United States Sentencing Commission

TRIBAL ISSUES ADVISORY GROUP

Honorable Brian Morris, Chair
One Columbus Circle N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002

March 2, 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 January 30, 2026, and published in the Federal Register on February 6, 2026. See 91 Fed. Reg. 5556 (February 6, 2026); see also 28 U.S.C. § 994(o).

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Proposed Amendment No. 2—Career Offender

TIAG appreciates the opportunity to share its views on the proposed revisions to the career offender guideline. As explained further below, changes to the definition of federal "crimes of violence" are changes that overwhelmingly disproportionately affect Indian Country. TIAG believes, therefore, that it has unique insights and perspectives on these changes.

TIAG supports Sub-option 2C of the portion of the proposed amendment relating to changes to § 4B1.2(b) (controlled substance offenses). TIAG believes that sub-option 2C strikes the right balance in ensuring that repeat, serious drug offenses are punished harshly while also reducing the risk of overincarceration of low-level individuals who are likely to benefit from treatment and services and for whom lengthy incarceration is unnecessary and a burden to the families, taxpayers, and the overcrowded prison system. Sub-option 2C, which defines "controlled substance offense" in terms of time served as opposed to whether the prior offense was state or federal, is the fairest option for Indian Country, where for jurisdictional reasons all drug crimes committed by tribal members fall within the exclusive jurisdiction of the federal government, as well as the tribe itself.

TIAG has concerns, however, about the proposed revision to the definition of crime of violence. TIAG is concerned that the list of federal statutes that qualify as crimes of violence is over-inclusive. TIAG is also concerned that the proposed changes to the federal and state definitions may have significant, undesirable collateral consequences for Indian Country, including imposing unreasonable burdens on criminal defendants and on victims. TIAG is further concerned that if adopted, it may lead to overincarceration of individuals with non-violent prior convictions.

(1) Changes to § 4B1.2(a)(1)(A)—Federal Offenses

Amendments that affect federal statutes constituting crimes of violence are overwhelmingly disproportionately felt by Indians in Indian County. While Native Americans are a small percent of the total population of the United States, and Indians in Indian Country are a smaller percentage even still, federal prosecution for crimes of violence are, to a very significant degree, Indian Country prosecutions. On many reservations, the federal government, apart from the tribe itself, is the only entity with criminal jurisdiction, with the result that essentially all major crimes on these reservations are federal crimes.

Ultimately, Indians in Indian Country are an enormous percent of the individuals prosecuted under these federal statutes.

Data compiled from United States Courts' Statistical Tables for the Federal Judiciary reflect that for the 3-year period ending June 30, 2025, 69% of all federal homicide charges and 45% of all federal assault charges filed in the United States were filed in one of the 11 districts with the highest number of Indian Country cases.[1] During this same period, there were more robbery cases filed in Arizona than in all of the New York City metropolitan area (including New Jersey) or the entire Los Angeles metropolitan area. For the 12-month period ending June 30, 2025, the US Attorney's Office for District of South Dakota—population 930,000—filed 72 assault cases, while the Northern District of Illinois—population 9.3 million—filed only 2. Moreover, the Commission's data shows that between FY 2020 and FY 2024, 60.5% of individuals in cases involving criminal sex abuse, 85.0% of individuals in cases involving statutory rape, and 48.7% of individuals in cases involving abusive sexual contact were Native American.[2]

This data shows that federal prosecutions for crimes of violence are disproportionately not prosecutions involving crime taking place in our country's densely populated urban centers but instead are prosecutions that involve Native American defendants, Native American victims, or both, who reside in some of the poorest, most sparsely populated, and most geographically remote parts of the country. For this reason, TIAG has a unique and significant interest in proposals to change the definition of federal offenses that qualify as crimes of violence. With this in mind, TIAG offers the following observations regarding the proposed revised list of federal crimes of violence.

As an initial matter, TIAG observes that many of the crimes listed in the proposed revised § 4B1.1(a)(1)(A) are already crimes of violence for purposes of the career offender guideline. TIAG agrees that those offenses should be included in any revised definition. However, the proposed amendment adds statutes that significantly broadens the scope of the guideline, for example by including the entirety of 18 U.S.C. § 113(a), which includes, inter alia, the

[1] Those districts are the Districts of Minnesota, North Dakota, South Dakota, Arizona, Montana, Eastern District of Washington, New Mexico, Eastern District of Oklahoma, Northern District of Oklahoma, Western District of Oklahoma, and Wyoming.

