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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

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

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

Father, we know that as we ask your blessings on this day that you'll deliver them. We know that you will deliver the wisdom and the strength that we need as leaders to lead our people. And we know that you'll deliver the wisdom and the strength that the commission needs to be able to help our people.
We ask for a blessing of all the people of this world, the people of this state, and the people of our reservations. We ask for blessing of the weak and the strong alike, and we do so in Jesus' name. Amen.

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

Congress was concerned that there were great disparities in sentencing depending upon who the judge was, what part of the country the judge was located, who the defendant was, and so this concern about disparities was one of the great motivating forces for Congress in passing this reform act, and the idea was that they would have a sentencing commission that would create sentencing.
guidelines for all federal offenses so that when somebody is convicted of a federal crime, there would be a guideline range in which the judge would sentence, and it would not depend upon what part of the country you were in, what race you were and so forth.

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

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

This commission was appointed in November of 1999, so we have been there for 19 months, and
our job is to continue working on this sentencing
guideline system that Congress has set in place, to
make guidelines for new offenses that Congress
decides on, and also to make modifications and
adjustments to the guidelines.

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

And then to my left is Judge Ruben
Castillo from the Northern District of Illinois.
Seated next to him is Judge Sterling Johnson from
the Eastern District of New York. And then seated
next to him is -- there are two nonvoting members
of the commission, and one of them is either, under
the statute, the Attorney General of the United
States or the Attorney General's delegate, and so
the Attorney General has typically, because of all
the responsibilities of that office, delegated to
someone in the Department of Justice to be the
ex officio member that represents the Department of
Justice, and that is Michael Horowitz who, prior to
his present service, has been a prosecutor in the
Southern District of New York, and he has just
joined us some months ago and is very helpful to
us.

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

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

Just a few words about why we’re here. I
would say the one that got this all in motion,
really, is Elsie Meeks because you are familiar
with the fact that she’s the vice-chair of the
United States Commission on Civil Rights, and the
South Dakota Advisory Committee to that commission.
had some hearings here, many of you were probably here, and issued a report. One of the items in the report expressed a concern about the impact on Native Americans who are sentenced in federal court with the federal guidelines and asking the commission to take a look at this, and that set in motion the process that brought us here today. And we’re here really to listen to you. I am taking a few minutes here to tell you something about us, just to explain who we are and why we’re here, but we’ve come to hear what you have to say, to understand what you may think the problems are.

And Mr. Kindle was asking me, "Well, what will be the next step?" Well, we’re going to listen and then we will, I said, ponder and we’ll see. We have limitations. We have a statutory scheme. What we promulgate is sent to Congress; it becomes effective. Under the statute we send things normally on May 1st and they become effective on November 1 unless Congress doesn’t like what we send. So -- and by and large, over the history of the commission, Congress has accepted almost everything that’s been sent because I think the commission has tried to do a very good job with what it’s been working on.
We are a small -- we are an independent agency within the judicial branch. We have a very relatively -- you know, for a federal entity, we have a small staff and a very small budget, and that's a limitation. And our statutory scheme is also one of the things that we don't have any jurisdiction over is state sentencing, and I know that many of you are going to be also at a hearing with the state people tomorrow.

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

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

MS. MEEKS: Thank you, Judge Murphy, and thank you for coming, Commissioners. I'm deeply honored that you came here to South Dakota, and I'm
aware that you have a very busy schedule, and so
your taking time to come here and seek public
comments on the Federal Sentencing Guidelines is
really very much appreciated by all of us here, I'm
sure.

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

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

When the guidelines were being developed,
the New Mexico Federal Public Defender urged the
sentencing commission to allow trial judges
discretion in sentencing Indian country crimes
because of these circumstances. A couple years
after the guidelines were implemented, the Arizona Federal Public Defender asked the commission to be sensitive to the unique problems on reservations. And U.S. Attorney Judge Bilby urged the commission to revisit the question of alcoholism on the reservations and the impact of the guidelines.

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

While we may have only one set of Federal Sentencing Guidelines, we do have two separate standards of justice for crimes committed on the reservation, one for American Indians and another for everyone else. And for example, let's just say that today after today's hearing, Judge Murphy, you and I drive down to Prairie Winds Casino, our local casino, and I'm assuming -- in fact, I know that you're non-Indian, and we sit down at the blackjack
table and proceed to lose all of our money, which
is probably what would happen if I sat down to a
blackjack table. So we decide to exact some
revenge on the dealer who is non-Indian and beat
him up. Being Native American, I will go to
federal court and be sentenced under the federal
guidelines. You being non-Indian will be subject
to state court jurisdiction, but since the crime
occurred on a reservation, the state may not even
pursue it.

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

My involvement came about in this issue in
April of 1999 when I first became interested in the
Federal Sentencing Guidelines and the impact on
Native Americans. I had read in a local newspaper
two articles about the impact of the Federal
Sentencing Guidelines -- the impact that the
Federal Sentencing Guidelines were having in Indian
country. In these articles a federal judge was
voicing his concerns about the harshness of the
sentencing guidelines on Native American
defendants. This judge, the Honorable Charles Kornmann, later invited me to observe some sentence hearings and to meet with him, which I did.

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

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

And after the SAC I continued my research. What I found was that there was very little statistical data available concerning Native
Americans and administration of justice issues. The Federal Sentencing Guidelines specifically have been subject to a number of studies and much has been written about their impact on different races. However, these reviews have generally only looked at four races: white, black, Hispanic and other with Native Americans falling into the "Other" category. I know this is -- this is because nationally Indians constitute a very small part of the federal criminal docket, but American Indians are the only race that is subject to federal criminal jurisdiction and hence, the Federal Sentencing Guidelines based solely on being Indian and committing a crime on a reservation, usually where he or she lives. Because of this, any review of the impact of guidelines by race needs to include Native Americans.

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

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

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

The second reason why I mentioned the report is that it shows that while some things may be statistically minor or insignificant in the overall picture, they could affect greatly portions of the population; for example, the impact of the Federal Sentencing Guidelines on American Indians.
I will submit all of my testimony. I want to conclude here. I think I’m probably getting close to my ten-minute limit, and since I’ve been asked to provide that role for others, I will keep myself to a ten-minute limit.

