United States Sentencing Commission Public Hearing
February 13, 2014, in Washington D.C.
Remarks of United States District Court Judge Roberto A. Lange
United States District Court for the District of South Dakota

I. Introduction

Good morning and thank you for inviting me to address the Sentencing Commission. For you to understand my experience and perspective, I believe it appropriate to provide some background about the District of South Dakota and myself before providing my thoughts on the Sentencing Guidelines and some of the proposed revisions.

II. Background in District of South Dakota

I have been a federal district court judge for four years and four months in the District of South Dakota. There are nine Native American Indian Reservations within the District of South Dakota. According to the United States Census Bureau, of the poorest eleven counties in the United States based on per capita income, five of them are in South Dakota and each of those five counties are on Indian Reservations. See FTC v. PayDay Financial LLC, 935 F. Supp. 2d 926, 930 (D.S.D. 2013). The area comprising South Dakota Indian Reservations, known as "Indian country," consists of some of the least desirable land in the state for agriculture, ranching, industry, or development. Unemployment runs over 50 percent in Indian country in South Dakota; alcoholism and alcohol abuse is rampant; and housing conditions often are abysmal and overcrowded. The rates of all types of death–suicide, homicide, accident, and natural causes–are elevated in Indian country. According to one survey, the average Native American male from a South Dakota reservation has a life expectancy of 58 years. United States v. Boneshirt, 662 F.3d 509, 523-24 (8th Cir. 2011) (Bright, J., dissenting) (citing Christopher J.L. Murray et al., Eight Americas: Investigating Mortality

Disparities across Races, Counties, and Race-Counties in the United States, 3 PLoS Med. 1513, 1514 (2006).

Crime rates likewise are higher in Indian country than elsewhere in the United States. It has been widely reported that one in three Native American women are sexually assaulted at least once during their lifetime.

Based on the special trust relationship that the federal government has with Indian tribes and this continent's indigenous people, as incorporated in federal law through, among other things, the Indian Commerce Clause of the Constitution, the Major Crimes Act, and Assimilative Crimes Act, federal criminal jurisdiction extends to felony offenses in Indian country where the victim or the defendant is an "Indian." "Indian" has a distinct legal definition, meaning a person of Native American ancestry who is a tribal member or otherwise affiliated with a tribe. St. Cloud v. United States, 702 F. Supp. 1456, 1459 (D.S.D. 1988); see also United States v. Stymiest, 581 F.3d 759, 763-64 (8th Cir. 2009). I use the word "Indian" in my remarks, not intending any disrespect for our indigenous population, which has endured substantial disrespect and injustice through much of the history of colonization and of the United States, but because that word has a distinct legal meaning and is part of our statutes and case law.

The caseload in federal court in South Dakota therefore is unique. Sixty-four percent of defendants in federal court in South Dakota are Native American, and 76 percent of those seen on revocation cases are Native American. The District of South Dakota ranks first among the 94 federal district courts in the percentage of cases involving violent crime, first in the percentage of cases involving sex crimes, and first in the percentage of cases involving juveniles. Last year the District of South Dakota ranked second among the 94 federal court districts in the number of criminal trials

conducted per judge.

I handle criminal cases in the Central Division of the District of South Dakota, where I presently see cases from five different Indian Reservations. I see a higher percentage of Native American defendants and violent crimes than do my fellow judges in the District of South Dakota. My criminal caseload for calendar year 2013 was 209 cases involving a total of 239 defendants, plus approximately 50 additional instances of supervised release or probation revocations. Although I do not keep statistics on my criminal caseload, I estimate that approximately 85 percent of the cases filed in front of me arise from Indian country, and that nearly all of the defendants in those cases are Native American. Of these federal criminal cases arising out of Indian country, the majority are crimes of violence–sexual assaults, assaults resulting in serious bodily injury ("ARISBI") or assaults with a dangerous weapon ("AWDW"), domestic assaults, homicides, burglaries, and assaults on federal officers ("AFO"), including on tribal police officers. The number of such cases is increasing; the criminal caseload in the Central Division of the District of South Dakota has nearly doubled since 2009, and the number of defendants charged has more than doubled since 2009, the year during which I became a federal judge. The increase in caseload principally is in cases involving crimes of violence, including sex crimes.

III. Common Threads in Violent Crime Cases in the District of South Dakota

Violence against women, including sexual assaults, is among the major problems in Indian country. The vast majority of the sexual assault cases in front of me involve a male defendant and a female victim or alleged victim. In almost all such cases, both the alleged victim and the defendant are Native American. The only female defendants whom I have seen in sexual assault cases were charged as an aider or abettor or charged with an offense of child abuse as somewhat of an accessory

after the fact.