[2] U.S. Sent'g Comm'n, Quick Facts on Sexual Abuse Offenses (2024), available at https://bit.ly/4aWiDyj.

offenses of assault resulting in serious bodily injury, 18 U.S.C. § 113(a)(6), and assault resulting in substantial bodily injury to a spouse or intimate partner, a dating a partner, or an individual who has not attained the age of 16 years, 18 U.S.C. § 113(a)(7), both of which are not presently crimes of violence because they can be committed recklessly and which are, in our collective experience, very often prosecuted in Indian Country on the basis of reckless conduct.[3] Examples of qualifying reckless conduct that we regularly see prosecuted under this statute include impaired driving, unsafe handling of firearms, and operation of motor vehicles with knowledge that the vehicle is not in safe operating condition.

The Commission further proposes to expand the crimes listed to include the entirety of 18 U.S.C. § 1112. Section 1112 involves not only voluntary manslaughter but also involuntary manslaughter. Voluntary manslaughter previously has been considered a crime of violence, *see United States v. Draper*, 84 F.4th 797, 800 (9th Cir. 2023), whereas involuntary manslaughter, which is only ever reckless conduct, has to our knowledge never previously been understood to be a crime of violence. Denominating the entirety of 18 U.S.C. § 1112 as a crime of violence creates unexplained and unwarranted disparity with both Option 1 and Option 2 for § 4B1.1(a)(1)(B) (state offenses), both of which expressly exclude involuntary manslaughter. TIAG opposes making federal, but not state, involuntary manslaughter a crime of violence.

The current proposal also adds 18 U.S.C. § 1201, kidnapping, which is not currently a crime of violence with respect to the career offender guidelines. Owing to the extraordinarily broad language of the statute, we very regularly see this offense charged in Indian Country for restraints that are brief, pose no risk of injury, and do not involve the use of force. For example, when an

[3] Including the entirety of 18 U.S.C. § 113(a) also has the puzzling effect of designating the misdemeanor offenses of assault by striking, beating, or wounding, 18 U.S.C. § 113(a)(4), and simple assault, 18 U.S.C. § 113(a)(5), as crimes of violence. The inclusion of federal misdemeanor offenses within the list of crimes of violence may create confusion in application given that § 4B1.1(a) purports only to apply when the "instant offense of conviction is a felony." It also creates an unexplained disparity with the proposed revised § 4B1.2(a)(1)(B) (governing state offenses), which specifies that state offenses qualify as crimes of violence only if they are "punishable by imprisonment for a term exceeding one year."

individual stands in the doorway of a room during a verbal altercation to prevent someone from leaving. In recent years, both the Ninth and the Tenth Circuits, which together cover a significant majority of Indian Country, have moved to limit the scope of the kidnapping statute, despite its broad statutory language, specifically to avoid providing "prosecutors [with] unfettered discretion to charge the same conduct, such as impeding certain individuals . . . as a mere misdemeanor or a life imprisonment felony." *United States v. Jackson*, 24 F.4th 1308, 1312 (9th Cir. 2022) (internal quotation omitted); *see also United States v. Murphy*, 100 F.4th 1184 (10th Cir. 2024). It is possible that these cases may alleviate some of TIAG's concerns with designating kidnapping as a crime of violence, but these decisions are still too new for their full impact to be assessed on charging policies.

TIAG appreciates that the Commission recognizes that its proposed definition is overbroad and has therefore provided an opportunity for defendants to rebut the presumption that designated offenses qualify as crimes of violence, but TIAG is concerned that this proposal insufficiently protects Indians in Indian Country from unwarranted application of the Career Offender guideline for a number of reasons.

First, placing the burden on defendants to rebut a presumption in favor of a Guideline application is a significant departure from the standard, well-established norm that the proponent of the applicability of a guideline sentencing enhancement bears the burden of establishing by a preponderance of the evidence that the enhancement applies. *See, e.g.*, *United States v. Price*, 409 F.3d 436, 444 (D.C. Cir. 2005); *United States v. Brown*, 510 F.3d 57, 75 (1st Cir. 2007); *United States v. Wyatt*, 102 F.3d 241, 246 (7th Cir. 1996). Placing the burden on defendants to defeat application of the guideline will require defense lawyers, as a matter of professional competence, to conduct detailed fact investigations of long-ago offenses, including locating, interviewing, and potentially subpoenaing victims, who may understandably find such contact distressing or detrimental to healing. Inevitably, the passage of time will make such investigations difficult as evidence has been lost or destroyed, memories have faded, and witnesses may no longer be available.

