

UNITED STATES SENTENCING COMMISSION

NATIVE AMERICAN ADVISORY GROUP

PUBLIC HEARING

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NATIVE AMERICAN ADVISORY GROUP

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INTRODUCTORY REMARKS

CHAIR MURPHY: I would ask the commissioners please to be seated.

We have a new face at our table in the person of John Richter, who is the Chief of Staff in the Criminal Division of the Department of Justice and is going to be with us until the Department picks a new ex officio commissioner. So we want to welcome you.

Commissioner O'Neill has a class at George Mason Law School this morning, so we have an empty seat for him.

With that, though, I would like to convene our meeting. We know that the Native American Advisory Group has been hard at work for a period of 18 months, and we have had an opportunity to look over your written report in the last few days, but we have really been looking forward to this day when we can meet with you and hear what you want to tell us about your work and your conclusions or recommendations.

So with that, I will turn it over to Chief Judge Lawrence Piersol, who served as chair of the group.

INTRODUCTION OF GROUP MEMBERSHIP AND CHARGE

INTRODUCTION OF SUBCOMMITTEE CHAIRS

JUDGE PIERSOL: Thank you, Judge Murphy, and members of the Commission, thank you first of all for creating this, and I believe you did a fine job in selecting the members, with the possible exception, of course, of the chair, being me. But the membership -- by the way, as you know, in the back, Appendix A gives a little thumbnail sketch of some of the experience of the different members, but out of the 14 members, I would like to mention that eight have tribal affiliations but do very, very different work from directing law enforcement for the BIA in the case of Bob Ecoffey to being a litigator in the United States Attorney's Office in Arizona and having other responsibilities there, Diane Humetewa, to my left, to working with the Department of Justice, Tracy Toulou to my right, and we have a wealth of experience that was brought

to this committee -- to this group, I should say.

The charge to us was to consider any viable methods to improve the operation of the Federal Sentencing Guidelines in their application to Native Americans under the Major Crimes Act. Of course, that excludes naturally looking at, for instance, drug offenses because drug offenses don't have anything to do with the Major Crimes Act. The federal legislation applies to reservations just like every place else.

We concentrated on the three areas that most impacted the native country out of the Major Crimes Act, and that's murder and manslaughter, sexual abuse and aggravated assault, and I appointed subcommittees.

The Murder/Manslaughter Committee made an initial report to John Sands and myself, reported to you last fall because you had impending actions you were considering as well as Congress being anxious. Then also the Assault Committee was headed by Tracy Toulou.

I should mention on the

Murder/Manslaughter Committee that Diane Humetewa, who will speak to you today on behalf of that committee was also on the committee, as was Marlys Pecora, who is with us here from the United States Attorney's Office in South Dakota, and also Thomas LeClaire was on that committee.

The Assault Committee, Tracy Toulou, as I mentioned, was the chair, and Robert Ecoffey, the law enforcement head for BIA, was on that committee also, as well as Philip Hogan and Elsie Meeks.

Elsie Meeks is the Vice Chair of the U.S. Commission on Civil Rights and also a businesswoman from South Dakota. Phil Hogan was our former United States Attorney from South Dakota. He is also on that committee, now the counsel for the Indian Gaming Commission.

Then the Sexual Offenses Committee, Tom Peckham, is here with us, and he was the chair, and Marlys Pecora was there on that and also Maggie Jensen, the Chief of Probation in Arizona, and Judge Molloy, my counterpart in Montana, who is the chief judge in Montana.

Then the Drafting Committee was headed by Celia Rumann, who is to my right, who did a lot of work. She was assisted by John Sands, Tom Peckham, Kevin Washburn, and Tracy Toulou, as the chair. Kevin was added into that to do the drafting.

I can't speak highly enough of the work that all the members of the committee did.

Now, a major impetus toward our creation by you was probably the Civil Rights Commission hearings in 1999 in Rapid City, South Dakota, and then the subsequent hearings that your commission held, then, in 2001 in Rapid City, South Dakota.

There was a concern by the Civil Rights Commission about a racial bias with regard to the sentencing of Indians or Native Americans in federal court.

After examining the data and also based upon our collective experience, because I don't think we were selected to just examine data, but also to bring whatever experience we had, which is quite varied, to these issues, we found that with regard to a racial basis, that that was not the

case with regard to Native American sentencings federally. On the other hand, we certainly did find from the data and our experience that the federal criminal sentencing system -- from the system, there is significant negative disparity in sentencing of Native American people, but it's a jurisdictional thing, it is not a racial matter. But to the Indian being sentenced and his or her family and extended family and friends and the tribal members, including tribal government, sometimes all of whom are there when we're sentencing them, the nicety that it's jurisdictional as opposed to racial is lost upon them and the result is the same.

Aside from our specific recommendations in these three areas that I mentioned -- murder/manslaughter and sexual abuse and assault -- I want to report also that there is a general recommendation, an overall recommendation, of consultation from time to time with the tribes on sentencing issues as you consider them where it's those issues that will possibly have a special

impact upon Native Americans once again because of the jurisdictional peculiarity within which they exist, because, as you know, a determination was made by Congress, which was well within the authority of Congress -- the Supreme Court has said that -- to have the jurisdictional arrangement that we have with Native Americans, which is a highly complex one, but with the trust relationship that the Federal Government has with Native Americans, then that mitigates against having a disparate impact upon them when we're sentencing them, and that trust relationship suggests, I believe, a continuing review of the impact of federal criminal law and, of course, necessarily the Sentencing Guidelines upon these dependent indigenous people.

