
**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

USCA No. 23-1295

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

IAN TODD GOOD LEFT,

Defendant - Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
WESTERN DIVISION
HONORABLE DANIEL M. TRAYNOR
UNITED STATES DISTRICT COURT JUDGE

APPELLANT'S BRIEF

Jason J. Tupman, Federal Public Defender
Darren E. Miller, Assistant Federal Public Defender
Office of the Federal Public Defender
Districts of South Dakota and North Dakota
100 W. Broadway Avenue, Suite 230
Bismarck, ND 58501
Phone: (701) 250-4500
Fax: (701) 250-4498

ATTORNEYS FOR APPELLANT

SUMMARY OF THE CASE

Pursuant to a plea agreement, Ian Todd Good Left pleaded guilty to assault of an intimate partner by strangulation and suffocation and domestic assault by a habitual offender, in violation of 18 U.S.C. §§ 113(a)(8), 1153, and 117(a)(1). The government agreed to recommend a sentence of 57 months of imprisonment based on a total offense level of 21, a criminal history category IV, and a resulting guideline range of 57 to 71 months. The district court *sua sponte* upwardly departed from criminal history category IV to criminal history category VI and imposed a sentence of 90 months in prison. This prison sentence is on the upper end of the post-departure guideline range of 77 to 96 months and greatly exceeded the government's suggested sentence.

Two sentencing errors occurred. First, the district court committed procedural error when it *sua sponte* imposed an upward departure by rotely assigning the enhanced criminal history score and category calculated by probation, which scored Ian's tribal convictions as if they were nontribal convictions, without engaging in the steps necessary in order to properly exercise true judicial discretion. Second, the 90-month sentence is substantively unreasonable.

REQUEST FOR ORAL ARGUMENT

Mr. Good Left requests 15 minutes of oral argument to discuss the procedural infirmities and substantive unreasonableness of his sentence.

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JURISDICTIONAL STATEMENT

Appellant Ian Todd Good Left appeals from the final Judgment in a Criminal Case entered upon his conviction for assault of an intimate partner by strangulation and suffocation and domestic assault by a habitual offender in violation of 18 U.S.C. §§ 113(a)(8), 1153, and 117(a)(1). R. Doc. 34. The judgment was entered on January 31, 2023. R. Doc. 34. Ian timely filed his notice of appeal on February 13, 2023. R. Doc. 36. The district court had jurisdiction under 18 U.S.C. §§ 3231 and 3242. This Court has jurisdiction under 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

- I. The district court erred in departing upward under USSG § 4A1.3 without fully considering the circumstances of Ian's tribal convictions and whether an intermediate criminal history category would be sufficient.**

United States v. Sullivan, 853 F.3d 475 (8th Cir. 2017)

United States v. Azure, 536 F.3d 922 (8th Cir. 2008)

Gall v. United States, 552 U.S. 38 (2007)

USSG § 4A1.2(i)

USSG § 4A1.3

USSG § 4A1.3, comment. (n.2(C))

- II. The sentence is substantively unreasonable.**

United States v. Soliz, 857 F.3d 781 (8th Cir. 2017)

Gall v. United States, 552 U.S. 38 (2007)

18 U.S.C. § 3553(a)

STATEMENT OF THE CASE

Ian Todd Good left was sentenced to 90 months in prison for assault of an intimate partner by strangulation and suffocation, and to a concurrent 60 months in prison for domestic assault by a habitual offender. He now asserts that his prison sentence, being 33 months higher than the 57-month sentence the government believed was warranted, is the result of significant procedural error and is substantively unreasonable.

