STATEMENT TO UNITED STATES SENTENCING COMMISSION
FEBRUARY 13, 2014
WASHINGTON, D.C.
JUDGE KIRK G. SAUNOOKE, ASSOCIATE JUDGE
THE CHEROKEE COURT

Good morning to the Commissioners on behalf of the Eastern Band of Cherokee Indians I would like to thank you for this opportunity to address the Commission and to offer comments as to the proposed changes to the Sentencing Guidelines.

My name is Kirk G. Saunooke and I am an enrolled member of the Eastern Band of Cherokee Indians born and raised on the Qualla Indian Boundary located in beautiful Western North Carolina at the base of the Great Smoky Mountains National Park, the most visited national park in the United States. My Tribe has just over 14,000 members and our Reservation is approximately 56,000 acres split primarily between Swain and Jackson counties with a small portion of the reservation located in Graham and Cherokee county about an hour away from the seat of government located in Cherokee. The tribal government is made up of three separate and distinct branches. The Executive headed by a popularly elected Principal Chief and Vice-Chief. The Legislative made up of six townships with two representatives from each township with a weighted vote apportioned by the population of the township. And the Judicial Branch consisting of a trial court with two trial judges and a Supreme Court with three justices that hear all appeals from the trial division.

I would like to give the Commission some insight into my personal background and my career with the EBCI. I started out as a Magistrate with the Court of Federal Regulations (CFR Court) in 1996. The CFR court was operated by the Bureau of Indian Affairs and had a very limited grant of jurisdiction. The court handled only misdemeanor crimes and only had criminal jurisdiction over members of the Tribe. My career with the Tribe continued as the Tribe took

over all Court operations in April of 2000 under the provisions of a 638 Indian Self-Determination Contract which actually made the Court a full Tribal Court. I did not have a law degree and one was not required to be an associate judge. A law degree as well as a North Carolina bar license was required to be Chief Justice and Chief Judge. I worked for two years as a trial judge then in August of 2002 I enrolled in law school at The University of North Carolina at Chapel Hill and graduated in 2005. I returned to work at the Tribal Court and passed the North Carolina bar exam in 2008. Today the EBCI requires all judges and all attorneys practicing before the Court to a valid North Carolina Bar license and be a member in good standing with the North Carolina Bar. I note that our Court was among the first to comply with the Tribal Law and Order act of 2010 in this regard. The Court does allow *pro hac vice* admissions on a limited basis.

I have watched the Tribal Court evolve from a very limited and often disrespected court to one recognized as one of the leading Courts in Indian Country. We are on the verge of expanded jurisdiction over non-Indians pursuant to the re-authorization of the Violence Against Women Act of 2013. Once our Court was not respected by our fellow state courts; now the state of North Carolina has enacted legislation giving full faith and credit to the judgments of the Tribal Court. At one time we had virtually no contact with the state and federal judges; now we regularly participate in conferences with the North Carolina District Court Judges and the U. S. District Judges consider tribal convictions when sentencing defendants in federal court. Superior Court Judges in North Carolina now routinely transfer civil cases to the Tribal Court when dealing with tribal interests.

My tribal court has changed greatly since first starting as a one room court in the early 1980's. Later this year we will celebrate the grand opening of a new state of the art justice center

with two courtrooms including a police department and, for the first time ever, a new jail capable of holding over 75 inmates.

I was asked to provide some insight into factors that I consider when dealing with the imposition of judgments on defendants in domestic violence cases.