Thank you for creating us, and now you will hear the substance of what our work was rather than merely my introduction. So for that, then, I would like to turn first of all to Celia Rumann.

PRESENTATION OF FINAL REPORT

MS. RUMANN: Thank you.

I was asked by Judge Piersol to give an

overview of the report to the Commission, and the report is organized in ways to emphasize those topics that the Advisory Group viewed as important components for improving the operation of the Federal Sentencing Guidelines in Indian country.

As you will note, the report begins with an extensive discussion of the historical and jurisdictional framework under the Major Crimes Act. The Advisory Group thought this was important because, as Judge Piersol noted, to the extent that the Advisory Group found that Native Americans are sentenced more harshly, that that arises from the fact of jurisdiction, not necessarily from the specifics of the guidelines themselves, and therefore the Advisory Group wanted to make sure that the Commission understood this jurisdictional framework to a certain extent.

There are some points in the background that I wanted to emphasize here with the Commission, and that is that the Major Crimes Act, as you know, deals with violent felonies. That's important because although Native American

defendants account for only 5 percent of the overall federal criminal caseload, they are a significant portion of the violent crime caseload in that 80 percent of the manslaughter defendants are Native Americans and approximately 60 percent of the sexual abuse and about half of the assault causes arise in Indian country and under Indian jurisdiction. Thus, when this Commission changes those guidelines, the impact falls heavily on the Native American communities.

The Advisory Group, as Judge Piersol noted, broke itself out into certain subcommittees to discuss certain offenses: murder/manslaughter, sexual abuse, and assault. Members of those subcommittees will address those portions of the report. However, there are two sections of the report that are not often specific, and the first of those is with regard to alcohol abuse and the effects of alcohol abuse in Indian country.

Alcohol abuse plays an unquestionable role in cases arising under the Major Crimes Act, and the effect of that varies from offense to offense.

With one exception, and that exception will be discussed by Ms. Humetewa with respect to manslaughter cases, the Advisory Group strongly advises the Commission against including any enhancements or SOCs for alcohol in a violent crime, and the reason for that is that will fall very heavily on Native American communities.

The Advisory Group believes that alcohol generally plays a mitigating role in a criminal case and that it mitigates culpability; however, the -- in addition, the lack of access to meaningful treatment and the extent of the problem on reservations is likely to result in an increased disparity in the sentences for violent offenses for Native Americans if such an enhancement is included in the guidelines, and thus the Advisory Group would strongly advise against that.

To the extent that the Commission can recommend that additional resources for alcohol treatment on reservations be made available, the group would strongly encourage that, but the group felt strongly that no other enhancements for -- no

other enhancements for alcohol be included in the guidelines.

The final topic discussed in the report is tribal consultation, and this group feels very strongly and encourages the Commission to continue what it began with the formation of this group; that is to find a way to formalize consultation with affected Indian communities so that their voices can be heard.

As the Commission has noted in other contexts, perceptions play an important role in maintaining respectful confidence in the criminal justice system. Perceptions are what gave rise to this committee and this group has found those perceptions to be verified or to be justified in some contexts. However, the perception of the affected communities is important, and the Advisory Group believes that participation in the process by the affected Indian communities will improve the operation of the Federal Sentencing Guidelines in that it will foster respect and confidence in the system and hopefully prevent any additional

unwarranted and unintended disparity in the sentences received for these offenses.

I thank you for your attention and I will now turn it over to my co-committee members.

JUDGE PIERSOL: Tom.

PRESENTATION OF FINDINGS AND RECOMMENDATIONS

REGARDING SEXUAL OFFENSES

MR. PECKHAM: Judge Murphy, Commissioners and staff and guests, thanks for having us here today. I also want to thank the other members of the Sexual Offenses Subcommittee. Marlys, Maggie Jensen, and Judge Molloy put a lot of work into this project and I hope it yields fruitful results.

Tying in quickly to Celia's comments about alcohol, over 50 percent of the sex offenses in Indian country involved alcohol, just to give you some sense of how serious the problem is and how widespread.

Sex offenses are a serious problem in Indian country and because of the jurisdictional framework that Celia and Judge Piersol have talked about, federal sentences have a great impact on

Indians.

The Advisory Group was able to gather data from three states -- Minnesota, South Dakota and New Mexico. We had hoped to get data from Arizona and Montana, which also have significant Indian American populations, but because of how state data is kept, we weren't able to look at those states.

For sex offenses specifically, because Minnesota is a Public Law 280 state, there's only one Indian reservation, Red Lake Reservation, where there's federal jurisdiction, so there was only one federal conviction in the year that we had data for, so we excluded Minnesota from our analysis in the Sex Offenses Subcommittee. So we mainly looked at the South Dakota and New Mexico.