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

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

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

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

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

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

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

We’re well aware of the Sentencing Reform Act of 1984 and the purpose of the guidelines, the constitutional implications of the Fourth -- of the
Fifth and the Fourteenth Amendments to the U.S. Constitution. And I would like to sort of restate what Elsie said in that the Pine Ridge Indian Reservation, and you can see it throughout South Dakota, and the U.S. Census when it defines the poorest counties. Now we've got -- we took over -- we're the number one, number two, number four, number five of the poorest, and these are all situated where our reservations are situated.

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

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

The Pine Ridge Reservation since 1970, '80, '90, now 2000, we were identified as the poorest. I think Cheyenne River took over that distinction in the year 2000, but that created a
lot of violations of criminal statutes, both tribal
and federal criminal statutes, and depending on
whether or not the perpetrators are Indian or
non-Indian, the victim is an Indian or non-Indian,
the U.S. sometimes has jurisdiction to prosecute,
the tribe also has jurisdiction. But like Elsie
said, we see this disparity, and we do hope that
this commission can somehow address it and make the
sentencing fair so that both the victim and the
perpetrator can receive justice, and that's all
we're asking.

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

In this area here, we think that the
greatest problem with the sentencing guidelines is
like Elsie said here, the lack of discretion given
to the judge. We know that sometimes the judge is
given the authority to -- I guess, from the circuit court of appeals, they ruled that some downward departure from the guidelines is allowed when such departure is based upon extraordinary achievement despite adverse living conditions on the reservation. I guess this is what we've been talking about in the poverty, the high unemployment, and so the judge is given some departure downward to -- in the sentencing guidelines in that instance, but we believe that more discretion should be allowed to the judge.

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

And another major concern is the lack of good time whereby good behavior is rewarded and the offender is released early; such things as time
spent in other jurisdictions such as tribal jails. They spend an inordinate amount of time before the federal jurisdiction charges on the crime of five months or something like that. We think that they should possibly be given some good time for that.

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

On the reservations most of our employment is created with federal funds, and these people can't participate in any way the rest of their lives, whether it be voting or holding a job. And so if possible, if this commission can recommend, because we're working on the tribal end to effect more funds for the tribal judiciary systems, that
we believe that the major crimes, 14 supposed to
be, but I've got people in the federal system up
here for one cigarette of marijuana, for some
burglaries, these should be able to be handled in
the tribal courts instead of having them in the
federal system, then having to get the sentencing
guidelines on them in the first place.

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

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records, possibly, and the probation.

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

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

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

My comments here this morning are going to be a lot shorter than Chairman Bourland’s (sic) and Ms. Meeks’. I’m going to be sort of brief and to the point. I want to touch on four issues, four items of concern, and Chairman Bourland (sic) spoke of one or two of them already, but I would like to just mention again the fact that in my conversations with a lot of the federal judges, a lot of correspondence with them, they’ve indicated
the sentencing guidelines are too rigid. And they've always in their response to my questions about it, they thought they should be looked at on a case-by-case basis and that they should have the flexibility there to do what they feel should be done. And so that's one of our concerns. The guidelines are just too rigid for the federal judges.

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

COMMISSIONER JOHNSON: There are no interpreters?

MR. KINDLE: No, there is none, and that's
something that's imperative that we have.

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

As all of you know, prisons can't be built fast enough today to house all of the offenders that come through the court systems. So what we'd like to see down at Rosebud is more drug counseling, alcohol counseling, anger management counseling to take place right back in Indian country, right back through our court systems. We'd like to have those people returned to receive the help they need. And a lot of times this counseling and this help needs to be done with their family members as well. So if they're back
home, back in Indian country this could be achieved. The counseling can reach not only the offender, but the family as well, and I think that would be a great help to us.

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

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

So with that, I want to thank you for allowing me some time here today, and we hope that
something will definitely happen; that we don't just come here and listen and go away and not see something happen. With that, I want to thank you very much for allowing me a few minutes here.

Thank you.

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

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

As Elsie had indicated, if you went down to the casino, and she gave you a hypothetical situation, and got yourself in a little bit of trouble, that there is a tremendous disparity...
between Native American and non-Indians as they're treated in the State of South Dakota and in the federal court system.

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

On the other hand, the non-Indian perpetrator, the guy that was driving the car and stole the car to begin with, in the good old boy system that exists, can go before a state court judge -- I hope there's none present here and I hope I don't offend anybody -- but in that good old boy system could receive a slap on the hand, an imposition of sentencing; you know, could be told, "Look, Johnny, go spend three years in the U.S.
Army, and you come back and be a good boy, and we'll just let the whole thing ride."

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

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

But we also realize, too, that not all cases can be handled in tribal court. There are many of the felonies that absolutely must go federal. What we ask, though, is that federal judges be given discretion to be able to look at mitigating circumstances, to be able to sift through all the circumstances that exist. That while Johnny is going to get a pretty easy ride
over on the state side, little Tommy who passed out in the back seat is not, and yet the judge could probably look at that and say, "Tommy, you know, I don't think you need to go to a federal pen. Maybe to an alcohol treatment program. Maybe you need to go spend three years in the Army with Johnny, and you guys need to straighten your lives out so you won't be getting yourself into any trouble in the future."

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

But in the future, we would like to meet with you again, but we'd also encourage you to not...
just gather in South Dakota. To go to the other states that have Native American nations in them, the Navajo Nation, the Great Cherokee Nation, many of the people in the Northwest, and I think that you'll hear and you'll find very similar testimonies. I think that you will hear tribal leaders and tribal people alike give you very similar stories because the situation is a federal situation and it exists across the board.

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

In conclusion, I'd like to submit ten copies on behalf of the Cheyenne River Sioux Tribe of my formal testimony and some recommendations, get into the legalese and I'm sure that you'll all appreciate that, being judges. And I also have two
signed testimonies from two different members of our tribe, and I realize that the record is going to close, I believe, on Thursday, but I would hope and pray that you keep the record open a little bit longer so that we can get more people back home to submit. And let's put it this way: Even if you don't, we're going to send it to you anyway.

