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UNITED STATES SENTENCING COMMISSION
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* * * * *
UNITED STATES SENTENCING COMMISSION
PUBLIC HEARING

Tuesday, June 19, 2001
9:00 a.m. to 1:00 p.m.

Judge Diana E. Murphy, Presiding

United States Courthouse, Courtroom No. 1
515 Ninth Street
Rapid City, South Dakota

* * * * *

COMMISSIONERS PRESENT:

Chairperson:
Judge Diana E. Murphy

Vice Chairs:
Judge Ruben Castillo
Judge William K. Sessions, III
Mr. John R. Steer

Commissioners:
Judge Sterling Johnson, Jr.
Judge Joe Kendall
Professor Michael E. O'Neill

Ex-Officio Commissioner:
Mr. Michael E. Horowitz

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**DISK
ENCLOSED**

1 CHAIRPERSON MURPHY: I'm Diana Murphy.
2 I'm the chair of the United States Sentencing
3 Commission, and then my other role in life, I am a
4 judge on the United States Court of Appeals for the
5 Eighth Circuit. In a few moments I'll tell who we
6 are and why we're here, a little of what we are.
7 It'll be brief because we've come to listen to
8 you. And I want to now call on Gregg Bourland, the
9 Chair of the Cheyenne River Tribe, to set us off on
10 the right track with an opening prayer.

11 MR. BOURLAND: Let us all bow our heads to
12 our Creator. Our most gracious, wonderful and
13 loving Heavenly Father, you who have bestowed life
14 on this beautiful planet that we live upon, we
15 thank you. We give you thanks for the day that
16 you've given us, and we give you thanks for the
17 commission that you've gathered here to hear what
18 our concerns are.

19 Father, we know that as we ask your
20 blessings on this day that you'll deliver them. We
21 know that you will deliver the wisdom and the
22 strength that we need as leaders to lead our
23 people. And we know that you'll deliver the wisdom
24 and the strength that the commission needs to be
25 able to help our people.

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1 We ask for a blessing of all the people of
2 this world, the people of this state, and the
3 people of our reservations. We ask for blessing of
4 the weak and the strong alike, and we do so in
5 Jesus' name. Amen.

6 CHAIRPERSON MURPHY: We are an institution
7 and creation of Congress which in 1984 passed the
8 United States Sentencing Reform Act, and part of
9 the concern that Congress had at that time,
10 Congress has always set the penalties for federal
11 crimes, but they used to be very open-ended. They
12 might have a maximum of 40 years, and it was
13 completely up to the judge as to where within that
14 range the judge would sentence someone. And then
15 it was there was the United States Parole
16 Commission that decided when somebody would get out
17 of prison.

18 Congress was concerned that there were
19 great disparities in sentencing depending upon who
20 the judge was, what part of the country the judge
21 was located, who the defendant was, and so this
22 concern about disparities was one of the great
23 motivating forces for Congress in passing this
24 reform act, and the idea was that they would have a
25 sentencing commission that would create sentencing

1 guidelines for all federal offenses so that when
2 somebody is convicted of a federal crime, there
3 would be a guideline range in which the judge would
4 sentence, and it would not depend upon what part of
5 the country you were in, what race you were and so
6 forth.

7 There also was a concern in Congress that
8 some judges were not giving significant enough
9 sentences for serious crimes, and there also wasn't
10 a clear idea for people as to how long an
11 individual would serve in prison because the parole
12 commission made that decision. Even the judge
13 would not have a good idea of how long an
14 individual would serve with a particular sentence.

15 So they wanted to have more clarity in
16 sentencing, more fairness -- that was their idea --
17 and something that would suit the type of offense,
18 and there was a great desire to deter crime and to
19 incapacitate criminals, to put bad folks into
20 prison. And there was -- the sentencing guidelines
21 were actually passed and became effective in the
22 fall of 1987, and that was -- our predecessors did
23 that.

24 This commission was appointed in November
25 of 1999, so we have been there for 19 months, and

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1 our job is to continue working on this sentencing
2 guideline system that Congress has set in place, to
3 make guidelines for new offenses that Congress
4 decides on, and also to make modifications and
5 adjustments to the guidelines.

6 And at this point, I'd like to introduce
7 everybody that is present from the commission. On
8 my far right is Judge Joe Kendall who is from the
9 Northern District of Texas, and next to him is
10 Judge William Sessions who is from the District of
11 Vermont. And to my right is John Steer who has the
12 longest experience of any of us with the commission
13 because he was the general counsel for the
14 commission from 1987, so he has valuable experience
15 with the commission.

16 And then to my left is Judge Ruben
17 Castillo from the Northern District of Illinois.
18 Seated next to him is Judge Sterling Johnson from
19 the Eastern District of New York. And then seated
20 next to him is -- there are two nonvoting members
21 of the commission, and one of them is either, under
22 the statute, the Attorney General of the United
23 States or the Attorney General's delegate, and so
24 the Attorney General has typically, because of all
25 the responsibilities of that office, delegated to

1 someone in the Department of Justice to be the
2 ex officio member that represents the Department of
3 Justice, and that is Michael Horowitz who, prior to
4 his present service, has been a prosecutor in the
5 Southern District of New York, and he has just
6 joined us some months ago and is very helpful to
7 us.

8 I'm hoping that while we're here this
9 morning, our other voting commissioner will
10 arrive. There was a death in his family, and so if
11 he arrives and a chair is put up here, you'll know
12 that is Professor Michael O'Neill who is a law
13 professor at George Mason Law School in Northern
14 Virginia, and I do hope that he is going to be
15 here.

16 The other ex officio member is the chair
17 of the United States Parole Commission. That
18 office has just changed and so his schedule had
19 already been set and he was unable to come.

20 Just a few words about why we're here. I
21 would say the one that got this all in motion,
22 really, is Elsie Meeks because you are familiar
23 with the fact that she's the vice-chair of the
24 United States Commission on Civil Rights, and the
25 South Dakota Advisory Committee to that commission

1 had some hearings here, many of you were probably
2 here, and issued a report. One of the items in the
3 report expressed a concern about the impact on
4 Native Americans who are sentenced in federal court
5 with the federal guidelines and asking the
6 commission to take a look at this, and that set in
7 motion the process that brought us here today. And
8 we're here really to listen to you. I am taking a
9 few minutes here to tell you something about us,
10 just to explain who we are and why we're here, but
11 we've come to hear what you have to say, to
12 understand what you may think the problems are.

13 And Mr. Kindle was asking me, "Well, what
14 will be the next step?" Well, we're going to
15 listen and then we will, I said, ponder and we'll
16 see. We have limitations. We have a statutory
17 scheme. What we promulgate is sent to Congress; it
18 becomes effective. Under the statute we send
19 things normally on May 1st and they become
20 effective on November 1 unless Congress doesn't
21 like what we send. So -- and by and large, over
22 the history of the commission, Congress has
23 accepted almost everything that's been sent because
24 I think the commission has tried to do a very good
25 job with what it's been working on.

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1 We are a small -- we are an independent
2 agency within the judicial branch. We have a very
3 relatively -- you know, for a federal entity, we
4 have a small staff and a very small budget, and
5 that's a limitation. And our statutory scheme is
6 also one of the things that we don't have any
7 jurisdiction over is state sentencing, and I know
8 that many of you are going to be also at a hearing
9 with the state people tomorrow.

10 So we're here -- in addition to what you
11 might want to say about the impact on Native
12 Americans by the federal guidelines, we are
13 considering a guideline amendment for crimes that
14 relate to the damage of cultural and archeological
15 artifacts and objects, and we delayed taking action
16 on that because we knew we were going to come out
17 here and we thought this could well be a subject
18 that was of interest to you.

19 So with that, I'd like to turn the floor
20 over to Elsie Meeks who will be testifying and also
21 then can introduce the other people who are on the
22 first panel. Thank you all for coming.

23 MS. MEEKS: Thank you, Judge Murphy, and
24 thank you for coming, Commissioners. I'm deeply
25 honored that you came here to South Dakota, and I'm

1 aware that you have a very busy schedule, and so
2 your taking time to come here and seek public
3 comments on the Federal Sentencing Guidelines is
4 really very much appreciated by all of us here, I'm
5 sure.

6 You've invited a number of distinguished
7 persons to testify here. Many of these people are
8 in the trenches every day dealing with the Federal
9 Sentencing Guidelines, and others have a wealth of
10 knowledge and experience with Indian issues. I'm
11 looking forward to hearing them as much as you are.

12 And so to begin my testimony, and I'll try
13 to keep it brief, since before the Federal
14 Sentencing Guidelines were even implemented and
15 ever since, efforts have been made to consider the
16 unique circumstances on most Indian reservations in
17 sentencing. These circumstances are poverty, high
18 unemployment, alcoholic abuse and federal criminal
19 jurisdiction over crimes that ordinarily are local
20 law offenses.

21 When the guidelines were being developed,
22 the New Mexico Federal Public Defender urged the
23 sentencing commission to allow trial judges
24 discretion in sentencing Indian country crimes
25 because of these circumstances. A couple years

1 after the guidelines were implemented, the Arizona
2 Federal Public Defender asked the commission to be
3 sensitive to the unique problems on reservations.
4 And U.S. Attorney Judge Bilby urged the commission
5 to revisit the question of alcoholism on the
6 reservations and the impact of the guidelines.

7 The chairperson of the commission at that
8 time responded to Judge Bilby that alcoholism was
9 rejected as a mitigating factor in sentencing. The
10 chairman related that the commission was not
11 unmindful of the crimes that occurred on Indian
12 reservations, but the commission concluded that it
13 would be contrary to our statutory mandate to draft
14 guidelines which set forth two separate standards
15 of justice, one for American Indians and another
16 for everyone else.

17 While we may have only one set of Federal
18 Sentencing Guidelines, we do have two separate
19 standards of justice for crimes committed on the
20 reservation, one for American Indians and another
21 for everyone else. And for example, let's just say
22 that today after today's hearing, Judge Murphy, you
23 and I drive down to Prairie Winds Casino, our local
24 casino, and I'm assuming -- in fact, I know that
25 you're non-Indian, and we sit down at the blackjack

1 table and proceed to lose all of our money, which
2 is probably what would happen if I sat down to a
3 blackjack table. So we decide to exact some
4 revenge on the dealer who is non-Indian and beat
5 him up. Being Native American, I will go to
6 federal court and be sentenced under the federal
7 guidelines. You being non-Indian will be subject
8 to state court jurisdiction, but since the crime
9 occurred on a reservation, the state may not even
10 pursue it.

11 Now you and I committed the same exact
12 crime at the same time against the same victim, but
13 only one of us will be tried in federal court and
14 be subject to the Federal Sentencing Guidelines, so
15 clearly this is two separate standards of justice.

16 My involvement came about in this issue in
17 April of 1999 when I first became interested in the
18 Federal Sentencing Guidelines and the impact on
19 Native Americans. I had read in a local newspaper
20 two articles about the impact of the Federal
21 Sentencing Guidelines -- the impact that the
22 Federal Sentencing Guidelines were having in Indian
23 country. In these articles a federal judge was
24 voicing his concerns about the harshness of the
25 sentencing guidelines on Native American

1 defendants. This judge, the Honorable Charles
2 Kornmann, later invited me to observe some sentence
3 hearings and to meet with him, which I did.

4 Shortly after this, I received a letter
5 from the Honorable Judge Battey in which he stated
6 the guidelines were unfair to both victims and
7 defendants because they did not provide the
8 flexibility judges need to deal with unique
9 situations presented by reservation crimes.

10 Based on my meeting with Judge Kornmann
11 and the letter from Judge Battey, I decided to try
12 to find out what the effects Federal Sentencing
13 Guidelines were having in Indian country. I had
14 already begun some research when the State Advisory
15 Commission to the U.S. Commission on Civil Rights
16 held a forum here in Rapid City in 1999. This
17 forum was to address injustices Native Americans
18 felt they were subjected to here in the state. At
19 this forum the SAC was asked to look at -- the
20 State Advisory Commission was asked to look into
21 the impact of the Federal Sentencing Guidelines and
22 the impact they were having on Native Americans.

23 And after the SAC I continued my
24 research. What I found was that there was very
25 little statistical data available concerning Native

1 Americans and administration of justice issues.
2 The Federal Sentencing Guidelines specifically have
3 been subject to a number of studies and much has
4 been written about their impact on different
5 races. However, these reviews have generally only
6 looked at four races: white, black, Hispanic and
7 other with Native Americans falling into the
8 "Other" category. I know this is -- this is
9 because nationally Indians constitute a very small
10 part of the federal criminal docket, but American
11 Indians are the only race that is subject to
12 federal criminal jurisdiction and hence, the
13 Federal Sentencing Guidelines based solely on being
14 Indian and committing a crime on a reservation,
15 usually where he or she lives. Because of this,
16 any review of the impact of guidelines by race
17 needs to include Native Americans.

18 As you know, the sentencing commission has
19 issued three reports concerning manslaughter, rape
20 and sex offenses against children which show that
21 because of federal jurisdiction over these crimes
22 on reservations, the majority of those sentenced
23 for these crimes are Native American. I will speak
24 to these reports a little later, but first I wanted
25 to briefly mention that the report entitled

1 "American Indians and Crime" issued in 1999 by the
2 Department of Justice Bureau of Justice Statistics,
3 BJS. "American Indians and Crime" was the first
4 comprehensive analysis of Indians and crime. The
5 findings revealed a disturbing picture of Native
6 Americans and crime as both victims and offenders.
7 Even the BJS author was surprised by the findings.
8 He stated, and I quote, "The common wisdom was that
9 blacks experience the highest exposure to violence,
10 and when we released the crime survey results year
11 after year, that was the result. This adds a new
12 dimension to our understanding of the problem."

13 I mention this report for two reasons.
14 The first reason, while the author may have been
15 surprised by his findings, most Indians probably
16 were not. The same could be said that the study
17 revealed that federal sentences were harsher than
18 state sentences for similar offenses. Indians
19 would not be surprised.

20 The second reason why I mentioned the
21 report is that it shows that while some things may
22 be statistically minor or insignificant in the
23 overall picture, they could affect greatly portions
24 of the population; for example, the impact of the
25 Federal Sentencing Guidelines on American Indians.

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1 I will submit all of my testimony. I want
2 to conclude here. I think I'm probably getting
3 close to my ten-minute limit, and since I've been
4 asked to provide that role for others, I will keep
5 myself to a ten-minute limit.

6 Some have attributed dropping crime in the
7 past few years in part to tough criminal
8 sentencing. While that may be true nationally, it
9 certainly is not the case on many Indian
10 reservations. The crime rate is still high. The
11 Federal Sentencing Guidelines are not a deterrent
12 on Indian reservations. In fact, I believe you
13 could double or even triple the current sentences
14 and have no effect on crime. The underlying
15 problem, alcohol abuse, lack of opportunity, those
16 things need to be addressed.

17 And lastly, if needed, I would like to see
18 a comprehensive review of the impacts of the
19 Federal Sentencing Guidelines on Native Americans.
20 I prefaced with "if needed" for there are
21 individuals here who are experienced with the
22 guidelines and may already know the changes that
23 may be needed or desired and may convince you. The
24 fact that we are discussing this is a step in the
25 right direction, and I thank you very much for

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1 coming.

2 And now I've been given the great pleasure
3 of introducing our tribal chairmen from South
4 Dakota. I've also been given the dubious pleasure
5 of asking them to maintain a ten-minute limit,
6 which may be a difficult task. Not because John
7 Yellow Bird Steele, President Steele is from the
8 Oglala Sioux Tribe, but because he is next on the
9 agenda, I would like to introduce our tribal
10 chairman John Yellow Bird Steele.

11 MR. STEELE: Thank you, Elsie. I'd like
12 to welcome Honorable Diana Murphy and honorable
13 commission members to the sacred Black Hills of the
14 Lakota, Dakota, Nakota peoples. I do wish you
15 would have an opportunity to go into the Black
16 Hills to feel their presence, to feel the
17 sacredness up there.

18 I thank you for this opportunity to
19 express our concerns over what we consider to --
20 we've got a lot of our people in the federal
21 system, and this is because of the political
22 relationship our tribe has with the federal
23 government, the reservations, the trust status of
24 the lands, the 14 major crimes that the federal
25 government has jurisdiction over. So we think it's

1 very serious.

2 But before I get into that, I'd like to
3 express the tribe's gratitude to our tribal member,
4 Elsie Meeks here, and her role in the civil rights
5 commission which she's also a member of. We think
6 that she's bringing attention to our concerns, our
7 areas here. And it's not only from me as president
8 of the tribe, but it's from the people that we're
9 here talking about the disparity in the sentencing
10 in similar crimes, but our people feel this
11 disparity in all phases of their everyday life, and
12 it's whether they walk into a retail outlet store,
13 whether they're doing business, at school, and
14 they're very appreciative of the commission, both
15 the civil rights commission and your sentencing
16 commission, for taking the time to let us express
17 our concerns to you.

18 What we would wish is that, if possible,
19 you could extend your comment period to offer
20 individual tribal members and tribes ourselves an
21 extension to get you also written comments on these
22 sentencing guidelines disparities that we see.

23 We're well aware of the Sentencing Reform
24 Act of 1984 and the purpose of the guidelines, the
25 constitutional implications of the Fourth -- of the

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1 Fifth and the Fourteenth Amendments to the U.S.
2 Constitution. And I would like to sort of restate
3 what Elsie said in that the Pine Ridge Indian
4 Reservation, and you can see it throughout South
5 Dakota, and the U.S. Census when it defines the
6 poorest counties. Now we've got -- we took over --
7 we're the number one, number two, number four,
8 number five of the poorest, and these are all
9 situated where our reservations are situated.

10 This has a big impact on our relationship
11 with the federal government and ending up in
12 federal court and having our people sentenced and
13 into the federal system many, many, many miles from
14 home because of the situated prison system of the
15 federal government, and this puts a mental stress
16 on the people on having their loved ones sent off
17 and in the prison system.

18 And we believe also that the judge should
19 have more discretion in sentencing. The sentencing
20 guidelines, as are, are very strict, we believe,
21 and very harsh, harsher than the state's.

22 The Pine Ridge Reservation since 1970,
23 '80, '90, now 2000, we were identified as the
24 poorest. I think Cheyenne River took over that
25 distinction in the year 2000, but that created a

1 lot of violations of criminal statutes, both tribal
2 and federal criminal statutes, and depending on
3 whether or not the perpetrators are Indian or
4 non-Indian, the victim is an Indian or non-Indian,
5 the U.S. sometimes has jurisdiction to prosecute,
6 the tribe also has jurisdiction. But like Elsie
7 said, we see this disparity, and we do hope that
8 this commission can somehow address it and make the
9 sentencing fair so that both the victim and the
10 perpetrator can receive justice, and that's all
11 we're asking.

12 We've got other places that we're
13 addressing justice, and this is in the Nebraska
14 system on the White Clay issue. I'm in court down
15 there, and it's sort of a -- it's a violation that
16 we want to bring attention to the injustices there,
17 and that's all we're asking on some murders, some
18 acts of crimes committed that aren't being
19 addressed by the system, and we just want
20 cooperation to work on them, to get them resolved
21 and to get some justice here.

22 In this area here, we think that the
23 greatest problem with the sentencing guidelines is
24 like Elsie said here, the lack of discretion given
25 to the judge. We know that sometimes the judge is

1 given the authority to -- I guess, from the circuit
2 court of appeals, they ruled that some downward
3 departure from the guidelines is allowed when such
4 departure is based upon extraordinary achievement
5 despite adverse living conditions on the
6 reservation. I guess this is what we've been
7 talking about in the poverty, the high
8 unemployment, and so the judge is given some
9 departure downward to -- in the sentencing
10 guidelines in that instance, but we believe that
11 more discretion should be allowed to the judge.

12 I do have a concern that the guidelines
13 specifically state that race is not relevant, and
14 that special unique trust relationship between the
15 U.S. and the Indian tribes is a political
16 relationship and not a racial relationship. But I
17 don't know, it's hard to express the way people
18 feel. It's a disparity throughout their lives, and
19 sometimes this doesn't reflect upon the words
20 written, that it's not race-related, but it almost
21 seems that we feel that it is. Maybe it's on our
22 part.

23 And another major concern is the lack of
24 good time whereby good behavior is rewarded and the
25 offender is released early; such things as time

1 spent in other jurisdictions such as tribal jails.
2 They spend an inordinate amount of time before the
3 federal jurisdiction charges on the crime of five
4 months or something like that. We think that they
5 should possibly be given some good time for that.

6 And I think we think it is time to revisit
7 the Crow Dog decision and the subsequent major
8 crimes legislation. We think that the tribal
9 governments, which have been taking more
10 responsibility and more authority unto themselves,
11 should have a working relationship whereby the
12 federal government and the tribal governments can
13 get justice to the perpetrator and the victims
14 through the tribal government system. I've got
15 young people unknowingly, because of alcohol
16 influence, end up having their whole lives affected
17 by being not only sentenced, but convicted in the
18 federal system.