In South Dakota, the average state sentence for sex offenses is 81 months. The average federal sentence is 96 months. In New Mexico, the average state sentence is 25 months. And we looked at that data, and if you just look at Class 1 and Class 2 felonies, it goes up to 43 months. The average federal sentence is 86 months,

more than twice as long, or twice as long as the adjusted figure. In Minnesota, just for reference, the average state sentence was 53 months.

So looking at states in which there is significant Indian populations where we could gather data and trying to compare apples and apples to the extent we could, it was very clear that federal sentences are, in fact, longer than state sentences for sex offenses.

We wanted to make sure to the extent we could that that disparity was actually -- was not racially motivated, and by looking at the federal sentences, you can see that federal sentences are similar for Native Americans and non-Native Americans, so it appears truly not to be a racial bias. We are looking at a jurisdictional framework that throws Native Americans disproportionately into federal court where they receive stiffer sentences.

There was a great reluctance within the group to even consider reducing or recommending a reduction of sentences for sex offenses. Part of

that is because some of these are the most horrible crimes that we see. They often involve young victims and they can have tremendous impacts on victims' lives. But we are concerned about the disparity, and we are particularly concerned about the disparity in light of the recent enactment of the Protect Act. There are a couple of provisions in the Protect Act which will, we believe, over time increase the disparity even further, and obviously that is out of the Commission's hands, but, for example, the guideline note that used to require a sexual offender who offended against a minor to have two different victims now only requires one, and based on evidence that many, many cases in Indian country are incestual, we are concerned that that will disproportionately affect Native Americans and will increase the sentences received by Native Americans, therefore increasing the differences between state and federal courts.

The two-strikes-you're-out provision in the Protect Act is also likely to lead to much longer sentences. However, again, we're reluctant

to recommend a reduction, and so we tried to focus on other ways that the group could address the disparity, hopefully in more effective ways.

The first is to support a proposal currently before the Commission -- I think it will be discussed later this morning -- to separate out the tribal offenses from the non-tribal offenses through the creation of a new guideline, 2G1.3, I believe.

When the Protect Act was enacted, at least on the record in the reports from Congress, there was no mention of Native Americans. The reports appeared to focus largely on pornography. There are very few Indian pornography defendants. That isn't the problem, and yet the Protect Act sweeps Native Americans in, and we believe the creation of a new Guideline 2G1.3 may at least help in the future if Congress comes back to revisit this issue to separate Native Americans from non-Native Americans by separating tribal offenders from non-tribal offenders.

The second recommendation I think could

have a very important effect in Indian country, and it is the creation of a DAP style drug and alcohol program, a sentence reduction program that would require Native American and non-Native American defendants to participate in the sex offender treatment program run by the Bureau of Prisons.

If a defendant or an inmate successfully completes that program, at the Bureau of Prisons' discretion, they would be entitled to up to a twelve-month reduction in their sentence.

We spoke extensively with Dr. Hernandez, who is the Director of the SAPP Program at FCI Butner, and he believes, and I think the group believes, that providing useful, positive incentives for inmates to participate in these programs, or in this program, would get more people into treatment, hopefully more Native Americans into treatment, and reduce recidivism.

It was interesting doing research on sex offenses. The literature is truly in its adolescence. It is hard to find concrete conclusions at this point, but the research is

coming along. Just in the last seven years, much better data has become available. I talked to the director of research at FCI Butner and over the next several years, we will have I think some groundbreaking recidivism research coming out of the SOTP program there as it -- they've got a long enough track record to have produced good data.

So there is good evidence now that treatment will, in fact, reduce recidivism. Treated inmates who return to their communities, especially if they are able to get treatment in the community, will be safer for the community. So we strongly urge the Commission to consider a DAP-style program.

It wasn't clear to us whether the Commission could do this on its own through a guideline or whether it would be necessary to go to Congress, and we defer that issue to the Commission for consideration if there is significant interest in this idea. But our underlying concern is having inmates return to their tribal communities safer, less likely to recidivate.

A subpart of the proposal arose in part from conversations with Dr. Hernandez, which is if the Commission elects to push for such a proposal, to leave flexibility with the Bureau of Prisons so that they can tailor this program as research continues and develops.

For example, Dr. Hernandez notes that if we wait until the end to force somebody to volunteer for this program, that that long period of not having fully accepted responsibility, and that's not just stating the facts necessary to get the points off at the beginning, but to truly internalize that, the harder it is to get people to do that, to get inmates to do that.

So we would urge the Bureau to have and you to give the Bureau the flexibility to be able to look at when an offender fully accepts responsibility, starts to heal the wounds caused to the victim and, in cases of incest, the family, because often the family is divided, you know, members of the family will side with the perpetrator, ostracizing the victim. So we believe

that such a treatment program with the incentives created could end up being a healing influence in Indian country and beyond.

Also, just for the Commission's information, the Bureau is sex offender management program. Currently Butner is the only sex offender treatment site. They are planning on having 18 within the next several years. Right now, only 1 percent of sex offenders in the federal system receive any treatment whatsoever, and that is only at Butner. They are planning on having at least some treatment for every sex offender inmate who comes into the federal system.