Ian's background

Ian was born in 1987 in Cannonball, North Dakota with fetal alcohol syndrome. PSR ¶¶ 66, 68, 69.¹ Both Ian's mother and father struggled with alcoholism. PSR ¶ 71. Ian's mother died in a car accident near Cannonball when Ian was two months old. PSR ¶ 66. Thereafter, he was raised by his maternal grandmother until the age of 14; however, Ian did not live with her after the age of nine or ten. PSR ¶¶ 66, 69. When Ian was nine or ten years old, his grandmother placed him in a hospital for in-patient mental health treatment. PSR ¶ 69. Ian was diagnosed with ADHD, Oppositional Defiant Disorder, Depressive Disorder, and fetal alcohol syndrome. PSR ¶ 69. Upon being released from the hospital, Ian was sent to Indian

¹ Ian will cite to the presentence investigation report filed on January 10, 2023 (R. Doc. 27) as "PSR" followed by the paragraph or page number. He will cite to the transcript of the plea hearing held on October 12, 2022 as "PH" and to the transcript of the sentencing hearing held on January 30, 2023 as "SH."

boarding school, where he resided until the age of 14. PSR ¶ 69. After leaving Indian boarding school, Ian was placed in a foster home. PSR ¶ 69. Also, when Ian was 14 years old, Ian's sister died in a car accident near to where Ian's mother had died. PSR ¶ 66.

Ian began smoking marijuana and consuming alcohol at the age of 14. PSR ¶ 70. His alcohol consumption adversely impacted his temper, relationships, and ability to complete high school. PSR ¶ 71. When Ian was 17 years old, his alcohol consumption greatly increased culminating with a daily consumption of a half-gallon of vodka. PSR ¶ 70. The consumption of alcohol was due to Ian's grief over losing his mother and sister. PSR ¶ 72. Ian reported that he was drunk at the time the offenses at issue occurred and stated that he could only recall "bits and pieces" of the incident. PSR ¶ 71. Ian does not possess a high school diploma or a GED and does not have a stable work history. PSR ¶¶ 73, 74.

Plea

In August, 2022, Ian was charged under a three-count indictment with assault resulting in substantial bodily injury to an intimate partner (Count One), assault of an intimate partner by strangulation and suffocation (Count Two), and domestic assault by a habitual offender (Count Three). R. Doc. 2. Ian entered into a plea agreement under which he agreed to plead guilty to Counts Two and Three, and the government agreed to dismiss Count One. R. Doc. 23, at 2, 9. The government also agreed to

recommend a sentence at the low end of the guideline range. R. Doc. 23, at 9. On October 12, 2022, per the plea agreement, Ian pleaded guilty to assault of an intimate partner by strangulation and suffocation and domestic assault by a habitual offender. PH, pp. 3-4, 18. Prior to the court accepting the plea, the government informed it that the expected offense level was 21, the expected criminal history category was IV, and the expected guideline range was 57 to 71 months in prison. PH, p. 7.

In its factual basis, the government stated that on July 11, 2022, law enforcement was dispatched to a residence in Cannon Ball on the Standing Rock Sioux Indian Reservation. PH, p. 19. Upon arrival, Special Agent Dobbs interviewed Jordyn Bird Horse who was in an ambulance. PH, p. 19. Bird Horse's face was swollen, her right hand had cuts, and she had a possible dislocated shoulder. PH, p. 19. Bird Horse told Dobbs that Ian forced himself into her residence and hit her and pulled her hair. Bird Horse reported that Ian threw her inside a bathtub, resulting in an injury to her shoulder. PH, p. 19. Ian also knocked her down and caused her to hit her head on the toilet. PH, p. 19. Ian choked her, and she lost consciousness, and at some point he grabbed a broomstick and said as he was going to go to prison he was going to make it worth it. PH, p. 19. The incident ended when Bird Horse's sister entered the residence. PH, p. 20. Bird Horse's sister reported that when she entered she saw Ian holding an object resembling a black bar over Bird Horse. PH, p. 20. As Ian left, he said that next time he would "kill you [Angel] also." PH, p. 20.

PSR guideline calculations, objections, and sentencing memorandum

In the January 10, 2023 presentence investigation report (PSR), the probation officer calculated a total offense level of 21. PSR ¶ 26. The probation officer calculated a total criminal history score of eight, placing Ian in criminal history category IV. PSR ¶ 37. The total criminal history score was calculated by assigning six points to prior convictions plus two points because the instant offenses were committed while Ian was under a criminal justice sentence. PSR ¶¶ 35-37. Three points were assigned to a 2018 federal court conviction for assault with a dangerous weapon. PSR ¶ 31. In that case, Ian and his brother were both acutely intoxicated, argued, and Ian threw a chair at his brother, injuring his brother's head. PSR ¶ 31. The convictions scored at one point each were a 2018 county conviction for simple assault in which Ian served two days in jail, a 2020 county conviction for physical obstruction and refusing to halt in which Ian served two days in jail, and a 2021 conviction for interference with an emergency call and domestic violence with bodily injury in which Ian served 26 days in jail. PSR ¶¶ 32-34.