19 On the reservations most of our employment
20 is created with federal funds, and these people
21 can't participate in any way the rest of their
22 lives, whether it be voting or holding a job. And
23 so if possible, if this commission can recommend,
24 because we're working on the tribal end to effect
25 more funds for the tribal judiciary systems, that

1 we believe that the major crimes, 14 supposed to
2 be, but I've got people in the federal system up
3 here for one cigarette of marijuana, for some
4 burglaries, these should be able to be handled in
5 the tribal courts instead of having them in the
6 federal system, then having to get the sentencing
7 guidelines on them in the first place.

8 And I would like to say that it appears
9 that the state courts allow suspended imposition of
10 sentence as to many first-time offenders, and this
11 practice allows an individual to successfully serve
12 a period of probation after which the charges are
13 dismissed and the record expunged. This is a
14 concern about the future of, like I stated a little
15 previous, some very young people because of
16 alcohol. They're not that type of a person, but
17 they did commit a crime, and we should allow these
18 young people a chance. Like I say, they're not
19 that type of a person, but they did commit the
20 crime because of alcohol, being under the
21 influence, and it's not a reason for not charging
22 them and convicting them, but we need to give that
23 individual a chance to be a good citizen and to
24 straighten out their lives and have a chance, and
25 so that's why I request the expunging of the

1 records, possibly, and the probation.

2 Once again, I would just like to request
3 an extension of time. I think some of my tribal
4 members would like to have input into this subject
5 that we're talking about, the disparity of
6 sentencing, and so if they could get some written
7 comments in to you. I appreciate you once more for
8 listening to us, for coming to our area, and we
9 welcome you.

10 MS. MEEKS: Now, Commissioners and Judge
11 Murphy, I'd like to introduce William Kindle from
12 the Rosebud Sioux Tribe.

13 MR. KINDLE: Thank you, Elsie. Good
14 morning, Commissioners. Good to see all of you
15 here. We're glad you took the time out to come out
16 to Indian country and hear our concerns.

17 My comments here this morning are going to
18 be a lot shorter than Chairman Bourland's (sic) and
19 Ms. Meeks'. I'm going to be sort of brief and to
20 the point. I want to touch on four issues, four
21 items of concern, and Chairman Bourland (sic) spoke
22 of one or two of them already, but I would like to
23 just mention again the fact that in my
24 conversations with a lot of the federal judges, a
25 lot of correspondence with them, they've indicated

1 the sentencing guidelines are too rigid. And
2 they've always in their response to my questions
3 about it, they thought they should be looked at on
4 a case-by-case basis and that they should have the
5 flexibility there to do what they feel should be
6 done. And so that's one of our concerns. The
7 guidelines are just too rigid for the federal
8 judges.

9 The other thing that is a concern to us
10 down at Rosebud and, I believe, probably across
11 Indian country, the majority of our tribal members
12 that ended up in the federal system are fluent
13 Lakota Indian speakers, and Lakota is their first
14 language, English is their second language, and we
15 feel there should be some translators and
16 interpreters in the federal system to help these
17 people to better understand the legal jargon and
18 the plea bargaining process that takes place that's
19 widely used today, as all of you know. And I think
20 some interpreters would be of great help to our
21 grass roots people when they come through the court
22 system up there.

23 COMMISSIONER JOHNSON: There are no
24 interpreters?

25 MR. KINDLE: No, there is none, and that's

1 something that's imperative that we have.

2 The other concern we have is many of the
3 public defenders that our people have to use when
4 they get into the system. Many times they're
5 overworked, poorly staffed, and many times they're
6 lacking in proper training, but yet that's the
7 person -- that's the legal person that our members
8 are stuck with or trapped with when it comes to
9 their legal defense. And many times, these people,
10 as I say, you know, their defense is inadequate,
11 weak and many times, no defense at all. So that's
12 a real big concern, the lack of training for those
13 public defenders, and we would like that addressed
14 in some way.

15 As all of you know, prisons can't be built
16 fast enough today to house all of the offenders
17 that come through the court systems. So what we'd
18 like to see down at Rosebud is more drug
19 counseling, alcohol counseling, anger management
20 counseling to take place right back in Indian
21 country, right back through our court systems.
22 We'd like to have those people returned to receive
23 the help they need. And a lot of times this
24 counseling and this help needs to be done with
25 their family members as well. So if they're back

1 home, back in Indian country this could be
2 achieved. The counseling can reach not only the
3 offender, but the family as well, and I think that
4 would be a great help to us.

5 Crimes involving destruction or damage of
6 items of cultural heritage, I think those should be
7 and need to be referred back to tribal courts.
8 Many tribes don't address this in their tribal
9 codes, but it's something that can be developed and
10 put into a tribal code pretty easy and pretty
11 quick, and I think they should be developed by all
12 the tribes. All these cases should be addressed in
13 the tribal court because we have many, many tribal
14 members that are law-trained and as well as
15 culturally trained as well so they would be the
16 people to handle those.

17 So those are the issues that I wanted to
18 address here today. In conclusion, the Rosebud
19 Sioux Tribe requests that the sentencing guidelines
20 offered here today be implemented and that the
21 appropriate funding be provided to shift some of
22 that burden out of the federal system to the tribal
23 level for proper litigation.

24 So with that, I want to thank you for
25 allowing me some time here today, and we hope that

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1 something will definitely happen; that we don't
2 just come here and listen and go away and not see
3 something happen. With that, I want to thank you
4 very much for allowing me a few minutes here.
5 Thank you.

6 MS. MEEKS: At this time I would like to
7 introduce Chairman Bourland from the Cheyenne River
8 Sioux Tribe. He's told me that it takes him five
9 minutes to say his name in Lakota, so I might give
10 him a couple extra minutes. Probably not.

11 MR. BOURLAND: Thank you very much. My
12 Lakota name is Wanbli Awanyankapi which means
13 "Eagles Watch Over Him," and I welcome each and
14 every one of you to the Great Sioux Nation. We're
15 just temporarily loaning you this facility and this
16 land. Your own United States Supreme Court has
17 ruled that the Lakota people own the Black Hills,
18 and, of course, we were awarded money as such and
19 we've rejected it in hopes that Congress will one
20 day see the sanity in providing all of our people
21 justice.

22 As Elsie had indicated, if you went down
23 to the casino, and she gave you a hypothetical
24 situation, and got yourself in a little bit of
25 trouble, that there is a tremendous disparity

1 between Native American and non-Indians as they're
2 treated in the State of South Dakota and in the
3 federal court system.

4 Another similar scenario would be a young
5 man at a party, a young Indian man drinking and
6 actually drinking himself probably a little bit too
7 much into a stupor, and some of his friends pull
8 up, one who is a non-Indian who is driving a nice
9 new vehicle. And the young man staggers out and
10 crawls in the back seat, and they all drive off and
11 he passes out, not realizing that the car is
12 stolen. And in this state and in the state of
13 affairs that we have in the federal system, that
14 young man, being a party now to grand theft auto,
15 will face some very stiff sentencing guidelines in
16 federal court.

17 On the other hand, the non-Indian
18 perpetrator, the guy that was driving the car and
19 stole the car to begin with, in the good old boy
20 system that exists, can go before a state court
21 judge -- I hope there's none present here and I
22 hope I don't offend anybody -- but in that good old
23 boy system could receive a slap on the hand, an
24 imposition of sentencing; you know, could be told,
25 "Look, Johnny, go spend three years in the U.S.

1 Army, and you come back and be a good boy, and
2 we'll just let the whole thing ride."

3 The Native American is, of course, saddled
4 with a federal felony on his record that can be
5 only granted leniency by the President of the
6 United States. He does not have the money to go
7 into court and to be able to fight and to be able
8 to defend himself properly.

9 Many cases back home on the reservation
10 are handled in tribal court, probably not nearly as
11 many as we would like. As a result, the Cheyenne
12 River Sioux Tribe has now created a mediation
13 peacekeeping department in our tribal court system
14 and we've enjoyed that for five years. We're
15 implementing new guidelines to dictate that further
16 as far as the kinds of cases that can go to
17 mediation to alleviate some of these problems.

18 But we also realize, too, that not all
19 cases can be handled in tribal court. There are
20 many of the felonies that absolutely must go
21 federal. What we ask, though, is that federal
22 judges be given discretion to be able to look at
23 mitigating circumstances, to be able to sift
24 through all the circumstances that exist. That
25 while Johnny is going to get a pretty easy ride

1 over on the state side, little Tommy who passed out
2 in the back seat is not, and yet the judge could
3 probably look at that and say, "Tommy, you know, I
4 don't think you need to go to a federal pen. Maybe
5 to an alcohol treatment program. Maybe you need to
6 go spend three years in the Army with Johnny, and
7 you guys need to straighten your lives out so you
8 won't be getting yourself into any trouble in the
9 future."

10 What I'd like to ask of the United States
11 Sentencing Commission is a couple of commitments.
12 Number one, I would hope that you would provide us
13 with a liaison, an agent in the field, so that we
14 can begin dialogue in earnest. For us to gather
15 here today is excellent. I wish we could have
16 gathered here longer today because there's a lot of
17 people in the crowd here that have a lot to say,
18 but knowing that you're on a tight time schedule,
19 and I do want to say that you have been upstaged by
20 the state because I think they're going to take all
21 day and all night and hard telling how long they're
22 going to go, and I'm not even sure why they're
23 doing it.

24 But in the future, we would like to meet
25 with you again, but we'd also encourage you to not

1 just gather in South Dakota. To go to the other
2 states that have Native American nations in them,
3 the Navajo Nation, the Great Cherokee Nation, many
4 of the people in the Northwest, and I think that
5 you'll hear and you'll find very similar
6 testimonies. I think that you will hear tribal
7 leaders and tribal people alike give you very
8 similar stories because the situation is a federal
9 situation and it exists across the board.

10 We would, as I had indicated, wish to
11 continue meeting to create the dialogue so that we
12 can work together to find a solution. I realize
13 that by saying, "Let's give federal judges more
14 discretion," it sounds simple, but I know that
15 logistically there's a lot behind that and a lot
16 that has to go into that and a lot of study and a
17 lot of, you know, different circumstances that will
18 lead towards that, but we would like to be your
19 partners in that effort, should you choose to make
20 that effort.

21 In conclusion, I'd like to submit ten
22 copies on behalf of the Cheyenne River Sioux Tribe
23 of my formal testimony and some recommendations,
24 get into the legalese and I'm sure that you'll all
25 appreciate that, being judges. And I also have two

1 signed testimonies from two different members of
2 our tribe, and I realize that the record is going
3 to close, I believe, on Thursday, but I would hope
4 and pray that you keep the record open a little bit
5 longer so that we can get more people back home to
6 submit. And let's put it this way: Even if you
7 don't, we're going to send it to you anyway.

8 So I guess with that being said, again,
9 welcome to the heart of the Great Sioux Nation, the
10 land of Crazy Horse and Sitting Bull, Hump, Gall
11 and all the great leaders of our past, and we hope
12 that your stay here is a pleasant one. Thank you,
13 and I'll submit this to the record.

14 MS. MEEKS: Thank you, Chairman Bourland.
15 At this time Tom Ranfranz from the Santee -- or the
16 Flandreau Santee Sioux Tribe --

17 MR. RANFRANZ: That's correct.

18 MS. MEEKS: -- has joined us, and so I'd
19 like to introduce him.

20 MR. RANFRANZ: Thank you. Thank you,
21 Elsie. I would like to thank the commission for
22 this opportunity today. My name is Thomas
23 Ranfranz. I'm the president of the Flandreau
24 Santee Sioux Tribe in Flandreau, South Dakota.
25 We're one of the smallest tribes in both population

1 and land base. We have a population of about 500
2 tribal members on the reservation, and half of
3 those are under the age of 18. Our land base, we
4 have about 2700 hundred acres of land, so we're
5 very small.

6 In the last few days, I've been listening
7 to our tribal elders and our tribal members and I
8 -- like you folks are listening today, I was
9 listening in the last few days to our membership.
10 Yesterday we held a brief meeting with some of the
11 tribal members across our Aberdeen area and the
12 Great Plains area and also with some of the tribal
13 leaders, and so I have written testimony that I'd
14 like to turn in, but I'd also like to share with
15 you what I was listening to from our tribal
16 membership and tribal leadership and also those
17 people that attended the meeting yesterday. So I'd
18 like to just share that with you now and then I'll
19 turn in my written testimony.

20 Looking into the future, our reservation
21 as well as other reservations are experiencing
22 growth. Through our economic development programs
23 that we have put in place, in a large extent a lot
24 of our tribal members are coming home to our
25 reservations, and with this growth and the

1 increased population comes crime. So with our
2 tribe, we haven't experienced -- because we're so
3 small, we haven't experienced a lot of federal
4 offenses on our reservation, but in the future I
5 think with this growth potential on the
6 reservations, with ours and others, I think it
7 could become a huge problem.

8 My tribe fully supports what we're doing
9 here today; the South Dakota tribes coming here and
10 sharing their thoughts and ideas with the
11 Commission on Civil Rights for the assessments and
12 impact on the United States sentencing. We believe
13 that sentencing should be based on a case-by-case
14 basis taking into account all factors including the
15 severity of their crime and the background and the
16 history of the offender being a tribal member. My
17 tribe believes that the overall goal of sentencing
18 on punishment should be to protect the communities
19 from the criminals who are at risk of being repeat
20 offenders and harming others in our tribal
21 communities.

22 As federal judges and members of the
23 United States of America Commission on Sentencing,
24 you can make a huge, huge difference in the lives
25 of hundreds and thousands of our people. You can

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1 make a difference in Native American people that
2 have never had the level playing field as others,
3 and the odds of success are minimal at best living
4 in the -- some of the poorest communities and
5 counties in America today, the Cheyenne River and
6 the Pine Ridge like Chairman Steele.

7 You can make a difference in the lives of
8 our people by offering hope through education
9 versus prison. You can make a difference in the
10 lives of our people by offering hope through
11 outreach programs and rehabilitation versus
12 prison. You can make a difference in offering an
13 option of serving for the United States Government
14 in the form of military forces versus prison. You
15 can make a difference by offering those that earn
16 it time off for good behavior versus the strict
17 mandatory prison sentencing guidelines today. You
18 can make a difference by supporting parole officers
19 on Indian reservations. A lot of our reservations
20 don't have parole officers or they don't have the
21 funding for it.

22 My understanding is that the federal
23 judges follow strict mandatory guidelines set up by
24 Congress. We feel very strongly that the federal
25 judges and the federal courts should be granted

1 more discretion, and that's what we've been talking
2 about here this morning on sentencing, especially
3 in Indian country.

4 I believe we are all a part of the
5 environment we are or were raised in, and those
6 environment influences, good or bad, can affect us
7 for the rest of our lives. With more discretion
8 available to our federal judges, background and
9 history of the offenders could play an important
10 guide in sentencing rather than the grid system
11 used today. Tribal courts, as an example, take
12 into account family history, family support groups,
13 life on the reservation, offender's character,
14 their past and present record, I think we discussed
15 that briefly here this morning, and the
16 understanding of reservation living conditions as
17 they are today. I invite all of you to come to my
18 reservations or any of the reservations here in
19 South Dakota in the Great Plains area so you can
20 see for yourself the living conditions that these
21 young people are brought up into with the
22 conditions of alcohol and drugs and family abuse.

23 Historically, economic conditions on some
24 of our reservations have been in poverty at its
25 worst with, on John Steele's reservation alone, 70

1 to 80 percent unemployment rates and those jobs
2 that are available are federal jobs. Schools that
3 are understaffed and are in poor physical condition
4 and basically falling apart. Housing conditions
5 where you have some homes where families of 15
6 people live in a three-bedroom home. Roads that
7 are like third world country conditions. They're
8 gravel, they're pitted, that have huge holes, and
9 with these winters up here in the Great Plains
10 area, it's very difficult for travel for school,
11 for emergency purposes, for healthcare.

12 Our court systems, which we're talking
13 about today, yesterday I talked to one of the
14 public defenders, and on the Cheyenne River Sioux
15 Tribe they have 10,000 cases a year. They have one
16 prosecutor and one public defender. We need more
17 money for our court systems. We can do it; we just
18 need the funding.

19 As leaders of the tribal nations, I hope
20 today we touch you in some way that you want to
21 help our people by making a difference in their
22 lives, and I thank you.

23 CHAIRPERSON MURPHY: I would like -- I had
24 meant to say at the outset that we did receive two
25 written statements from chairs that were invited to

1 participate, Michael Jandreau of the Lower Brule
2 Sioux Tribe, and Andrew Gray of the Sisseton
3 Wahpeton, and they were both very thoughtful and
4 they're going to be part of the record. And I
5 think I can speak for the whole commission that we
6 want to -- we will extend the time for comment
7 because I know we'll get them anyway, but we are
8 interested in hearing anything else that you may
9 want to tell us.

10 I guess there was some people that were
11 wondering about the camera, and the camera is just
12 to be able to represent the proceeding in an
13 adjacent courtroom for any overflow. It's not the
14 media. There's no permanent record, camera
15 speaking, to be made. We do have the court
16 reporter here, I'm sure you've seen her, and there
17 will be a transcript made that will be available of
18 this hearing.

19 At this point I think we'll take a very
20 brief recess. I understand that there are -- that
21 the chairs have two or three elders present that
22 would like to address us. We have two other panels
23 and we have people present for those, so time is of
24 the essence, but we want to take the most
25 opportunity we can here. So take a very brief

1 recess and then we'll reconvene.

2 (A recess was taken from 10:02 to 10:13.)

3 CHAIRPERSON MURPHY: Okay. We have
4 another panel that we're very honored to have the
5 opportunity to listen to, and I've got the pleasure
6 of calling on one of my children, so to speak, Tom
7 Peckham who practices law in Albuquerque, New
8 Mexico, and is an expert in Indian law. He has
9 come up here for 24 hours just to help us with this
10 hearing. He's a native of South Dakota, and so
11 I've asked Tom if he could introduce each member of
12 this panel. These are people who are valued by
13 their tribes as wise and good communicators. And
14 so, Tom, would you lead us into this session?

15 MR. PECKHAM: Judge Murphy and
16 Commissioners, it is a privilege to be able to
17 introduce elders of several tribes. The views of
18 tribal elders are always important to keep when
19 dealing in Indian country, so I have the pleasure
20 first of introducing Harold Frazier from the
21 Cheyenne River Sioux Tribe.

22 MR. FRAZIER: Okay. Thank you. I guess
23 I'm not an elder; I'm an elected official up
24 there. I'm the vice-chairman and also District 4
25 councilman, and some of the elders asked for me to

1 speak on their behalf. I guess I'd like to thank
2 you for allowing me to submit comments on the
3 Federal Sentencing Guidelines.

4 Since the 1885 Major Crimes Act, the
5 federal government has been slowly chipping away at
6 our criminal jurisdiction within Indian country.
7 Many of our members on the Cheyenne River Sioux
8 Tribe Tribal Reservation believe in the Supreme
9 Court's decision in the Crow Dog case. We have
10 tribal laws and customs dealing with these types of
11 crimes.

12 Also in our Indian Reorganization Act,
13 Constitution and Bylaws of the Cheyenne River Sioux
14 Tribe, in Article V of the bylaws, Tribal Courts,
15 Section 2, it states that it shall be the duty of
16 the council to establish by ordinance a tribal
17 police force which shall have full jurisdiction
18 upon the reservation. The Crow Dog decision and
19 our Constitution and recent stories that have been
20 told by our tribal members and federal judges
21 question why some cases are in the federal system
22 and not in tribal court.

23 All these show that the time has come for
24 our tribe to reassume jurisdiction over all crimes
25 committed on the reservations. In order to do our

1 Constitutional right and duty, additional funding
2 is needed for more court personnel, training,
3 office space and equipment so that we can handle
4 all these crimes committed on the reservation.

5 Recently within the Cheyenne River Sioux
6 Tribal Reservation, a non-Indian physically
7 assaulted his wife and broke her jaw. He was never
8 prosecuted for this crime. Instead, all that he
9 received was counseling. Presently within the
10 federal system, if this had happened to an Indian
11 man, he would have been sentenced to a federal
12 prison. Why can't our Indian people get the same
13 treatment as non-Indians? Instead of sentencing
14 our people to prison, there needs to be more
15 counseling made available to our Indian people.
16 Statistics will show that 95 percent or more of the
17 crimes committed by Native Americans are alcohol-
18 and drug-related.

19 In conclusion, I would like to ask for
20 this comment period to be extended for another 90
21 days, and also that the federal investigation
22 guidelines need to be open for comment and
23 consultation. Thank you. And I'd like to submit
24 this for the record.

25 CHAIRPERSON MURPHY: We're happy to

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1 receive it. Do you want to bring it up,
2 Mr. Frazier? Thank you.

