Commentary: Policy Meets Practice: Why Tribal Court Convictions should not be Counted

Professor Kevin Washburn’s article, *Reconsidering the Commission’s Treatment of Tribal Courts*, raises the issue of counting tribal convictions in defendants’ criminal history. Professor Washburn believes that the Federal Sentencing Guidelines should treat tribal court convictions and sentences like state sentences rather than like foreign sentences. His article advances reasons why tribal sentences should be considered and presents options for counting such convictions. After reviewing the arguments, we are still not convinced that counting tribal sentences advances the goals of the Federal Sentencing Guidelines, which are to provide fair sentences and to eliminate unwarranted and unguided disparity. In addition, some of the arguments that Professor Washburn makes are arguments that, when examined more closely, actually support the current practice of not counting tribal sentences.

I. If It Ain’t Broke, Don’t Fix It

Federal jurisdiction is exercised over certain crimes occurring on certain Indian reservations involving Indian defendants. As such, Native American defendants constitute a small but significant portion of federal criminal jurisdiction. For example, they comprise a large percentage of offenders convicted for federal violent crimes. These crimes generally fall under 18 U.S.C. § 1153 (Major Crimes Act) jurisdiction. Nonetheless, the present federal guidelines system, as recognized by Professor Washburn, does not count tribal sentences in criminal history calculations. Tribal sentences, like foreign sentences, are not assessed criminal history points, but can be used as a basis for an upward departure for underrepresentation of criminal history, pursuant to U.S.S.G. § 4A1.3.

Professor Washburn takes the position that tribal sentences should be counted like state sentences because tribal governments, and hence tribal courts, are separate sovereigns and thus convictions and sentences issued by sovereign tribal nations, like the states, should be counted. Policy though needs to be practical and pragmatic. Do we really need to count tribal sentences to achieve the goals of the Federal Sentencing Guidelines? Presently, there is no indication that such a change in calculations is necessary. The number of upward departures based on inadequacy of criminal history are minuscule in the context of the number of federal cases, and even in the number of federal cases arising from Indian jurisdiction.

Of a total of 64,366 cases, there were only 315 upward departures in the entire federal system in 2002, as compared to 10,995 downward departures. The total upward departures for “criminal history that did not represent the seriousness of the past conduct” numbered 197, whereas downward departures for the overrepresentation of criminal history numbered 1,199.1 Upward departures have consistently been low—from 1997 to 2002 upward departures accounted for only between 0.6% and 0.8% of all sentences. United States v. Booker, in making the Guidelines advisory, has focused attention back on 18 U.S.C. § 3553 factors, which include criminal history. As such, courts can now more readily take into account tribal convictions in fashioning a sentence.

The statistics also indicate that sentences as a whole are generally at the low to midpoint of each guideline range. Tribal history, if a court considers it, can appropriately be factored into the sentencing range which, at the offense levels associated with violent crime, can be quite wide. For example, an offense range of 33 with a criminal history category of one has a sentencing range of 135 to 168 months, which is almost a three year span. A court can easily sentence at the high end of the range to reflect, if appropriate, any prior tribal convictions.

When a court does depart upward based on tribal criminal history, it is the “extraordinary” or “atypical” case. That is what departures are for. Indeed, a close examination of the upward departure rates in violent crimes, which include proportionately higher percentages of Native American defendants, show that courts will depart, when warranted. For example, the upward departure rate for second-degree murder is 17.1% (there can be no upward departures for first-degree murder because the sentence is mandatory life imprisonment), and the upward departure rate for manslaughter is 22.8%. It is also likely that the upward departure rates for violent crimes in the future will be reduced, because the Sentencing Commission recently increased the base offense levels for certain violent crimes, notably murder and manslaughter, effective November 1, 2004. Second-degree murder, for example, rose from a base offense level

III. Do Tribal Courts Have Sufficient Due Process?
Professor Washburn argues that tribal courts have made great strides in providing due process and protecting the defendant’s rights. While undoubtedly there are many tribes that have sophisticated court systems, the fact is that many, if not most, do not. Even in the tribal court systems which Professor Washburn points to, such as the Navajo Nation’s criminal justice system, neither judges nor prosecutors nor defense counsel are required to be lawyers. Frequently the defendant is unrepresented, and is not afforded the same constitutional rights that defendants are given as a matter of course “off the reservation.” As recognized by the United States Supreme Court in Duro v. Reina, tribal courts do not afford the same level of protection and rights as state jurisdictions:

> While modern tribal courts include many familiar features of the judicial process, they are influenced by the unique customs, languages, and usages of the tribes they serve. Tribal courts are often “subordinate to the political branches of tribal governments,” and their legal methods may depend on “unspoken practices and norms.” It is significant that the Bill of Rights does not apply to Indian tribal governments. The Indian Civil Rights Act of 1968 provides some statutory guarantees of fair procedure, but these guarantees are not the equivalent to their constitutional counterparts. There is, for example, no right under the Act to appoint counsel for those unable to afford a lawyer.8

This lack of rights is nowhere more apparent than in the right to representation. Professor Washburn makes the point that uncounseled convictions can be counted under United States v. Nichols.9 However, Nichols holds that uncounseled misdemeanors count for criminal history purposes only if no jail time was imposed. Indeed, the Supreme Court recently made clear in Alabama v. Shelton that non-tribal jurisdictions enjoy the power to punish and imprison as can state convictions, can be stacked or run consecutive.

To add to this problem is the fact that tribal convictions, as state convictions, can be stacked or run consecutive. A defendant may get consecutive sentences on counts arising from the same offense, and thus the sentence imposed may be far longer than one that would have been imposed off the reservation, and all without benefit of counsel. It is not unusual to have tribal sentences of several years, all imposed, again, without the benefit of a lawyer. In addition, tribal courts may not have the same benefit of the subpoena power, appeal rights, and confrontation rights that non-tribal jurisdictions enjoy. The power to punish must be accompanied by the protection of due process. At this point, the uniform lack of such due process requires sentences not to be counted automatically.