Ian also had other criminal conduct that was not scored, being 26 tribal convictions. PSR ¶¶ 38-63. Many of Ian's tribal convictions involved sentences imposed more than 10 years prior to the commission of the instant offenses and many were for less serious offenses. PSR ¶¶ 38-63. Pertinent here are paragraphs 56 through 62, wherein probation claimed that three tribal convictions which resulted in

sentences of 60 days or more of incarceration would have counted for six additional criminal history points had they been scored. PSR, p. 24. These tribal convictions were a 2013 tribal conviction for simple assault and hindering a law enforcement officer (case number unknown), a 2016 tribal conviction for aggravated assault and family violence (case number unknown), and a 2017 tribal conviction for aggravated assault, hindering a law enforcement officer, and criminal contempt (case number unknown). PSR ¶¶ 57, 62, 63.

The probation officer opined that a departure based on a purported inadequate criminal history category could be warranted pursuant to USSG § 4A1.3 due to Ian's uncounted tribal convictions. PSR ¶¶ 93-95. Ian objected to any departure based on USSG § 4A1.3. PSR, p. 23. Ian asserted that 14 of the 26 tribal arrests noted in the PSR were over 10 years old and would have been excluded from calculation even if they had been nontribal. PSR, p. 23. Ian also objected on the basis that many of the remaining 12 arrests within the last decade were for less serious conduct such as contempt or disorderly conduct. PSR, p. 23. Probation responded to Ian's objection by asserting that had the tribal arrests and convictions been non-tribal convictions, it would have resulted in six additional criminal history points (two for each tribal conviction with prison sentences of 60 days or more) PSR, p. 24. Such a calculation would have placed Ian into a criminal history category VI rather than IV and would have increased the guideline range to 77 to 96 months.

In his supplemental sentencing memorandum, Ian recommended a sentence of 24 months in prison and again objected to the imposition of an upward departure pursuant to USSG § 4A1.3. R. Doc. 30, at 2. Ian noted that USSG § 4A1.3, comment. (n.2(C)(i))², which addresses factors a court may consider when determining whether or to what extent an upward departure based on tribal convictions is warranted, allows for the court to consider whether the defendant was represented by a lawyer and whether sufficient due process protections were in place during the tribal proceedings. R. Doc. 30, at 5. Ian argued that the PSR did not indicate whether such protections were in place. R. Doc. 30, at 5-6. Ian also observed that USSG § 4A1.3, comment. (n.2(C)(vi)) allows the court to consider whether the tribal convictions would have otherwise been counted for criminal history, and that 14 of the 26 tribal cases would not have been counted due to being over a decade old. R. Doc. 30, at 6. Ian argued that the initial criminal history calculation fairly reflected his criminal history and that an upward departure was neither requested nor appropriate. R. Doc. 30. Ian recommended a 24-month prison term as a sentence. R. Doc. 30, at 6.

The government's supplemental sentencing memorandum asserted that the applicable guideline range was 57 to 71 months based upon a total offense level of 21 and a criminal history category IV. R. Doc. 32. The government asked the court to

² The supplemental sentencing memorandum mistakenly cited to Application Note 3(C) rather than Application Note 2(C).

impose a “low-end sentence of 57 months.” R. Doc. 32, at 1. The government’s recommendation came even after considering Ian’s tribal convictions. R. Doc. 32.