The most significant sentencing inquiry in to determine the lethality factors in each case, in an effort to distinguish extremely dangerous coercive control battering from situational battering. The following are some of the factors I consider when sentencing criminal defendants in domestic violence actions:

1. Severity of the crime:
    a. Weapon used?
    b. Hospital visit?
    c. Permanent scaring?
    d. Bruising?
2. Criminal history of the defendant:
    a. Look especially to previous violent crimes towards women.
    b. History of fighting and violent crimes?
    c. How many times has defendant been to court for domestic violence?
    d. Look at state and tribal criminal histories.
3. Substance abuse issues:
    a. Does the defendant have a history of substance abuse?
    b. Is the DV always connected to substance abuse?
    c. Consumption of alcohol then abusive behavior towards women?
4. Economic condition of the parties:

a. Reservations are economically depressed areas.

b. Are the parties working?

c. Is lack of work and financial situation causing stress and violence?

5. Repeat offenders:

a. Has this happened before?

b. Not just with present victim but with past victims?

c. Look to past protective order history with defendant.

These are some, but not all of the factors to be taken into consideration when sentencing a domestic violence defendant. Each case is unique and presents its own requirements for consideration.

Upon the recommendation of the Tribal prosecutors they offer first offenders the option of a batterer's treatment program. However, this is usually not offered to particularly violent crimes. Upon successfully completing this program, participants may petition the Court for the charges to be dismissed. However, if they fail the program or are dismissed they are, in most cases, sentenced to active prison time.

The most severe punishment is usually reserved to repeat offenders and defendants who have committed violent crimes against the victim.

Economic factors also need to be given careful consideration as lots of people at the bar of justice are unemployed or are really struggling financially and this has caused a great amount of stress on the parties. Imposition of a large fine is not always best as this will most likely take much need money from the basic needs of the children, if any are involved, and will create further stress down the road which in turn could lead to more domestic violence.

As for the specific issues for comment raised by the proposed amendments to U.S. Sentencing Guidelines in light of the Violence Against Women Act of 2013 ("VAWA") changes to the Assault and Domestic Violence statutes, please find the comments of the Eastern Band of Cherokee Indians below:

2. PROPOSED AMENDMENT: VAWA

(A) Assaults

Issues for Comment:

1. Given the fact that Congress has sought to punish a specific mechanism of a domestic assault in 18 U.S.C. Section 113(a)(8) by criminalizing assault by strangulation/suffocation, it is clear that these types of domestic assault are considered to be more serious. The Eastern Band of Cherokee Indians ("EBCI") has recently passed legislation as well specifically criminalizing assault by strangulation/suffocation, making the violation a new felony level crime pursuant to the authority granted by the Tribal Law and Order Act of 2010. The EBCI recognizes that assaults of this nature are very dangerous and easily lethal. Therefore, the EBCI would support a specific Guideline enhancement for offenses involving strangling, suffocating, or attempting to strangle/suffocate. The EBCI would support applying such an enhancement separately from other enhancements for bodily injury, etc. However, given the data and statutory application to domestic situations of 113(a)(8), the EBCI would support applying this enhancement only in cases of domestic violence. The EBCI would recommend referencing the new offense in 113(a)(8) to both the Aggravated Assault Guideline and the Domestic Violence Guideline. The Domestic Violence Guideline should be amended to include strangling/suffocating or attempting to do so as a separate aggravating factor independent of bodily injury.

2. Generally, the EBCI would be in support of lengthy terms of Supervised Release following incarceration in cases involving domestic violence. Although the ability to impose this as a mandatory provision given the statutory requirements may be somewhat limited, it is the belief of the EBCI that the Guidelines should specifically recommend where possible lengthy terms of Supervised Release in these cases. Based on the experience of the Cherokee Court in handling cases of domestic violence, the longer authorities can maintain supervision over individuals convicted of this offense, the less likely the chance for recidivism becomes.

3. (A) Since the new assault statutes are separate offenses under the Code, the EBCI would recommend reference to the Assault Guidelines for punishment. These Guidelines should be updated to provide for the new offenses in 113(a)(1) and (a)(2). Enhancements of at least 6 levels or more for these violations should be included.