Second, placing the burden on defendants to rebut application of an enhancement is especially fraught in the context of Indian Country cases. As TIAG has previously noted in its submissions to the Commission on possible

revisions to the categorical approach, the process of litigating the facts of prior convictions in the context of Indian Country is uniquely difficult.[4] Many reservations are physically remote, and circumstances of history have left many tribal communities isolated, insular, and deeply suspicious of outsiders. 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 information they have with people from the outside. These features of tribal communities make investigations challenging 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 American defendants represented by private counsel under the Criminal Justice Act ("CJA"). These CJA lawyers report difficulty finding investigators wiling to travel to remote areas—frequently five or more hours away by car—and who have sufficient cultural competence to acquire cooperation from community members. Likewise, in the current federal fiscal environment, judges are reluctant to approve funding for multiple trips to speak with the same witnesses in order to build trust. These concerns are likely to be more aggravated and more frequent when the investigation relates to sentencing issues.

These concerns are further exacerbated by underfunding of the federal criminal defense system, such as the recent funding shortfall that in 2025 left many CJA lawyers working for deferred compensation for more than four months. One member of TIAG, who lives on her tribe's reservation, runs its indigent defense program and also represents Indian defendants and others in federal court, reports that by the time CJA funds were replenished, she was owed nearly $200,000 for completed work and was paying support staff out of personal savings. Finding competent investigators—always a challenge in Indian country—becomes even more difficult, and sometimes practically impossible, when the investigators know they will not receive prompt payment. Shifting the burden to defendants to prove predicate offenses were not violent

[4] *See* Letter from Hon. Ralph Erickson, TIAG Chair, to Hon. Carlton R W. Reeves (Feb. 5, 2025), *available at* https://bit.ly/4bjYWkr.

places the burden on the individuals in the system with the fewest resources to meet this burden and risks over-incarceration simply for lack of resources.

In sum, if the Commission adopts this proposed amendment, TIAG recommends that it delete from its list of federal crimes of violent crimes: (1) misdemeanors; (2) involuntary manslaughter under 18 U.S.C. § 1112; and (3) offenses that are regularly charged on the basis of reckless conduct and/or conduct that does not pose a significant risk of injury to another person, including 18 U.S.C. §§ 113(a)(6), (a)(7), and 18 U.S.C. § 1201.

(2) Changes to § 4B1.2(a)(1)(B)—State Offenses

While changes to the definition of federal crimes of violence are likely to have the biggest impact on Indians in Indian Country, because many individuals who reside on reservations move back and forth between reservation and off-reservation land, Indian Country also contains individuals with prior convictions for state offenses. In addition, in Eastern Oklahoma, the state unlawfully exercised jurisdiction over Indian defendants until 2020, when the Supreme Court decided *McGirt v. Oklahoma*, 591 U.S. 894 (2020). The recency of this jurisdictional shift means that on these Eastern Oklahoma reservations, the overwhelming majority of prior convictions TIAG sees are for state, rather than federal, crimes.[5]

As between Option 1 and Option 2 of the proposed changes to § 4B1.1(a)(1)(B), TIAG unanimously prefers Option 1, though it finds both options significantly problematic and not an obvious improvement over the status quo. With respect to Option 2, TIAG views its complicated scheme of matching elements from federal statutes to elements from state statutes to bear significant resemblance in methodology to the much-criticized categorical approach. While TIAG understands and appreciates the frustrations with the categorical approach, it has the advantage that at this point, most of the complicated analytical work and litigation surrounding its application has already been accomplished, and everyone is fairly apprised of its results. Option 2 appears to simply replace the complicated and convoluted scheme that is the categorial approach with a different complicated and convoluted scheme

[5] Obviously, this balance between state and federal prior convictions will change with the passage of time, but there likely remain many years before prior state convictions of Indians in Eastern Oklahoma cease to be a significant issue.

whose parameters will have to be litigated de novo. For this reason, TIAG unanimously disfavored its adoption.

With respect to Option 1, TIAG disfavors its adoption as compared to the status quo for crimes of violence, *i.e.*, the categorical approach, but does prefer it to Option 2. TIAG's concerns with respect to Option 1 largely mirror those that it expressed with respect to the overbroad federal statutes included in the proposed revised § 4B1.1(a)(1)(A), namely that many of the statutes encompass conduct that is not reasonably a "crime of violence," and that the safety net provisions set forth in § 4B1.1(a)(4) are impractical and unduly burdensome.