Sentencing Hearing and Sentence

A sentencing hearing was held on January 30, 2023. SH, pp. 1-22. Defense counsel objected to the PSR in that it suggested a possible upward departure due to Ian’s criminal history purportedly being underrepresented. SH, p. 4. The government stated that it was not asking for a departure in this case. SH, p. 5. The court recognized Ian’s written and oral objections and his argument that 14 of the 26 tribal arrests were over a decade old and would be excluded from calculation even if they had been nontribal arrests. SH, p. 6. The court also acknowledged Ian’s objection that many of the remaining 12 tribal arrests involved less serious crimes and should not justify a departure. SH, p. 6. The court did not mention Ian’s written objection that there was no evidence that Ian was represented by counsel during the tribal court proceedings or that the tribal convictions complied with due process. The court discussed how the tribal convictions would result in six additional criminal history points (two points for each of the three convictions with 60 or more days of incarceration) if treated as nontribal convictions. SH, p. 7. If treated as nontribal convictions, the result would be a criminal history category VI with a sentencing range

of 77 to 96 months rather than category IV³ with a sentencing range of 57 to 71 months. SH, p. 7.

The court overruled Ian's objection and concluded that an upward "variance" to a category VI criminal history was appropriate.⁴ SH, p. 7. Specifically, the court said the following:

The court will overrule the objections from the defense. The court concludes that an upward variance is appropriate in this case providing for a Criminal History Category of VI. Therefore, the court will adopt the presentence investigation report.

SH, p. 7. The court asserted that it would adopt the guideline calculation for an offense level of 21 and a criminal history category of VI for a post-departure guideline range of 77 to 96 months. SH, p. 7. Thereafter, the government recommended a prison term of 57 months, and the defense recommended a prison term of 24 months. SH, pp. 8-10. Ian gave a brief statement prior to the court imposing sentence. SH, pp. 13-14.

In sentencing Ian, the court noted that it had an obligation to impose a sentence that is sufficient but not greater than necessary to comply with the sentencing statute. SH, pp. 14-15. The court asserted that it could consider the nature

³ The court mistakenly stated category V rather than category IV but cited the appropriate category IV sentencing range.

⁴ In the Statement of Reasons, the court noted that it was imposing an upward departure pursuant to USSG § 4A1.3. R. Doc. 35, at 2, 4.

and circumstances of the offense, which included the victim losing consciousness and sustaining a nasal fracture, hematoma to her face, and a separated shoulder. SH, p. 15. The court opined that Ian has a significant criminal history of violent behaviors, demonstrated assaultive behavior while under the influence of alcohol, and was a habitual abuser of individuals. SH, p. 16. The court also stated that Ian had a history of alcohol abuse and that his violent behaviors were mostly the result of lack of impulse control and excessive use of alcohol. SH, p. 16. The court again stated that it was recognizing an “upward variance” to a guideline range of 77 to 96 months. SH, p. 16. The court sentenced Ian to 90 months in prison for Count Two and a concurrent 60-month sentence for Count Three. SH, p. 17; R. Doc. 34.

SUMMARY OF THE ARGUMENT

The district court erred when it *sua sponte* upwardly departed based on Ian’s tribal convictions. First, the court committed significant procedural error by rotely adding the suggested six points to Ian’s criminal history score without exercising discretion to consider a lesser departure or considering why a less serious sentence would be inappropriate. Further, significant procedural error occurred because the court departed from the initial guideline range without considering that there was no evidence that Ian was represented by counsel during any of the tribal proceedings. Finally, the 90-month prison sentence is substantively unreasonable. The imposed prison sentence is significantly higher than the 57-month sentence suggested by the

government, and much higher than the 24-month sentence suggested by the defense. The court abused its discretion by imposing a hefty prison sentence that was greater than necessary to accomplish the goals of federal sentencing.

ARGUMENT

I. The district court erred in departing upward under USSG § 4A1.3 without fully considering the circumstances of Ian’s tribal convictions and whether an intermediate criminal history category would be sufficient.