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

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

MR. RANFRANZ: That's correct.

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

MR. RANFRANZ: Thank you. Thank you, Elsie. I would like to thank the commission for this opportunity today. My name is Thomas Ranfranz. I'm the president of the Flandreau Santee Sioux Tribe in Flandreau, South Dakota. We're one of the smallest tribes in both population
and land base. We have a population of about 500 tribal members on the reservation, and half of those are under the age of 18. Our land base, we have about 2700 hundred acres of land, so we're very small.

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

Looking into the future, our reservation as well as other reservations are experiencing growth. Through our economic development programs that we have put in place, in a large extent a lot of our tribal members are coming home to our reservations, and with this growth and the
increased population comes crime. So with our tribe, we haven’t experienced -- because we’re so small, we haven’t experienced a lot of federal offenses on our reservation, but in the future I think with this growth potential on the reservations, with ours and others, I think it could become a huge problem.

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

As federal judges and members of the United States of America Commission on Sentencing, you can make a huge, huge difference in the lives of hundreds and thousands of our people. You can
make a difference in Native American people that have never had the level playing field as others, and the odds of success are minimal at best living in the -- some of the poorest communities and counties in America today, the Cheyenne River and the Pine Ridge like Chairman Steele.

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

My understanding is that the federal judges follow strict mandatory guidelines set up by Congress. We feel very strongly that the federal judges and the federal courts should be granted
more discretion, and that's what we've been talking about here this morning on sentencing, especially in Indian country.

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

Historically, economic conditions on some of our reservations have been in poverty at its worst with, on John Steele's reservation alone, 70
to 80 percent unemployment rates and those jobs
that are available are federal jobs. Schools that
are understaffed and are in poor physical condition
and basically falling apart. Housing conditions
where you have some homes where families of 15
people live in a three-bedroom home. Roads that
are like third world country conditions. They’re
gravel, they’re pitted, that have huge holes, and
with these winters up here in the Great Plains
area, it’s very difficult for travel for school, for
emergency purposes, for healthcare.

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

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

CHAIRPERSON MURPHY: I would like -- I had
meant to say at the outset that we did receive two
written statements from chairs that were invited to
participate, Michael Jandrea of the Lower Brule Sioux Tribe, and Andrew Gray of the Sisseton Wahpeton, and they were both very thoughtful and they're going to be part of the record. And I think I can speak for the whole commission that we want to -- we will extend the time for comment because I know we'll get them anyway, but we are interested in hearing anything else that you may want to tell us.

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

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

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

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

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

MR. FRAZIER: Okay. Thank you. I guess I’m not an elder; I’m an elected official up there. I’m the vice-chairman and also District 4 councilman, and some of the elders asked for me to
speak on their behalf. I guess I'd like to thank you for allowing me to submit comments on the Federal Sentencing Guidelines.

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

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

All these show that the time has come for our tribe to reassume jurisdiction over all crimes committed on the reservations. In order to do our
Constitutional right and duty, additional funding is needed for more court personnel, training, office space and equipment so that we can handle all these crimes committed on the reservation.

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

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

CHAIRPERSON MURPHY: We're happy to
receive it. Do you want to bring it up, Mr. Frazier? Thank you.

MR. FRAZIER: Thank you.

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

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

As you all are aware, I believe that there is a case in Wisconsin, United States versus, I believe it's Sandra -- I cannot recall the last name of that, but it's in Wisconsin, which basically deals with the sovereignty of the tribal members and the IRA government. The appeals court
had ruled in favor of the tribal members, stating that they are sovereign -- more sovereign than the IRA governments themselves. Now if I remember correctly, that is now on its way to the Supreme Court.

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

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

And I do want to remind the honorable ladies and gentlemen here that the tribal courts that we see today are basically misdemeanor courts, and the federal court, I believe, is appropriately set for the more serious crime that we see on the reservation today which is murder and DUI and some
of the white collar crimes, so to speak, of fraud and embezzlement.

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

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

CHAIRPERSON MURPHY: Thank you.

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

MS. MEANS: Thank you. Honorable judges and the commission members and all other honorable judges present and Elsie, I'm here as an elder to share with you that a lot of us elders are sitting back and we're seeing what's happening on this path to the prisons in which it's mainly made up of -- for the last eight to ten years of the Native
Americans, and it’s sad to see this. It took many years to see that as the gentleman before me, Denver, had stated that we had a lot of respect within our own Tiospas, or our family units, in which we were able to handle our own, and there was a lot of great respect that we had for each other. And so we never had to get to the area that we’re -- era that we’re in today where we’re utilizing all of these different kinds of sentences.

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

And so in congregating, we discussed a lot of things to try to bring out some of the concerns that we had in trying to combat this, and there has
to be a balance somewhere along the line, and some say there is no balance. It's a choice.

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

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

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

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

MS. MEANS: Pardon?

COMMISSIONER JOHNSON: You say "using tribal facilities."

MS. MEANS: Yes.
COMMISSIONER JOHNSON: What are you referring to?

MS. MEANS: Yes.

COMMISSIONER JOHNSON: The institutions and penitentiaries?

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

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

MS. MEANS: Thank you very much.

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

All right. Chief Judge Larry Piersol, who's helped us plan this hearing today, if you can introduce the people on your panel and we'll get started right away.
JUDGE PIERSOL: Do you want me to introduce everybody or introduce them as they speak?

CHAIRPERSON MURPHY: However you see fit.

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

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

And I’d like to give a little bit of a background, and some of these are statistics that you know, some of them you might have forgotten. But for instance, from 1996 to 1999, there was a 69
percent increase in the number of Native Americans 
under supervision in South Dakota versus a 9 
percent increase for the nation. In South Dakota, 
in the District of South Dakota -- we're all one 
district, four divisions, three active judges, 
three senior judges -- 48 percent of the criminal 
cases prosecuted in the District of South Dakota 
were Native Americans, and compare that with some 
other states: Arizona, 6.7 percent; the highest, 
North Dakota next, was 37 percent; Montana, 20 
percent; and if you took my division, the Southern 
Division, that happens to have a lot of immigration 
cases and other things, if you took the Southern 
Division out, we'd probably be around 75 percent of 
our federal court cases are Native American 
prosecutions. Nobody else has a statistic that 
even approaches that.