So as that evolves, there may be resources for the Commission to use, so I would just encourage you to keep track of that and over time try to coordinate your efforts with the Bureau's, not only for the good of Indian country, but for the good of all sex offenders and their victims, past and potential.

Thank you.

JUDGE PIERSOL: Thank you.

CHAIR MURPHY: Could I ask a question?

MR. PECKHAM: Yes.

CHAIR MURPHY: One of the things that we heard when we were out in Rapid City for our hearing from a number of witnesses was how far removed prison facilities were, and because of people's economic standing and so on, the inability to support friends or members of the family that were incarcerated, and couldn't we get some community treatment centers near South Dakota, at least, for example, and so forth.

What about -- did they give any indication about the placement of these other 18 programs? There aren't any federal prison facilities very close to that particular area.

MR. PECKHAM: We actually considered including this as an express recommendation, but talking to Dr. Hernandez, what they are looking to do is create 18, three in each of their six regions, one at each level of security, and they are planning first on putting one either in Arizona, most likely in Tucson, which, of course,

would capture the large Native population in the Southwest, and they are also looking at the North Central Plains, Minnesota, South Dakota, et cetera. There is hope that without intervention from the Commission, that that will happen in due course. I think the Bureau could use all the encouragement it could get. But those are the most likely next facilities.

JUDGE PIERSOL: All right. Then with regard to the findings and recommendations concerning assault offenses.

PRESENTATION OF FINDINGS AND RECOMMENDATIONS

REGARDING ASSAULT OFFENSES

MR. TOULOU: Good morning. I have been asked to address the issue of assault that we have looked at over this past 18 months. Before I start, I really would like to thank the Commission for taking up this issue. It's a very important issue to Indian country, and I think all of us in Indian country appreciate the fact that you have done this.

Because of the operation of the Major

Crimes Act in Indian country, federal assault prosecution has a substantial impact on the Indian community.

About 34 percent of the assaults that are assault -- defendants that are sentenced in the federal system come from Indian country, and that's the highest percentage of any ethnic group in the country. That said, as I think has been reiterated by everybody else who has spoken before me, we don't believe that there is a racial animus behind the number of people who are in the system; it's simply a matter of jurisdiction. That said, as we looked at the statistics, we did find that a disparity existed.

As we went through the various states that might be impacted by this, we selected two states that had statistics that made it possible for us to compare the sentencing guideline statistics, and those two states were South Dakota and New Mexico, and those are two states that have substantial Indian populations and we think provided a good example of what is going on in Indian country.

If you look at the assault sentences for a federal Indian defendant in South Dakota, an individual on average is sentenced to 39 months for an aggravated assault. In the state system, which one would assume would be an individual stepping across a reservation line, has an average assault of -- or a sentence for assault of 29 months.

If we move to New Mexico, we see an even greater disparity in sentence, and that's in part because there are offenses included in New Mexico that aren't included in the federal sentence, but even taking those aside, we have a substantial disparity. The average federal sentence for assault in New Mexico for an Indian person is 54 months; the average state assault sentence is six months. So you can see there is a substantial disparity there.

The Assault Subcommittee, as we looked at this and tried to grapple with what constitutes a disparity, and that has been a substantial issue for us -- I mean, when does this become meaningful? And what we decided as a rule of thumb was to look

at any sentence, difference in sentence that falls outside of the specific guidelines range. We thought within a specific guidelines range, you're looking at judicial discretion, and that probably doesn't rise to the level of a disparity. When we looked at the two sentences I described, they fell well outside of that.

South Dakota, which seemed to us to represent kind of the more conservative approach and probably more average disparity in sentence, was two guideline ranges outside what would be discretion, so you would have to depart down two guideline ranges to reach the same sentence in the federal system as a state sentence.

Based on that, we reached our recommendation, and that was that we probably should reduce -- we would recommend that you reduce the base guideline ranges for assault by two guideline ranges. So that is the basis for -- that is our recommendation.

I would like to point out the difference we felt there was between the assault statute and

the sentencing and the sexual assault statute.

When we looked at the sexual assault statute, there is a disparity there also, but many of the laws underlie sentencing for sexual assaults, particularly sexual assaults on children, which tend to be a large percentage of what we find in Indian country. We have laws that were written with Indian country in mind that were written as a reaction to some cases that occurred in Indian country in the late '80s and early '90s.

When we look at the assault statute, what we have is a statute that has been around since the mid 1800s and was not written with Indian country in mind at all. It was just by operation of the Major Crimes Act that assault has become a major factor in sentencing in Indian country.

We saw that as a major factor in making this recommendation, that the Sentencing Guidelines did not intend to impact this community because of what is going on in this community, but that this community was picked up by an accident of history and geography.

As a final note, Celia mentioned the consultation recommendation. As an executive agency, we are operating under an executive order at the Department of Justice that requires that we consult with tribes on major activities that impact them, and my office is the point of contact for the Department of Justice on those issues. I would be happy to assist, if the Commission wishes, in your endeavors to consult with the tribes. It's something we're familiar with and have connections and contacts in the tribes that would help us do that if that is something you would elect to do.

So with that, I will pass.

JUDGE PIERSOL: Thank you, Tracy.