3 MR. FRAZIER: Thank you.

4 MR. PECKHAM: Next we'll hear from Denver
5 American Horse who is a representative of the
6 Traditional Lakota Government which is an
7 over-arching organization over several specific
8 Lakota tribes.

9 MR. AMERICAN HORSE: Good morning. I want
10 to say welcome to each and every one of you ladies
11 and gentlemen. My name is Denver L. American
12 Horse. My Indian name through ceremonies is Little
13 Warrior which translates to Zuya Cikala. Although
14 I am not an elder, I am a spokesman for the Lakota
15 Traditional Government. This is not a new
16 concept. It has been in practice prior to the
17 reservation era, prior to the Major Crimes Act, and
18 what we are doing today is basically advocating for
19 our treaty rights.

20 As you all are aware, I believe that there
21 is a case in Wisconsin, United States versus, I
22 believe it's Sandra -- I cannot recall the last
23 name of that, but it's in Wisconsin, which
24 basically deals with the sovereignty of the tribal
25 members and the IRA government. The appeals court

1 had ruled in favor of the tribal members, stating
2 that they are sovereign -- more sovereign than the
3 IRA governments themselves. Now if I remember
4 correctly, that is now on its way to the Supreme
5 Court.

6 That particular case is very important for
7 us basically because the Traditional Lakota
8 Government is apart from those three gentlemen that
9 you had seen here earlier talking about the things
10 that they would like to see in the sentencing
11 guidelines.

12 We do have our own traditional practices
13 of dealing with cases involving murder and some
14 problems within the family and the greater society
15 prior to the reservation era. Everything that we
16 see today is basically fairly new to us which is
17 DUIs, murder, domestic problems, a lot of
18 embezzlement and fraud which are fairly new in
19 Indian -- in Lakota country.

20 And I do want to remind the honorable
21 ladies and gentlemen here that the tribal courts
22 that we see today are basically misdemeanor courts,
23 and the federal court, I believe, is appropriately
24 set for the more serious crime that we see on the
25 reservation today which is murder and DUI and some

1 of the white collar crimes, so to speak, of fraud
2 and embezzlement.

3 And I do want to remind the ladies and
4 gentlemen again to please keep in mind the case in
5 Wisconsin which is, I believe, a very far-reaching
6 -- is going to set a far-reaching precedent for
7 those Traditional Lakota Governments not only on
8 the Pine Ridge Reservation, but in Cheyenne River,
9 Rosebud and throughout North America where there
10 are Indian tribes under IRA governments.

11 I do want to again welcome each and every
12 one of you here, and I hope your stay is a pleasant
13 one, and I appreciate your listening to us today.
14 Thank you.

15 CHAIRPERSON MURPHY: Thank you.

16 MR. PECKHAM: And finally, we have the
17 privilege of an elder, Germain Means, from the
18 Cheyenne River Sioux Tribe.

19 MS. MEANS: Thank you. Honorable judges
20 and the commission members and all other honorable
21 judges present and Elsie, I'm here as an elder to
22 share with you that a lot of us elders are sitting
23 back and we're seeing what's happening on this path
24 to the prisons in which it's mainly made up of --
25 for the last eight to ten years of the Native

1 Americans, and it's sad to see this. It took many
2 years to see that as the gentleman before me,
3 Denver, had stated that we had a lot of respect
4 within our own Tiospas, or our family units, in
5 which we were able to handle our own, and there was
6 a lot of great respect that we had for each other.
7 And so we never had to get to the area that we're
8 -- era that we're in today where we're utilizing
9 all of these different kinds of sentences.

10 And I never was interested in this
11 particular field. It wasn't my lifestyle, but I
12 started attending, reviewing different cases, going
13 to some of the penitentiaries and visiting to see
14 some of our inmates on a firsthand basis, and a lot
15 of the areas that we discussed are why this is
16 happening when we have so many prevention programs
17 and has been so eloquently stated in some of the
18 tribal leadership's presentations; that lack of
19 funds, untrained public defenders. We can go on
20 and on that we're citing these things now today.
21 And it's sad to see that when we elders sit back
22 and see what's happening.

23 And so in congregating, we discussed a lot
24 of things to try to bring out some of the concerns
25 that we had in trying to combat this, and there has

1 to be a balance somewhere along the line, and some
2 say there is no balance. It's a choice.

3 I'm going to make my presentation to the
4 point because I think our leaders have all spoken
5 and have covered all the areas that I'm going to
6 also allude to. So in those areas is I have four
7 areas of deep concern in which I humbly request
8 your favorable review and consideration.

9 Number one, that probation be reinstated
10 back into the federal guidelines. Number two,
11 federal judges be allowed more discretion or
12 flexibility in sentencing. Number three, that more
13 points or credit be given or allowed for the
14 rehabilitation that inmates are receiving, whatever
15 point system that may be or may be utilized. Also,
16 number four, to utilize tribal facilities versus
17 state and federal facilities.

18 And I want to thank you for your time.
19 Thank you, and I have my little brief comments.

20 COMMISSIONER JOHNSON: When you say "using
21 tribal facilities," what are you referring to?

22 MS. MEANS: Pardon?

23 COMMISSIONER JOHNSON: You say "using
24 tribal facilities."

25 MS. MEANS: Yes.

1 COMMISSIONER JOHNSON: What are you
2 referring to?

3 MS. MEANS: Yes.

4 COMMISSIONER JOHNSON: The institutions
5 and penitentiaries?

6 MS. MEANS: Yes, we have facilities on
7 some of the reservations that we can rehabilitate.
8 Do you need one for each one or can you all share?

9 CHAIRPERSON MURPHY: No, we'll share.
10 We'll share. We'll make copies. Thank you very
11 much.

12 MS. MEANS: Thank you very much.

13 CHAIRPERSON MURPHY: Thank you so much.
14 It's an honor for us to be here and to meet you and
15 to hear from you, and we are not going to take
16 another break now because it takes so long to get
17 back together again. So I would thank you very
18 much and let you move so that the next panel which,
19 Judge Piersol, I think that you will recognize your
20 panel members, perhaps, and get them up here so
21 that we can proceed.

22 All right. Chief Judge Larry Piersol,
23 who's helped us plan this hearing today, if you can
24 introduce the people on your panel and we'll get
25 started right away.

1 JUDGE PIERSOL: Do you want me to
2 introduce everybody or introduce them as they
3 speak?

4 CHAIRPERSON MURPHY: However you see fit.

5 JUDGE PIERSOL: Well, you each have a
6 program so why don't we introduce and we'll speak
7 then in the order in which we appear on the panel
8 list here. And I noticed that we have the
9 distinction of having, with one exception, a wasicu
10 panel in that really, for the most part, white
11 people are talking this time.

12 I'd like to first of all thank the
13 commission very much for coming to South Dakota,
14 and in a letter that you'd sent out, one of the
15 questions that you asked was what was my experience
16 -- what has my experience been regarding any
17 apparent disparity between federal and state
18 sentences for similar offenses? And due to the
19 limitation of time, I'm going to, to some extent,
20 try and speak also for the other judges from the
21 District of South Dakota.

22 And I'd like to give a little bit of a
23 background, and some of these are statistics that
24 you know, some of them you might have forgotten.
25 But for instance, from 1996 to 1999, there was a 69

1 percent increase in the number of Native Americans
2 under supervision in South Dakota versus a 9
3 percent increase for the nation. In South Dakota,
4 in the District of South Dakota -- we're all one
5 district, four divisions, three active judges,
6 three senior judges -- 48 percent of the criminal
7 cases prosecuted in the District of South Dakota
8 were Native Americans, and compare that with some
9 other states: Arizona, 6.7 percent; the highest,
10 North Dakota next, was 37 percent; Montana, 20
11 percent; and if you took my division, the Southern
12 Division, that happens to have a lot of immigration
13 cases and other things, if you took the Southern
14 Division out, we'd probably be around 75 percent of
15 our federal court cases are Native American
16 prosecutions. Nobody else has a statistic that
17 even approaches that.

18 In terms of raw numbers, South Dakota for
19 the same year had 182 Native American defendants.
20 The only state that had -- the only district that
21 had more was Arizona with 187, although that was
22 only, like, 6 percent of their cases. And other
23 states trail off, all Non-Public Law 280 states, of
24 course: Montana 56, North Dakota 58, New Mexico
25 57, and then you drop down to Idaho 20 and so on.

1 So you can see where the cases are. And we're a
2 Non-Public Law 280 state, but that isn't going to
3 change so that's why we have the rich possibility
4 for disparity.

5 With regard to case makeup, 45 percent of
6 prosecutions against Native Americans are crimes
7 against a person, while on the other hand, in the
8 federal system only 1.7 percent of the crimes are
9 crimes against a person. And just to give a little
10 more flavor of our caseload, over half of the
11 juveniles in the entire federal system come from
12 the District of South Dakota. I go someplace and
13 talk to a federal judge and I say, "Juvenile
14 cases," and they say, "What?" They've never had
15 one, and of course, that all gets farmed out
16 because we have no federal facilities for
17 juveniles. But actually it works out fairly well
18 with the way that we can handle it, though, through
19 private placement probation. It actually works
20 out, I think, really well.

21 COMMISSIONER CASTILLO: Judge Piersol, if
22 we just focused on that first set of statistics
23 that you gave us, certainly Native Americans don't
24 occupy 48 percent of South Dakota's population.
25 One could look at those statistics and say,

1 "There's discriminatory law enforcement." Do you
2 want to comment on that?

3 JUDGE PIERSOL: Well, it's 48 percent of
4 the cases prosecuted in federal court are Native
5 Americans. They comprise about 8 percent of the
6 state population, but recognize we have nine
7 reservations. So I wouldn't -- I don't think from
8 those figures I can extrapolate a selective
9 prosecution. I think you'd have to look at other
10 things, and there's a study that's being undertaken
11 now at the University of South Dakota with regard
12 to whether there's disparate enforcements in the
13 state court system.

14 But given the nature of the Ten Major
15 Crimes Act, you know, it's the Indians that are
16 going to get prosecuted. So if there's a
17 discrimination, it would be because of the Ten
18 Major Crimes Act and the way the jurisdictions can
19 occur because you've heard other examples primarily
20 from the native speakers about if you're a white
21 person, this happens to you; if you're a native,
22 that happens to you, but it's -- I would suggest
23 with regard to the federal system, it's because of
24 the structure of jurisdictions. That it isn't --

25 COMMISSIONER JOHNSON: I wanted to ask you

1 something about the study. This is a state study;
2 is that correct?

3 JUDGE PIERSOL: Well, it's my
4 understanding that it is.

5 COMMISSIONER JOHNSON: And what's the
6 purpose of the study and what will it show, that's
7 number one, and number two, will it compare federal
8 stats -- state stats with federal stats?

9 JUDGE PIERSOL: Frankly, I don't know that
10 much about the study, Judge Johnson, and it's just
11 starting. When we heard about this study, we
12 thought, "Oh, good, we're going to have information
13 for you." I don't know the scope of the study and
14 so I can't answer that directly.

15 COMMISSIONER JOHNSON: Maybe the next
16 panel will be able to do it?

17 JUDGE PIERSOL: I don't know because the
18 study is just starting, and I know Judge Schreier
19 and I think staff also talked -- your staff talked
20 -- once we found out about the study talked to
21 them at the University of South Dakota, and they
22 were just getting going, so I can't answer the
23 question. I'm sorry.

24 But I'm not suggesting, Judge Castillo,
25 that there's a selective enforcement by the FBI,

1 but I'm giving you statistics so that you have a
2 flavor of what is in federal court here. There's
3 no place else like it.

4 Then talking -- and I said I'd try and
5 speak some for the other judges, too, and to give
6 you a flavor, I'd like to quote, because I
7 circulated a letter to all of you judges. Judge
8 Battey commented, "Insofar as the" -- and first of
9 all, I want to say that he has an unusual basis for
10 comparison. He served on the South Dakota Board of
11 Pardons and Parole some time ago and reviewed the
12 sentences of state court judges in maybe a thousand
13 cases on a variety of different kinds of cases.

14 But he said, "Insofar as the comparison of
15 federal guidelines to that of the state sentences
16 is concerned, it's my experience that as applied to
17 Indian country, the federal sentences in certain
18 cases are highly disparate. I refer in particular
19 to the crime of assault for the most part.

20 Aggravated assault under Sentencing Guideline 2A2.2
21 proceeds from a base offense level of 15 to which
22 are added various specific offense
23 characteristics. In Indian country the type of
24 assault we see is one occurring in and around the
25 residence resulting from the use of alcohol and

1 usually between family or friends. A cursory
2 example would be a family fight where the defendant
3 picks up a board or perhaps a stick --" it would
4 have to be a big stick; that's my insertion into
5 that -- "and strikes the victim in the face causing
6 bodily injury."

7 "If one adds the specific offense
8 characteristics of use of a dangerous weapon, which
9 is 5, and serious bodily injury, 4, the total
10 adjusted offense level will be 24. Assuming a
11 Category I criminal history, the sentence would be
12 51 to 63 months."

13 "Under the same example in state court,
14 one would find a sentence of 12 to 18 months. A
15 sentence of 51 months in state court would be
16 unheard of." He has a good basis to say that,
17 having served on the Pardon and Parole Board.

18 And that's another point that I would like
19 to make, and that is that aside from the
20 guidelines, you know, we've got a whole other layer
21 that study of the guidelines ignores, and that is
22 that, at least in our state and I believe in most
23 states, you have parole that you have eligibility
24 for.

25 For instance, in South Dakota by statute

1 under SDCL 24-15A-32, you'd have a grid -- we're
2 all familiar with grids -- that you have, for
3 instance, you're eligible for consideration for
4 parole in a nonviolent offense, first offender at
5 25 percent of the service of your sentence. For a
6 violent offense, you're eligible, first offense, at
7 35 percent of your sentence. So that's a whole
8 other layer aside from whatever the sentence is
9 that's put out, and of course, people see that
10 because what really counts is when do you get out,
11 not just necessarily what somebody said when you
12 went in. So that's something that, I think, is
13 ignored in a lot of the statistics, what time do
14 you really serve because, you know, federally, with
15 certain exceptions, you're going to serve at least
16 85 percent.

17 I don't want to -- I want to set some sort
18 of example for people. I'm sure I've used up my
19 time already, but the last group was a little bit
20 shorter so we can take a little bit longer.

21 CHAIRPERSON MURPHY: Except that that
22 group was fit in.

23 JUDGE PIERSOL: Beg your pardon?

24 CHAIRPERSON MURPHY: That group was fit
25 in, though.

1 JUDGE PIERSOL: Oh, I see. Well, but they
2 were smaller numbers than we are, too. Anyway --

3 COMMISSIONER KENDALL: He sounds like he's
4 a federal judge.

5 COMMISSIONER CASTILLO: Chief judge.

6 COMMISSIONER KENDALL: Yeah, right.

7 JUDGE PIERSOL: A suggestion, that when
8 jurisdiction arises under the Ten Major Crimes Act
9 or some other act which confers jurisdiction over a
10 Native American defendant where there wouldn't be
11 jurisdiction otherwise over a defendant, then under
12 5K2.0 of the guidelines, the sentencing court
13 should be able to consider in sentencing what would
14 be a comparable sentence in South Dakota State
15 court.

16 Now some nay-sayers might say, "Well, my
17 goodness, how are you going to do that?" Well, it
18 wouldn't be too difficult. It would be a
19 defendant's obligation to come forward with the
20 information, and that's something that we see now
21 when we have a disparate sentencing claim in a
22 state habeas that comes before us. And so it isn't
23 unusual and that sort of information could be
24 gathered.

25 And a couple of other comments that I'd

1 like to make. The commitments --

2 COMMISSIONER SESSIONS: Can I just
3 interrupt for a second? How would that -- Judge,
4 how would that be reviewed? If you essentially
5 would allow the judge to exercise discretion to be
6 able to assess what a state court is likely to do,
7 given that fact pattern --

8 JUDGE PIERSOL: Yes.

9 COMMISSIONER SESSIONS: -- how would that
10 be subject to review?

11 JUDGE PIERSOL: I don't see that there
12 would be any difficult review issue because once
13 again, the habeases that we have, which I use as a
14 parallel, those go up on appeal, you know, as to
15 whether there was a disparate sentence, and you
16 look at comparable -- other state sentences to see
17 if a particular one, you know, violated
18 constitutional standards. And this one wouldn't
19 have to be a constitutional standard violation, but
20 the courts of appeal in their wisdom have figured
21 out all kinds of other ways to review all kinds of
22 other appeals from our sentences, and so I don't
23 think that there would be any problem there.

24 I do -- I would say I think that the
25 courts of appeal are becoming somewhat more

1 sensitized to the fact that trial judges actually
2 see what happens in the courtroom.

3 COMMISSIONER SESSIONS: Are you saying
4 that because there are two U.S. Court of Appeals
5 judges in the room right now?

6 JUDGE PIERSOL: Absolutely not.

7 COMMISSIONER KENDALL: To the Eighth
8 Circuit.

9 JUDGE PIERSOL: They get the last word.
10 But nonetheless, I think that there is some
11 additional sensitivity that's coming to that
12 situation.

13 COMMISSIONER CASTILLO: With regard to
14 that proposal, Judge Piersol, would you be willing
15 to help us draft that proposal, number one?

16 JUDGE PIERSOL: Of course.

17 COMMISSIONER CASTILLO: And two, if we put
18 together some type of advisory committee on Native
19 American issues in the sentencing guidelines, would
20 you be willing to have a member of your court serve
21 on that committee?

22 JUDGE PIERSOL: Yes. It would be a
23 question of who would get to because everybody, I'm
24 sure, would be wanting to.

25 COMMISSIONER CASTILLO: Thank you.

1 JUDGE PIERSOL: Because you can see what
2 the business of the courts in the District of South
3 Dakota is, and frankly -- well, I was going to make
4 a comment with regard to tribal courts. We've made
5 a commitment, you know, all kinds of dollars are
6 going to go to the tribal courts, but it hasn't
7 been funded to any large extent. And there is
8 another reason that they should be funded, and that
9 is that if the tribal courts didn't operate, you'd
10 see a need for a lot more magistrates than we
11 already have. But there are other reasons, too,
12 that the tribal courts could take care of other
13 offenses, and we should fund those commitments.

14 COMMISSIONER JOHNSON: They have not been
15 funded yet?

16 JUDGE PIERSOL: Beg your pardon?

17 COMMISSIONER JOHNSON: They have not been
18 funded yet?

19 JUDGE PIERSOL: No, they're funded to a
20 level, but they're not funded to the level that
21 there's been a commitment made to them.

22 COMMISSIONER JOHNSON: South Dakota now
23 has a Senator that they can rely on.

24 JUDGE PIERSOL: Yes, and I -- without
25 speaking for him, I think he has his hands full,

1 but I'm sure he'll do as much as he can on that
2 issue, too.

3 COMMISSIONER JOHNSON: For the people of
4 South Dakota, I know you'll have an extra hand.

5 JUDGE PIERSOL: Yes, we believe that. You
6 know, we're not talking, generally speaking, about
7 drug cases; that's not on the table, but I'd like
8 to suggest something to you, and that is that even
9 there, the Indians get -- the Native Americans get
10 nicked, and I'll tell you why. Because if you have
11 a multiple-defendant drug bust, whoever gets a
12 smart lawyer quickly, the first thing they'll say
13 is, "I'll turn," or in other words, cooperate, "if
14 you'll let me be handled in state court." I had it
15 happen in my court, but of course, a Native
16 American defendant doesn't have that option. So
17 there's yet another way they get nicked, and I'm
18 not suggesting that we can necessarily do anything
19 about it, but with regard to the overall fairness
20 of it, think about that, too, because what happens
21 in state court, of course, is dramatically
22 different than what happens in federal court in
23 drug cases, as we know.

24 So let me then turn to the others that are
25 on our panel. Michelle Tapken is the United States

1 Attorney for the District of South Dakota that has
2 prosecuted all sorts of cases in my court as well
3 as other courts here and has particularly done
4 outstanding work in the area of child sexual abuse
5 both in her interests -- she served a year
6 specially with the Department of Justice in
7 Washington and has had tremendous impact in the
8 handling of those cases in federal court.

9 CHAIRPERSON MURPHY: Could I just point
10 out, I told you earlier that Professor Michael
11 O'Neill was going to arrive during the hearing, and
12 he has done so. There he is. We're glad that you
13 got here. Please go ahead, Ms. Tapken.

14 MS. TAPKEN: Chair Murphy and members of
15 the commission, I'm very pleased to be here at the
16 sentencing commission's hearing today. Because of
17 the significance of the sentencing guidelines in
18 federal criminal prosecutions, it's most fitting
19 that the sentencing committee hold a hearing to
20 explore the impact of the Federal Sentencing
21 Guidelines on Native Americans in South Dakota, a
22 state known for the importance of its Native
23 American population, and the United States
24 Attorney's Office is very pleased to be a part of
25 this process.