In terms of raw numbers, South Dakota for 
the same year had 182 Native American defendants. 
The only state that had -- the only district that 
had more was Arizona with 187, although that was 
only, like, 6 percent of their cases. And other 
states trail off, all Non-Public Law 280 states, of 
course: Montana 56, North Dakota 58, New Mexico 
57, and then you drop down to Idaho 20 and so on.
So you can see where the cases are. And we're a Non-Public Law 280 state, but that isn't going to change so that's why we have the rich possibility for disparity.

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

COMMISSIONER CASTILLO: Judge Piersol, if we just focused on that first set of statistics that you gave us, certainly Native Americans don't occupy 48 percent of South Dakota's population. One could look at those statistics and say,
"There's discriminatory law enforcement." Do you want to comment on that?

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

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

COMMISSIONER JOHNSON: I wanted to ask you
something about the study. This is a state study; is that correct?

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

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

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

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

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

But I'm not suggesting, Judge Castillo, that there's a selective enforcement by the FBI,
but I'm giving you statistics so that you have a flavor of what is in federal court here. There's no place else like it.

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

But he said, "Insofar as the comparison of federal guidelines to that of the state sentences is concerned, it's my experience that as applied to Indian country, the federal sentences in certain cases are highly disparate. I refer in particular to the crime of assault for the most part. Aggravated assault under Sentencing Guideline 2A2.2 proceeds from a base offense level of 15 to which are added various specific offense characteristics. In Indian country the type of assault we see is one occurring in and around the residence resulting from the use of alcohol and
usually between family or friends. A cursory example would be a family fight where the defendant picks up a board or perhaps a stick --" it would have to be a big stick; that's my insertion into that -- "and strikes the victim in the face causing bodily injury."

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

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

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

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

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

  CHAIRPERSON MURPHY: Except that that group was fit in.

  JUDGE PIERSOL: Beg your pardon?

  CHAIRPERSON MURPHY: That group was fit in, though.
JUDGE PIERSOL: Oh, I see. Well, but they were smaller numbers than we are, too. Anyway --

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

COMMISSIONER CASTILLO: Chief judge.

COMMISSIONER KENDALL: Yeah, right.

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

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

And a couple of other comments that I'd
like to make. The commitments --

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

JUDGE PIERSON: Yes.

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

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

I do -- I would say I think that the courts of appeal are becoming somewhat more
sensitized to the fact that trial judges actually see what happens in the courtroom.

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

JUDGE PIERSOL: Absolutely not.

COMMISSIONER KENDALL: To the Eighth Circuit.

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

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

JUDGE PIERSOL: Of course.

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

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

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

COMMISSIONER JOHNSON: They have not been funded yet?

JUDGE PIERSOL: Beg your pardon?

COMMISSIONER JOHNSON: They have not been funded yet?

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

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

JUDGE PIERSOL: Yes, and I -- without speaking for him, I think he has his hands full,
but I'm sure he'll do as much as he can on that issue, too.

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

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

So let me then turn to the others that are on our panel. Michelle Tapken is the United States
Attorney for the District of South Dakota that has prosecuted all sorts of cases in my court as well as other courts here and has particularly done outstanding work in the area of child sexual abuse both in her interests -- she served a year specially with the Department of Justice in Washington and has had tremendous impact in the handling of those cases in federal court.

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

MS. TAPKEN: Chair Murphy and members of the commission, I’m very pleased to be here at the sentencing commission’s hearing today. Because of the significance of the sentencing guidelines in federal criminal prosecutions, it’s most fitting that the sentencing committee hold a hearing to explore the impact of the Federal Sentencing Guidelines on Native Americans in South Dakota, a state known for the importance of its Native American population, and the United States Attorney’s Office is very pleased to be a part of this process.
As Judge Piersol stated, in many ways we're unique in the United States Attorney's Office here as other jurisdictions that have Indian country. And one of the things that we have done is to take important steps to ensure communications and dialogue between our office and Native Americans. We meet with tribal entities and organizations on a regular basis to discuss issues of importance. The United States Attorney meets personally with each of the nine tribes in South Dakota on an annual basis to review and discuss issues of mutual concern. We annually publish a report and it's our South Dakota Indian Country Report which provides statistics on each reservation.

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

Several years ago, the United States Attorney Judge Schreier, at that time, made a
decision that we should have an Assistant U.S. Attorney responsible for each reservation so therefore, people on that reservation would know who to call. It wouldn’t be just like calling the United States Attorney’s Office, but they had an individual that they knew. And from that, we were able to develop what we call multidisciplinary teams, and on those teams we have tribal law enforcement, tribal judges, people from IHS, the FBI, the BIA, and we meet once a month on each reservation, and that has been invaluable to us to help us deal with the problems of child sexual abuse on our reservations.

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

However, it is important to bear in mind the purpose of the sentencing guidelines. Chief
Among the goals of Congress in enacting the Sentencing Reform Act of 1984 was to increase fairness in sentencing by avoiding unwarranted sentencing disparities for similar federal defendants found guilty of similar criminal conduct. This means, for example, that the sentencing guidelines generally provide the same sentencing range for all defendants in federal court with the same criminal history who commit aggravated sexual abuse in a similar manner and who accept responsibility for their offenses in the same way, regardless of the basis of federal jurisdiction. Thus, the offense may have been committed in Indian country by an Indian or by a non-Indian against an Indian or it may have been committed on a federal enclave, and the guidelines provide for a limited range of sentences for that offense with the goal of treating federal defendants fairly and equally.