Then on the murder/manslaughter offenses, to tell us what we did as well as didn't consider, Diane Humetewa from the U.S. Attorney's Office in Arizona will speak to you on that.

PRESENTATION OF FINDINGS AND RECOMMENDATIONS

REGARDING MURDER/MANSLAUGHTER OFFENSES

MS. HUMETEWA: Thank you, Judge. Thank you, Commission members, for being here today, and

I also want to add my personal thanks for the Commission recognizing that Indians are a particularly vulnerable population to whom Congress has special trust and legal responsibility to, and that there may be in the future a potential for creating disparity to this special population if it is not examined closely.

Our manslaughter working group, as Judge Piersol mentioned, is comprised of John Sands, Marlys Pecora, who is here, and Tom LeClaire. We accelerated our work in the area of manslaughter because we understood that the Commission was undertaking amendments to this area, and that there was a call for looking at this area by certain members of the Senate.

We completed our report knowing that the new amendments would be taking place and I believe took effect on November 1st, but because those amendments are now in effect, that does not, however, change our recommendation to specific areas of this particular manslaughter -- in particular, I should say.

As you know, Judge Piersol testified before this Commission on March 25th and he provided this Commission with our recommendations at that time, as did my boss, Paul Charlton, the U.S. Attorney for the District of Arizona, and Arizona is one of the districts with the higher prosecution rates of Indian country crimes. He provided this Commission with the Department of Justice recommendation as well as those recommendations from the District of Arizona.

I will jump right into our recommendations, which are found on pages 13 through 19 of our report.

In the area of second-degree murder -- and I should back up and say that in the area of manslaughter, our working group relied heavily on the previous work of the data that existed in the 1997 manslaughter working group.

Getting back to second-degree murder, the data that we had and that the Commission staff provided to us did not show Indians as a majority of the population affected or convicted nationally,

so with a great deal of discussion, it was our working group's recommendation as agreed to by the committee that we believe that second-degree murder was, therefore, outside of the charge of this Advisory Group, so we have no recommendation in that area.

With respect to involuntary manslaughter, the data that we had available to us show that approximately 75 percent involved Indians. Again, that was using the data based on 1997, the 1997 report, as well as the data that was provided, too, by the Commission staff.

We also understood in looking at this data that the heartland of the involuntary manslaughter cases were drunk driving homicides in Indian country, and our working group experiences, John Sands being an Assistant Federal Public Defender, Tom LeClaire, a former Assistant U.S. Attorney, Marlys Pecora, a Victim Witness Specialist, and myself, a former prosecutor, we brought our experiences to that table and recognized that by and large, the cases that we have come into contact

with in our districts were drunk driving homicides in this room, and we acknowledged that, looking at the data that was available to us, that drunk driving homicides under the Sentencing Guideline scheme are more lenient sentences than many state sentences and individuals that are committing DUI are exposed to.

We did not go into our charge assuming that a statutory increase was on the horizon. We looked at our charge as the statutory maximum exists today; that is the six-year maximum penalty under 18 USC 1112, and we proposed the following:

With regard to Sentencing Guideline 2A1.4, criminal negligent conduct arising to homicide, we propose no change. We did so because, like in the second-degree murder realm, we did not have data to support that this particular charge was primarily a charge that affected Indians committing this particular offense in Indian country. So we did not make a recommendation, but we are, again, aware that the Commission did make a recommendation to increase that base offense level.

With regard to 2A1.4B, we did make a recommendation to increase the base offense level for reckless homicide conduct from 14 to 18, and again, we understand that that did take effect on November 1st. However, we did add additional amendments or recommendations.

We recommended that the Commission include specific offense characteristics that would affect or address the sorts of conduct that our various experiences told us should be addressed or that were common in the cases that we handled or saw across the country and also within the various ad hoc committees' experience.

We propose the following additional specific offense characteristics to reckless conduct: that driving under the influence resulting in death, that there be four levels attached to that; that there be two levels attached to use of a weapon; and that a note clarify that in cases where an individual is committing a DUI homicide, that a car could not be counted as a weapon, but the thinking about the

scenarios in which weapons could be used, including, for example, if a car was driven into a crowd intentionally or those cases which I know our district has experienced where a car is used to run into someone, back over them again and commit a homicide in that manner, we have seen a couple of those cases; and where multiple homicides occur, that two points be added for that. Our data found that approximately 9 to 10 percent of convictions for involuntary vehicular manslaughter while under the influence or otherwise did result in multiple homicides.

Under this scheme, a defendant with a criminal history of one who commits a drunk driving homicide would end up with a final adjusted Offense level of 19, and his exposure would be from 30 to 37 months, which essentially doubles the sentencing exposure that was in existence prior to the amendment, but it stays within the six-year maximum statutory penalty.

With regard to the prior DUIs, our working group did discuss this at length and we came to the

conclusion that the adequacy of criminal history guideline would take care of this particular area, or in those cases where there was egregious criminal history, that, again, that would be left to the discretion of the prosecutor charging that case and perhaps a second-degree murder charge would be something that would be considered.

In the area of voluntary manslaughter, similar to involuntary manslaughter, we recommended that there be specific offense characteristics as follows: We did recommend that the base offense level be kept at 25.