1 As Judge Piersol stated, in many ways
2 we're unique in the United States Attorney's Office
3 here as other jurisdictions that have Indian
4 country. And one of the things that we have done
5 is to take important steps to ensure communications
6 and dialogue between our office and Native
7 Americans. We meet with tribal entities and
8 organizations on a regular basis to discuss issues
9 of importance. The United States Attorney meets
10 personally with each of the nine tribes in South
11 Dakota on an annual basis to review and discuss
12 issues of mutual concern. We annually publish a
13 report and it's our South Dakota Indian Country
14 Report which provides statistics on each
15 reservation.

16 One thing that I've been involved in and
17 that I feel is extremely valuable to our Assistant
18 United States Attorneys, and this has changed over
19 the years, we used to have assistants that went
20 down to reservations, and there might be three
21 different assistants going to a reservation at
22 different times, and you really didn't get to know
23 the people on that reservation.

24 Several years ago, the United States
25 Attorney Judge Schreier, at that time, made a

1 decision that we should have an Assistant U.S.
2 Attorney responsible for each reservation so
3 therefore, people on that reservation would know
4 who to call. It wouldn't be just like calling the
5 United States Attorney's Office, but they had an
6 individual that they knew. And from that, we were
7 able to develop what we call multidisciplinary
8 teams, and on those teams we have tribal law
9 enforcement, tribal judges, people from IHS, the
10 FBI, the BIA, and we meet once a month on each
11 reservation, and that has been invaluable to us to
12 help us deal with the problems of child sexual
13 abuse on our reservations.

14 Our office is always open to suggestions
15 for ways to improve prosecution and investigation
16 of crime in Indian country and to increase
17 cooperation among the various entities to share
18 this goal. We do understand that there are
19 concerns in South Dakota regarding sentences
20 imposed under the Federal Sentencing Guidelines for
21 crimes committed in Indian country as compared to
22 sentences imposed under state law for like
23 offenses.

24 However, it is important to bear in mind
25 the purpose of the sentencing guidelines. Chief

1 among the goals of Congress in enacting the
2 Sentencing Reform Act of 1984 was to increase
3 fairness in sentencing by avoiding unwarranted
4 sentencing disparities for similar federal
5 defendants found guilty of similar criminal
6 conduct. This means, for example, that the
7 sentencing guidelines generally provide the same
8 sentencing range for all defendants in federal
9 court with the same criminal history who commit
10 aggravated sexual abuse in a similar manner and who
11 accept responsibility for their offenses in the
12 same way, regardless of the basis of federal
13 jurisdiction. Thus, the offense may have been
14 committed in Indian country by an Indian or by a
15 non-Indian against an Indian or it may have been
16 committed on a federal enclave, and the guidelines
17 provide for a limited range of sentences for that
18 offense with the goal of treating federal
19 defendants fairly and equally.

20 And I do know that, for example, most of
21 the cases I've prosecuted in the area of sexual
22 abuse have been on the reservation, but I did
23 prosecute a case in front of Judge Piersol where
24 there was a rape of a young woman at the Yankton
25 Federal Prison Camp, and the guidelines applied in

1 that area.

2 In fact, to promote fairness, the
3 Sentencing Reform Act specifically requires the
4 sentencing commission to assure that the sentencing
5 guidelines are entirely neutral as to race, sex,
6 national origin, creed and socioeconomic status of
7 the offender.

8 One of the things that we have found is,
9 as Judge Piersol said, the sentences in some areas,
10 and I think Judge Battey noted the sentences as far
11 as assault were one area that we have found is in
12 the area of involuntary manslaughter, that we have
13 had many distraught victims come to us and ask why
14 the sentencing in that area is so low when they've
15 lost a family member and they see the extremely
16 high sentence in state courts for that area.

17 The public is, of course, free to bring
18 the sentencing commission's attention to any
19 guideline that results in sentences that the public
20 believes are too harsh or too lenient, and the
21 commission can analyze the guideline and assess its
22 impact. In so doing, the commission must consider
23 the goals of the sentencing act set forth by
24 Congress in the Sentencing Reform Act; namely, just
25 punishment, deterrence, protection of the public

1 from further crimes of the defendant and
2 rehabilitation. A sentence that may be adequate
3 from the standpoint of punishing a particular
4 defendant may be inadequate from the standpoint of
5 deterring others from committing the offense. The
6 balancing of these various goals is a challenging
7 job for this commission, and we recognize the
8 challenge ahead.

9 COMMISSIONER CASTILLO: Ms. Tapken, with
10 regard to the assault sentences, let's talk about
11 those, has your office seen a disparity?

12 MS. TAPKEN: Well, I think as Judge
13 Piersol stated, that is one area when we deal with
14 assaults, many times it's been my experience that
15 those will go back to tribal court, and we look
16 very carefully at those to determine whether or not
17 it's an assault that's resulted in serious bodily
18 injury or there's a dangerous weapon involved.
19 We'll look at those. Of course, the simple
20 assaults go back to the tribal courts.

21 COMMISSIONER JOHNSON: That's a
22 misdemeanor you're referring to?

23 MS. TAPKEN: That's correct.

24 COMMISSIONER CASTILLO: So you're saying
25 you only prosecute the serious assaults in federal

1 court?

2 MS. TAPKEN: We have only jurisdiction
3 over those involving a dangerous weapon or
4 resulting in serious bodily injury.

5 COMMISSIONER CASTILLO: And when I was a
6 federal prosecutor in Chicago, we had a thing
7 called pretrial diversion. Do you have that here?

8 MS. TAPKEN: We do.

9 COMMISSIONER CASTILLO: So you have the
10 discretion to divert a case right out of the system
11 and either send it to a tribal court or not
12 prosecute it at all?

13 MS. TAPKEN: We do have pretrial
14 diversion, and we do utilize those, I will say
15 sparingly, and we do oftentimes look at assaults
16 and we do send them back to the tribal courts. And
17 as I told you, on the MDTs I personally was
18 responsible for two reservations, and when I would
19 go down, particularly on the Yankton Sioux
20 Reservation, after my meetings I met with the
21 tribal prosecutor and we would sit and visit about,
22 "Perhaps this case is better to go to the tribal
23 court and could be handled there." And we tried
24 to --

25 COMMISSIONER O'NEILL: If I may ask, do

1 you have specific guidelines to determine which
2 cases you're going to send to the tribal court and
3 which cases you'll prosecute in federal court?

4 MS. TAPKEN: Other than those cases that
5 involve, you know, clear-cut -- like a simple
6 assault wouldn't actually go to tribal court, but
7 other than that, most of the time there's
8 extenuating circumstances that we would have to
9 look at.

10 COMMISSIONER KENDALL: But is there
11 written criterion or is it an ad hoc decision by
12 the given Assistant United States Attorney that the
13 case agent brings the case to? Which is it? Is
14 it --

15 MS. TAPKEN: It's an ad hoc decision.

16 COMMISSIONER CASTILLO: And when that ad
17 hoc decision was being made, you heard the examples
18 given here, same incident, some non-American
19 Indians, some American Indians, and the ones that
20 are not Native American Indians being processed in
21 state court, is that taken into account at all when
22 that decision is being made, if you have an
23 incident like that?

24 MS. TAPKEN: I can't speak to the state
25 courts and --

1 COMMISSIONER CASTILLO: I'm not asking you
2 to speak to the state court, but I'm saying when a
3 federal prosecutor is sitting in his or her office,
4 and there's a multiple-person incident and three
5 are non-Native American Indians and one happens to
6 be a Native American Indian who is facing a federal
7 prosecution, is it taken into account that in the
8 same incident, three non-Native American Indians
9 were involved and they're going to be treated in
10 the state courts? Is that taken into account at
11 all?

12 MS. TAPKEN: In the same -- the same
13 offense?

14 COMMISSIONER CASTILLO: In the same
15 offense, the same incident, you have four people
16 involved. You heard the example of the stolen
17 car.

18 COMMISSIONER SESSIONS: In other words, do
19 you consider what would happen to the other persons
20 in making that decision about diversion,
21 essentially?

22 MS. TAPKEN: I'm sure we would, yes.

23 COMMISSIONER SESSIONS: And I've got --

24 CHAIRPERSON MURPHY: Well, I'm a little
25 concerned about the other panel members getting a

1 chance to speak, and so perhaps -- I understand one
2 of the things that we're very familiar with is that
3 the important decision that the prosecutor makes to
4 charge or how to handle, and there are a lot of
5 questions about that.

6 COMMISSIONER O'NEILL: Could I just ask
7 one brief --

8 COMMISSIONER SESSIONS: Well, only if I
9 can ask one brief question. So, Michael, are you
10 going to go?

11 CHAIRPERSON MURPHY: Well, it's just that,
12 you know -- go ahead.

13 COMMISSIONER O'NEILL: My only question
14 was this, how large is -- it's sort of a two-part.
15 How large is your office, the U.S. Attorney's
16 Office here?

17 MS. TAPKEN: We have three offices, one in
18 Sioux Falls, one in Pierre and one in Rapid City,
19 and we have approximately 25 attorneys, give or
20 take a few.

21 COMMISSIONER O'NEILL: Do you know how
22 many off the top of your head are Native Americans
23 or if they have other ties, familial ties with the
24 reservations?

25 MS. TAPKEN: We do have one Native

1 American prosecutor currently, and we do have two
2 victim witness advocates that are Native American,
3 one of which you'll be hearing from.

4 COMMISSIONER SESSIONS: Well, can I
5 just --

6 JUDGE PIERSOL: Which leads me to
7 introduce the next person -- oh, excuse me, Judge
8 Sessions.

9 COMMISSIONER SESSIONS: I think that she's
10 letting me ask a question.

11 COMMISSIONER KENDALL: It's not that she's
12 letting. She can't stop you.

13 COMMISSIONER SESSIONS: That's true. I
14 have life tenure. You talk about disparity, and I
15 looked at your statistics. We have these terrific
16 statistics from the commission, and what I noticed
17 was that the departure rate was exceedingly low.
18 In fact, the departure rate for 5K1, or the
19 substantial assistance departure, in South Dakota
20 is the lowest in the country. And obviously when
21 the 5K1 departure is filed, a request is filed,
22 that gives the judge much broader discretion.

23 I wonder, is there something unique about
24 South Dakota which would suggest that there is not
25 an environment of flexibility in the system?

1 MS. TAPKEN: Well, I think one reason that
2 it may be unique is that the departures, I think --
3 and Judge Piersol could speak better to this than I
4 possibly -- but many of the United States
5 Attorney's Offices deal primarily with drug cases,
6 and there are more departures there. But as I
7 said, maybe Judge Piersol can help me out on that.

8 JUDGE PIERSOL: 45 percent roughly, 40, 45
9 percent of the cases nationwide are drug cases. We
10 have a much smaller percentage and so -- but I told
11 you about, you know, assaultive conductive is such
12 a high percentage, and, you know, when we talk
13 about anything, because generally you've got the
14 victim, you've got witnesses, and so there really
15 isn't the opportunity.

16 I don't want to, on the other hand, say
17 that I always think that the U.S. Attorney's Office
18 is as forthcoming with Rule 35s or departures on
19 their drug cases as they should be, but that's
20 another issue. But basically the makeup of cases
21 drives that rate down so we don't get the latitude.

22 Now you heard that we have a Victim
23 Witness Specialist who is Native American. Marlys
24 Pecora is the Victim Witness Specialist with the
25 United States Attorney's Office in Pierre, South

1 Dakota, and I believe an enrolled member of the
2 Crow Creek Tribe?

3 MS. PECORA: Yes, correct.

4 JUDGE PIERSOL: Proceed then.

5 MS. PECORA: Chairman Murphy and members
6 of the commission, I am honored to be here today at
7 the sentencing commission's hearing. I am the
8 Victim Witness Specialist for the United States
9 Attorney's Office and have worked with victims at
10 various stages in the criminal justice system. My
11 experience in working with victims dates back to
12 1980 when I worked as a police cadet in Ft. Hall,
13 Idaho. I have also worked as a criminal
14 investigator for the Crow Creek Sioux Tribe in the
15 investigation of child abuse and child sex abuse on
16 the Crow Creek Reservation. I have provided direct
17 services to domestic violence victims at the
18 Missouri Shores Domestic Violence Center and also
19 served as its executive director. I've been a
20 Victim Witness Specialist --

21 COMMISSIONER JOHNSON: You're going a
22 little fast. We've got a court reporter here.

23 MS. PECORA: Oh, I'm sorry. I'm worried
24 about the ten minutes. All right. I've been the
25 Victim Witness Specialist for the United States

1 Attorney's Office for the past three years.

2 I would request that any of your decisions
3 or discussion regarding the United States
4 Sentencing Guidelines give credit to -- excuse me,
5 consideration to and weigh the victim's interest in
6 formulating an appropriate guideline range. A lot
7 has been said and written lately concerning the
8 impact of the sentencing guidelines on Native
9 Americans in Indian country. The perspective that
10 always seems to be forgotten in this consideration
11 is that the victims are also Native American.

12 I've worked with victims of crime ranging
13 in age from less than five years to more than 70
14 years during my last three years as the Victim
15 Witness Specialist in the United States Attorney's
16 Office. More than 90 percent of the victims that I
17 have worked with have been Native American. The
18 Honorable Charles B. Kornmann recently cited
19 statistics that show that a Native American female
20 is three times more likely to be the victim of a
21 crime than an African American male. Based upon
22 this, I would urge the commission to proceed with
23 caution before it undertakes any modification to
24 the guidelines regarding Native American offenders.

25 I am here to share the perspective of some

1 of the victims that I work with regarding their
2 cases. When a person has been victimized by
3 another person or persons, they are not always the
4 only person affected by the crime. The mother of a
5 14-year-old sexual assault victim sought counseling
6 for herself to deal with her feelings of rage
7 towards the defendant, helplessness and failure as
8 a parent to protect her child. The child also
9 received counseling as this case began, and today,
10 years later, both mother and daughter are still
11 seeing a counselor to work out issues relative to
12 this case.

13 Another case involved the systematic
14 sexual abuse of a 16-year-old girl that began when
15 she was in the first grade and continued through
16 the years, as she stated, over 100 times. During
17 the course of the investigation, several other
18 females were identified as prior victims of the
19 defendant. The family of the defendant, including
20 the child's mother, supported the defendant and
21 ostracized the victim and the aunt whom she had
22 told about the abuse. This young girl lost her
23 mother, father, brothers and extended family
24 because she was the victim of a crime and had the
25 courage to tell.

1 After the trial the victim and her aunt
2 sent a card to the Assistant United States Attorney
3 and me which stated the following, "Thank you for
4 believing." Sometimes when you hear directly from
5 the victim, the words have much more meaning. I
6 would like for the commission to hear some of the
7 words from the victims themselves.

8 The following is from a 13-year-old victim
9 of sexual assault. "My life changed a lot because
10 when I sleep at night, I sometimes dream about that
11 night. When I wake up, I'm still thinking of that
12 night and a place over and over in my head. I
13 remember one night when I heard a lot of rumors
14 about me and about what they did to me. I just
15 couldn't take it anymore so I tried to kill myself.
16 I remember everyone in my house was trying to help
17 me, but I just wanted to end my life. I didn't
18 want to survive that night. I didn't want to live
19 to tell anyone."

20 "My family is drifting apart because
21 every time someone tries to talk about what
22 happened, we just fight about it. I guess you
23 could say they still have control over me. I don't
24 know what to do sometimes. I hope they get help
25 for themselves and that they get the punishment

1 that they need."

2 "I don't really have nothing else to say
3 that could be put into words of how I feel. I just
4 really hate them, and I hope and pray that they
5 will open their eyes and see how much they hurt me,
6 my family, themselves, and their family."

7 In another case a woman, now 33 years old,
8 spoke of when she was 4 or 5 years old, her
9 grandmother warned her to stay away from one of the
10 men in her adoptive family. She wouldn't tell the
11 girl why, just that she should always stay away
12 from him.

13 One day the man told her he had a baby
14 rabbit that he wanted to show her. He reached into
15 his car as though he were picking up something
16 small, held his hands together and asked if she
17 wanted to see it. She went towards him hoping to
18 see a baby rabbit, but once there, he grabbed the
19 girl, forced her into the car and raped her.

20 When she told her grandmother what had
21 happened, her grandmother told her not to tell
22 anyone. She was repeatedly raped for approximately
23 six more years. This man was a spiritual leader
24 and well-respected by the community. This sexual
25 abuse continued over the course of a generation,

1 and we have currently identified six additional
2 victims. In this case the defendant sexually
3 abused the mother, and then years later, also
4 sexually abused the daughter.

5 Since this case began 18 months ago, the
6 daughter, now age 15, has had to be moved seven
7 times to various group homes and psychological
8 treatment facilities to deal with issues related to
9 her abuse. The following represents a summary of
10 one of the case workers who worked with this young
11 victim.

12 "Since the victim's arrival at the youth
13 program, we have noticed that her behavior has
14 greatly affected her ability to live a responsible,
15 productive life. Her self-abusive behavior,
16 aggression and psychological issues present
17 potential lifelong treatment issues and have caused
18 her permanent injury. The rapes of the victim by
19 the defendant are relived by her several times a
20 week in dreams and flashbacks."

21 "Her relationships with other individuals
22 have been greatly impaired, and she is reluctant to
23 trust and to allow displays of affection. She may
24 never have a healthy relationship with a
25 significant other due to this."

1 "She becomes physically violent at times
2 with the smallest corrective measures. She becomes
3 very upset when other individuals need to be held
4 for their safety and will lash out at staff,
5 assaulting them. She states that her memories of
6 the defendant's violent behavior make her scared
7 and these situations bring it back to the forefront
8 of her memory."

9 "She was not only raped physically, but
10 was raped of her childhood. She will never have
11 the opportunity to experience what it might have
12 been like to grow up with a normal childhood
13 without having been subjected to abuse. She will
14 never have a chance to fall in love with another
15 and have the experience of what a healthy sexual
16 relationship could be."

17 Not only are Native American females the
18 victims of crime, but also Native American males.
19 A male victim was physically assaulted by three
20 individuals by being kicked so frequently and
21 forcefully that his head stuck into the back of the
22 couch with such force that the couch had to be cut
23 apart to remove him. He stated the following:

24 "I don't understand why they did this to
25 me. I thought we were friends. I can't sleep at

1 night. I am constantly going from door to door to
2 make sure they're locked. I pull the shades down
3 on the windows and am afraid to leave the house.
4 If a car pulls up outside, I get scared and run to
5 the window to see who it is. I'm always afraid
6 they'll come back and beat me up again."

7 In an involuntary manslaughter case
8 involving a drunk driver in which a 16-year-old
9 girl was killed and her four-year-old passenger
10 injured, the mother of the four-year-old girl who
11 was paralyzed from the neck down stated at the
12 sentencing hearing that, "My daughter thinks when
13 she leaves the hospital, she's going to run again.
14 She doesn't understand and I don't know how to make
15 her understand that she may never leave the
16 hospital and she will never walk again."

17 "I have to check her breathing tube all
18 the time for her because she's always afraid it's
19 going to come loose. It came loose once and she
20 passed out because she didn't have any air. She
21 really likes Barbie dolls and she can't play with
22 them, and so we just set them up so she can look at
23 them. As a parent, it hurts so much to see your
24 child like this and know there's nothing you can do
25 to help them."

1 Intense fear is a factor that most victims
2 of crime feel as the crime is being committed. A
3 woman -- excuse me, a woman whose house was broken
4 into reported the following:

5 "I was so scared. While he was raping
6 me, I was constantly thinking of my eight-year-old
7 daughter sleeping in the next room. I was afraid
8 he was going to rape her next, and I couldn't do
9 anything about it because I was tied up. He told
10 me if I just did what he said, he wouldn't hurt my
11 daughter, but I didn't believe him. She's my only
12 girl. I've wanted a little girl for so long. I
13 was terrified he would kill me and then rape and
14 kill her, too. I felt so helpless."

15 This woman also received a visit from the
16 defendant's mother who apologized for his behavior
17 and asked her not to testify against him.

18 Many of the victims of crime that I have
19 worked with are victims of sexual assault. Sexual
20 assault is a very personal crime and it's difficult
21 for victims to speak about it. Some of them have
22 the courage to come to the sentencing hearings and
23 speak to the judge about what they feel is an
24 appropriate sentence; many do not.

25 I'm going to skip this last page. I have

1 been present on numerous occasions while the
2 Assistant United States Attorney explains the
3 criminal justice process and the United States
4 Sentencing Guidelines to the victim. It is
5 comforting for the victim to know that a sentence
6 will be imposed based upon factors that do not
7 include whether the defendant knows the tribal
8 chairman or tribal councilmen, her race or any
9 other subjective factors.