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

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

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

The public is, of course, free to bring
the sentencing commission's attention to any
guideline that results in sentences that the public
believes are too harsh or too lenient, and the
commission can analyze the guideline and assess its
impact. In so doing, the commission must consider
the goals of the sentencing act set forth by
Congress in the Sentencing Reform Act; namely, just
punishment, deterrence, protection of the public
from further crimes of the defendant and rehabilitation. A sentence that may be adequate from the standpoint of punishing a particular defendant may be inadequate from the standpoint of deterring others from committing the offense. The balancing of these various goals is a challenging job for this commission, and we recognize the challenge ahead.

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

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

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

MS. TAPKEN: That's correct.

COMMISSIONER CASTILLO: So you're saying you only prosecute the serious assaults in federal
court?

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

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

MS. TAPKEN: We do.

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

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

COMMISSIONER O'NEILL: If I may ask, do
you have specific guidelines to determine which
cases you’re going to send to the tribal court and
which cases you’ll prosecute in federal court?

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

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

MS. TAPKEN: It’s an ad hoc decision.

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

MS. TAPKEN: I can’t speak to the state
courts and --
COMMISSIONER CASTILLO: I'm not asking you to speak to the state court, but I'm saying when a federal prosecutor is sitting in his or her office, and there's a multiple-person incident and three are non-Native American Indians and one happens to be a Native American Indian who is facing a federal prosecution, is it taken into account that in the same incident, three non-Native American Indians were involved and they're going to be treated in the state courts? Is that taken into account at all?

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

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

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

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

COMMISSIONER SESSIONS: And I've got --

CHAIRPERSON MURPHY: Well, I'm a little concerned about the other panel members getting a
chance to speak, and so perhaps -- I understand one of the things that we're very familiar with is that the important decision that the prosecutor makes to charge or how to handle, and there are a lot of questions about that.

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

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

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

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

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

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

MS. TAPKEN: We do have one Native
American prosecutor currently, and we do have two victim witness advocates that are Native American, one of which you’ll be hearing from.

COMMISSIONER SESSIONS: Well, can I just --

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

COMMISSIONER SESSIONS: I think that she’s letting me ask a question.

COMMISSIONER KENDALL: It’s not that she’s letting. She can’t stop you.

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

I wonder, is there something unique about South Dakota which would suggest that there is not an environment of flexibility in the system?
MS. TAPKEN: Well, I think one reason that it may be unique is that the departures, I think -- and Judge Piersol could speak better to this than I possibly -- but many of the United States Attorney’s Offices deal primarily with drug cases, and there are more departures there. But as I said, maybe Judge Piersol can help me out on that.

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

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

Now you heard that we have a Victim Witness Specialist who is Native American. Marlys Pecora is the Victim Witness Specialist with the United States Attorney’s Office in Pierre, South
Dakota, and I believe an enrolled member of the Crow Creek Tribe?

MS. PECORA: Yes, correct.

JUDGE PIERSON: Proceed then.

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

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

MS. PECORA: Oh, I'm sorry. I'm worried about the ten minutes. All right. I've been the Victim Witness Specialist for the United States
Attorney's Office for the past three years.

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

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

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

Another case involved the systematic sexual abuse of a 16-year-old girl that began when she was in the first grade and continued through the years, as she stated, over 100 times. During the course of the investigation, several other females were identified as prior victims of the defendant. The family of the defendant, including the child's mother, supported the defendant and ostracized the victim and the aunt whom she had told about the abuse. This young girl lost her mother, father, brothers and extended family because she was the victim of a crime and had the courage to tell.
After the trial the victim and her aunt sent a card to the Assistant United States Attorney and me which stated the following, "Thank you for believing." Sometimes when you hear directly from the victim, the words have much more meaning. I would like for the commission to hear some of the words from the victims themselves.

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

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

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

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

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

When she told her grandmother what had happened, her grandmother told her not to tell anyone. She was repeatedly raped for approximately six more years. This man was a spiritual leader and well-respected by the community. This sexual abuse continued over the course of a generation,
and we have currently identified six additional victims. In this case the defendant sexually abused the mother, and then years later, also sexually abused the daughter.

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

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

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

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

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

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

"I don't understand why they did this to me. I thought we were friends. I can't sleep at
night. I am constantly going from door to door to make sure they're locked. I pull the shades down on the windows and am afraid to leave the house. If a car pulls up outside, I get scared and run to the window to see who it is. I'm always afraid they'll come back and beat me up again."

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

"I have to check her breathing tube all the time for her because she's always afraid it's going to come loose. It came loose once and she passed out because she didn't have any air. She really likes Barbie dolls and she can't play with them, and so we just set them up so she can look at them. As a parent, it hurts so much to see your child like this and know there's nothing you can do to help them."
Intense fear is a factor that most victims of crime feel as the crime is being committed. A woman -- excuse me, a woman whose house was broken into reported the following:

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

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

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

I'm going to skip this last page. I have
been present on numerous occasions while the Assistant United States Attorney explains the criminal justice process and the United States Sentencing Guidelines to the victim. It is comforting for the victim to know that a sentence will be imposed based upon factors that do not include whether the defendant knows the tribal chairman or tribal councilmen, her race or any other subjective factors.

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

I would request that you consider the plight of victims of crime in your consideration. When the district judge imposes a sentence, the perpetrator knows the number of years that he or she will have to serve before they are released.
Oftentimes the victims that I deal with feel that they have been given a life sentence, and they have to continue to deal with all the issues of being a victim of crime throughout the rest of their lives. This concludes my statement to the commission.

CHAIRPERSON MURPHY: Thank you.

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

CHAIRPERSON MURPHY: On the sexual assaults?

JUDGE PIERSOL: On the sexual assaults,
that's right.

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

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

CHAIRPERSON MURPHY: Yes.

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

CHAIRPERSON MURPHY: Commissioner Steer has a question.

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

MS. PECORA: Are you talking about aggravated physical assault or sexual?
COMMISSIONER STEER: I'm not talking about sexual assault. I'm talking aggravated assaults.

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

COMMISSIONER STEER: Thank you.

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

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

MR. McBRIDE: No, the next-to-the-last one, Judge Murphy, because I used Harry Potter in the last one, and you were disappointed I wasn't going to use it on the last one. But I want to talk about that, my very last argument, not the one you heard, the one that Judge Bye presided over, because it is a guideline-specific thing; it's something I think you can do, and I think my friend, Mr. Van Norman, from the Public Defender's Office, will agree I'm right on this. It's...
somewhat of a loosening that I believe needs to be
done in the domestic abuse area.

