data Background materials on the amendment[1] strongly suggest that the proposed amendment may have significantly disproportionate impact on tribal populations and may result in unjustified disparities between tribal and non-tribal defendants.

In attempting to interpret the information contained in the Data Background, TIAG is concerned that the information contains identifiable gaps and limitations such that the true effect of the proposed amendment is likely to be greater than projected and may ultimately result in the application of unduly punitive sentences that have a disparate impact on Indians in Indian country.

Because of the limited nature of the data provided, TIAG possesses insufficient information to make concrete suggestions as to how the disparate impact in Indian Country could be mitigated. TIAG generally supports the Commission's efforts to revise the sentencing guidelines to reduce reliance on the categorical approach if it is possible to identify a method that does not result in an unjustifiable disparate impact on Native American defendants.

### a. Exclusion of state drug offenses.

TIAG supports the elimination of the reliance on state drug offenses as predicates for the career offense enhancement and views this portion of the proposed amendment as consistent with the Congressional mandate set out in.

[1] United States Sentencing Commission, Individuals Sentenced Under § 4B1.1, Proposed Amendment Data Background (hereinafter "Data Background").

28 U.S.C. § 994(h)(2)(B). Generally speaking, federal drug offenses are more serious than state drug offenses, and the existence of two prior federal controlled substance offenses is a more reliable indicator of serious criminal conduct. Elimination of reliance on prior state convictions will significantly reduce the application of the career offender enhancement to low-level individuals who may be selling or sharing small amounts of drugs to support a personal habit. TIAG notes that the large-scale incarceration of such low-level offenders is a burden to individuals, families, communities, and taxpayers and remedying this would be of benefit to our communities.

That said, TIAG believes it is important to note that because virtually all drug felonies committed by Indians in Indian Country are subject to exclusive federal jurisdiction, the elimination of reliance on state priors will not have the same impact with Indian defendants as it does with other defendants. While the purpose of the elimination of priors is to mitigate the harsh application of the career offender enhancement to low-level participants, Native defendants who reside in Indian Country could continue to have countable drug convictions for low-level offenses that would never have been prosecuted against a non-native person in federal court. For this reason, TIAG supports Option 3: limiting qualifying offenses to those for which the individual served more than five years in prison.

TIAG believes Option 3 strikes the right balance in identifying and harshly punishing individuals involved in moving large quantities of drugs onto and around the reservation, while simultaneously protecting low-level operatives—frequently addicts themselves—from unduly harsh penalties that are both unfair to the individual and wasteful of government and taxpayer resources.

TIAG arrived at the 5-year exclusion by looking at both the Guidelines drug tables and the mandatory minimum laws, particular with respect to meth, which remains the drug we see most commonly on reservations. Both the federal mandatory minimum sentence laws and the drug tables envision relatively high penalties for very low quantities of meth, and a five-year exclusion would likely be necessary to avoid ensnaring these lower-level individuals.

### b. Elimination of the categorial approach.

TIAG understands the Commission's desire to reduce reliance on the categorical approach and is familiar with the widespread criticism of that approach from many constituencies. TIAG, however, believes that the Commission's "actual conduct" proposal is overinclusive, suffers from significant problems with administrability, is likely to significantly increase the number of defendants subject to the career offender enhancement, and may have disproportionate, unjustified, and unforeseen effects on Indian defendants in particular.

As an initial matter, TIAG notes that the Data Background strongly suggests that Native defendants will be disproportionately impacted by the proposed amendment. A continuing concern of TIAG is that the racial data does not break out either Indians in Indian Country defendants or Native American defendants as a class—placing such populations in the "other" category. TIAG perceives that Native Americans (and its subset of Indians in Indian Country) are likely a major component of the "other" category. According to the Data Background, in fiscal year 2022, 1.9% of the individuals receiving an enhancement under § 4B1.1 were identified as "other." Under the proposed amendment, that number would increase to over 6%,[2] a significant increase that is not explained. Native Americans make up approximately 2% of the population of the United States and account for approximately 2.9% of the federal prison population.[3] To the extent that under the proposed amendment Native American individuals would be represented within the career offender population at rates three times higher than their rates within the general population, and two times higher than their rates within the Bureau of Prisons population, the amendment warrants further study.