10 It is consistently reassuring for the
11 victim to be told that the sentence imposed by the
12 Court will be based upon guidelines that have been
13 established by the United States Sentencing
14 Commission, and that the perpetrator in her case
15 will receive a sentence similar to perpetrators in
16 other cases. In no instance since I have been
17 working with victims has the victim expressed the
18 opinion that the sentence under the United States
19 Sentencing Guidelines is too harsh or too long for
20 the crime committed.

21 I would request that you consider the
22 plight of victims of crime in your consideration.
23 When the district judge imposes a sentence, the
24 perpetrator knows the number of years that he or
25 she will have to serve before they are released.

1 Oftentimes the victims that I deal with feel that
2 they have been given a life sentence, and they have
3 to continue to deal with all the issues of being a
4 victim of crime throughout the rest of their
5 lives. This concludes my statement to the
6 commission.

7 CHAIRPERSON MURPHY: Thank you.

8 JUDGE PIERSOL: Parenthetically, since I'm
9 one of the judges that does sentencing, I talked
10 with Judge Schreier about that also, and with
11 regard to the sexual assault crimes, which many of
12 them are child sexual molestations, the
13 sentencing -- we have not done a specific study,
14 but it was our feeling that the state sentences are
15 probably similar to ours, and we have some feel for
16 that because we get the habeases coming up from
17 state court with regard to once they've been
18 sentenced. There would be a difference once again
19 with regard to when you're eligible for parole, of
20 course, in the state as opposed to federally, but
21 with regard to the initial sentences, we don't feel
22 that there's any particular disparity.

23 CHAIRPERSON MURPHY: On the sexual
24 assaults?

25 JUDGE PIERSOL: On the sexual assaults,

1 that's right.

2 CHAIRPERSON MURPHY: Because I think you
3 told us at the outset you thought that the real
4 problem was in the assault cases?

5 JUDGE PIERSOL: Yes, and I'm separating
6 out sexual assault.

7 CHAIRPERSON MURPHY: Yes.

8 JUDGE PIERSOL: I was talking about other
9 assaults that are assaults against a person other
10 than sexual assault. I didn't make that
11 distinction. Next --

12 CHAIRPERSON MURPHY: Commissioner Steer
13 has a question.

14 COMMISSIONER STEER: On that pint, if I
15 could, I'd like to follow up with Ms. Pecora. You
16 made the statement that, "In no instance since I've
17 been working with victims has the victim expressed
18 the opinion that the sentence under the United
19 States Sentencing Guidelines is too harsh or too
20 long for the crime committed." You had one example
21 in your statement of an aggravated assault case.
22 Is that true for aggravated assault cases and the
23 victims that you have worked with, generally?

24 MS. PECORA: Are you talking about
25 aggravated physical assault or sexual?

1 COMMISSIONER STEER: I'm not talking about
2 sexual assault. I'm talking aggravated assaults.

3 MS. PECORA: It's true in every case that
4 I've worked with.

5 COMMISSIONER STEER: Thank you.

6 JUDGE PIERSOL: As you know, Michelle
7 Tapken is the United States Attorney at this point,
8 and she's already spoken to you, and her immediate
9 predecessor was Ted McBride who is now in private
10 practice in Rapid City, but for many years was a
11 prosecutor in the United States Attorney's Office,
12 and then became the Acting United States Attorney.
13 He has a good deal of experience in these matters.

14 CHAIRPERSON MURPHY: And didn't I hear
15 your last argument?

16 MR. McBRIDE: No, the next-to-the-last
17 one, Judge Murphy, because I used Harry Potter in
18 the last one, and you were disappointed I wasn't
19 going to use it on the last one. But I want to
20 talk about that, my very last argument, not the one
21 you heard, the one that Judge Bye presided over,
22 because it is a guideline-specific thing; it's
23 something I think you can do, and I think my
24 friend, Mr. Van Norman, from the Public Defender's
25 Office, will agree I'm right on this. It's

1 somewhat of a loosening that I believe needs to be
2 done in the domestic abuse area.

3 I was concerned -- well, before I begin
4 speaking, I no longer have an axe to grind. I'm
5 doing civil litigation. I'm actually technically
6 retired from federal service. I had 20 years in,
7 50 years old, and the President invited me to
8 leave, so I got my first retirement check last
9 week. Not very big, but it's still nice.

10 I was worried how I was going to shift
11 after hearing from people who I have great respect
12 for, the tribal chairs. Gregg Bourland has a
13 voice, I've said many times, with such
14 thoughtfulness and strength that you cannot help
15 but listen to him, and Gregg and I have talked a
16 number of times about these issues, the judges who
17 have expressed opinions.

18 I don't necessarily have different views,
19 but I think there are some different questions that
20 you need to ask, and one of the first ones -- I
21 didn't know how to get in and say, you know, "Let's
22 not forget the victims." Thank goodness the
23 Department of Justice allowed Marlys Pecora to
24 testify today because I don't have to pull your
25 attention back to the victims.

1 I think there's a reason you aren't
2 hearing much about the victims from our political
3 figures, and I say "political figures" with great
4 respect. The victim rights movement and the
5 violence against women movement, while people like
6 Lisa Thompson have done just Herculean efforts in
7 terms of providing services to the victims of crime
8 in Indian country, the political throw weight that
9 you find for those issues in Congress simply have
10 not gotten to the point where it is affecting
11 tribal political leadership. I'm not saying that
12 to be critical of the leadership. I understand,
13 you know, what they're facing and the fact that
14 their awareness simply hasn't been brought to this
15 issue. I think it will in the future. I think
16 there will come a time when you'll hear more about
17 victims' rights from some of the people today that
18 only cursorily touched upon them.

19 Another thing that I think you should know
20 is I went to the last meeting of the Native
21 American Issues Subcommittee down in Albuquerque
22 with the outgoing U.S. Attorneys, and one of the
23 things they wanted to emphasize was to make sure
24 they understood that -- people understood they
25 wanted -- the Indian tribes wanted more federal

1 prosecutions, more -- and I said, "Wait a minute,
2 that's not what I hear from South Dakota tribes."
3 They couldn't believe it. They thought I wasn't
4 talking to the people.

5 I think if you're going to do anything,
6 you need to go talk to Arizona, you need to go talk
7 to other places because I'm not sure that
8 everybody's on the same sheet of music with regard
9 to this particular issue.

10 There may be a couple reasons for that.
11 In South Dakota, at least from the time I started
12 over 20 years ago, Indian country issues were the
13 number one priority of every U.S. Attorney I worked
14 for and myself. There were eight assistants when I
15 started, I was number eight, and that was our most
16 important function. There now is, Ms. Tapken has
17 told you, almost 25, and most of that increase,
18 much of it at least recently has gone into Indian
19 country prosecution as have FBI resources and other
20 resources. Janet Reno is one of the reasons for
21 that. Congress, including Republicans such as John
22 McCain and Ben Nighthorse Campbell, is another
23 reason for that, and the prior U.S. Attorney prior
24 to me, now Judge Schreier, had no small part in
25 seeing the increase nationwide in resources.

1 Now the table scraps of the federal
2 government, which is really what we're giving to
3 Indian country resources recently, become
4 tremendously significant in states like South
5 Dakota with only 700,000 people. I believe that
6 the prosecutions in Indian country done by the
7 federal government, that you've got AUSAs with more
8 experience, paid better and a lighter caseload than
9 any state prosecutor can dream of in this state.
10 The caseloads of the judges -- well, the federal
11 judges have tremendous caseloads, so do the state
12 cases -- so do the state people. The state's
13 attorneys, many of them are part-time.

14 I think when you couple that with the fact
15 that the willingness and ability of Native
16 Americans to engage the judicial system as victims
17 is somewhat less, I believe, than non-Indians, you
18 can't simply base your decision on what does an
19 Indian person get for a sentence in state court. I
20 think you're going to have to look and see whether
21 that victim in state court was an Indian person or
22 a non-Indian person. And I don't mean this as
23 criticism to my colleagues in state court or
24 judges. I think institutionally and simply
25 socially, they aren't getting the same pressure

1 from Indian victims that one might in federal
2 court. And even in federal court, it's not so much
3 a function of pressure by the victims. The victims
4 don't tend to really push, but the federal
5 government has decided to put tremendous, but
6 proportional resources into this area, and it is
7 something that's pursued with great vigor in this
8 state.

9 Now one of the assumptions that seems to
10 have been made here is that the state court is
11 right in giving its lesser sentences. I don't know
12 whether you want to buy into that; that's something
13 you need to determine. Congress has determined
14 there should be sentencing guidelines. Really, you
15 have been asked, to some extent, to abolish them in
16 Indian country. I --

17 COMMISSIONER JOHNSON: No, no, no. Let me
18 ask you this: One of the things that has come up
19 this morning is the fact that they think that
20 federal judges should have more discretion, and I'd
21 like to ask you about that and also Ms. Tapken how
22 she feels about that.

23 MR. McBRIDE: Judge Sterling -- excuse me,
24 Judge Johnson. I don't want to be too personal,
25 Judge Johnson. Judge Johnson, that's just where I

1 was going. When I started, there were no
2 sentencing guidelines. I was telling Mr. Steer, I
3 was in Washington at a major narcotics conference
4 the day that passed, and they came in and threw out
5 the agenda and we talked about what this was going
6 to mean. I thought it was a crazy idea at the
7 time.

8 When I started, a standard plea agreement
9 for an assault with a dangerous weapon was we --
10 with a serious bodily injury is we drop one count,
11 we go with just the ADW. We'd make no
12 recommendation. It was understood the defendant
13 was going to ask for probation. That was a
14 first-timer. First assaults were always free
15 then. They were always free, virtually always, and
16 I mean, that was really something different that
17 that first assault wasn't free. I think the
18 statistics may still be there in the probation
19 office; almost always probation was granted.
20 Almost every case within the first two to three
21 sentences the word out of the defense lawyer's
22 mouth was, "Judge, this wouldn't have happened if
23 Joe hadn't been drinking, and I believe that."

24 Jean Renoir says, "Of all things in life,
25 there is one thing that is most terrible, and that

1 is everyone has his reasons." The sentencing
2 guidelines, while they may acknowledge that that
3 was a reason, took it away as an excuse. You are
4 being asked to put it back in as an excuse. You
5 may want to do that. I don't know. If you do, I
6 do suggest you may have a problem if you only make
7 it relative to a Native American because if you
8 have a non-Indian person in Indian country who is
9 drunk and assaults an Indian person, they're going
10 to be prosecuted in federal court. Do you want
11 that exemption to extend to them? If you don't
12 have it extend to them, I suggest you may have
13 constitutional problems not covered by the Native
14 -- by the Indian sort of exception to equal
15 protection which is the fact that the designation
16 of Indian in Indian country is not based on racial
17 standards, but is rather a unique political
18 relationship. I don't know how you can justify
19 down at that level giving a non-Indian -- saying it
20 was a reason you were drunk, it's no excuse and
21 turning around and saying that to a Native
22 American. Maybe you can. That's an issue that you
23 need to address.

24 COMMISSIONER CASTILLO: Let me test your
25 memory, Mr. McBride. You say that the first

1 assault in the old system was free, but the
2 defendant would be placed on probation. How many
3 times would that person successfully complete their
4 probation?

5 MR. McBRIDE: You almost couldn't
6 measure. Almost never. That first free one simply
7 resulted in another violation in almost every
8 case. There were a few fellows that --

9 COMMISSIONER CASTILLO: So usually there
10 would be revocation proceedings, and then down the
11 road, after giving somebody a chance, they would go
12 into prison or some other repercussion?

13 MR. McBRIDE: Yes, Judge Castillo, and I
14 think an interesting statistic would be to see
15 whether prison first, then supervised release has
16 resulted in less recidivism than -- you know, it's
17 kind of from Alice in Wonderland, the rule is jam
18 yesterday, jam tomorrow, never jam today. Let's
19 find out what jam today is. Look at those and see
20 which --

21 COMMISSIONER CASTILLO: You have a lot of
22 experience in the criminal justice system. What's
23 your view on that? What do you think is more
24 appropriate, given all the factors; putting
25 somebody on probation first with an opportunity to

1 turn around their life, with the idea that this
2 sword of Damocles is hanging over their head in
3 terms of a revocation proceeding, or putting them
4 in prison first and then supervised release after
5 prison?

6 MR. McBRIDE: My sense is, although I'd
7 like to see the numbers, that consequences
8 initially with subsequent supervision and continued
9 consequences is more -- is going to be more
10 effective and was more effective than, "I'm really
11 serious this time and next time you're really going
12 to get it."

13 COMMISSIONER CASTILLO: So then your
14 presumption is that there is somehow a deterrent
15 effect to the penalties and the consequences that
16 word gets out, because I know that nobody's out
17 there reading these Federal Sentencing Guideline
18 Handbooks, but you're just saying that word gets
19 out?

20 MR. McBRIDE: I don't think word gets
21 out. I don't think it happens until after the
22 offender is dealt with. I think in terms of the
23 offender's chances of not being a recidivist that
24 you're going to -- that if you looked at the
25 statistics, you would see a slight increase over

1 rehabilitation on somebody that's had consequences,
2 then supervision than opposed to the free bite. I
3 know I don't have much time, but I would like --

4 COMMISSIONER SESSIONS: Can I just test
5 your memory just a little bit further, because I'd
6 like to go back to Judge Johnson's question to
7 you. Essentially what you heard today for much of
8 the morning was expanded judicial discretion; give
9 Judge Piersol some more discretion so that, sure,
10 he can impose a strict sentence, but he also can
11 reflect the individual needs of a particular
12 defendant and of a particular victim. And I guess
13 in light of your comments about the guidelines,
14 what's your response to people who say, "There
15 should be some more discretion, not necessarily
16 that you reduce sentence because of intoxication of
17 the defendant"?

18 COMMISSIONER KENDALL: What he's asking is
19 do you trust Judge Piersol?

20 MR. McBRIDE: As Judge Piersol knows, I
21 trust him with my life.

22 COMMISSIONER KENDALL: Well, right now
23 he's going to trust him.

24 MR. McBRIDE: Every one of the judges in
25 this room, you know, much like -- it's much like

1 when they do the surveys, everybody dislikes
2 lawyers, but they like the lawyer they know. I
3 love the judges I know.

4 No, I think that's the problem when you
5 engage in this discussion is how do you turn to a
6 judge like Judge Piersol who's just magnificent, I
7 can't begin to tell you what a joy it is to
8 practice in front of him, and say, "Does that mean
9 we should get rid of discretions because some other
10 judge may or may not be that good?" I don't know
11 the answer to that. That's a congressional
12 determination.

13 I will say there are some areas where I
14 think that -- and probably in these assaults, the
15 bottom end of the guidelines could, without much
16 damage, be lowered. I believe that, but I don't
17 believe there ought to be -- I don't believe there
18 ought to be the free bite any longer; everybody
19 gets a free assault.

20 COMMISSIONER O'NEILL: Is that still the
21 case with respect to the state system, that people
22 are still getting a free bite of the apple?

23 MR. MCBRIDE: Yeah, what they probably get
24 and what they sometimes got here was the reduced
25 plea to a misdemeanor their first shot, their first

1 go-round. I think Bob and I talked --

2 COMMISSIONER O'NEILL: Because what might
3 be an interesting comparison is looking at the
4 degree of recidivism among those people who get the
5 first bite of the apple and whether or not they
6 violate parole or probation vis-a-vis those people
7 in the federal system who don't, because I imagine
8 there are two ways to look at this problem, right?
9 You could say, "Oh, those Federal Sentencing
10 Guidelines are too tough with the people at the low
11 end," but you could also flip that, as I imagine
12 Ms. Pecora might suggest, and say, "Gee, actually
13 the problem's not with the federal system, but the
14 problem's with the state system in not bringing the
15 hammer down hard enough and soon enough."

16 MR. McBRIDE: I think, Professor, I would
17 say if you show me that a person who abuses an
18 Indian child in Indian country gets more of a
19 sentence than someone in state court, I would
20 without shame say, "What's wrong with the state
21 court?" So I think that's a good point.

22 If I could very quickly, because this is
23 something I feel is important, and it has to do
24 with the area of domestic abuse where you have an
25 assault with a dangerous weapon or an assault

1 resulting. As you know, acceptance of
2 responsibility can rarely be given when there is an
3 obstruction of justice points given. This provides
4 peculiar problems in the area of domestic abuse.
5 We didn't used to prosecute those, you know,
6 because the victim would -- she'd keep saying, "No,
7 I don't want to prosecute. I fell down the
8 stairs," or as Roddy Doyle's book, The Woman Who
9 Ran Into Doors, "Yeah, I ran into doors."

10 It was only recently that -- well,
11 prosecutors elsewhere understood it. It was only
12 recently I understood the dynamics going on in
13 domestic abuse. That this is a long-term process;
14 how the woman will often recant her testimony; how
15 she won't want to go through with it; how
16 obstruction is virtually part of the dynamics in
17 every one of these family situations and other
18 members of the family.

19 So almost every domestic abuse case you
20 have, you can have the defendant having said, "Tell
21 them you walked into the door. Tell them you did
22 this." Once you get that, you're going to have
23 obstruction of justice. And under the readings I
24 have heard, certainly not with Judge Piersol --

25 JUDGE PIERSOL: You're five minutes

1 beyond.

2 MR. McBRIDE: Excuse me. Extraordinary
3 cases is what the commentary says, extraordinary
4 cases adjustments. I would ask that there be a
5 recognition that domestic abuse provides a
6 particularly rich environment for a finding of
7 extraordinary cases because of its nature. I'm
8 sorry, Judge Piersol.

9 JUDGE PIERSOL: No, no. I would have one
10 comment with regard to, you know, whether the South
11 Dakota courts have a right or not. There's a
12 Department of Justice study that I got from
13 somebody, and it was done about three or four years
14 ago, that shows that for reasons they were trying
15 to figure out, but really didn't, the rate of
16 incarceration in South Dakota is very high.

17 You look at North Dakota, a similar state
18 in terms of socioeconomic climate and a variety of
19 other things. The incarceration rate between South
20 Dakota and North Dakota is vastly different. It is
21 much lower in North Dakota.

22 COMMISSIONER O'NEILL: Among the
23 non-Indian population, the Indian population or
24 both?

25 JUDGE PIERSOL: Overall with regard to the

1 population that is in the South Dakota State penal
2 institutions, and it is hard to understand why, but
3 I just wanted to mention that in case you thought
4 that the South Dakota judges and the legislature
5 were being passive. Anything but; we have a very
6 high rate of incarceration.

7 And now we go on to Robert Van Norman,
8 who's the Head Public Defender for the District of
9 South Dakota. Before he became the Federal Public
10 Defender, for many years he was a practitioner
11 specializing in criminal defense law in Rapid City
12 and a very, very excellent criminal defense lawyer
13 with a tremendous reputation, and we were fortunate
14 that he applied for the position which has been
15 only recently created. We frankly had substantial
16 problems with the adequacy of representation from
17 CJA counsel, frankly in large part due to the
18 guidelines, but that's another story.

19 Mr. Van Norman.

20 MR. VAN NORMAN: Thank you, Judge. Judge
21 Murphy, panel members -- or commission members,
22 rather. I've seen "panel" so many times today, I'm
23 starting to repeat that. It's nice to be in this
24 courtroom and have the opportunity to talk to you.
25 I've submitted written comments, many of which I'll

1 try not to repeat, but I will some because I think
2 they do bear repeating.

3 It's also nice to be in this courtroom
4 when I don't risk being overruled. That's fairly
5 unusual.

6 JUDGE PIERSOL: Don't be too sure.

7 MR. VAN NORMAN: You're just the
8 timekeeper, I understand. At any rate, one thing
9 about victims, my assistants, there are just six
10 assistants that I have in three offices across this
11 district, so when we look at our opportunity to
12 confront the U.S. Attorney's Office, we have to use
13 our resources very carefully and select cases that
14 we want to take. We take most cases that come in
15 the door, obviously, and that the Court approaches
16 us on, but we have a heavy burden here in this
17 federal system for many of the reasons that have
18 been alluded to already.

19 But with regard to victims, I want to
20 mention this and then move on because I am an
21 advocate. I don't pretend to be anything else.
22 I'm not a statistician, I'm not an academician, I'm
23 an advocate. And the thing about victims is that
24 there is a restorative justice movement that is
25 starting to take hold in this district, and I look

1 at it this way: If my clients can benefit from
2 participating in the restorative justice --
3 sometimes you have to lead them to drink, that's
4 fine, and I'm talking about the horse to water and
5 not alcohol -- and they can get credit for
6 participation in the restorative justice movement,
7 excellent, and that to me may yield something down
8 the road for my clients and certainly for the
9 victims that they don't have an opportunity to look
10 at or be involved in at this point.