Professor Washburn acknowledges this problem, and proposes an option that would not count convictions if there were no counsel provided to the defendant. If the tribes knew that their convictions and sentences would only count for criminal history purposes in federal cases if counsel were provided, then, Professor Washburn opines, this might encourage more tribes to provide for counsel and other rights. However, this option would lead to an examination in every case where tribal convictions exist of the tribal court system in place in that jurisdiction and would entail an examination of the records for each conviction. Tribal records are not easily accessible, despite Professor Washburn’s suggestion to the contrary, nor are they always consistent or accurate. If the burden were on the defendant to show that the conviction did not meet the criteria for a “valid” and thus countable conviction involving the full panoply of rights such as right to counsel, then this shifting of burdens would not be fair to the defendant.

IV. The Proposal Would Drastically Lengthen Sentences
A real consequence of such counting would be longer sentences. For example, certain convictions (where the sentence was probation or less than 60 days of imprisonment) are capped at four criminal history points. However, as noted above, under the rules for calculating criminal history, convictions of more than 60 days and less than 13 months are assessed two criminal history points, and there is no limit to the number of so-called “two-point” convictions that can be added to the defendant’s criminal history score. In addition, there are the recency criminal history points that are assessed if the instant offense was committed within two years of a countable conviction or committed while the defendant was serving a criminal justice sentence or while on probation or parole for a countable offense. This would have the effect of increasing sharply the criminal history categories of many Native American criminal defendants, but without providing them, at the time of the prior convictions, all the due process protections non-Indians possess.

To make matters worse, the Supreme Court’s holding in Custis v. United States prevents defense counsel from challenging prior convictions in federal court, except those that are structurally unfair because of deficiencies such
as lack of counsel. Given that Custis has recognized the exception to challenge prior convictions for lack of counsel, this will require prosecutors, defense counsel, and probation officers to investigate any number of prior tribal convictions, many of which will have no records or transcripts of proceedings, to assess whether counsel was provided or waived. This will increase markedly the work of the federal sentencing courts and all concerned—an outcome Custis seeks to avoid. Further, while Custis is grounded to some extent on the presumption that federal and state convictions were obtained in compliance with constitutional protections, no such presumption is appropriate with respect to the disparate tribal court systems, many of which do not provide the same level of constitutional guarantees.

V. Would Convictions Still Count?
Many tribal convictions are for petty offenses. For example, “disorderly conduct” and “public intoxication” are tribal convictions that are frequently seen on the rap sheets of Indian defendants. There are over 100,000 tribal convictions in the District of Arizona. Moreover, lack of adequate rehabilitation services on many reservations results in jail taking the place of counseling. Yet, these offenses and the like are not counted under the Guidelines Criminal History Chapter § 4A1.2(c)(1) and (2). The Commission recognizes that such minor offenses do not factor into the criminal history calculus because either of their nature or the sentence. In the context of counting and then precluding criminal history points, and the nature of tribal courts, it makes pragmatic sense not to assess points.

VI. Not All Indians Are Alike
Professor Washburn recognizes that each tribe has unique history and cultural context. Each tribe has decided, on its own, what criminal justice system it will employ, and at what cost. The varieties of tribal criminal justice systems are remarkable. Some large tribes have extensive tribal criminal justice systems while other small tribes may have rudimentary or nonexistent criminal justice systems. Given the exception in the Indian Civil Rights Act that does not require tribes to provide free counsel, and the latitude that the federal government shows to the tribes in how they run their affairs under the Indian Civil Rights Act, use of tribal convictions would increase, not decrease, the disparity that the U.S. Sentencing Guidelines were designed to reduce.

VII. Tribal Convictions/Foreign Convictions
Professor Washburn notes that tribal convictions tend to more closely resemble state adjudications rather than, for example, foreign convictions from North Korea. On the other hand, convictions from sophisticated jurisdictions such as the United Kingdom, Australia, and Canada, as well as convictions from civil jurisdictions such as Germany or France, are likewise not counted.

The use of a different criminal justice system, such as is employed by many tribes, makes the Indian convictions more closely resemble foreign convictions than state convictions.

VIII. Conclusion
Professor Washburn performs a valuable function in calling attention to tribal convictions. However, such an alteration would be a striking and extensive change in calculating criminal history for Native American defendants, not a “modest” change as he suggests. The counting of tribal convictions would increase the workload in those federal courts dealing with Indian jurisdictions; and it would, in our opinion, be fundamentally unfair to Native American defendants. We believe, in contrast to Professor Washburn, that federal courts should not count tribal convictions in criminal history. Tribal convictions already provide a basis for an upward departure—a provision that is used even now. There is no reason to alter the present system. We have deep reservations about counting criminal convictions arising from offenses on Indian reservations.

Notes
4 The U.S. Sentencing Commission recognizes this high percentage of Indian defendants in violent crimes. In 2003 it gave special attention to the matter, forming an Ad Hoc Final Adjudication Committee on Native American Sentencing Issues and Indian Crime. Professor Kevin Washburn served on this Committee, as did one of the authors of this commentary. The Committee issued its report to the U.S. Sentencing Commission with specific recommendations as to offense levels. It made no recommendation as to criminal history. See Report of the Native American Advisory Group (Nov. 4, 2003).
5 2002 Sourcebook supra notes, Tbls. 24 & 25.
7 2002 Sourcebook, supra note 3, at Tbl. 27.
8 495 U.S. 676, 693 (1990) (citation omitted).
13 See U.S.S.G. § 4A1.3(a).