In sum, TIAG is concerned that the Data Background obscurely identifies what is likely a hugely disproportionate effect of the proposed amendment on

[2] Data Background at 30.

[3] Federal Bureau of Prisons, Inmate race, (Feb. 1, 2025), https://www.bop.gov/about/statistics/statistics_inmate_race.jsp. It is worthy of note that the statistics kept by the Bureau of Prisons do not routinely breakout Indian inmates who have been convicted for crimes arising in Indian Country.

Native Americans but does not sufficiently tease out data that is sufficient for TIAG to understand why the increase of incarnation rates for Native Americans will occur and whether it is justifiable by differential conduct.

TIAG had additional concerns based on the data that has been included as it is tied to prior convictions that have been previously coded by the Commission as relating to robbery, aggravated assault, murder, child abuse, forcible sex offenses, or "other violent offenses." In making this analysis we are concerned that the Data Background substantially understates the true impact of the proposed amendment. The proposed definition of what constitutes a "crime of violence" is quite expansive and appears to permit classification of offenses as "crimes of violence" based on a broad swath of documents, including charging documents and potentially "offense conduct" descriptions located in presentence reports.

In our experience, we see that many convictions for regulatory and other non-violent offenses, such as violations of 18 U.S.C. § 922(g), originally included within the charging document an allegation of some behavior that would convert these non-violent and/or regulatory crimes into "crimes of violence" under the Commission's proposed definition. Yet, when a defendant is not convicted of the ancillary behavior described in a charging document, it is often because the allegation was determined to be not well founded and/or readily provable. Many allegations set forth in charging documents never rise above the level of probable cause and the abandonment of those allegations in a subsequent plea may well recognize a failure of proof on the particular issue. Punishing a defendant for these sorts of unconvicted allegations by raising the specter of including them in the category of "crimes of violence" years after the fact raises fundamental questions of fairness, equity, and accuracy.

Similar problems exist with the probable use of presentence reports—which under the proposed amendment may be deemed to constitute "the judge's formal rulings of law or finding of fact"—to prove prior conduct. In TIAG's collective experience, the "Offense Conduct" portion of federal presentence reports often represents little more than a summary of the allegations taken from law enforcement materials with little review or editing. This section of the report is rarely revised in response to objections as many

judges decline to rule on the objections, stating that the court will not give weight to or consider germane to sentencing the factual issues raised by objector. Whether the objections are noted in the judgment or in a supplement to the presentence report is a matter of widely divergent practices in the district courts. Under the current system, defendants and defense counsel have had legitimate tactical reasons not raise objections to the offense conduct provisions in presentence reports unless prevailing on the objection would change the offense level or impact the likelihood of receiving a lesser sentence. TIAG is aware that many attorneys currently counsel defendants not to dispute or object to parts of the offense conduct that may not be entirely accurate in order avoid a perception that they are making only a grudging acceptance of responsibility.

TIAG believes these concerns are aggravated by reality that these documents are now going to be used in a way that was unforeseen at the time of the original sentencing. It is very likely that defense counsel would have proceeded much more aggressively to correct the offense conduct descriptions in presentence reports if they had anticipated that the documents would be employed to determine career offender status which has the very real potential to increase a sentence, sometimes by orders of magnitude.

TIAG recognizes that the Commission likely anticipated some of these concerns and has explicitly left open the ability of defendants to litigate the designation of prior offenses, but this process can be expensive, burdensome, and sometimes hampered by the age of the prior convictions. This is even more difficult for many Indians residing in Indian Country. Many reservations are physically remote, and circumstance of history has left many Native communities isolated, insular, and often deeply suspicious of outsiders. These suspicions are not unfounded given the historic interactions between the dominant culture and the Indian Nations. It is notoriously difficult to investigate incidents that have occurred on Indian reservations as very few witnesses and local residents are willing to openly share the information they have with people from the outside. These features of tribal communities make them notoriously difficult to navigate even for federal law enforcement officers and investigators who have had a long-standing presence in the community.