11 That really is a factor that would be
12 unusual under the guidelines for judges to consider
13 at the time of sentencing, that they were willing
14 to -- of course, judges have the opportunity to
15 look at sentences again after they've been imposed,
16 and there's some question about the timing of
17 restorative justice and when it's best, but that
18 certainly would be something that I think the
19 commission could consider because it does something
20 that we don't do otherwise.

21 I can apologize until I'm blue in the face
22 to victims. My clients oftentimes are inarticulate
23 and incapable and can't go to those victims. There
24 was mention earlier made of a victim who was
25 approached by the mother of an offender.

1 Ms. Pecora, I believe, mentioned it, and she did
2 half of it right. She apologized for her child and
3 the offense he had committed. And then the next
4 part was, of course, wrong and that probably was a
5 negative yield for the offender in that instance
6 because that would be very easily obstruction
7 attributed to him.

8 Okay. That aside, these are the things I
9 really want to address. First of all, I want to
10 tell you that I come here with 88 years of
11 collective experience as a criminal defense lawyer
12 and I'm absorbing the experience of my attorneys in
13 my office. I have an experienced staff and I used
14 them, I talked to them and talked to them
15 extensively before I came here.

16 Another thing I want to say about my staff
17 and my office is this: I would be delighted if a
18 Native American were the Federal Public Defender
19 instead of me. This is an Indian country office.
20 Virtually 90 percent of my clients are Native
21 Americans. Maybe in the future and hopefully in
22 the near future, that will change. I have one
23 Assistant Federal Defender, an excellent trial
24 lawyer, who is an enrolled member of the Oglala
25 Sioux Tribe.

1 That having been said, I want to tell you
2 that there are -- there was a mission I was given
3 when Judge Murphy wrote to me, and that was about
4 disparities, and so most of my comments really
5 address the disparities between the state and
6 federal systems that the judge had asked about.

7 The first thing I think the commission
8 needs to understand -- and by the way, I think the
9 disparity between sentencing options that the state
10 allows and the federal system doesn't allow
11 essentially should be considered by judges, but the
12 first thing about the disparity is that it is
13 structural. It is very clearly structural. The
14 whole state system allows in this state -- it's the
15 only one we're talking about, I believe -- in this
16 state allows a huge amount of discretion to
17 sentencing judges in virtually all cases. There
18 are a few mandatory sentences over which state
19 judges have no control. They are very few: Second
20 degree murder which is mandatory life. First
21 degree murder which is mandatory life. Drug
22 distribution cases, there are mandatory minima.
23 However, the problem with that is this: If you're
24 comparing again, the judges, upon making written
25 findings, can waive even the mandatory minimum

1 sentences on drug distribution cases.

2 My clients sit in county jails throughout
3 this state and compare day-to-day what their
4 counterparts, oftentimes other Native American
5 offenders in the state system, receive. That has a
6 huge impact on their understanding and their
7 feeling that they're being unfairly treated. It is
8 a fact, and so that is a sentencing fact.

9 The sexual assaults, which is a hot button
10 topic obviously, and it's something the commission
11 considered earlier this year, and I was happy to
12 have an opportunity to write the commission about
13 Amendment V with the various sexual assault
14 proposed guideline changes. Sexual assault in the
15 state system is also vastly different than it is in
16 the federal system. The state system here allows,
17 but for one or two exceptions, again absolute
18 discretion on sentencing to the sentencing judges.
19 Now when I'm talking about absolute discretion,
20 we're ranging from zero to a maximum number of
21 years. We're also ranging to a smorgas -- or
22 considering a smorgasbord, essentially, of
23 sentencing options such as what are called deferred
24 prosecutions. We talked a little about the fairly
25 incoherent program with regard to pretrial

1 diversions that exist in this district.

2 COMMISSIONER JOHNSON: Would you suggest
3 giving more discretion to federal judges in these
4 criminal matters?

5 MR. VAN NORMAN: Absolutely. There's just
6 no question in my mind. I've practiced under both
7 systems, both state and federal, and prior to the
8 guidelines being instituted. You know, the one
9 thing that struck me, Judge, in law school -- and I
10 went to law school when I was a little older, and I
11 didn't mean to mislead you with the 88 years of
12 experience.

13 CHAIRPERSON MURPHY: It got everybody's
14 attention.

15 MR. VAN NORMAN: Right. I'm remarkably
16 well-preserved. But one thing that struck me about
17 U.S. Supreme Court decisions previously was that
18 there was individualized sentencing, and in Indian
19 country I think that is just incredibly important.
20 We have -- and the tribal chairs have talked about
21 it much more eloquently and adequately than I
22 could. We have huge degrees or levels of
23 unemployment. The poverty rate is something that,
24 for most of you, you can't even understand. I've
25 worked in tenement areas in St. Louis. I've worked

1 in VISTA at different places around the country, in
2 New Mexico and Texas, before I was ever a lawyer,
3 and the poverty that I see on the reservations here
4 is striking in comparison. That is the first
5 characteristic of the situation that I think that
6 you need to be able to take into consideration as a
7 sentencing judge.

8 Chapter 5, Section 8 -- or H, excuse me,
9 of the guidelines, ties the judge's hands on a
10 number of things. They are both prohibitive -- and
11 I'm speaking to the choir, I know, but I'm also
12 wanting to address other people. It prohibits
13 certain considerations like socioeconomic
14 background. That implicitly destroys many
15 opportunities for my clients.

16 Getting back to the state system again, I
17 can't again emphasize how different it is. I
18 mentioned suspended impositions of conviction. You
19 talk about funding and opportunity to have jobs
20 later and what a conviction does to a person on the
21 reservation. It's true. A suspended imposition of
22 conviction under the state system, which is
23 available in all but a few cases, is just that.
24 You complete the probationary period, you have no
25 conviction at the end of that probationary period.

1 That's a matter of grace. That's a matter of mercy
2 that the system should extend that it does not in
3 the federal system.

4 There are other ranges of options that the
5 state judges have which obviously impact my
6 clients' perceptions of what is going on, and in
7 addition to the deferred prosecutions, suspended
8 imposition of conviction, there's also a creature
9 known as suspended execution of conviction. A
10 suspended execution of conviction works this way:
11 I plead guilty, I'm sentenced, I don't go to
12 prison, but I have a conviction. During the first
13 year oftentimes under the state system, if that
14 offender is doing well, the judge will convert it
15 to a suspended imposition of conviction and
16 continue the probation under the same terms. Again
17 that's an option we don't even begin to see in the
18 system federally.

19 I want to talk a moment about another form
20 of sexual assault that I know the commission will
21 be looking at and that is incest. There's no
22 question in my mind, based on my experience and the
23 information I've been provided by a local expert by
24 the name of Dewey Ertz who I've written about in my
25 submission who, by the way, is an enrolled member

1 of the Cheyenne River Tribe and has a Doctorate,
2 excellent therapist and author that the probation
3 office here frequently looks at. His statement is
4 firmly about incest that the offenders are
5 treatable unlike pattern activity for pedophiles,
6 and they should be treated differently.
7 Unfortunately, because of the huge range of factors
8 on the reservations, incest is a fact. It's
9 something that should be dealt with obviously, but
10 dealt with with the humanity of the offenders and
11 their backgrounds in mind while this is being done.

12 Finally I want to say this, and I think my
13 time must be about up; is that correct?

14 JUDGE PIERSOL: It is, but just.

15 MR. VAN NORMAN: Okay. Thank you. That
16 the 5H factors need to be changed. I beg you to
17 really seriously consider changing them. The whole
18 history of Indian/white relations is terrible. I'm
19 ashamed. What we do under the guidelines
20 perpetuates the same problems that we've visited on
21 these peoples because all those considerations,
22 socioeconomic, history, alcoholism, all of these
23 factors cannot be considered.

24 I really appreciate you being here, and
25 the one last challenge I would give to you is to

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1 visit Pine Ridge while you're here. Please do so.
2 Thank you.

3 COMMISSIONER O'NEILL: Does the state, for
4 other than specific intent crimes, allow alcoholism
5 as a defense?

6 MR. VAN NORMAN: Diminished capacity is a
7 possibility.

8 COMMISSIONER O'NEILL: In specific intent
9 crimes or general intent crimes?

10 MR. VAN NORMAN: Specific intent crimes.
11 It's a possibility. There's also --

12 COMMISSIONER O'NEILL: So it's really not
13 used in the state then much either, I would
14 suspect?

15 MR. VAN NORMAN: No, the reality is
16 there's an instruction under state law that
17 voluntary intoxication is to be put into the
18 context that it should be, and so it's really a
19 minor consideration as a defense.

20 COMMISSIONER KENDALL: Could I understand
21 one thing from what you said from the author that
22 you cited? Are you saying that incest in Indian
23 country is a cultural phenomenon?

24 MR. VAN NORMAN: No. It's a recent
25 phenomenon based on alcohol and situational -- the

1 circumstances are situational.

2 COMMISSIONER CASTILLO: You mentioned a
3 lot of proposed changes in the guidelines. Let's
4 move away from that for a second, and I know how
5 difficult it is to have undertaken a new creation
6 of an office and working with outside counsel.
7 Perhaps is there some type of training that we
8 might be able to assist you on as a commission with
9 regard to the sentencing guidelines which are
10 complex to deal with that would be of assistance to
11 your office and those attorneys that work with your
12 office?

13 MR. VAN NORMAN: Yes. My attorneys have
14 opportunities to go to national seminars, which is
15 a wonderful thing, but they haven't had the
16 opportunity to work directly with commission
17 members, and that alone would be a huge benefit.
18 The panel attorneys in this district are very
19 willing to take the cases and they're willing to
20 attend training, but you about have to come here,
21 you know, unless money is available otherwise.

22 When the guidelines were initiated, your
23 staff came out. This was in 1988 or 9 that there
24 was a seminar here. It was very informative. It
25 was a one-shot deal and that was it. So I would

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1 encourage that, you bet.

2 COMMISSIONER CASTILLO: So you think the
3 time is ripe to have another training session out
4 here in South Dakota?

5 MR. VAN NORMAN: Yes, I do. I'd do
6 anything to help.

7 COMMISSIONER KENDALL: Could I follow up
8 on that, because I was going to save it till the
9 end and I know we're all pressed for time and all,
10 but I was going to say -- and certainly Tim's
11 probably over there cringing as I say this, but I
12 know the Training and Education Division of the
13 U.S. Sentencing Commission -- I am hearing the
14 words of William Kindle earlier, that was when we
15 first started this morning, not all of us trek out
16 here and sit and all smile politely and listen, and
17 then everyone go back on home and nothing come of
18 this, but that is something that could be doable is
19 increased training in the area of sentencing
20 guidelines for panel attorneys.

21 And I was going to bring this up at the
22 end, but the current president of the National
23 Association of Criminal Defense Lawyers is a fellow
24 from Houston who I know, and another thing that
25 might be possible is us maybe to get together and

1 look at this would be of use to the panel attorneys
2 is training for -- maybe get some volunteers from
3 the NACDL to come to South Dakota to put on some
4 type of training.

5 From what I'm hearing, the problem seems
6 to be that what's coming out of Indian country are
7 historic street crimes; that you may have people
8 who historically have dealt with historic federal
9 crimes might not have that type of training. So
10 it's a different kind of animal to try to defend
11 those cases. So I really think that it's kind of
12 the implication of Ruben's question that the area
13 of training for the lawyers that represent Native
14 Americans is something that we could do something
15 about relatively easily.

16 COMMISSIONER JOHNSON: Do you think that
17 should not be just limited to six members of your
18 office, but expanded to other defense counsel?

19 MR. VAN NORMAN: Yes. Oh, yes. Yeah.
20 No, I mentioned my staff in passing.

21 COMMISSIONER JOHNSON: Other lawyers?

22 MR. VAN NORMAN: Yes.

23 COMMISSIONER O'NEILL: Do you feel like
24 the community generally -- because usually we
25 assume when we've got laws, criminal laws

1 especially, we assume that the community, whether
2 they do as a matter of fact or not, you assume sort
3 of defacto that people are apprised of those laws
4 and the penalties to a certain degree. Do you find
5 that the clients that you deal with and work with
6 on the Indian reservations, that they have a pretty
7 good understanding of what they're going to get
8 popped with or the severity of the penalties that
9 they're going to be facing and circumstances?

10 MR. VAN NORMAN: None. I'd say no and
11 none. You know, they don't have any understanding
12 and they really don't have any basis for that
13 understanding. I don't even think Mr. McBride was
14 really saying that it had a deterrent effect
15 generally word of mouth, were you, because I don't
16 experience that?

17 MR. McBRIDE: No, the deterrence comes
18 from sentence first, probation after, not from any
19 sense that people know what they're getting
20 themselves into, no.

21 CHAIRPERSON MURPHY: Judge Piersol, do you
22 want to introduce your final panelist?

23 JUDGE PIERSOL: Yes, thank you. The final
24 speaker is Lisa Thompson who's the Executive
25 Director of the Child Advocacy Center in

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1 Ft. Thompson who is also an enrolled member of the
2 Lower Brule. Ms. Thompson.

3 MS. THOMPSON: I would also like to add
4 that I'm not only the Executive Director of the
5 Child Advocacy Center, but also the domestic
6 violence shelter, and I've been there for over ten
7 years. So I'm going to be speaking basically a lot
8 of experience and personal experience as well, not
9 only on behalf of victims, but as a victim myself
10 as well. And I would just like to say, I would
11 have to agree with Marlys Pecora on the statements
12 that she made and also as far as with what
13 Mr. McBride spoke about earlier. And I just want
14 to say that, too, I'm feeling really nervous right
15 now because I really feel like --

16 COMMISSIONER JOHNSON: Don't be. We're
17 all family.

18 MS. THOMPSON: I understand what it's like
19 to -- it's too bad that not everybody can
20 experience what it's like for a child to be in
21 front of a whole jury, and so -- and being here
22 right now, I've never had to -- well, I've had to
23 sit in front of a jury before, but as far as this
24 is somewhat very intimidating, and if other people
25 could experience this and know what children, child

1 victims go through and what their mothers go
2 through as well is very intimidating, and that is
3 why sometimes a lot of victims do not tend to come
4 forward because of the intimidation and threats.

5 But I would like to -- I would like to
6 read a little bit of some of the research that I
7 have read. Research has compared -- I'm going to
8 be talking both about domestic violence and child
9 sexual abuse. Research has compared batterers
10 participating in treatment with those not treated.
11 They found that the group treated appears to reduce
12 recidivism. One study found that 40 percent of
13 treated batterers used violence two years after
14 treatment, while 40 percent of the match group that
15 did not receive treatment continued to use
16 violence.

17 Another study found that substantial
18 reductions in violence and psychological abusive
19 behavior occurred in the first three months of
20 treatment, and 70 percent of the women partners
21 reported that they were not being -- they were not
22 being bothered one year post treatment.

23 In the third study, 63 percent of the men
24 completing treatment were not using violence six
25 months after treatment, whereas 50 percent of the

1 non-treatment batterers remained violence-free
2 (sic).

3 Research has shown that 50 percent of
4 batterers also abuse their children, so when
5 batterers are arrested, children are also
6 protected. Research has also shown that the
7 majority of children from violent families already
8 witnessed their fathers -- that their fathers
9 deliberately arrange for children to witness
10 violence such that those role models perpetrate
11 violence into the next generations. Boys who
12 witness their fathers battering their mothers are
13 three times more likely as adults to hit their
14 wives, and sons of the most violent fathers have a
15 rate of wife beating 1000 times greater than sons
16 of nonviolent fathers.

17 There is some evidence that girls from
18 violent homes are at heightened risk of being
19 battered as adults. Children who witness abuse
20 frequently evidence behavior of somatic and
21 emotional problems similar to those experienced by
22 physically abused children. Preschool children
23 often become intensely fearful, nightmares,
24 sickness. Older boys become aggressive, fighting
25 with siblings, schoolmates, siblings and have

1 temper tantrums.

2 Abuse of children by batterers may be more
3 likely when the marriage is dissolving, the couple
4 has separated and the husband and the father is
5 highly committed to continue the dominance and
6 control of the mother and the children. His
7 struggle to dominate her may increase, and up to
8 three-fourths of domestic violence cases reported
9 to law enforcement are due to the woman leaving the
10 batterer. 70 percent of battered women seeking
11 medical treatment sustain injuries while leaving
12 the batterer.

13 I would just like to say on this behalf
14 that we don't have -- 50 percent of the cases in
15 South Dakota in 50 -- 50 percent of women in South
16 Dakota -- well, let me see. Okay. The shelters in
17 South Dakota, of all the women, 50 percent of them
18 have been Native American women that are sheltered
19 in the State of South Dakota, and I do not think
20 that -- or our sentencing does not reflect that,
21 that they have been prosecuted or sentenced on
22 domestic violence or the assault charges.

23 And I think that the sentencing needs to
24 include a batterer's reeducation, and there needs
25 to be rehabilitation so that tribal members can

1 come back and be good tribal members and give back
2 to the community. And that we don't have jails --
3 our jails are not big enough on our reservations,
4 at least the ones on the Crow Creek and the Lower
5 Brule Reservation. I work on the Crow Creek
6 Reservation, but I'm enrolled on the Lower Brule
7 Reservation which is 15 miles from the Crow Creek
8 Reservation.

9 We deal with many of abuses that we've
10 dealt with. We don't have a problem as far as for
11 child sexual abuse that are prosecuted in Indian
12 country. However, I think that the serious
13 domestic violence cases are not prosecuted or even
14 the fact that the sexual assault of women, you
15 don't see many of those cases that go federally.
16 Often I have found that sometimes, and I'm now
17 speaking -- I've talked to other advocates across
18 the state in Indian country, that as far as a lot
19 of cases of sexual assault are not prosecuted when
20 they're being investigated. That sometimes when we
21 talk about alcohol, that there is alcohol abuse.
22 And I think one of the things that -- the reason
23 why some of the cases with women aren't prosecuted
24 is because they say they were drunk and they don't
25 want to prosecute those cases. However, there --

1 and I'm not saying that there haven't been cases
2 that haven't been prosecuted because I know that
3 there has as far as on our reservation where there
4 have been cases that have been charged federally
5 and have went and they have been sentenced.

6 One of the -- as far as the federal
7 prosecution goes, I really believe that for our
8 women and our children that that is just their only
9 hope. That is just their only lifeline besides the
10 battered women's shelters or child advocacy
11 centers, and we are the only child advocacy center
12 on the reservation in the State of South Dakota at
13 this time. But sometimes we are their only hope in
14 seeking justice.

15 Sometimes a lot of these -- a lot of
16 people do not want to come forward because of the
17 fact -- the mere fact that the political people who
18 may be in the tribal council, many victims that,
19 like I said, we are their only hope. That when it
20 comes time that when their questions are -- when
21 it's going to go federal is that they don't get the
22 community support. They don't get the support from
23 the tribes. We are their only hope.

24 It saddens me to say that even though in
25 Indian country we say our children are sacred, our

1 women are sacred, they are not held sacred. You
2 know, we have to live it. We can't just say it;
3 we've got to do it, and I'm speaking from the
4 heart. I'm speaking for women. I'm speaking for
5 children who I've seen throughout the years who
6 I've seen hurt.

7 I've seen women who have tried to commit
8 suicide, children that are suicidal. On
9 reservations we know that suicide is seven times
10 the national rate -- seven times more than the
11 national rate on reservations, and we all know that
12 on the reservations how high our suicide rates are,
13 and I really truly believe a lot of it is because
14 of domestic violence and sexual assault that is
15 happening.

16 I believe that if we prosecute, that if
17 prosecutions is brought more for batterers, I think
18 we're going to be protecting those children as
19 well. We're going to be protecting some of those
20 children from committing suicide. We've had many
21 young children that have hung themselves in the
22 last four years. We've had three domestic violence
23 murders on the Crow Creek Reservation and we've had
24 three murders on the Lower Brule Reservation.

25 And it's just -- it saddens me that as far

1 as I myself, my two daughters have been sexually
2 abused, so I speak from experience and know. I
3 know the feeling. I know the feeling of
4 hopelessness and helplessness; how it is to feel to
5 know as being a victim walking around in the
6 community trying to stand up for your children, and
7 nobody else wants to support you or they're afraid
8 to support you. Members -- sometimes you're
9 ostracized from members of your family. They don't
10 want to come near you. Your children are called
11 liars. "They're making up that story. No, that's
12 not true. He would never do that." We look at,
13 "Oh, it was because of he was drinking, the drugs,
14 the alcohol."

15 A lot of -- and again, I'm speaking from
16 experience. A lot of times the battered women that
17 we have come into shelter, sometimes the battering
18 that has occurred was not due to the alcohol; a lot
19 of them weren't drinking. However, there are times
20 that when women have come into shelter, yeah, the
21 batterer was drinking. But drinking intensifies
22 the battering, but it is not the cause of the
23 battering, and neither is it the cause of child
24 abuse or incest. And I do believe that we have to
25 look at some type of reeducation for batterers and

1 some type of treatment programs for our family
2 members.