The reasonableness of a sentence is reviewed in “two parts: first, for significant procedural error, and second, if there is no significant procedural error, for substantive reasonableness.” *United States v. Sullivan*, 853 F.3d 475, 478 (8th Cir. 2017) (per curiam). A district court commits significant procedural error if it fails to calculate or improperly calculates the guidelines range, or if it fails to adequately explain the sentence, which includes explaining any deviation from the guideline range. *United States v. Wise*, 17 F.4th 785, 788 (8th Cir. 2021). More specifically, an improper calculation of the guideline range includes errors in determining the extent of an upward departure based upon a purportedly underrepresented criminal history. *United States v. Azure*, 536 F.3d 922, 932 (8th Cir. 2008). Although the guidelines are advisory rather than mandatory, “a district judge must give serious consideration to the extent of any departure from the Guidelines” and the judge must explain his or her conclusion that “an unusually harsh sentence is appropriate in a particular case with sufficient justifications.” *Gall v. United States*, 552 U.S. 38, 46 (2007). This Court

reviews departures from the guideline range under the abuse of discretion standard of review. *Azure*, 536 F.3d at 930 (standard of review for procedural error). However, the district court’s “interpretation and application of the Guidelines” are reviewed *de novo*. *United States v. Mayer*, 63 F.4th 680, 684 (8th Cir. 2023).

Here, the district court committed significant procedural error by rotely adding probation’s suggested six points to Ian’s criminal history score without exercising discretion to consider a lesser departure or less serious sentence.⁵ SH, pp. 5-7, 14-21. The guidelines manual requires a court to exercise discretion when considering when and how to use tribal convictions as a basis for departing from a designated criminal history category. The guidelines do not direct a court to count tribal convictions in the same manner as nontribal convictions. Indeed, the starting point is that tribal convictions are not counted as part of a defendant’s criminal history score. USSG § 4A1.2(i). Although tribal convictions are not counted in one’s criminal history score, they “may be considered under §4A1.3.” USSG § 4A1.2(i). Section 4A1.3 provides:

⁵ At times, the district court mistakenly referred to the departure as a “variance.” SH, p. 7. However, the court observed that USSG § 4A1.3 “is applied to provide a departure,” and later reiterated that it was imposing an upward departure pursuant to USSG § 4A1.3. SH, p. 6; R. Doc. 35. The court imposed an upward departure despite using imprecise language. *See United States v. Thompson*, 888 F.3d 347, 354 (8th Cir. 2018) (“[M]ere imprecise language at a hearing” does not negate the obvious intent of the court). *See also United States v. Hall*, 965 F.3d 1281, 1296 (11th Cir. 2020) (“To determine whether the district court varied or departed, we look, unsurprisingly, to the court’s reasoning and what it said about that reasoning.”).

If reliable information indicates that the defendant's criminal history category substantially under-represents the seriousness of the defendant's criminal history . . . an upward departure may be warranted.

USSG § 4A1.3(a)(1). The upward departure section of the guidelines manual lists information which *may* be considered including, *inter alia*, prior sentences not used in calculating the criminal history category, such as tribal convictions. USSG § 4A1.3(a)(2)(A). Thus, *if* the defendant's criminal history score (calculated without considering tribal convictions) substantially under-represents the seriousness of the defendant's criminal history, an upward departure *may* be warranted and tribal convictions *may* be considered.

The guidelines manual also provides guidance on how the sentencing court should calculate the extent of the upward departure. Courts are advised to use “as a reference, the criminal history category applicable to defendants whose criminal history or likelihood to recidivate most closely resembles that of the defendant's.” USSG § 4A1.3(a)(4)(A). When departing upward under USSG § 4A1.3, the district court, “first must proceed along the criminal history axis of the sentencing matrix, comparing the defendant's criminal history with the criminal histories of other offenders in each higher category.” *Azure*, 536 F.3d at 931 (citation and internal quotation marks omitted). This process is not a “ritualistic exercise in which the sentencing court mechanically discusses each criminal history category it rejects en route to the category that it selects,” but the sentencing court “must adequately

explain why it concludes the intermediary categories fail to meet the purposes of § 4A1.3.” *Id.* (cleaned up). Or put another way, if the court will not explain why each of the intermediate categories are inadequate, it should explain why the chosen category is the most appropriate. *See United States v. Anderson*, 886 F.2d 215, 216 (8th Cir. 1989) (per curiam) (the court failed to compare the defendant’s history to most defendants in the selected criminal history category).