Several members expressed concern that sentencing in Indian Country—which are, for jurisdictional reasons, much more frequently sentencings under Chapter 2, Part A of the Guidelines than they are in other parts of the country—will devolve into "mini-trials" of conduct from many years before. Members who regularly represent Indian defendants in federal court were concerned they would be unable to advise their clients competently regarding potential sentencing exposure, and it would be more difficult to resolve cases without a trial even in cases where the underlying conduct is largely uncontested. A number of members expressed concern about the impact that litigation of the mens rea or possibility of injury associated with past convictions would have on victims of past crimes, who may find themselves in unwelcome receipt of subpoenas requiring them to come to court and face cross-examination about a crime that they believed had long ago been resolved.

TIAG further has concerns about the inclusion of state statutes that penalize a mix of intentional and reckless, or violent and non-violent, conduct that are similar to the concerns it expressed in 2025[6] about the Commission's "actual conduct" proposed amendment, including about the possibility of presentence reports and similar documents being used in ways that were not foreseen at the time of the original sentencing. Members were concerned that state records, which vary in quality and completeness, may be incomplete, ambiguous, or otherwise inadequate to determine precisely what conduct formed the basis for the underlying conviction.

[6] *See* Letter from Hon. Ralph Erickson, TIAG Chair, to Hon. Carlton R W. Reeves (Feb. 5, 2025), *available at* https://bit.ly/4bjYWkr.

Lastly, TIAG remains concerned about potential disproportionate effect on Native American defendants given the 2025 data briefing, which suggested that then-proposed change might have significant disproportionate impact on tribal populations and might have resulted in unexplained disparity between Indian Country and non-Indian Country defendants.

In sum, while TIAG understands and shares the Commissions frustrations with the categorical approach, TIAG does not believe that either Option 1 or Option 2 represents a clear improvement over the status quo sufficient for TIAG to support its adoption at this time.

(3) Changes to § 4B1.2(b)—Drug Offenses

With respect to the proposed changes to the definition of a controlled substance offense for purposes of the career offender guideline, TIAG supports Sub-option 2C, Limiting Prior Convictions Through a Time-Served Approach. As noted in TIAG's 2025 letter to the commission regarding then-proposed changes to the career offender guideline,[7] TIAG believes that the application of the career offender guideline to low-level drug crimes, many committed by individuals who are themselves suffering from addiction—poses an unwarranted burden to individuals, families, communities, and taxpayers and that remedying this feature of the career offender guideline would benefit our communities.

As between the options proposed, TIAG prefers Sub-option 2C because, as we noted in our 2025 letter, simple elimination of state drug priors would in many cases lack the ameliorative effect in Indian Country that it might have elsewhere because the federal government has exclusive jurisdiction over drug crimes committed by tribal members in Indian Country. As a result, the federal government more regularly prosecutes low-level drug conduct, such as sharing or selling small quantities of drugs among a community of addicted persons, which would more typically be handled by the state in other parts of the country.

As also reflected in our 2025 letter, TIAG continues to believe that a 5-year exclusion, defined as time actually served, is the best option. TIAG arrived

[7] *See* Letter from Hon. Ralph Erickson, TIAG Chair, to Hon. Carlton R W. Reeves (Feb. 5, 2025), *available at* https://bit.ly/4bjYWkr.

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

TIAG prefers a time-served approach because we see individuals residing on reservations, particularly smaller reservations near major off-reservation cities, who have state convictions. A number of the states neighboring reservations have sentencing laws that purport to punish crimes quite harshly, with lengthy sentences, but who only require individuals to serve a small fraction of the sentence imposed. Given different postures of different states regarding how much of a sentence must be served, TIAG felt that using the time served, rather than sentence imposed, was the most reliable available proxy for seriousness of the offense.

Proposed Amendment No. 3—Circuit Conflicts Concerning § 4B1.2(b)

With respect to the circuit conflicts concerning § 4B1.2(b), TIAG supports the time-of-sentencing rule, which is consistent with the Sentencing Reform Act's mandate that when imposing a sentence, courts should consider the Guidelines and any pertinent policy statements that are "in effect on the date the defendant is sentenced." 18 U.S.C. §§ 3553(a)(4)(A)(ii) and (a)(5)(B). It is also consistent with the directive contained within the Guidelines to "use the Guidelines Manual in effect on the date that the defendant is sentenced." U.S.S.G. § 1B1.11(a).