The collateral consequences of these investigatory difficulties are likely to fall hardest on Native defendants who are often represented by private counsel under the Criminal Justice Act. These CJA lawyers repeatedly report difficulty in finding investigators who are both willing to travel to these remote areas to investigate and who are sufficiently culturally aware to acquire necessary cooperation from witnesses and others with relevant knowledge. Given the trust issues that often exist in Native communities, investigators without ties into the community are often hampered in their investigations because repeated contacts are frequently necessary to obtain information from the community. Likewise, in the current federal fiscal environment judges are reluctant to approve funding for multiple trips to speak with the same witnesses in an effort to build trust. These concerns are likely to be aggravated and more frequent when the investigation relates to sentencing issues. Thus, evidentiary proceedings to establish sentencing facts will be more complicated for Indian Country defendants.

TIAG is concerned that the proposed amendment may have unintended consequences in the plea-bargaining process. Professional competence will require defense counsel representing persons with two or more prior felony convictions to do extensive investigation prior to counselling the defendant to enter into a plea agreement. At a minimum it will require counsel to review all relevant Shepherd documents and follow up on identified risk once the documents are reviewed. Without this sort of review, it will be impossible to counsel a client regarding sentencing exposure and evaluating the real risk of being treated as a career offender. Often these documents are old, difficult and costly to obtain, and not in the possession of the United States. TIAG is also concerned because these documents are frequently more difficult for defendants to receive as the responding courts and agencies frequently prioritize requests made by government agents and agencies.

TIAG is also concerned with the possibility that the broad definition of "crime of violence" as used in the proposed amendment may increase the risk that conduct that is not serious enough to warrant the imposition of a penalty as severe as Career Offender status may be captured. The aggravating factor in a conviction for "aggravated assault," may, for example, have been predicated

on the identity of the victim and not the dangerousness of the conduct. Relatively non-injurious behavior such as spitting or pushing may be classified as "aggravated assault" if victim is a member of a protected class such as a police officer, a minor, or an otherwise vulnerable person.

The Data Background supports the idea that many offenses that sound quite serious are punished relatively more lightly than one might expect based solely on the name of the offense. More than half of all prior convictions for all enumerated offenses other than robbery, murder, and forcible sex offenses received sentences of less than three years.[4] It is reasonable to assume that a defendant sentenced to less than 2 years for aggravated assault, which nearly half of all defendants are, has engaged in conduct less serious than some might imagine based solely upon the name of the offense.

TIAG is aware that one of the criticisms of the categorical approach as it is currently constructed is the occasional absurd result, such as a conclusion that certain murder offenses may not be crimes of violence under the categorical approach.[5] We note, however, that as a practical matter this absurdity is far less likely than the possibility that an individual defendant would acquire two prior convictions for less serious crimes that might not ordinarily be viewed as crimes of violence. Put another way, people who commit the most serious violent offenses are generally incarcerated for a very long time. Thus, they are less likely to accumulate a third offense that may lead to their designation as a career offender. TIAG believes that the reach of the proposed amendment is disproportionately likely to reach people convicted of less serious offenses for which they received correspondingly shorter sentences.

TIAG believes that not counting convictions that resulted in a defendant actually serving less five years could significantly reduce the risks that TIAG has identified, but we have not seen the underlying data such that we are confident in concluding that this limitation would ameliorate our concerns such that we

[4] Data Background at 26.

[5] Much of this criticism comes in the context of litigation over 18 U.S.C. § 924(c), which is outside the Commission's purview.

can currently support the amendment. TIAG understands and appreciates the Commission's desire to reduce the reliance on the categorical approach. That said, we think that greater study and data development is necessary prior to final determination on the categorical approach. We are willing to participate in any further study or data development necessary to fully understand the implications of the proposed amendment.

**Proposed Amendment No. 2—Firearms Offenses**

**Part A** of the proposed amendment addresses the application of machinegun conversion devices (MCD) which are commonly referred to as switches. An MCD is designed to convert a conventional firearm to a fully automatic firearm, commonly known as "machineguns."