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

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

I don't necessarily have different views,
but I think there are some different questions that
you need to ask, and one of the first ones -- I
didn't know how to get in and say, you know, "Let's
not forget the victims." Thank goodness the
Department of Justice allowed Marlys Pecora to
testify today because I don't have to pull your
attention back to the victims.
I think there's a reason you aren't hearing much about the victims from our political figures, and I say "political figures" with great respect. The victim rights movement and the violence against women movement, while people like Lisa Thompson have done just Herculean efforts in terms of providing services to the victims of crime in Indian country, the political throw weight that you find for those issues in Congress simply have not gotten to the point where it is affecting tribal political leadership. I'm not saying that to be critical of the leadership. I understand, you know, what they're facing and the fact that their awareness simply hasn't been brought to this issue. I think it will in the future. I think there will come a time when you'll hear more about victims' rights from some of the people today that only cursorily touched upon them.

Another thing that I think you should know is I went to the last meeting of the Native American Issues Subcommittee down in Albuquerque with the outgoing U.S. Attorneys, and one of the things they wanted to emphasize was to make sure they understood that -- people understood they wanted -- the Indian tribes wanted more federal
prosecutions, more -- and I said, "Wait a minute, that's not what I hear from South Dakota tribes." They couldn't believe it. They thought I wasn't talking to the people.

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

There may be a couple reasons for that. In South Dakota, at least from the time I started over 20 years ago, Indian country issues were the number one priority of every U.S. Attorney I worked for and myself. There were eight assistants when I started, I was number eight, and that was our most important function. There now is, Ms. Tapken has told you, almost 25, and most of that increase, much of it at least recently has gone into Indian country prosecution as have FBI resources and other resources. Janet Reno is one of the reasons for that. Congress, including Republicans such as John McCain and Ben Nighthorse Campbell, is another reason for that, and the prior U.S. Attorney prior to me, now Judge Schreier, had no small part in seeing the increase nationwide in resources.
Now the table scraps of the federal government, which is really what we're giving to Indian country resources recently, become tremendously significant in states like South Dakota with only 700,000 people. I believe that the prosecutions in Indian country done by the federal government, that you've got AUSAs with more experience, paid better and a lighter caseload than any state prosecutor can dream of in this state. The caseloads of the judges -- well, the federal judges have tremendous caseloads, so do the state cases -- so do the state people. The state's attorneys, many of them are part-time.

I think when you couple that with the fact that the willingness and ability of Native Americans to engage the judicial system as victims is somewhat less, I believe, than non-Indians, you can't simply base your decision on what does an Indian person get for a sentence in state court. I think you're going to have to look and see whether that victim in state court was an Indian person or a non-Indian person. And I don't mean this as criticism to my colleagues in state court or judges. I think institutionally and simply socially, they aren't getting the same pressure.
from Indian victims that one might in federal court. And even in federal court, it's not so much a function of pressure by the victims. The victims don't tend to really push, but the federal government has decided to put tremendous, but proportional resources into this area, and it is something that's pursued with great vigor in this state.

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

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

MR. McBRIDE: Judge Sterling -- excuse me, Judge Johnson. I don't want to be too personal, Judge Johnson. Judge Johnson, that's just where I
was going. When I started, there were no sentencing guidelines. I was telling Mr. Steer, I was in Washington at a major narcotics conference the day that passed, and they came in and threw out the agenda and we talked about what this was going to mean. I thought it was a crazy idea at the time.

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

Jean Renoir says, "Of all things in life, there is one thing that is most terrible, and that
is everyone has his reasons." The sentencing
guidelines, while they may acknowledge that that
was a reason, took it away as an excuse. You are
being asked to put it back in as an excuse. You
may want to do that. I don't know. If you do, I
do suggest you may have a problem if you only make
it relative to a Native American because if you
have a non-Indian person in Indian country who is
drunk and assaults an Indian person, they're going
to be prosecuted in federal court. Do you want
that exemption to extend to them? If you don't
have it extend to them, I suggest you may have
constitutional problems not covered by the Native
-- by the Indian sort of exception to equal
protection which is the fact that the designation
of Indian in Indian country is not based on racial
standards, but is rather a unique political
relationship. I don't know how you can justify
down at that level giving a non-Indian -- saying it
was a reason you were drunk, it's no excuse and
turning around and saying that to a Native
American. Maybe you can. That's an issue that you
need to address.

COMMISSIONER CASTILLO: Let me test your
memory, Mr. McBride. You say that the first
assault in the old system was free, but the
defendant would be placed on probation. How many
times would that person successfully complete their
probation?

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

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

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

COMMISSIONER CASTILLO: You have a lot of
experience in the criminal justice system. What's
your view on that? What do you think is more
appropriate, given all the factors; putting
somebody on probation first with an opportunity to
turn around their life, with the idea that this sword of Damocles is hanging over their head in terms of a revocation proceeding, or putting them in prison first and then supervised release after prison?

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

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

MR. McBRIDE: I don't think word gets out. I don't think it happens until after the offender is dealt with. I think in terms of the offender's chances of not being a recidivist that you're going to -- that if you looked at the statistics, you would see a slight increase over
rehabilitation on somebody that's had consequences, then supervision than opposed to the free bite. I know I don’t have much time, but I would like --

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

COMMISSIONER KENDALL: What he’s asking is do you trust Judge Piersol?

MR. McBRIEDE: As Judge Piersol knows, I trust him with my life.

COMMISSIONER KENDALL: Well, right now he’s going to trust him.

MR. McBRIEDE: Every one of the judges in this room, you know, much like -- it’s much like
when they do the surveys, everybody dislikes lawyers, but they like the lawyer they know. I love the judges I know.