Most of the perpetrators of sexual abuse against children under the age of 12 are relatives—uncles, stepfathers, cousins, grandfathers, half-brothers—of those children, or are invited guests in the homes where those children live. Abduction of the child for purposes of perpetrating a sexual abuse is even rarer in my experience than the rare man-on-man sexual abuse. Alcohol may or may not be a factor in the cases of sexual abuse of a child.

For cases involving sexual abuse of an adult female, alcohol or some other form of intoxication typically is involved. The most common scenario is a house party where the woman either passes out or is intoxicated and where the male, usually drunk to a lesser degree, rapes or otherwise sexually abuses the woman. Most of the aggravated sexual abuse by force cases that I have seen begin with a male taking advantage of an intoxicated female, the female awakening, and the male then completing the sex act by restraining the female with his hands and body weight. A rape where the female is unacquainted with the male or where the male stalks the female is highly unusual in the cases filed in front of me. I have seen only two cases thus far where a sexual assault culminated in a murder.

Most of the ARISBI, AWDW, or AFO cases involve male defendants and male victims. A male defendant in an ARISBI or AWDW case is more likely to have a male victim, unless it is a domestic violence case. A female is a victim of the ARISBI or AWDW by a male defendant in perhaps no more than around 20 percent of the cases that I see. There are gangs in Indian country in South Dakota—including those who deem themselves affiliated with the Crips, Bloods, Gangster Disciples, and Surenos 13s—who assault those who wear rival gang colors, for instance, or "gang" a person with whom they have a dispute. There also are assaults, often alcohol fueled, over women,

family issues, grudges, or other reasons that make little sense to a sober person considering the offense months after the fact.

Perhaps 10 to 15 percent of such cases involve a female defendant, and of those cases almost all such defendants have been drinking or are otherwise intoxicated. A female defendant in an ARISBI or AWDW case is much more likely to have a female victim, unless she is part of a larger group of defendants assaulting a male victim.

Most of the murder cases that I see stem from assaults—usually involving knives or bats or similar blunt force objects—where the injuries inflicted cause death. All of the defendants in these types of cases before me thus far have been men and most of the murder victims likewise have been male, although I have seen a couple of murder cases where a man killed his domestic partner or wife. I all too frequently see involuntary manslaughter cases where drunk driving or an intoxicated parent passing out on top of an infant is the cause of death. Alcohol or other intoxication is almost always involved in the homicide cases before me, whether these cases are involuntary manslaughter, voluntary manslaughter, or murder.

The majority of violent crimes on South Dakota Indian Reservations occur when the defendant is intoxicated or otherwise impaired. It is harder to achieve deterrence in cases where defendants have impaired and impulsive thinking, as they are not inclined to take the time for rational consideration of the ramifications of a crime.

In the past two years, there has been an increase in the number of domestic violence cases indicted under 18 U.S.C. § 117 for domestic violence by a habitual offender. Such prosecutions have a potential for deterrence of such crimes. All defendants thus far indicted and convicted in cases in front of me have been men whose victims are their female domestic partner or spouse. In

most of those cases, the man had been convicted in tribal court on at least two occasions of an assault against a domestic partner frequently with additional tribal arrests suggesting other incidences of domestic abuse. The tribal courts have concurrent jurisdiction with federal court in cases where a tribal member is the charged defendant. Tribal courts typically handle misdemeanor type offenses and family law issues where tribal members are the defendants or parties. Often the sentence imposed by the tribal court is short, certainly by federal sentencing standards, providing somewhat limited deterrence to future offenses. A case "going federal," as tribal members often put it, can provide some deterrence through the more significant sentence and federal supervised release thereafter.

Fashioning terms of supervised release can be a challenge in domestic assault cases because a no contact with the victim provision often is unworkable. The defendant and the victim may have children together. The victim sometimes wants to remain with the defendant and is requesting leniency or even testifying that she is to blame for the incident or volatile relationship.

There has been information that many domestic assault cases involve a white male assaulting his Native American wife or partner. I have seen very few cases where the defendant is white and the victim is Native American, even though those cases are subject to federal criminal jurisdiction if arising in Indian country. There may be concurrent jurisdiction in state and federal court over non-Indian defendants who commit crimes in Indian country, so it is conceivable that such non-Indian defendants end up in state criminal court.