3 As I said, I agree with Ted earlier when
4 he spoke about going to other tribes. I have went
5 to a lot of national events and met with a lot of
6 other tribal people that I hear that they do --
7 they want more federal prosecution. They don't
8 prosecute as many child sexual abuse cases. Rarely
9 is it domestic violence cases do they prosecute.

10 They don't even have a relationship, some
11 of those tribes don't even have relationships with
12 their U.S. Attorneys. I was shocked to hear that.
13 They won't return their phone calls, and I think it
14 is one of the better things that the U.S.
15 Attorney's Office has done is establish
16 multidisciplinary teams in Indian country because
17 that sets those relationships up for those -- the
18 specialized where you have the people who are
19 working the cases to come together, to ensure that
20 these cases don't fall through the crack because in
21 the past those cases have fallen through the crack
22 because of the -- because of the police
23 departments, because who was in there. It may have
24 been a family member, close relative or a friend.
25 Some of these did not get to make it up to the U.S.

1 Attorney's Office. Some didn't make it over to the
2 tribal court. Some of these were lost.

3 And I can say that the reason why some of
4 these cases have went federal before the MDT was
5 established is because we would always contact our
6 U.S. Attorney or Assistant U.S. Attorneys, and we
7 had that relationship to talk to them and say, "Did
8 you get this case? Did you know about this?" And
9 they wouldn't have a clue about it, so they would
10 take that up and they would make sure that their
11 Federal Bureau investigators or FBI agents would
12 come down there and investigate these cases.

13 COMMISSIONER O'NEILL: Ms. Thompson?

14 MS. THOMPSON: Yes.

15 COMMISSIONER O'NEILL: If I could just ask
16 you, has the rate or the number of federal
17 prosecutions been increasing, say, over the last
18 five years? I mean, has there been a shift in
19 terms of bringing more of these cases into federal
20 court? And also, do the tribes also keep
21 statistics for us to be able to look at to
22 evaluate, you know, what the situation was like
23 before 1987 in terms of abuse cases, domestic
24 assault, sexual assault, incest, vis-a-vis since
25 the guidelines have been adopted and the harsher

1 federal penalties have actually come into play?

2 MS. THOMPSON: Well, yes, I believe that I
3 can say as far as -- I can say that for child
4 sexual abuse cases, yes, they have been -- there
5 have been an increase. However, I say that's just
6 the tip of the iceberg because I don't believe that
7 a lot of these cases are becoming forward because
8 in our communities, when the other victims do see
9 what the victims go through and their families go
10 through, they sometimes don't tell. They won't say
11 anything just because of what happens.

12 I want to say also that because we have a
13 high turnover sometimes in our police departments,
14 sometimes advocates have to educate police officers
15 -- that's if they'll listen -- as far as on what
16 they are supposed to do; that they are mandated to
17 go and arrest the abuser. That also that when we
18 have rape victims, sometimes we are the ones to
19 tell them, "No, you can't do that. That is for the
20 hospital to do. You can't touch any of that."
21 Sometimes we are the ones -- we are the ones
22 educating them. I have police officers that ask
23 me, "Please, we want some education here. We don't
24 know what to do. We get people coming and going.
25 Tell us this, tell us that."

1 So I'm -- and as far as those, like I
2 said, they rise, they go up and they sometimes go
3 down, and I think a lot of -- a lot of the cases
4 with -- well, like for instance -- oh, I want to
5 talk about a few years ago, we actually -- like I
6 said, we are a non-profit entity on the
7 reservation. The old council that got in, we had
8 -- they were trying to get rid of us and do away
9 with -- do away with us and put their own people in
10 there because of the fact that they have family
11 members that they want to protect, and they know
12 that because of us advocates being in the shelter,
13 we'll stick up -- we are the only ones that will
14 stand up for women and children and go with them
15 into tribal court, into federal court, even if --
16 even in some instances, we do go into state court
17 at times, too. But we are their -- like I said, we
18 are their only hope, and so it's things like that
19 we have to fight for for the victims to make
20 sure --

21 CHAIRPERSON MURPHY: Judge Kendall, I
22 think, has a question, too, that he'd like to
23 direct to you.

24 COMMISSIONER KENDALL: Well, it's actually
25 whenever we're through, I had one I want to ask

1 Ms. Pecora.

2 JUDGE PIERSOL: I would like to also
3 respond to that last question, if I could.

4 CHAIRPERSON MURPHY: I didn't mean to
5 interrupt you, Ms. Thompson. Did I interrupt you
6 while you were in the middle of something?

7 MS. THOMPSON: Well, yeah, you did, but
8 now I kind of lost my train of thought. But I
9 would just like to say that, I mean, as far as
10 here's some of the other things that I wanted to
11 pose. That as far as I know, that the state does
12 have -- when people talk about this, I really do
13 think that the state needs to up some of theirs as
14 far as to be equal with the federal guidelines.
15 When you look at the state does have some areas
16 where they will prosecute a 15-year-old and a
17 17-year-old statutory rape. In the federal court
18 we -- that is not so. If you have a 15 and a 17,
19 there has to be that four-year difference in there.

20 And we've also been seeing -- the trend
21 has been lately is that there has been a lot more
22 children on -- children that sexually abuse, and if
23 there's even -- say, if you have a five-year-old
24 and a ten-year-old, where's that handled at? It's
25 not handled in tribal court and that's not handled

1 in federal court. Sometimes the state doesn't know
2 how to handle it. State Social Services or Bureau
3 of Indian Affairs, they don't have treatment
4 facilities for a lot of these victims.

5 So I'm just saying that we need a lot more
6 as far as looking at there needs to be more
7 education, treatment, batterers' groups, as far as
8 when people are sentenced, batterers, that there
9 needs to be some type of education.

10 The other thing is that federal probation
11 officers, I really believe that there's not enough
12 of those to keep track of cases on the
13 reservation. We know that the guidelines for when
14 people are on federal probation, they have to stay
15 away from drinking establishments, they have to not
16 have alcohol, drugs, any weapons on them, and we
17 know that a lot of times, this still does happen
18 and these aren't followed up on.

19 There have been cases where I've had
20 victims that come in and said, "I know they're on
21 federal probation." They have called up there.
22 We've had one case where a federal probation
23 officer told the perpetrator, "Stay away from her.
24 She is bad news." I mean, she called in to the
25 federal probation officer and told the probation

1 officer she was beat up, and this was the question
2 -- or the thing she told -- what she told the
3 offender was, "Stay away from her, she's bad
4 news." And there was no consequences for what he
5 did while he was on federal probation.

6 So I think that -- I think that the
7 guidelines as far as child sexual abuse and for
8 sexual assault and domestic violence, that they're
9 not too stringent because, as Marlys Pecora said
10 earlier, a lot of these children and women have to
11 live with these for the rest of their lives. What
12 has been done to my children, they have to live
13 with that for the rest of their life, and a lot of
14 these victims end up -- we know they end up
15 becoming perpetrators themselves as well. They end
16 up going -- sometimes perpetrating on others and
17 getting into -- sometimes they end up going to jail
18 as well.

19 So we need to take a look at that, too.
20 You need to consider victims. I would like to --
21 personally I would like to see more victims speak
22 on -- it's just too bad that there wasn't more
23 victims on the panel, but I'm hoping that maybe
24 there will be more comments from them.

25 But I also -- I will give you some written

1 -- more written comments from myself as far as
2 from the South Dakota Coalition Against Domestic
3 Violence and Sexual Assault. Thank you for
4 allowing me to speak here this morning.

5 CHAIRPERSON MURPHY: Thank you very much
6 for coming and being so open with us. Now I know
7 Judge Kendall has a question, and you wanted to
8 answer O'Neill's question.

9 JUDGE PIERSOL: Yes. Something else with
10 regard to what Commissioner O'Neill had asked
11 about. I became a federal judge in 1993, and in
12 1994 on, the prosecutions probably roughly doubled
13 with regard to child sexual abuse. It isn't
14 because there was twice as much because now Judge
15 Schreier, then United States Attorney Schreier,
16 came into office and it was a law enforcement push,
17 and it didn't have anything to do with the
18 guidelines; it was a law enforcement matter. And
19 we see violence against women act prosecutions that
20 come before us, but as to how many come before us
21 is a function, I believe, of the law enforcement,
22 not of the guidelines. And there hasn't been, I
23 don't think, any inadequacy in the guidelines with
24 regard to our ability to deal with those things.

25 COMMISSIONER O'NEILL: But was there much

1 of a shift, say, post 1987, pre 1987 in terms of --

2 JUDGE PIERSOL: In prosecutions, yes, but
3 that's a matter of law enforcement. It doesn't
4 have anything to do with the guidelines.

5 CHAIRPERSON MURPHY: Judge Kendall -- we
6 are going to have to end with this panel because we
7 have another panel. Judge Kendall, you have a
8 question?

9 COMMISSIONER KENDALL: I want to
10 understand something because I've read the
11 materials and I read your statement that you gave,
12 and I don't want to come away with the wrong
13 conclusion that maybe some others may have, and
14 perhaps asking a victim's rights advocate might not
15 be the best person, but if you could, put yourself
16 out of that role and speak as a Native American
17 woman.

18 Given the alarming rates of victimization
19 by Native American women, can you help me get a
20 handle on whether or not -- if I were to have a
21 candid discussion with the average woman living in
22 Indian country with regard to where her role or
23 place is in that culture versus the role of women
24 in non-Indian country culture? I mean is -- I know
25 that I'm not being very articulate about this. I'm

1 trying to get a handle on would it be the consensus
2 among Native American women that their plight with
3 regard to how they are treated by men in Indian
4 country is different from how they would be treated
5 or women are treated in the dominant culture, I
6 think, if I'm using the right terminology? Does
7 that make sense, what I'm saying?

8 MS. PECORA: I'm not sure that I
9 understand your question. Are you asking me --

10 COMMISSIONER KENDALL: Are the
11 victimization rates that are off the charts as
12 suffered by Native American women, is that
13 cultural, in your judgment, and what would the
14 average Native American woman tell me, to answer
15 that question?

16 MS. PECORA: I'm not speaking as a victim
17 witness advocate with the U.S. Attorney's Office.
18 Victimization of Native American women is not
19 cultural. They are supposed to be culturally
20 treated as a sacred person and well-respected
21 because they have the ability to give life.

22 COMMISSIONER KENDALL: Then why are they
23 not, in your judgment, because the statistics seem
24 to indicate they're not?

25 MS. PECORA: In my personal judgment, I

1 think that somewhere along the lines, all of the
2 culture lost some of their sense of identity, and
3 we're losing some of the cultural practices,
4 traditional cultural practices, and a lot of the
5 things that I am doing in my job that go beyond the
6 scope of my duties as a victim witness advocate is
7 to try to bring some of the culture back to the
8 reservations that I work on through crime
9 prevention programs where we ask some of the Lakota
10 elder people to come in and do talk to the children
11 about their Lakota roles. I think the reservations
12 themselves are starting to get back to that as
13 well. They have some -- in the school systems some
14 immersion programs where they speak Lakota, fluent
15 Lakota, nothing but Lakota in the classroom to try
16 to get back some of that and get a balance back to
17 where we should be. Does that answer your
18 question?

19 COMMISSIONER KENDALL: I think so, yes.

20 MS. PECORA: Okay. And I'm not sure that,
21 working in urban society as the executive director
22 in Pierre, South Dakota, that Native American women
23 are suffering at the hands of their abuser more
24 often than they are off the reservation. I think
25 they're just becoming stronger and coming forward

1 and saying -- talking about what's happening to
2 them.

3 COMMISSIONER KENDALL: Well, I wanted to
4 make sure that I wasn't coming away with the
5 message, because I was kind of hearing from
6 Ms. Thompson that apparently -- and I don't want to
7 speak for someone, that you would see -- or would
8 you see the role of the sentencing guidelines as
9 protective of women and children in Indian country,
10 and therefore, we shouldn't -- despite other points
11 of view that we heard, we shouldn't change a thing,
12 speaking for yourself? I mean, what's the message
13 we should take from this?

14 CHAIRPERSON MURPHY: This will have to be
15 the last word as far as this panel goes because
16 time is fleeting, and we do have more to hear
17 from.

18 MS. PECORA: Again, not speaking as an
19 employee of the U.S. Attorney's Office, but
20 speaking as a person, yes, that there have to be
21 some consequences for behavior; that alcoholism or
22 poverty cannot be used as reasons for a person
23 committing a crime. I mean, a lot of us grew up in
24 poverty stricken homes and have been surrounded by
25 alcohol and chose not to lean on that. And it is

1 protective when somebody who is a violent person
2 like some of the people that I referred to in my
3 statement is taken out of the community. There's a
4 measure of safety in that.

5 CHAIRPERSON MURPHY: Well, I want to thank
6 this panel very much. It's been very helpful, and
7 we'll take a five-minute break before the next
8 panel.

9 (A recess was taken from 12:12 to 12:26.)

10 CHAIRPERSON MURPHY: We've come here
11 together to hear from the people here, and so I
12 have to end everybody's good time and chatting with
13 each other to bring us back to our final panel. I
14 did want to say that Judge Kornmann has -- thank
15 you. As part of the record, Judge Kornmann --
16 Judge Kornmann, you should be a good example here.
17 What --

18 JUDGE KORNMANN: My chief judge was
19 speaking to me.

20 CHAIRPERSON MURPHY: What I wanted to say
21 is that we have your article for the Federal
22 Sentencing Reporter, and we will be making that
23 part of the record just like all of the other
24 materials that have been given to us.

25 JUDGE KORNMANN: Thank you.

1 CHAIRPERSON MURPHY: And in the meantime,
2 we've discovered that some people from the
3 University of South Dakota that are going to be
4 working on the study are also here, so I've asked
5 the director to sit at the table with the people up
6 here because Judge Johnson will then be able to ask
7 his question. But first, Tom, would you introduce
8 the panel here?

9 MR. PECKHAM: I once again have the
10 privilege of being up here to enforce the time
11 limits, and we will start with, I believe, Terry
12 Pechota who's a private practitioner here in South
13 Dakota. Terry?

14 MR. PECHOTA: Thank you. I was the United
15 States Attorney very briefly from 1981 to about --
16 no, actually from '79 to '81 under President
17 Carter, and so I do have a little experience in the
18 field of prosecution. I also am a member of the
19 Rosebud Sioux Tribe and I practice criminal law and
20 civil law here in Rapid City. Been practicing in
21 the state for about 30 years.

22 I think the -- you know, we've been
23 talking here about disparity in sentences and how
24 the sentencing guidelines can be changed, and I'd
25 like to change directions a little bit and talk

1 about the ultimate answer to this particular
2 problem, and to do that, you have to understand a
3 little bit about why we're all here and where do we
4 get this jurisdiction in federal court over Indian
5 country.

6 I don't know if many of you have ever
7 heard of the case of ex parte Crow Dog, but before
8 that case was decided by the United States Supreme
9 Court, we handled all our criminal affairs and
10 criminal offenses as tribal matters. Crow Dog
11 killed Spotted Tail, and the Supreme Court said
12 that there was no jurisdiction because it was --
13 the treaty left that to the Rosebud Sioux Tribe, my
14 tribe incidentally, and there was an uproar over
15 that, and we finally have -- we got the Major
16 Crimes Act that used to be six or seven and now
17 it's expanded into the Major Crimes Act and the
18 Minor Crimes Act and almost any other kind of
19 offense that's committed on Indian reservations.

20 Now I think the answer to this question
21 is, and I think that the people that are making the
22 policy have to at some point in time really give
23 some thought to returning some of the jurisdiction
24 that was taken away by the Major Crimes Act to the
25 tribal courts, and that could be done on basically

1 a selective basis, picking a particular tribal
2 court and maybe as a pilot project, picking all
3 tribal courts in the state or dealing with all
4 tribal courts across the board.

5 If the tribal court justice systems had
6 the money that we were putting into prosecuting,
7 judging and imprisoning American Indian people, we
8 could have the very best tribal court systems bar
9 none. We could have court systems just like the
10 federal court systems, just like the state court
11 systems, but we don't have that.

12 And I think that at some point in time,
13 hopefully sooner rather than later, that we could
14 give some felony jurisdiction back to the tribes, a
15 tribe or the tribes, and allow the tribes to have
16 the services of the FBI, services of the United
17 States Probation Department, services of the United
18 States prisons; in other words, if somebody has to
19 go to jail, they can go to a federal prison, but
20 that would be decided by the tribal court justice
21 system under our rules and our regulations.

22 I realize that is not the situation at the
23 time, and I realize you folks have probably very
24 little to do with the situation as we find it at
25 the present time, but as we speak now, you know,

1 this is a system that's not working, and it causes
2 a -- it breeds resentment and breeds a lack of
3 trust in the criminal justice system. It does
4 nothing for the accomplishments of Indian
5 reservations, and we find ourselves sitting up here
6 talking about disparity in sentencing which really,
7 you know, just makes everybody feel good that's
8 involved in this. I mean, it makes the judges feel
9 good, it makes the probation officers feel good, it
10 makes the prosecutor feel good because there is
11 something that's inherently wrong about taking --
12 let's take Shannon County, 90 percent Indian. All
13 crimes, virtually all the crimes that are committed
14 on that reservation, you send the FBI down there,
15 you take the Indian off the reservation, you bring
16 him up here. After he commits the crime, that's
17 about the last Indian he sees along the way. I
18 mean, they're white FBI agents, basically they're
19 non-Indian judges, they're non-Indian attorneys,
20 they're non-Indian jurors, and they're 150 miles
21 and sometimes 200 miles from where the crime was
22 committed. A lot of people have one heck of a time
23 even getting up here. And they just see that the
24 Great White Father has come down and taken their
25 particular person and they've carted him off to

1 jail.

2 Now if, in fact, that person was tried in
3 a county, for example, in Shannon County, you would
4 have a jury down there of 90 percent Indian people
5 which, I mean, there are hardly any Indians on the
6 juries. Maybe -- you know, I'm not saying that
7 there's no Indians, but there's very few Indians on
8 the juries up here, and certainly not the jurors
9 that you would get if you were tried in a tribal
10 court system in the particular county or
11 reservation that you're dealt with.

12 And so, you know, this is just a -- it's
13 not a good system, and we can sit here and talk
14 about disparity in sentences until we're blue in
15 the face and it's not going to do one whit of good
16 other than, you know, we can all say, "Well, we're
17 making the best out of a system that was given to
18 us." And, you know, I applaud that and I want to
19 be a part of that, too, but that is not the
20 ultimate answer in this situation. It's not the
21 ultimate answer to take Indian people and just take
22 them completely out of their particular cultural
23 system and, you know, take them out of even a
24 scenario that would not be tolerated in any other
25 society.

1 If you took a county in Mobile, Alabama,
2 and took all -- you know, took the blacks that
3 committed crimes there and you took them to a non
4 -- you know, where they never had, you know, any
5 percentage of black people, you know, in the U.S.
6 Marshals, judges, prisons, you know, along the way,
7 I mean, it wouldn't be tolerated. You'd have an
8 uprising. And you could -- we could talk about the
9 other minorities in this country, it would be the
10 same way.

11 So I mean, I hope that somebody at some
12 point in time says that the policy has to be
13 changed, and let's return some of this jurisdiction
14 to the tribal courts and give them the resources
15 that they need to do the job. And if they don't
16 have the resources, I don't know what the problem
17 is with letting them use the resources that are in
18 existence at the present time.

19 COMMISSIONER JOHNSON: Have you sought
20 assistance from your legislators to accomplish
21 this?

22 MR. PECHOTA: Oh, I think it's been
23 brought up, you know, now and then. I don't know
24 if it has been recently, but I know that -- I
25 worked with the United States Commission on Civil

1 Rights when I got out of law school -- or while I
2 was in law school in '72, and I know that there was
3 a proposal then, and so it's something that gets
4 bantered around, but very little gets done on it.

5 COMMISSIONER JOHNSON: I'm talking about
6 your Congressman and/or your senators, and one
7 senator from South Dakota who's a very powerful
8 man.

9 MR. PECHOTA: That's right, and hopefully
10 that, you know, maybe something could be done along
11 those lines.

12 CHAIRPERSON MURPHY: His aide had to leave
13 just before this panel, but she said -- Senator
14 Daschle's aide was here, and she said how she'd
15 learned so much and that she thought it was very
16 important to be having this hearing, so I'm sorry
17 she didn't hear you.

18 MR. PECHOTA: Now having said that then,
19 I'd like to talk to a couple -- I'd like to just
20 make a couple brief statements about disparity in
21 sentencing in comparison with South Dakota, the
22 South Dakota Justice System. All the things I've
23 talked about breed resentment and lack of trust in
24 the federal justice system, but there are a couple
25 other things that we can talk about.