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

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

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

MR. McBRIDE: Yeah, what they probably get and what they sometimes got here was the reduced plea to a misdemeanor their first shot, their first
go-round. I think Bob and I talked --

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

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

If I could very quickly, because this is something I feel is important, and it has to do with the area of domestic abuse where you have an assault with a dangerous weapon or an assault
resulting. As you know, acceptance of
responsibility can rarely be given when there is an
obstruction of justice points given. This provides
peculiar problems in the area of domestic abuse.
We didn’t used to prosecute those, you know,
because the victim would -- she’d keep saying, "No,
I don’t want to prosecute. I fell down the
stairs," or as Roddy Doyle's book, The Woman Who
Ran Into Doors, "Yeah, I ran into doors."

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

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

JUDGE PIERSOL: You’re five minutes
MR. McBRIDE: Excuse me. Extraordinary cases is what the commentary says, extraordinary cases adjustments. I would ask that there be a recognition that domestic abuse provides a particularly rich environment for a finding of extraordinary cases because of its nature. I'm sorry, Judge Piersol.

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

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

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

JUDGE PIERSOL: Overall with regard to the
population that is in the South Dakota State penal institutions, and it is hard to understand why, but I just wanted to mention that in case you thought that the South Dakota judges and the legislature were being passive. Anything but; we have a very high rate of incarceration.

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

Mr. Van Norman.

MR. VAN NORMAN: Thank you, Judge. Judge Murphy, panel members -- or commission members, rather. I've seen "panel" so many times today, I'm starting to repeat that. It's nice to be in this courtroom and have the opportunity to talk to you. I've submitted written comments, many of which I'll
try not to repeat, but I will some because I think they do bear repeating.

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

JUDGE PIERSOL: Don’t be too sure.

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

    But with regard to victims, I want to mention this and then move on because I am an advocate. I don’t pretend to be anything else. I’m not a statistician, I’m not an academician, I’m an advocate. And the thing about victims is that there is a restorative justice movement that is starting to take hold in this district, and I look
at it this way: If my clients can benefit from participating in the restorative justice -- sometimes you have to lead them to drink, that's fine, and I'm talking about the horse to water and not alcohol -- and they can get credit for participation in the restorative justice movement, excellent, and that to me may yield something down the road for my clients and certainly for the victims that they don't have an opportunity to look at or be involved in at this point.

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

I can apologize until I'm blue in the face to victims. My clients oftentimes are inarticulate and incapable and can't go to those victims. There was mention earlier made of a victim who was approached by the mother of an offender.
Ms. Pecora, I believe, mentioned it, and she did half of it right. She apologized for her child and the offense he had committed. And then the next part was, of course, wrong and that probably was a negative yield for the offender in that instance because that would be very easily obstruction attributed to him.

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

Another thing I want to say about my staff and my office is this: I would be delighted if a Native American were the Federal Public Defender instead of me. This is an Indian country office. Virtually 90 percent of my clients are Native Americans. Maybe in the future and hopefully in the near future, that will change. I have one Assistant Federal Defender, an excellent trial lawyer, who is an enrolled member of the Oglala Sioux Tribe.
That having been said, I want to tell you that there are -- there was a mission I was given when Judge Murphy wrote to me, and that was about disparities, and so most of my comments really address the disparities between the state and federal systems that the judge had asked about.

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

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

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

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

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

CHAIRPERSON MURPHY: It got everybody's attention.

MR. VAN NORMAN: Right. I'm remarkably well-preserved. But one thing that struck me about U.S. Supreme Court decisions previously was that there was individualized sentencing, and in Indian country I think that is just incredibly important. We have -- and the tribal chairs have talked about it much more eloquently and adequately than I could. We have huge degrees or levels of unemployment. The poverty rate is something that, for most of you, you can't even understand. I've worked in tenement areas in St. Louis. I've worked...
in VISTA at different places around the country, in New Mexico and Texas, before I was ever a lawyer, and the poverty that I see on the reservations here is striking in comparison. That is the first characteristic of the situation that I think that you need to be able to take into consideration as a sentencing judge.

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

Getting back to the state system again, I can't again emphasize how different it is. I mentioned suspended impositions of conviction. You talk about funding and opportunity to have jobs later and what a conviction does to a person on the reservation. It's true. A suspended imposition of conviction under the state system, which is available in all but a few cases, is just that. You complete the probationary period, you have no conviction at the end of that probationary period.
That's a matter of grace. That's a matter of mercy that the system should extend that it does not in the federal system.

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

I want to talk a moment about another form of sexual assault that I know the commission will be looking at and that is incest. There's no question in my mind, based on my experience and the information I've been provided by a local expert by the name of Dewey Ertz who I've written about in my submission who, by the way, is an enrolled member.
of the Cheyenne River Tribe and has a Doctorate, excellent therapist and author that the probation office here frequently looks at. His statement is firmly about incest that the offenders are treatable unlike pattern activity for pedophiles, and they should be treated differently. Unfortunately, because of the huge range of factors on the reservations, incest is a fact. It's something that should be dealt with obviously, but dealt with with the humanity of the offenders and their backgrounds in mind while this is being done.

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

JUDGE PIERSOL: It is, but just.

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

I really appreciate you being here, and the one last challenge I would give to you is to
visit Pine Ridge while you’re here. Please do so. Thank you.

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

MR. VAN NORMAN: Diminished capacity is a possibility.

COMMISSIONER O’NEILL: In specific intent crimes or general intent crimes?

MR. VAN NORMAN: Specific intent crimes. It’s a possibility. There’s also --

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

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

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

MR. VAN NORMAN: No. It’s a recent phenomenon based on alcohol and situational -- the
circumstances are situational.

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

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

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

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

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

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

And I was going to bring this up at the
end, but the current president of the National
Association of Criminal Defense Lawyers is a fellow
from Houston who I know, and another thing that
might be possible is us maybe to get together and
look at this would be of use to the panel attorneys
is training for -- maybe get some volunteers from
the NACDL to come to South Dakota to put on some
type of training.

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

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

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

COMMISSIONER JOHNSON: Other lawyers?

MR. VAN NORMAN: Yes.