TIAG does not support the proposed amendment. TIAG believes that the proposed amendment unnecessarily complicates § 2K2.1 by adding to the definition of a firearm to encompass 26 U.S.C. § 5845(a). The result is to make an MCD count as a firearm. We believe that this approach raises questions that could invite the creation of a circuit split. The confusion rests in whether when an attached part should be counted as a separate firearm as an MCD. TIAG opposes adding 26 U.S.C. § 5845(a) to the guideline.

TIAG recognizes that having a MCD attached to a firearm renders the firearm more dangerous, but that increased danger is already captured in the guideline calculation. When an MCD is attached it is a machinegun, and the base offense level (BOL) is increased. The increased base offense recognizes the dangerous nature of the attached MCD and it is not necessary to amend § 2K2.1. Because of this, TIAG does not support counting an MCD as a separate firearm for the purposes of calculating the number of firearms. We believe an attached MCD to a firearm should be counted as one firearm rather than two firearms.

**Part B** of the proposed amendment includes a *mens rea* requirement for enhancements under § 2K2.1(b)(4) for stolen firearms and firearms with modified serial numbers.

TIAG supports the proposed amendment that includes a *mens rea* requirement. We are if the opinion that Adding the language "if the defendant

knew, was willfully blind to the fact or consciously avoided knowing." will alleviate evidentiary challenges. Proving willful blindness in other cases has been done by looking at the circumstances and is appropriate in cases involving stolen firearms and those with modified serial numbers.

**Proposed Amendment No. 3—Circuit Conflicts**

**Part A: "Physically Restrained" Enhancement §2B3.1(b)(4)(B)**

The Commission has identified a circuit split as to whether the "physically restrained" enhancement found at § 2B3.1(b)(4)(B) can be applied to situations in which a victim is restricted from moving at gunpoint but is not otherwise immobilized through physical measures such as those listed in the definition set forth in the Commentary to § 1B1.1(Application Instructions). TIAG advocates for the adoption of Option 2 which provides that the 2-level enhancement only applies to cases in which a "person's freedom of movement was restricted through physical contact or confinement, such as being tied, bound, or locked up, to facilitate commission of the offense or to facilitate escape."

TIAG views Option 2 as a clear, administrable standard that avoids overbroad application of the physical restraint enhancement. We note that the presence of a firearm already triggers an enhancement and in many of the cases where a gun is present, its presence is adequately addressed by application of the firearm enhancement. TIAG is sensitive to the reality that the presence of a firearm can be highly coercive, yet, it does not necessarily follow that a physical restraint has occurred. A person under duress from a weapon may deterred from moving, but that deterrence is distinct from being physically prevented from movement. Since the guidelines already account for the presence of the firearm, the application of physical restraint enhancement in the run-of-the-mine case risks an overscoring that would be tantamount to double-counting.

TIAG is also concerned that increasing the reach of the "physically restrained" enhancement at § 2B3.1(b)(4)(B) will have an inordinate impact on Indian Country sentencing. It is worth noting that because of the Major Crimes Act and the Assimilative Crimes Act, most ordinary street crime in Indian Country is prosecuted in the Federal Courts. In addition, many Native cultures

have a more intrinsic relationship to firearms—one in which firearms are a necessary and appropriate tool. In a culture which emphasizes hunting, fishing, animal husbandry, and protection of persons and livestock from predation, firearms are often ubiquitous. In these environments the presence or display of a firearm does not equate to a restraint of freedom of movement in the same way that it might in the more dominant culture. In those cases in which the display of a firearm is more menacing or threatening, the issue may more properly addressed by balancing the sentencing factors under 18 U.S.C. § 3553(a).

**Part B: Traffic Stop as "Intervening Arrest" for purposes of determining when multiple prior sentences should be counted separately.**

The Commission has identified a circuit split on whether a traffic stop is an "intervening arrest" for purposes of determining whether multiple prior sentences should be "counted separately or treated as a single sentence" when assigning criminal history points ("single sentence rule"). Part B proposes to adda provision to § 4A1.2(a)(2) which clarifies that an "intervening arrest" requires a "formal, custodial arrest."