In this area, there was some data to support this group looking at this particular area; however, they weren't as high as in the involuntary manslaughter area. So we would recommend the base offense level be kept at 25; that there be a two-level enhancement for use of a weapon; and for use of a firearm, that there be a four-level enhancement available.

Again, we do thank the Commission for considering this area. It is, again, a particular

area that is in much need of review and we think continued review of this area, especially in the involuntary manslaughter arena, I think is important.

Thank you.

JUDGE PIERSOL: Thank you.

Now, also Marlys Pecora is here. She was on the Murder/Manslaughter Subcommittee, and those of you on the Commission at the time that testimony was taken in 2001 might remember that I think that, in my watching the Commission, her testimony and some of her experiences were maybe particularly riveting. So she came, too, in the event that you have any questions or there is anything that you would like to add, Marlys, to what has been said.

MS. PECORA: Just briefly. I just wanted to I guess reiterate some of the things that everybody else already discussed. But I am not an attorney, of course, and I don't have legal experience, so my experiences came from personal experience.

I am a member of the Crow Creek Tribe and

I grew up on a reservation. I still have a lot of family that lives in Indian country and works in Indian country, so I have a vested interest in Indian -- you know, they could potentially be defendants, I have to admit, but I also work with victims of crime, and so my main concern, I guess, or my primary concern is balancing the Sentencing Guidelines, of course, are applicable to defendants, but trying to balance that with how these are going to impact victims of crime.

I work with victims who have -- you know, who we have had to sit in court and listen to the sentencing for a voluntary manslaughter or involuntary manslaughter case where they've lost a mother and a sister and the maximum guideline is six years, trying to explain that to them or trying to get them to understand that the Sentencing Guidelines are a set of numbers and it's a system designed to be fair to everybody versus when they know that they've had family members or somebody who has been sentenced for an assault crime that got probably eight years. So those are the kinds

of angles that I came from. Or sex offenders who have more than one victim, maybe six victims that we can identify in the course of the investigation, and those are the types of crimes that we work with in sentencing.

So my passion has always been in the murder/manslaughter area and the sex offense area, and so I was very -- not really vocal so much in the subcommittees unless they kind of went astray and really, I guess, spoke out when we talked about reducing the base offense -- or reducing the sex offense. I wasn't willing to go there or to even consider that. I think listening to Judge Korman from South Dakota, even he agrees that in the area of sex offenses, that Sentencing Guidelines are not that out of whack for the specific crimes that we see, and I think we all agree that as far as Indian country cases, we are seeing probably the worst that there is out there.

So I felt obligated to at least make some sort of statement to kind of give you an idea of the makeup the subcommittees and the ad hoc

advisory committee consisted of, but I don't really have anything to add to the reports. I think everybody that chaired these did an outstanding job. And I happen to disagree with our chair -- I think you did a great job in selecting our chair. So thank you very much for allowing us to participate.

JUDGE PIERSOL: Thank you.

So we used a little bit more of the time than was anticipated because we're going to try and split it up in terms of questions and -- our comments and then questions, but I think we were allotted an hour, so we have -- of course, at the pleasure of the Chair, we have as much time as you want, but at least we would have another few minutes.

CHAIR MURPHY: Well, of course, when I had a question, I just butted in. Everybody else was too polite.

Judge Sessions.

COMMISSIONER SESSIONS: I would like to ask you about the way you use alcohol, and I wonder

if there is somewhat of an inconsistency. I heard at the very beginning that we should not have an SOC for alcohol because that would unfairly impact Native American populations, and then -- and so that's why you don't include that in voluntary manslaughter. But then when you get to involuntary manslaughter, you do use essentially alcohol abuse, which impacts the vast majority of persons who are charged with involuntary manslaughter, and, again, 75 percent of the people charged with involuntary manslaughter are Native Americans.

So if you are trying to make a message not to impact Native American populations, is not that inconsistent? Or if you're trying to make a statement about alcohol on reservations, is there not an inconsistent statement there?

JUDGE PIERSOL: Well, since I'm sitting in between the two people that made the comments you're talking about, I'll take a shot at it, and then they can clear it up, because I'm the generalist here, as you can see.

My recollection of the situation is it was

a question of whether you raise the base offense level for the offense itself or whether you make -- because then you catch the instances in which alcohol wasn't involved. So that was the one exception, is my recollection.

Diane, now you can correct me if I am wrong.

MS. HUMETEWA: That's correct.

COMMISSIONER SESSIONS: Well, I guess I don't quite understand that. You're raising the base offense level of involuntary manslaughter from 14 to 18. No question about that. But then you're also using alcohol abuse -- i.e., intoxication when you're driving -- as a four-level enhancement. So you really are focusing in upon alcohol abuse in that context when in involuntary manslaughter you decide not to focus in upon the use of alcohol for -- I guess I'm confused as to whether that is an inconsistency in the approach of how you try to deal with the alcohol problem on reservations.

JUDGE PIERSOL: I didn't explain it very well, so I will have one of the others --

COMMISSIONER SESSIONS: Okay. Or maybe I didn't hear it very well, but go ahead.