Additionally, the guidelines offer specific guidance on whether or to what extent an upward departure based on tribal convictions is appropriate. USSG § 4A1.3, comment. (n.2(C)). Effective November 1, 2018, the United States Sentencing Commission amended the guidelines manual to provide guidance regarding treatment of tribal convictions for upward departures. USSG App. C. Sup., Amend. 805 (2018). This amendment led to a list of factors in the guidelines that may be considered by a court when departing based on prior tribal convictions. USSG § 4A1.3, comment. (n.2(C)). One factor is whether the defendant “was represented by a lawyer” and “received other due process protections consistent with those provided to criminal defendants under the United States Constitution.” USSG § 4A1.3, comment. (n.2(C)(i)). Other factors that a court may consider include whether the tribal proceedings afforded the defendant due process protections required for criminal defendants under the Indian Civil Rights Act of 1968, and whether the tribal court

conviction is for an offense that would have otherwise been counted. USSG § 4A1.3, comment. (n.2(C)(ii)) and (vi).

The specific tribal conviction considerations contained within USSG § 4A1.3, comment. (n.2(C)), as well as the fact that, as a starting point, tribal convictions are not counted into a defendant's criminal history score, reflect the reality that tribal convictions are different than nontribal convictions. Criminal defendants in tribal proceedings do not enjoy the same constitutional rights enjoyed by nontribal United States citizens. *See United States v. Red Bird*, 146 F. Supp. 2d 993, 997 (D.S.D. 2001), *aff'd sub nom. United States v. Bird*, 287 F.3d 709 (8th Cir. 2002) (“There is, as a general proposition, no Sixth Amendment right to counsel in Indian Country as to tribal court matters.”). *See also United States v. Archambault*, 174 F. Supp. 2d 1009, 1013 (D.S.D. 2001) (“We know that the Indian Civil Rights Act of 1968 does not guarantee the same rights that other Americans have. There is no right to counsel at public expense for Native Americans who are indigent and charged in tribal court.”); *United States v. Bryant*, 579 U.S. 140, 149-50 (2016) (recognizing that the Indian Civil Rights Act does not afford indigent defendants in tribal court proceedings the right to the appointment of free counsel if the sentence imposed is no greater than one year).

Although none of the tribal court conviction factors in the USSG § 4A1.3, comment. (n.2(C)) list are alone determinative, the list was implemented to provide “appropriate guidance and a more structured analytical framework under §4A1.3.”

USSG App. C. Sup., Amend. 805 (2018). The factors are “important considerations to help courts balance the rights of defendants, the unique and importance status of tribal courts, the need to avoid disparate sentences because of varying tribal court practices and circumstances, and the goal of accurately assessing a defendant’s criminal history.” USSG App. C. Sup., Amend. 805 (2018). The list was also the result of the Report of the Tribal Issues Advisory Group, which observed differences in tribal courts, such as oftentimes defendants are either unrepresented or represented by a lay advocate. U.S. Sentencing Comm’n, *Report of the Tribal Issues Advisory Group*, at 11 (May 16, 2016), *available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/20160606_TIAG-Report.pdf (last accessed May 1, 2023). The report noted that in some tribal courts the prosecutor or the judge may lack a law degree and formal legal training. *Id.* Moreover, tribal records are often inadequately maintained and some tribal courts refuse to share records with federal authorities and thus are not considered for certain federal defendants with tribal convictions. *Id.* at 11-12. “These differences make it often difficult for a federal court to determine how to weigh tribal court convictions in rendering a sentencing decision.” *Id.* at 11.

When sentencing Ian, the district court rehashed probation’s upward departure calculation, overruled Ian’s objections, and adopted probation’s modified criminal history score of 14 and the resulting category VI sentencing range of 77 to 96 months.

SH, p. 7. The court rotely adopted probation's enhanced criminal history score calculation and enhanced criminal history category without considering why a more intermediate sentence category was inappropriate and without considering that there was no evidence that Ian was represented by counsel during any of the tribal proceedings. This was significant procedural error because the court did not consider the pertinent factors beyond the mere fact that probation concluded that Ian's tribal convictions would have added six criminal history points if treated as nontribal convictions. *See Azure*, 536 F.3d at 932 (an improper calculation of the advisory guideline range includes errors in determining the extent of an upward departure based upon a purportedly underrepresented criminal history); *Sullivan*, 853 F.3d at 478-80 (per curiam) (procedural error occurs when a sentencing court does not adequately explain an upward departure); *Anderson*, 886 F.2d at 216 (per curiam) (court should explain why the chosen category is the most appropriate and should compare the defendant's history to most defendants in the selected criminal history category).