1 In South Dakota we have this beautiful
2 statute, it's called the -- and it's found under
3 23A-27-13, and it deals with a suspended imposition
4 of sentence, and it's used a lot in South Dakota
5 and it's used a lot in these garden variety kinds
6 of crimes. Now I think that -- you know, I think
7 that we have to sort of stay with this garden
8 variety kind of crime when we're dealing with this
9 situation because if you have a murder or if you
10 have, you know, a very serious child molestation
11 case or, you know, a very serious assault, I mean,
12 that we can all pretty much recognize and the
13 United States Attorney can recognize, too. I mean,
14 he would -- you know, he knows when he has to --
15 when that particular kind of crime has to come to
16 the federal court system. And I have no problem
17 with that because I think, you know, minds differ
18 very little when we start talking about, you know,
19 these incidents of brutality that occur.

20 But when you have the garden variety kinds
21 of things, these statutory rapes, these assaults,
22 you know, where somebody gets two or three stitches
23 in their head or, you know, or breaks their arm, or
24 burglaries or larcenies, those kinds of things,
25 under South Dakota law, I mean, unless you have a

1 record, you're basically -- you know, you basically
2 will get a suspended imposition of sentence.

3 Now I don't want to say that's across the
4 board, but if you -- you know, and it's beautiful
5 because the judge can give this person up to a year
6 in jail, but the beautiful part of it is that --
7 and keep him on probation for as long as he wants,
8 but if this person complies with the conditions of
9 that probation and parole -- or in the probation,
10 then he does not have a record, and he does not
11 have to, if you're 18 or 19 years old, try to
12 overcome on an Indian reservation with very little
13 education, probably a college education, although
14 we're getting better on that thanks to our local
15 community colleges, but it's very hard to overcome
16 because the primary employer on these reservations
17 is the federal government, you know. We have the
18 Bureau of Indian Affairs, we have the Indian Health
19 Service, and we have federal statutes that pertain
20 to felons working with children in schools.

21 MR. PECKHAM: Terry, I hate to do this,
22 but please try to wrap it up in about a minute or
23 so.

24 MR. PECHOTA: Okay. That has an enormous
25 effect on the ability of people to make a

1 meaningful life for themselves. And so I just feel
2 that if there would be something where that could
3 be incorporated into the guidelines so that you
4 could have that opportunity given to the judges,
5 you wouldn't have to saddle all these young people
6 that are coming before the court system with
7 felonies for the rest of their lives. Thank you.

8 MR. PECKHAM: Moving along and quickly,
9 Dr. Frank Pommersheim from the University of South
10 Dakota School of Law and a well-respected Indian
11 law scholar.

12 MR. POMMERSHEIM: I guess the later in the
13 day we get, the faster we have to move. My name is
14 Frank Pommersheim. I teach at the University of
15 South Dakota School of Law. I do a fair amount of
16 writing in the area of Indian law, and I'm a member
17 of the South Dakota Advisory Committee to the
18 United States Civil Rights Commission, and I also
19 serve as an appellate judge on several tribal
20 appellate courts.

21 In thinking about the issues before the
22 commission today, I would probably put them into
23 four areas that it to me makes sense to think
24 about, and that's understanding the issue of
25 context, the issue of consultation, the issue of

1 study, and the notion of consent. And what I mean
2 by context is a little bit building on what Terry
3 and other people have said. I think it's difficult
4 for the commission to really have a full grasp of
5 these issues unless they have some sense of the
6 historical context, because if you just step back
7 for a minute, isn't it odd that the United States
8 Sentencing Commission would be here getting input
9 about what happens to people who commit crimes in
10 Indian country? Why aren't they routinely
11 prosecuted in tribal court? And unless you have
12 some understanding of that background alluded to by
13 discussions of ex parte, Crow Dog, the Major Crimes
14 Act, I think the commission really can't come to
15 grips with what is actually happening here. And so
16 I hope it's not presumptuous, maybe it's the
17 teacher in me, but hopefully members on the
18 commission who don't have a sense of the context
19 would do some reading in the area, have a sense of
20 how the distribution of criminal jurisdiction in
21 Indian country came about, because part of this is
22 friction, racial friction, colonial friction
23 between the federal government and Indian tribes,
24 and that can't just be swept away because you've
25 heard a number of people testify there's concern

1 about why and how the tribes lost jurisdiction in
2 the first instance. And certainly that's outside
3 the purview of your authority to do anything about,
4 but I think it's important that you be informed
5 about it so that you can make informed decisions in
6 the context of the guidelines.

7 And so I think this notion of context is
8 important when people continually give the examples
9 which are very powerful and provocative examples,
10 if you have an Indian person commit a crime against
11 an Indian person on the reservation, he or she is
12 in the federal system, but if a non-Indian commits
13 the identical crime against a non-Indian person,
14 they're going to be in the state system. Well,
15 that's odd; that's not rational. Why is that the
16 case? And if you go to United States v. Antelope,
17 the Supreme Court said that that's not a denial of
18 equal protection, and I agree with that decision
19 because it vindicates tribal sovereignty in a way,
20 but it does lead to some very, very practical
21 problems when you have an Indian perpetrator and a
22 non-Indian perpetrator potentially involved in the
23 very same action, as the several examples were
24 given, and they're going to be treated in different
25 systems. I mean, it's hard to kind of mesh and put

1 that together and see how you're going to get a
2 just result and how that plays out in the
3 community, particularly an Indian community,
4 because people just say, "Well, how is it that I
5 get dragooned into the federal system and my best
6 buddy who I grew up with who's a non-Indian is
7 going to be in the state system?" I mean, it's
8 hard to make that case rationally to those
9 individuals. And I think those of you on the
10 commission have to at least understand the
11 historical routes and the thinking of the court in
12 making that decision, particularly United States v.
13 Antelope.

14 The second issue for me is the issue of
15 consultation, and that's why you're here and I
16 think it's terrific that you are here, but also
17 when you come here, as you probably well know,
18 you're not -- you know, you're not writing on clean
19 slate. All sorts of commissions have come to
20 Indian country and they assumed a part, and their
21 legacy oftentimes has been very little, and I think
22 that's something that you just have to keep in
23 mind.

24 As a member of the South Dakota Advisory
25 Committee to the United States Civil Rights

1 Commission, when the United States Civil Rights
2 Commission came here through the wonderful work of
3 Elsie, there was still a concern, "Well, you came,
4 and they came in the '70s, but they left, but there
5 was very little change." And so people look, I
6 think, with a slightly jaundiced eye to the feds
7 when they come here, even though they come in good
8 faith.

9 I have heard a number of suggestions today
10 that I think can be powerful to make this
11 consultation process an ongoing one. Judge
12 Castillo suggested an advisory committee. Could
13 the United States Sentencing Committee have a
14 specific advisory committee on sentencing in Indian
15 country, and I think that's a very strong idea,
16 particularly if the makeup of that committee would
17 include people from Indian country. And not just
18 people who are in the legal system, who are
19 professionals because we have expertise, but we
20 also have axes to grind and we also have sometimes
21 a limited vision. I think we need people from the
22 Indian community to be on this advisory committee,
23 perhaps both from the perpetrator community and
24 from the victim community because I think they have
25 very valuable insights into potentially the kinds

1 of things that the commission can do.

2 When Chairman Bourland of the Cheyenne
3 River Sioux Tribe was testifying, he said it would
4 be good if the committee could have some kind of a
5 liaison officer, some person that the people in
6 Indian country could know is their representative
7 to the commission because oftentimes, the spatial
8 distance, the cultural distance, things evaporate.
9 It's hard to find people when they leave here. And
10 so if there was a liaison person that members of
11 the public could be in touch with to renew or bring
12 concerns to the sentencing commission, I think that
13 that would be very, very positive.

14 The notion of additional training in
15 Indian country, here in Indian country, about how
16 the guidelines actually play out for both
17 professionals, but perhaps even the opportunity for
18 members of the community to participate in that
19 training, to see that training, to hear themselves
20 how this stuff is supposed to work, because
21 oftentimes the gap in communication is huge. And
22 we have to -- this is an exercise in closing that
23 gap in communication, but I think it has to be an
24 ongoing exercise in closing that gap in
25 communication.

1 And then the third area is this notion of
2 study. We've heard several references to a state
3 study that is about to start. We have Steve
4 Feimer, a colleague of mine at the University of
5 South Dakota, who's going to be leading that
6 study. I think it probably goes without saying
7 that we need some kind of a matching federal study
8 about how the guidelines actually work in Indian
9 country. We have feelings, we have opinions.
10 There are very few studies out there about
11 disparity. I mean, how does the --

12 COMMISSIONER JOHNSON: What is this study
13 seeking to show, the state study?

14 MR. POMMERSHEIM: Well, I need to say it's
15 not seeking to show anything. It's a study to
16 review the notion about whether there is disparity
17 in the treatment of Indian defendants in the state
18 criminal justice system, and it's just at its
19 fledgling stage. Steve can probably address this
20 better than I can. There's going to be a public
21 hearing tomorrow to get input from members of the
22 public about the kinds of things they'd like to see
23 in that study.

24 CHAIRPERSON MURPHY: Dr. Feimer, do you
25 want to --

1 DR. FEIMER: Sure, I'd be glad to.

2 CHAIRPERSON MURPHY: -- give us some
3 materials, but tell us what you're up to.

4 DR. FEIMER: Okay. First of all, let me
5 express my gratitude for the opportunity for myself
6 and my colleague, Dr. Richard Braunstein, who is
7 the principal investigator in this study to address
8 this panel this morning.

9 The purpose of our study is to determine
10 whether or not or to what extent race might be a
11 factor in determining sentence length, and there
12 are only a handful of studies that really get at
13 this issue with regards to Native Americans, and so
14 we feel like we're kind of plowing almost new
15 ground in this area.

16 This is going to differ from other
17 studies, too, in that it's a multiple-stage study
18 in that we're going to be looking from the time
19 that the individual has a filing through the
20 judiciary process. So we're going to be examining
21 the different decision points, not only by the
22 prosecutor to either move the case ahead or to drop
23 it out, but also once the case enters the court.

24 We're starting our study with 1994 data
25 and we'll go up through 1999 looking at

1 approximately 60,000 felony cases filed in the
2 State of South Dakota. At this point what we're
3 doing is conducting focus groups with members of
4 the Native American community. We'll be doing
5 focus groups with state prosecutors and judges to
6 make sure that we have their input in terms of the
7 kinds of variables that we should include in the
8 study. We don't want any gaping holes left in
9 this, and we've provided you with a copy of some of
10 the variables that we'll be extracting from the
11 data, but we're looking for anything else.

12 COMMISSIONER JOHNSON: How many state
13 judges are involved and how many are Native
14 Americans, and how many prosecutors are involved
15 and how many are Native Americans, if you know at
16 this point?

17 DR. FEIMER: I don't know the answer to
18 that question, sir.

19 MR. POMMERSHEIM: Well, there are no
20 Native American judges.

21 COMMISSIONER JOHNSON: No Native American
22 judges?

23 DR. BRAUNSTEIN: There are a few state's
24 attorneys as well. I'm not sure that there are
25 more than a handful.

1 COMMISSIONER JOHNSON: But how many
2 state's attorneys, period?

3 DR. BRAUNSTEIN: Each county has one so
4 there's --

5 COMMISSIONER SESSIONS: 66.

6 DR. BRAUNSTEIN: -- 66.

7 MR. PECHOTA: I'm not aware of any Indian
8 prosecutors.

9 CHAIRPERSON MURPHY: Okay. I am concerned
10 about moving along, so I think you wanted to -- we
11 have to go back for his consent, but do you want to
12 finish with your description?

13 DR. FEIMER: So at this point we're in the
14 process of taking data from the DCI, Department of
15 Criminal Investigation, the courts and
16 corrections. Data has been collected essentially
17 in three different languages and trying to convert
18 it into one language that we can use for doing the
19 analysis. And so we're really at the very
20 beginning stages of this process, and hopefully
21 we'll have preliminary reports by the end of
22 October.

23 MR. PECKHAM: Back to you, Frank.

24 MR. POMMERSHEIM: Okay. One thing in the
25 context of the study, for example, another

1 recommendation that came out of the South Dakota
2 Advisory Committee's report was to look at the
3 issue of racial profiling in the context of state
4 arrests, and there was a bill proposed in the state
5 legislature this year to keep track of potential
6 racial profiling statistics, and that bill failed
7 in the South Dakota Legislature so it didn't pass,
8 and so that's another recommendation of the
9 advisory committee that was at least temporarily
10 rejected by the state.

11 The last thing in terms of my remarks is
12 this notion of consent. Is it possible to use a
13 consent model for the imposition of the Federal
14 Sentencing Guidelines in Indian country? And I
15 would suggest the potential answer is yes, maybe on
16 a pilot study basis. But, for example, if you look
17 at 18 USC 3598 where there is a consent-based model
18 for the imposition of the death penalty in Indian
19 country when you will be prosecuting a crime in
20 Indian country solely because it was committed in
21 Indian country, you can only impose the death
22 penalty if the state -- if the tribe consents to
23 that.

24 And I would suggest at least as a way of
25 thinking that perhaps that's a model that the

1 commission could take a deeper look at. That
2 perhaps the strict use of the guidelines in Indian
3 country would be based on a consent model. That
4 each tribe, through its political process, could
5 decide whether it wanted the Federal Sentencing
6 Guidelines to play out exactly as they do now, or
7 whether they would not want them to play out and to
8 go to more of the discretion model that has been
9 described.

10 And, of course, you have to be careful
11 about discretion. Discretion always depends on
12 whose ox is getting gored by the discretion. I
13 mean, generally it's been put forward as a plus,
14 and I would generally support it as a plus, but
15 you're all seasoned people. That's probably a
16 little bit naive just to say that discretion is a
17 good thing. Particularly in certain contexts where
18 race may be an issue, discretion may actually have
19 an adverse effect. But I think this notion of
20 consent and collaboration are really important.

21 The very last thing I'd like to touch on
22 is that I would hate to see a greater divergence
23 between what the feds are doing and what the tribes
24 are doing. There was some discussion about the
25 tribes, I think, are trying to move more towards a

1 restorative model where the view of a perp -- and
2 this is somewhat simplified and not always true,
3 but I think it is accurate. I think in most tribal
4 communities, the view of a perpetrator is that he
5 or she is a valuable member of the community, and
6 we want to do what is necessary to bring him or her
7 back into the community and serve that community
8 with honesty, integrity and distinction.

9 The view of the Federal Sentencing
10 Guidelines would appear to be to get rid of that
11 person, to cull him or her out of the community for
12 a long time, don't give them any help along the
13 way, and just let them loose when finally they get
14 out. And if I'm accurate about that, I think we
15 have a fairly large divergence between where the
16 Federal Sentencing Guidelines appear to be taking
17 us in Indian country and what more and more tribal
18 people are trying to do within their own tribal
19 criminal justice systems. And this is not to be
20 romantic about restorative justice, that it's going
21 to make everything better, but I think that there
22 is a lot of very valuable ideas in the notion of
23 restorative justice; if you view a perpetrator as a
24 member of a community and you want to heal that
25 person to bring him or her back into the community

1 or if you regard that person as totally outside the
2 framework of the community and always to be held at
3 arm's length, or worse, from being a productive
4 member of that society.

5 And in some small way, I would urge the
6 commission to take a look at that, and I think that
7 fits together, in part, with what Terry was
8 saying. If there could be an opportunity for some
9 pilot projects on some reservations based on
10 consent, based at taking a look at how restorative
11 justice might work with tribes and tribal courts
12 having selected jurisdiction over selected felonies
13 in Indian country, and all of this has to be mended
14 together with the appropriate level of services
15 that can help people to restore them to cultural
16 health so that they can be productive members of
17 their community. Thank you.

18 CHAIRPERSON MURPHY: Thank you.

19 MR. PECKHAM: Moving on, Marty Hansford is
20 the District Manager of the BIA here in South
21 Dakota. Marty? Marty said he may not have much to
22 add, but we'll see.

23 MR. HANSFORD: After listening to
24 everybody all morning, I think just about anything
25 that I could have said has already been said. The

1 Bureau of Indian Affairs Office of Law Enforcement
2 Service as a group generally supports the idea of
3 the judges having more discretionary authority in
4 their decisions, but at the same time, we've also
5 got some reservations as to the judge, what sorts
6 of changes should be made.

7 Speaking on a personal level, I've got a
8 little over 20 years law enforcement experience.
9 Ten of that has been dedicated to Indian country,
10 and of the 28 states that have Indian country in
11 them, I think I've had 25 of them. I have seen
12 prosecutive guidelines ranging from a minimum of
13 \$100,000 loss down to other prosecutors who will
14 take anything you hand to them. There's everything
15 in between.

16 I've seen some federal judges that are
17 fully supportive of Indian country. I've seen
18 other federal judges that basically made the
19 comment that they felt that all tribal police
20 officers should be arrested for impersonating
21 police officers.

22 There's a lot to be considered in a
23 decision like this, and whatever decision you
24 ultimately make, you know, we only ask that full
25 and careful consideration to all aspects of the

1 victim, suspects, the community, that every
2 possible area be considered before any drastic
3 changes are made.

4 COMMISSIONER CASTILLO: I don't mean to
5 put you on the spot, especially when we're at the
6 tail end of this hearing, but what's your view of
7 the FBI?

8 MR. HANSFORD: Same experience.

9 COMMISSIONER CASTILLO: Some good, some
10 bad?

11 MR. HANSFORD: There's some excellent guys
12 out there and women. Others that make no bones
13 about it, that they'll tell you to your face that
14 they want no part of it.

15 COMMISSIONER CASTILLO: Do you think the
16 FBI does enough to recruit Native American agents?

17 MR. HANSFORD: I think they do a good job
18 of recruiting, but Indian -- people coming off the
19 reservation, you know, we're handicapped by our
20 educational systems, different language barriers,
21 cultural barriers. There are not a lot of our
22 folks that can afford or even want to come off the
23 reservation and go to a major university. They
24 can't afford it. It's too far away from home. And
25 with the standards that the FBI sets for their

1 agents, there's not a large pool of Indian people
2 to draw from. So it's not that the FBI's not
3 trying; it's just that there's a lot of improvement
4 that could be done in education.

5 COMMISSIONER CASTILLO: Thank you.

6 MR. PECKHAM: Dr. Feimer, do you have
7 anything more that you'd like to address?

8 DR. FEIMER: No. I'd just mention that
9 we're going to be having one of our focus group
10 sessions tomorrow at 10:00 in the Civic Center,
11 Room 202, and we certainly invite people that want
12 to contribute to this study, the study that's being
13 done in the fresh air, so to speak, and we welcome
14 and value your input.

15 COMMISSIONER JOHNSON: How long is the
16 study going to take?

17 DR. FEIMER: Well, that depends a little
18 on the kind of difficulties we have converting
19 data, but we expect it'll take probably till the
20 end of October or perhaps November.

21 CHAIRPERSON MURPHY: Well, I think we're
22 all interested in learning more about it. I'm sure
23 that Professor O'Neill in particular, who is always
24 thinking of various interesting surveys and
25 research projects that can be done, he'll be

1 particularly interested, but we all will be and
2 want to learn more about it.

3 I really never thought we would get to a
4 completion so close to the time. I must say I
5 think we've all looked forward to this hearing, and
6 one of the sobering aspects about coming out here
7 was the recognition that it can create expectations
8 that we necessarily can't meet because of our
9 jurisdiction, complexity of the problems and so
10 on. I think we expected that there would be many
11 of the statements that we've heard today about the
12 disparity and the frustration and the lack of
13 understanding about why some of these things have
14 been the way they are.

15 But speaking as an individual right now, I
16 think it's just been really impressive the breadth
17 and the depth of the testimony that has come and
18 the creativity with some of the proposals, and
19 there's a lot for us to think about here.

20 You know, when I walked in, there was one
21 person sitting at one of the tables, and that was
22 President Kindle from the Rosebud -- from your
23 tribe, and so I went up and introduced myself, and
24 he said, "What are you going to do about this?"
25 That was before we had heard anything, and I said,

1 "Well, we're going to listen, and then we're going
2 to go back and we're going to ponder." And we're
3 going to have a lot -- people have been taking
4 notes, people have been thinking, you know, there
5 have been questions.

6 We thank everybody that's participated on
7 the panels, that has or will be giving us written
8 materials. We want to stay in touch. We'll be
9 thinking about some of these ways that have been
10 suggested about that, and we have a lot of work
11 before us.

12 So does any commissioner want to add to
13 this? I hope I've expressed our views. All
14 right. Commissioner Castillo has suggested that it
15 would be helpful probably to set a date for the
16 written submissions to be in. Right now I believe
17 we had said they had to be postmarked on June 21,
18 and I think his suggestion is a good one, and that
19 is that it would have to be postmarked by the last
20 day in July.

21 Well, with that, I will adjourn this
22 hearing. Thank you very much for your presence and
23 your contributions.

24 (The hearing was adjourned at 1:02 p.m.)

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