MS. RUMANN: With respect to involuntary, I think the concern was rather than recommend raising the base offense level more, having a separate SOC for those instances that would admittedly be a great majority of the cases under the statistics in involuntary and apply the enhancement only to those instances where there was alcohol involved.

The reason why the Advisory Group believed that alcohol in that instance was different than in other offenses such as voluntary was because of certain considerations, a lot of it based on our experience in these cases, but that for a number of the defendants in these instances, they had had opportunities for alcohol treatment, and there was a belief among the members of the Advisory Group that there have been effective educational campaigns against driving while under the influence, so the Advisory Group believed that that was different than in other instances where alcohol

plays a role in a violent offense. So we limited it to involuntary and tried within involuntary to limit it to those instances where it actually played a role.

JUDGE MURPHY: Judge Hinojosa?

COMMISSIONER HINOJOSA: Yes. With regards to the disparity in the sentencing between the jurisdictions, I take it your federal sentences were those actually handed out, and in the state sentencing, those were the sentences that were pronounced and actually served or just pronounced?

JUDGE PIERSOL: Kevin can -- the staff was a lot of help to us, but we tried to get what was actually served in the state, so we were really -- that's the best comparison we could make, because, as you know, in the states, what is announced and what is served are two different things, unlike the federal, which is pretty close.

JUDGE MURPHY: Judge Castillo?

COMMISSIONER CASTILLO: First let me just add my thanks on behalf of the Commission to all the Advisory Committee members. I know your work

is not easy and we appreciate it.

I just want to follow up also on this question of disparity. In the course of your work, even though downward departures have recently been frowned upon, did you try and consider some type of downward departure to address this jurisdictional disparity that might apply to the Major Crimes Act, for example aggravated assault in Indian countries? Was that at all considered is a question I would have.

JUDGE PIERSOL: It was talked about, and there is a reference in the case to our -- you know, in the Eighth Circuit, and we talked about that, but then you start formulating that and then how do you take into account somebody that is, say, from a ghetto in Chicago or someplace who has, even though it's a different setting, who has some of the same common characteristics, and you're heading into a quagmire, not that probably both shouldn't somehow be recognized, but it was difficult and we talked about it but didn't come to any conclusion as to what to recommend.

COMMISSIONER CASTILLO: Thanks.

COMMISSIONER RICHTER: If I might, on the sentencing disparity issue -- first of all, I want to also thank you for your hard work.

I was particularly struck by Ms. Pecora's comments and a number of the comments of I believe two of the panel members who mentioned how the sentencing disparity fell heavily on Native Americans.

What struck me about the disparity, I suppose, between Ms. Pecora's comments and the comments of a couple of the other panel members was that it seems to be a disparity between who we need to be concerned about in terms of how sentences fall. Are we concerned about the victims or are we really concerned about the defendants?

The Bureau of -- in advance of this, because I wanted to see what some of the data is, the Bureau of Justice Statistics reports -- and particularly this struck me in the context of the sexual assault and the aggravated assault context -- that rape and sexual assault rates among

American Indians are three and a half times higher than for all other races -- this is as of 1999 -- that aggravated assault rates among American Indians were more than three times the national rate.

At a time when some of the highest priority of the Department of Justice in the context of violent crime nationally has been a Project Safe Neighborhoods effort to make up for the fact that state legislatures and state judicial systems are not locking up violent offenders sufficiently to assure that our streets are safe enough and therefore has led to essentially a federalization of an historically state-run area, and at a time in the last ten to 15 years when domestic violence has been an issue of great concern in states and increased intolerance, I certainly find it counterintuitive that we would be suggesting that the problem -- that if there is a disparity between federal jurisdiction and state jurisdiction on violent offenses and sexual offenses, sexual abuse offenses, that the criticism

would be levied at the federal government or the federal construct rather than looking toward the shortcomings or the failures of the state legislature.

So I wondered, obviously that may be outside the charge of this Commission, but I am hesitant as a prosecutor and from speaking to fellow prosecutors who have a great deal of experience in Indian country offenses, to Native Americans themselves who certainly registered their concerns privately with me when I suggested that there might be a recommendation for a more tolerant treatment of defendants who are committing violent offenses and sexual abuse offenses against Native Americans in Indian country.

JUDGE PIERSOL: Well, we didn't recommend that there be a reduction with regard to sexual abuse offenses, and in the report, it wasn't mentioned, but in the report, there was also a -- and this was an experiential thing; it isn't something you can take out of statistics; but we felt that the offenses on the Indian reservations

may be the most aggravated ones that are getting prosecuted. So there wasn't a desire to reduce on sexual offenses. We were trying to approach it in another way because -- and now I will speak from my point of view, my own experience as a judge sentencing in these things -- we were trying to approach the problems in another way with this DAP-type recommendation, because particularly when you have an incest situation, which a lot of them are -- they are incest either within the family or within an extended family group -- often the victim gets blamed and you don't have acceptance of responsibility, not in terms of the three points, but the broader acceptance of responsibility you don't have. And what happens? The victim keeps on getting blamed.

I could really talk about this very specifically, but I've got a case right before me where it's back before me on 2255s and so on and it's just a perfect example, but I can't say more about it than that.