IV. Thoughts on Proposed Amendments to USSG § 2A

As for the proposed amendments to the Sentencing Guidelines, I feel best positioned to comment on suggested changes to USSG Chapter 2 Part A, which captures the majority of cases on

which I sentence. First, on the proposed changes to USSG § 2A2.2 (aggravated assault), I, and the probation and pretrial services officers with whom I have discussed the matter, prefer what is described as Option Two, with the enhancement for "strangling, suffocating, or attempting to strangle or suffocate" being no more than a three-level increase (and perhaps limited to a two-level increase), and with the cumulative adjustments for the degree of bodily injury and mode of producing the bodily injury capped, whether at a ten or twelve level increase. USSG § 5K2.8 of course remains as a ground for possible upward departure if the defendant's conduct was "unusually heinous, cruel, brutal, or degrading to the victim." As it is, with the absence of parole available to federal inmates, the guidelines for assault cases tend to result in heavier sentences for Native Americans under federal jurisdiction than what non-Indian defendants receive in state court in South Dakota, given the eligibility with state sentences for parole and for a state judge to reconsider and reduce an initial sentence.

An assault through strangulation or suffocating is particularly terrifying and potentially life threatening, and thus deserving of some enhancement. From the very few cases before me where such an assault has occurred, there may or may not be "bodily injury" through bruising of the neck, but rarely would there be "serious bodily injury," as those terms are defined in USSG § 1.B1.1. Some enhancement in the offense level thus makes sense, as it may not be captured by a bodily injury enhancement. However, an enhancement beyond two or three levels and without an upper cap on the enhancement in USSG § 2A2.2 could result in ranges unduly high and unwarranted sentencing disparities.

Second, as for the proposed amendment to USSG § 2A2.3 (minor assault), I and those probation and pretrial service officers with whom I have spoken, believe that it is appropriate to have

an enhancement both for substantial bodily injury and for protection of those victims under the age of sixteen or who are a spouse, intimate partner, or dating partner of the defendant. We prefer a Specific Offense Characteristic subsection to USSG § 2A2.3 that would provide a two-level increase if the victim sustained bodily injury, and a three-level increase if the victim sustained substantial bodily injury; then we believe it proper to have a separate one-level increase that would apply if the victim was under sixteen or was the spouse, intimate partner, or dating partner of the defendant. That is not one of the options outlined in the proposal, but is what we thought most fair.

Third, as to the proposed changes to USSG § 2A6.2 (stalking or domestic violence), I and those with whom I spoke, believed that if the aggravated assault guidelines are going to have a separate enhancement for "strangling, suffocating, or attempting to strangle or suffocate," then guidelines covering stalking or domestic violence likewise should have a separate enhancement. That is, we favor option one of the two options proposed.

V. General Thoughts on Sentencing Guidelines and Areas of Frequent Variances

By way of further background, I am one of three full-time (non-senior status) judges in the District of South Dakota, with one of the other two being the former United States Attorney for the District and the other being the former head of the Federal Public Defender's Office for North and South Dakota. Although I was on the CJA panel in the District of South Dakota, my practice for twenty years was civil litigation and I only received federal appointments in very rare circumstances. Whatever opinions I have concerning the guidelines are of recent origin. By coincidence, the only argument that I gave before the Supreme Court of the United States was on January 12, 2005, a day when the Supreme Court began its session by announcing its decision in United States v. Booker, 543 U.S. 220 (2005).

I find the sentencing guidelines an extremely valuable tool and vary from the advisory guideline range less frequently than the average federal district court judge. I very much respect and appreciate the work of those who seek, through the sentencing guidelines, to provide guidance to us federal judges and greater consistency nationwide in sentencing. However, the variability in the circumstances of each crime and the inherent uniqueness of each individual defendant make it difficult for me to conceive of an era when the sentencing guidelines were mandatory.

I find the cases where I tend to vary the most from the guideline range to be convictions of felon in possession of a firearm (USSG § 2K2.1; 18 U.S.C. § 922), the statutory rape type of sexual abuse (USSG § 2A3.2; 18 U.S.C. § 2243(a)), and the fortunately rare child pornography case (USSG § 2G2.2; 18 U.S.C. §§ 1466A, 2252, 2252A, 2260(b)).

For the offense of felon in possession of a firearm, I have varied up and down from the guideline range, primarily based on how and why the felon is in possession and/or used the firearm. On the one extreme, I have varied upward to the statutory maximum when sentencing an individual recently out of prison who was burglarizing homes to steal firearms and other items and who had a violent encounter with a homeowner who interrupted one such burglary. United States v. Dowty, 11-cr-30008-02-RAL. On the other extreme, I gave a probationary sentence to an individual who, some fifteen years earlier had completed a sentence on a felony conviction, had not been back in trouble, was a productive member of society, and who had a shotgun in his control apparently not realizing that he was prohibited from possessing the gun. United States v. Besherse, 11-cr-30161-RAL. Indeed, this fellow—Wayne Besherse—had previously applied for and received a hunting license, although he was not using or possessing the shotgun for hunting or sporting purposes at the time of the incident. Besherse saw a group of men trying to break into his father's car outside his

rural home, took his shotgun, fired it into the air to scare the men, then "tagged" their car by firing into the rear quarter panel. Besherse then called the tribal police to report the incident and to advise that he had fired his shotgun to tag the car for the police to identify. Besherse was dumbfounded to then be arrested as a felon in possession of a firearm. Besherse was not the sort of person where the interests of society in punishment, deterrence, or protection militated for incarceration, in my opinion. I have seen an array of cases toward each of these extremes and have varied upward and downward in such cases with some frequency, which indicates to me that USSG § 2K2.1 may need some revision.