It simply was not good enough for the court to upwardly depart six criminal history points based on probation's calculation that had Ian's tribal convictions been nontribal convictions, they would have been assigned that score. Although USSG § 4A1.3, comment. (n.2(C)(vi)) indicates that a court may consider that tribal court convictions were for offenses that otherwise would be counted, this is only one factor to consider when determining whether a departure may be warranted. A thoughtful

analysis was required prior to deciding that an upward departure was warranted. The fact that the court did not address defense counsel's objections regarding lack of proven representation during the tribal court proceedings is further telling that the court did not exercise true discretion. R. Doc. 30; SH, pp. 5-17. Defense counsel specifically objected to the upward departure in part on the grounds that the guidelines assert that the court should consider whether Ian was represented by counsel at the tribal court proceedings but the PSR did not indicate that Ian was so represented. R. Doc. 30, 5-6. Although the lack of evidence that Ian was represented by counsel during the tribal court proceedings was not determinative, this was still an important factor to consider before determining whether a departure was warranted, and if so, to what extent.

Additionally, it is notable that the district court did not explain why an intermediate criminal history category was not appropriate because it in fact did not consider an intermediate criminal history category; rather, it just rotely moved Ian from criminal history category IV to VI by applying probation's calculations. Initially, Ian's criminal history score was an 8, placing him squarely in the middle of criminal history category IV. PSR ¶ 37; USSG § 5A (Sentencing Table). After deeming an upward departure to be applicable and counting Ian's tribal convictions as nontribal convictions, probation calculated Ian's criminal history score to be 14, meeting the "13 or more" points needed to place Ian in category VI. PSR, p. 24; USSG § 5A

(Sentencing Table). The district court rotely adopted this calculation and sentenced Ian under the guidelines for a criminal history category VI. SH, pp. 6-7, 16-17; R. Doc. 34; R. Doc. 35. The resulting 90-month sentence greatly exceeded even the 57-month sentence requested by the government. R. Doc. 32; R. Doc. 34; SH, p. 17. More was required than rotely applying probation’s calculated six-point adjustment by scoring Ian’s prior tribal convictions as nontribal convictions.

In sum, the district court’s rote upward departure arrived at by imposing the exact same criminal history score and category calculated by probation, without even considering any lesser sentence, was an abuse of discretion.

II. The sentence is substantively unreasonable.

If this Court rejects Ian’s argument that his sentence should be vacated because significant procedural error occurred, it then considers the substantive reasonableness of the sentence under an abuse of discretion standard of review. *Gall v. United States*, 552 U.S. 38, 51 (2007). “A district court’s decision to depart upward from the advisory guideline range is reviewed for abuse of discretion, and the extent of that departure is reviewed for reasonableness.” *United States v. Ruvalcava-Perez*, 561 F.3d 883, 886 (8th Cir. 2009). This Court’s review should consider the totality of the circumstances. *Id.*

In selecting an appropriate sentence, the district court must consider the 18 U.S.C. § 3553(a) sentencing factors and ensure that the sentence is “sufficient, but not greater than necessary” to accomplish the goals of federal sentencing. 18 U.S.C. § 3553(a)(2). A district court abuses its discretion “if it 1) fails to consider a significant factor it should have, 2) gives substantial weight to an improper or irrelevant factor, or 3) considers the appropriate factors but commits a clear error of judgment in weighing them.” *United States v. Soliz*, 857 F.3d 781, 783 (8th Cir. 2017) (cleaned up).