   (B) The EBCI generally would be opposed to the application of cross-references in the Guidelines. Generally, those convicted of any particular crime should be punished in accordance with the Guideline referenced therefore. Instead, enhancements or higher

base offense levels more appropriately provide for increased punishment in connection with the behavior targeted. As for treating the new Assault provisions in (a)(1) and (a)(2) as a completed sex offense for the purposes of applying the various enhancements listed in (B)(2) – (6), this is really not an issue specific to the Tribal provisions of VAWA, and the EBCI does not desire to have any input on this issue other than as stated above.

EBCI Specific Comment:

The majority of domestic violence crimes occurring in Cherokee are misdemeanor level crimes of varying degrees. The new VAWA provisions authorizing Special Domestic Violence Criminal Jurisdiction for tribes will be especially helpful to the EBCI because cases involving non-Indian perpetrators against Indian victims have thus far been very difficult to prosecute. Given the fact that the Federal system is not designed to handle the large volume emergent nature of many of these cases, getting justice in cases involving non-Indian perpetrators on Indian victims has been difficult for the EBCI. That fact coupled with the historical lack of appropriate law and punishment provisions for misdemeanor level assault crimes in Federal Court, have tremendously complicated how these cases have been handled in Cherokee, leading to injustice in many situations. For example, there have been cases of domestic assault in Cherokee which have only been punishable only as petty offenses in Federal Court due to the language of 18 U.S.C. Section 113. This is simply unacceptable. Even if the EBCI is able to implement the Special Domestic Violence Criminal Jurisdiction authorized by VAWA, there will still be cases to which it does not apply (VAWA requires certain ties to the community for this jurisdiction to take place). The EBCI is hopeful that the Sentencing Commission can not only make appropriate amendments to the Guidelines to account for the VAWA amendments but also that the Commission will consider generally increasing punishment provisions in cases of misdemeanor level domestic assaults and recommend more stringent supervision to those offenders who are not sentenced to incarceration.

(B) Major Crimes Act, etc.

Issues for Comment:

1. The EBCI does not believe that any Appendix A reference to 18 U.S.C. Section 1152 is appropriate, and it should be deleted from the Appendix. Since 1152 is a jurisdictional "hook" much like interstate commerce or "SMTJ" and since it applies the general laws of the United States to Indian Country, it would be too difficult to include every possible Guideline reference that statute could possibly implicate. Although 1153 is also really a jurisdictional "hook", the references to 1153 are more appropriate given the fact that there are a limited number of potential Guideline references possible for that statute due to the enumeration of crimes within the statute.

(C) Domestic Violence and Stalking

EBCI Specific Comment:

It remains unclear even after the VAWA amendments whether 18 U.S.C. Sections 2261, 2261A, and 2262 could apply in the case of a non-Indian perpetrator against an Indian victim under 18 U.S.C. Section 1152 (applying "SMTJ" law to Indian Country); however, the VAWA "presence" amendment to the "SMTJ" jurisdictional element would certainly make for a better argument. It would have been preferable to have Congress specifically state that these crimes of domestic violence apply when the jurisdictional elements of Section 1152 are met. However, the VAWA amendments to the assault crimes and the addition of all felony level assaults to the Major Crimes Act will help fill the gap. Again, there remains a gap in Federal law for misdemeanor crimes of domestic violence. This has no impact anywhere other than in Indian Country and perhaps other Federal enclaves. Even though the Special Jurisdiction created by VAWA will help, the gap will remain in Tribes unable to implement and in cases where the specific requirements of the Act are not met (i.e. the perpetrator lacks ties to the community).

The EBCI has also learned that repeat perpetrators of crimes of domestic violence as well as those who violate domestic violence protective orders pose special dangers to the community and their victims. For this fact, the Cherokee Court routinely imposes stiffer sentences in those cases. The EBCI would strongly recommend that the Commission consider creating enhancements in all of these guidelines for offenders who have either been convicted of a domestic violence offense previously or have violated a domestic violence protective order in the perpetration of the assault.