Similarly, the statutory rape cases can present a wide array of circumstances. Of course, we need to protect our children from sexual activity, even in instances where the child thinks himself or herself mature enough for sex. Under the federal statute, a person commits a crime when that person, being at least four years older, has sex with a child under the age of sixteen. 18 U.S.C. § 2243(a). To me, two things not accounted for in the guidelines make a difference in determining the sentence: 1) the age and maturity difference between the adult and the child; 2) whether the defendant was in a dating and caring relationship with the child as opposed to simply exploiting the child for sexual gratification.

There exists an enhancement under USSG § 4B1.5 if the sexual relationship occurred more than once, that sometimes captures two who may be just over four years apart and who are engaged in an intimate and caring relationship. By way of illustration, and drawing from facts from cases like United States v. Ennors Quick Bear, 12-cr-30032-RAL, and United States v. Justin Black Moon, 10-cr-30071-RAL, there may be an 18-year-old high school senior who is just over four years older than his 14-year-old high school sophomore girlfriend, and the parents of both the girl and young man are

aware of and approve of the relationship. When the 14 year old gets pregnant, the authorities become aware of the unlawful sexual act, and the 18 year old confesses to having two or more instances of sexual intercourse with the girl. The 18-year-old defendant wants to be a parent and father to the child and remain with the young mother, and the young mother wants the same. In such a situation, USSG § 4B1.5 applies a five-level enhancement to the offense level because the defendant engaged in "a pattern of activity involving prohibited sexual conduct," which means "if on at least two separate occasions the defendant engaged in prohibited sexual conduct with a minor." That defendant then is faced with a higher guideline range than a defendant—similar to cases I have seen, including United States v. Sean Johnson, 12-cr-20044-RAL and United States v. John Menard, 13-cr-30039-RAL—who, say, is 38, is at a drinking party where a 13-year-old girl happens to be among those drinking, and seduces the intoxicated 13-year-old girl for the sole purpose of one-time sexual gratification without any concern for the 13-year-old girl. I routinely vary downward for those who are closer in age and in a relationship that is an intimate and caring one, and vary upward from the guideline range to sentence more severely the older defendant whose conduct strikes me as more reprehensible and egregious. I believe that there should be some consideration in the guidelines about whether the enhancement in USSG § 4B1.5 should apply to statutory rape cases where a dating relationship exists and where parents are aware of and consent to such a relationship.

I know that you have heard a great deal about child pornography cases and criticism of provisions in USSG § 2G2.2, and I will not dwell on those, other than to observe that the offense level calculation gets very high in a hurry in child pornography cases, particularly when each video is to be counted as constituting at least 75 images under USSG § 2G2.2, Application Note 4(B)(ii), and a two level computer use enhancement routinely applies as all such cases seem to involve

electronic images. The guideline range in child pornography cases frequently can equal or exceed the range that I consider for someone who raped a woman not capable of consenting. I think that result to be anomalous. When a credible psychosexual examination reveals that the defendant in a child pornography case is at very low risk to act out or repeat the behavior and when the defendant appears to have had fleeting curiosity and not be an actual distributor of such vile and offensive filth, I am inclined to vary downward.

There is a class of criminal cases in the District of South Dakota where we struggle to come up with any offense level calculation. That is the class of cases charged as criminal child abuse under 18 U.S.C. § 1153(b), which in turn incorporates state criminal law as a gap-filling measure. Child abuse cases take many different forms, often involve female defendants, and would be difficult to devise a guideline to cover. Some such cases are where parents conceal and fail to report instances of their child allegedly being sexually abused by a relative, where the nature of the offense is similar to misprison of a felony but of a more pernicious nature. Other cases involve a mother leaving children in the care of an individual whom she knows or should know has sexually abused her children, which is akin to but falls short of aiding and abetting. Other instances involve criminal abusive care of a child that may not constitute an assault. Besides these child abuse convictions, I find the guidelines to be quite comprehensive.

IV. Closing

Thank you for the opportunity to provide my thoughts on these subjects. I very much appreciate your work on the Sentencing Commission. I invite any questions that any of you may have for me.