TIAG supports the proposed amendment which requires a formal arrest. TIAG is concerned that the broader interpretation found in the minority view as expressed in United States v. Morgan, 354 F.3d 621, 624 (7th Cir. 2003), increases the risk of undue disparity in Indian Country where frequent law enforcement encounters for minor traffic infractions are more likely to find their way into the federal sentencing record. Many Indian Nations exist on reservations that are remote, which increases the likelihood that a traffic stop will result in deprivations of liberty short of a full custodial arrest for reasons of officer safety.

**Proposed Amendment No. 4—Simplification of the Three-Step Process**

Consistent with its August 2024 identification of a policy priority for the current amendment cycle of "[s]implifying the guidelines and clarifying their role in sentencing" and "possibly amending the *Guidelines Manual* to address the three-step process," the Commission has again 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 Commission's 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 Part B of the proposed amendment which would remove the second step in the three-step process, as forth in subsection (b) of § 1B1.1(Application Instructions), requiring the court to consider the departure provisions set forth throughout the *Guidelines Manual* and the policy statements contained in Chapter Five, Part H, relating to specific personal characteristics.

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 supports the simplification of the three-step process. The advisory group believes that Proposed Part B will in some ways conform the manual to what had become a general practice in many district courts, will reduce the number of reversible errors arising from the different standards of review applied to departures and variances, and will provide sentencing courts with guidance in arriving at an appropriate sentence under the properly calculated guidelines and the sentencing statutes. TIAG generally supports the decision to remove language in the December 2023 proposal which would have recast the

departures as "Additional Considerations" that may be relevant to the court's determination under 18 U.S.C. § 3553(a).

Notwithstanding the advisory group's support of the proposal, we are concerned about the unique issues related to tribal court convictions that would need to be addressed if this proposed revision is adopted by the Commission. §§ 4A1.2 and 4A1.3 relate to a long-standing debate about how to handle convictions in tribal courts. Much of the difficulty arises out of the broadly variant methods of operation across the tribal courts of the 574 federally recognized Indian Nations. Section 4A1.1 provides that tribal convictions are generally not scored but cross-references to § 4A1.3 which provides that tribal convictions can for the basis for an upward departure. Application Note 2(C) "Upward Departures Based on Tribal Court Convictions" is particularly important because it sets forth various factors that are relevant and should be considered by the sentencing court in deciding how to treat tribal convictions. Among the relevant factors are whether the defendant was represented by counsel, had the right to a trial by jury, was afforded due process under the United State Constitution or the Indian Civil Rights Act of 1968, Public Law 90-284 as amended, whether the tribe was exercising expanded jurisdiction under the Tribal Law and Order Act of 2010, Public Law 111-211, and whether the defendant had already had points scored for the same conduct in another jurisdiction based on application of the separate sovereigns doctrine. Given that many district judges rarely see tribal court convictions, TIAG strongly believes that the *Guidelines Manual* needs to provide this information of how to consider tribal convictions under an 18 U.S.C. § 3553(a) analysis of criminal history. Whether the application note is moved from its current placement to either the Application Note in the commentary to § 4A1.1 or otherwise set forth in the *Guidelines Manual* is not so important as that the language be retained somewhere in the book.

As to the Commission's request for comment on whether the revision is consistent with the provisions of 28 U.S.C. §§ 994 and 995, the TIAG believes that the specific reference in § 994(a)(2)(w)(B) which directs Chief District Judges to ensure that sentencing statements include ". . .the reason for any departure from the otherwise applicable guideline range which shall be stated on the written statement of reasons form issued by the Judicial Conference and approved by the United States Sentencing Commission" is adequately resolved

by a direction that the sentencing court set forth its reasons for a variance from the guidelines on the statement of reasons. Likewise, the TIAG believes that the concerns related to the PROTECT ACT will be adequately addressed by variances and in the cases applicable, the mandatory minimum sentences. Once again, the issue is adequately addressed by clear direction that the statement of reasons should include a fulsome explanation of the reasons for a sentence that varies from the applicable guidelines range.

TIAG takes no position on whether the historic provisions should be included in a new appendix to the *Guidelines Manual*.

Sincerely yours,

Ralph R. Erickson