Given Ian’s background and the nature of the tribal convictions, it was substantively unreasonable to sentence Ian to 90 months in prison. Rather than follow the government’s suggested sentence of 57 months in prison, or the defense’s suggested downward variance of 24 months in prison, the court sentenced Ian to 90 months in prison. SH, pp. 10, 17; R. Doc. 34; R. Doc. 30, at 5. Ian recognizes that the district court had the difficult task of imposing a just and fair sentence, and that the recommendations of the parties are not controlling. Still, a drastic departure from the sentences recommended by the parties hints at an abuse of discretion and indicates that the court did not adequately consider the totality of the circumstances.

In assessing the substantive reasonableness of the sentence imposed, this Court should “take into account the totality of the circumstances, including the extent of any [departure or variance] from the Guidelines range.” *Gall*, 552 U.S. at 51. The 90-month sentence, being a significant departure from the pre-departure sentencing

range of 57 to 71 months, is in part the result of the court not properly considering Ian's tribal convictions. As asserted in Issue I, the upward departure was based on inadequate consideration of the nature of Ian's tribal convictions with no consideration given to whether Ian was represented by counsel during those proceedings. As defense counsel observed in her sentencing memorandum supplement, many of Ian's tribal convictions were more than a decade old and many were for less serious conduct. R. Doc. 30. The court placed too much weight on Ian's tribal convictions.

Additionally, the court placed too little weight on Ian's obstacles. Born with fetal alcohol syndrome, Ian fought against the odds from the very beginning. PSR ¶ 69. Ian's mother was an alcoholic and died in a car accident shortly after his birth, and his sister died in a car accident when Ian was 14 years old. PSR ¶¶ 66, 71. Ian's father was also an alcoholic and was not involved in raising Ian; instead, Ian was raised by his grandmother until he was about 10 years old when she placed Ian in a hospital for in-patient mental health treatment. PSR ¶¶ 66, 69, 71. Ian was diagnosed with ADHD, Oppositional Defiant Disorder, Depressive Disorder, and fetal alcohol syndrome. PSR ¶ 69. Thereafter, Ian was sent to a residential Indian boarding school until the age of 14, when he was placed in a foster home. PSR ¶ 69. By the time Ian was just 17 years old, he was consuming a half-gallon of vodka a day due to his ongoing grief over the deaths of his mother and sister. PSR ¶¶ 70-72. The court did

recognize Ian's history of alcohol abuse and that his crimes were mostly the result of alcohol abuse; however, the court did not address Ian's history leading him to that point other than a passing reference that Ian suffers from fetal alcohol syndrome. SH, p. 16.

Had the court adequately considered Ian's obstacles and the nature and detail of his tribal convictions, it would not have imposed such a severe sentence. As the government argued in its sentencing memorandum supplement against Ian's proposed downward variance, "[i]mposition of a 57-month sentence would properly reflect the 'nature and circumstances of the offense' and 'the need for the sentence imposed - to reflect the seriousness of the offense' as it would account for the harm resulting from the Defendant's conduct." R. Doc. 32. Although the court noted the parsimony principle that it was required to impose a sentence sufficient, but not greater than necessary, the sentence imposed upon Ian is greater than was necessary and was an abuse of discretion. SH, p. 14.

CONCLUSION

The district court abused its discretion in imposing a 90-month sentence. This Court should remand this case for resentencing.

Dated this 1st day of May, 2023.

Respectfully submitted,

JASON J. TUPMAN
Federal Public Defender
By:

/s/ Darren E. Miller

Darren E. Miller, Assistant Federal Public Defender
Attorney for Appellant Ian Todd Good Left
Office of the Federal Public Defender
Districts of South Dakota and North Dakota
100 W. Broadway Avenue, Suite 230
Bismarck, ND 58501
Telephone: 701-250-4500 Facsimile: 701-250-4498
ecf8_bi@fd.org

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of May, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

In addition, I certify the electronic version of the foregoing has been scanned for viruses and the scan showed the electronic version of the foregoing is virus-free.

/s/ Darren E. Miller
Darren E. Miller, Assistant Federal Public Defender
Attorney for Appellant Ian Todd Good Left

CERTIFICATE OF COMPLIANCE

This document complies with the word limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 5,704 words.

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Dated this 1st day of May, 2023.

/s/ Darren E. Miller
Darren E. Miller, Assistant Federal Public Defender
Attorney for Appellant Ian Todd Good Left