But by not having a true acceptance of

responsibility, the victim gets blamed through her adolescence, through her teen years and on, and if this DAP program could get going on work where you have true acceptance, then that's the only way the victim could really get some kind of peace out of these things.

But no, we didn't reduce and didn't recommend reducing sexual offense at all. The sexual offense punishments are long in federal court and probably appropriate. But then when we go over to the assaults, I think that we looked at it with a finer comb, so to speak, and we were concerned about some of the things that we saw with regard to disparity in assault convictions particularly because of how some of those convictions come about in Native American country, and you know from your experience in Oklahoma, I think, or I suspect you do, that a lot of those assaults come out of a party. And I don't want to sound racist, but, you know, a party isn't you get together for cocktails at 6:30 p.m., but it might go on for two days, and that doesn't make the

victim feel any better, but it's people that walked into someplace as friends and walked out with somebody having gotten hit with whatever was handy, and we have, frankly, probably, once again from my own experience, assault convictions that, compared to what would have happened in the state, the federal assault conviction is probably too long, but that doesn't carry over into the sexual offenses.

COMMISSIONER RICHTER: Well, I mean, I understand that obviously we can always come up with a particular scenario that may be more sympathetic, but at least from the data that has been provided to me that American Indian and Alaska Native women have higher rates of intimate partner violence, obviously are we suggesting that -- by going down two points, are we suggesting that we really want to send a signal of greater tolerance for violence in Indian country? I mean, that seems counterintuitive to me as a matter of public policy, although I understand the disparity is there, but given the higher incidence and higher

rates, isn't that suggesting that we maybe need to be sending a stronger signal rather than a weaker signal?

JUDGE PIERSOL: Let me suggest to you as a sentencing judge for ten years at this that if it's a violence against women, the guidelines, thankfully, provide enough latitude the other way that hold on if it's violence against women as opposed to the reservation party, because the violence against women, we couldn't separate those out, but I can guarantee you that those get treated differently, and the two points we're talking about are for the more typical situation, which is the party where somebody gets an assault.

MR. TOULOU: If I can wade in very quickly on that issue because that was an issue I was very concerned about when we looked at this move downward, was domestic violence. As a former prosecutor and somebody who has done a number of domestic violence cases, I wanted to make sure that was not impacted by this.

The unfortunate fact is the majority of

domestic violence cases that occur in Indian country are not cases that we can reach through federal jurisdiction because they don't reach the serious bodily injury standard. The cases that do reach usually have SOCs attached to allow us to punish the defendant in a way that is probably appropriate. But that was a very real concern that a number of us had who prosecuted those cases and we were satisfied that it wasn't going to reach those cases. But I do want to say that was something we took into consideration, we considered very seriously.

JUDGE MURPHY: Okay. Commissioner Steer had his hand up, too, and so I'll let you have the last question because we do have such a long agenda today. We're going to have to --

COMMISSIONER STEER: I just wanted to ask Judge Piersol or any of the members of the committee here, when we came to South Dakota for our field hearing, we heard about a study that was being conducted at that time by the -- I think it was going to be the University of South Dakota

looking at the South Dakota state sentencing impacts. What is the status of that study? Are any results available?

JUDGE PIERSOL: The results are just recently available. I spoke during the course of our work with a professor at the University of South Dakota who was doing the work and -- how shall I put this? -- the then-Governor, who is a friend of mine, now congressman from South Dakota -- I don't think he wanted the study to be outright -- it wasn't a propitious moment for it to be released, so it wasn't released at that time, but it has been subsequently released and Kevin can talk about the study with regard to the base that was used and so on. It wasn't directly useful to us, but we have made reference to it in our report, and the study has found that there is -- I think I can categorize it by saying there was some disparity with regard to Native Americans within the state system itself, which is, you know, a separate issue from our input, but related. But Kevin can speak more directly to the report, and

statistically, there were some problems I think that Kevin had with the report.

MR. BLACKWELL: Yes. We would have been comparing apples and oranges using their data. We did not use that study as a basis for any analysis.

COMMISSIONER STEER: Thank you very much.

JUDGE MURPHY: Well, on behalf of the Commission, I want to thank those of you who are here and those who weren't able to come to Washington today that have participated in this. You have given us a lot to think about and these are very difficult problems. We knew going in that this would not be simple because of the jurisdictional situation, the history of this, and just trying to get handle on some of these things. But I think that this is very -- you produced a lot of good information and your recommendations are something that we certainly are going to be looking at. So on behalf of everyone at the Commission, I want to thank you very much.

JUDGE PIERSOL: Thank you. If I could say

one last thing, if you would indulge me.

JUDGE MURPHY: Obviously.

JUDGE PIERSOL: Very short. That is with regard to the issue that John Richter raised, that I can't speak for every federal judge, but there aren't very many of us that do the sentencing in Indian country, and I can tell you that one of the positive things about the guidelines is that if it's a domestic abuse that comes in, at least in my court, hold on, because we have room enough to deal with it, and we do. Thank you.

JUDGE MURPHY: Okay. We will be reconvening upstairs, the Commission, for our regular meeting.

[Whereupon, at 10:15 a.m., the proceedings were adjourned.]