COMMISSIONER O'NEILL: Do you feel like
the community generally -- because usually we
assume when we've got laws, criminal laws
especially, we assume that the community, whether they do as a matter of fact or not, you assume sort of defacto that people are apprised of those laws and the penalties to a certain degree. Do you find that the clients that you deal with and work with on the Indian reservations, that they have a pretty good understanding of what they're going to get popped with or the severity of the penalties that they're going to be facing and circumstances?

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

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

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

JUDGE PIERSOL: Yes, thank you. The final speaker is Lisa Thompson who's the Executive Director of the Child Advocacy Center in
Ft. Thompson who is also an enrolled member of the Lower Brule. Ms. Thompson.

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

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

MS. THOMPSON: I understand what it's like to -- it's too bad that not everybody can experience what it's like for a child to be in front of a whole jury, and so -- and being here right now, I've never had to -- well, I've had to sit in front of a jury before, but as far as this is somewhat very intimidating, and if other people could experience this and know what children, child
victims go through and what their mothers go
through as well is very intimidating, and that is
why sometimes a lot of victims do not tend to come
forward because of the intimidation and threats.

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

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

In the third study, 63 percent of the men
completing treatment were not using violence six
months after treatment, whereas 50 percent of the
non-treatment batterers remained violence-free (sic).

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

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

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

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

And I think that the sentencing needs to include a batterer's reeducation, and there needs to be rehabilitation so that tribal members can
come back and be good tribal members and give back to the community. And that we don't have jails -- our jails are not big enough on our reservations, at least the ones on the Crow Creek and the Lower Brule Reservation. I work on the Crow Creek Reservation, but I'm enrolled on the Lower Brule Reservation which is 15 miles from the Crow Creek Reservation.

We deal with many of abuses that we've dealt with. We don't have a problem as far as for child sexual abuse that are prosecuted in Indian country. However, I think that the serious domestic violence cases are not prosecuted or even the fact that the sexual assault of women, you don't see many of those cases that go federally. Often I have found that sometimes, and I'm now speaking -- I've talked to other advocates across the state in Indian country, that as far as a lot of cases of sexual assault are not prosecuted when they're being investigated. That sometimes when we talk about alcohol, that there is alcohol abuse. And I think one of the things that -- the reason why some of the cases with women aren't prosecuted is because they say they were drunk and they don't want to prosecute those cases. However, there --
and I'm not saying that there haven't been cases that haven't been prosecuted because I know that there has as far as on our reservation where there have been cases that have been charged federally and have went and they have been sentenced.

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

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

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

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

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

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

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

A lot of -- and again, I’m speaking from experience. A lot of times the battered women that we have come into shelter, sometimes the battering that has occurred was not due to the alcohol; a lot of them weren’t drinking. However, there are times that when women have come into shelter, yeah, the batterer was drinking. But drinking intensifies the battering, but it is not the cause of the battering, and neither is it the cause of child abuse or incest. And I do believe that we have to look at some type of reeducation for batterers and...
some type of treatment programs for our family members.

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

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

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

COMMISSIONER O'NEILL: Ms. Thompson?

MS. THOMPSON: Yes.

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

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

I want to say also that because we have a high turnover sometimes in our police departments, sometimes advocates have to educate police officers -- that's if they'll listen -- as far as on what they are supposed to do; that they are mandated to go and arrest the abuser. That also that when we have rape victims, sometimes we are the ones to tell them, "No, you can't do that. That is for the hospital to do. You can't touch any of that."

Sometimes we are the ones -- we are the ones educating them. I have police officers that ask me, "Please, we want some education here. We don't know what to do. We get people coming and going. Tell us this, tell us that."

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

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

COMMISSIONER KENDALL: Well, it's actually whenever we're through, I had one I want to ask
Ms. Pecora.

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

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

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

And we've also been seeing -- the trend has been lately is that there has been a lot more children on -- children that sexually abuse, and if there's even -- say, if you have a five-year-old and a ten-year-old, where's that handled at? It's not handled in tribal court and that's not handled
in federal court. Sometimes the state doesn't know how to handle it. State Social Services or Bureau of Indian Affairs, they don't have treatment facilities for a lot of these victims.

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

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

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

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

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

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

But I also -- I will give you some written
-- more written comments from myself as far as
from the South Dakota Coalition Against Domestic
Violence and Sexual Assault. Thank you for
allowing me to speak here this morning.

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

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

COMMISSIONER O'NEILL: But was there much
of a shift, say, post 1987, pre 1987 in terms of --

JUDGE PIERSOL: In prosecutions, yes, but

that's a matter of law enforcement. It doesn't

have anything to do with the guidelines.

CHAIRPERSON MURPHY: Judge Kendall -- we

are going to have to end with this panel because we

have another panel. Judge Kendall, you have a

question?

COMMISSIONER KENDALL: I want to

understand something because I’ve read the

materials and I read your statement that you gave,

and I don’t want to come away with the wrong

conclusion that maybe some others may have, and

perhaps asking a victim’s rights advocate might not

be the best person, but if you could, put yourself

out of that role and speak as a Native American

woman.

Given the alarming rates of victimization

by Native American women, can you help me get a

handle on whether or not -- if I were to have a

candid discussion with the average woman living in

Indian country with regard to where her role or

place is in that culture versus the role of women

in non-Indian country culture? I mean is -- I know

that I’m not being very articulate about this. I’m
trying to get a handle on would it be the consensus among Native American women that their plight with regard to how they are treated by men in Indian country is different from how they would be treated or women are treated in the dominant culture, I think, if I’m using the right terminology? Does that make sense, what I’m saying?

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

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

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

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

MS. PECORA: In my personal judgment, I
think that somewhere along the lines, all of the culture lost some of their sense of identity, and we’re losing some of the cultural practices, traditional cultural practices, and a lot of the things that I am doing in my job that go beyond the scope of my duties as a victim witness advocate is to try to bring some of the culture back to the reservations that I work on through crime prevention programs where we ask some of the Lakota elder people to come in and do talk to the children about their Lakota roles. I think the reservations themselves are starting to get back to that as well. They have some — in the school systems some immersion programs where they speak Lakota, fluent Lakota, nothing but Lakota in the classroom to try to get back some of that and get a balance back to where we should be. Does that answer your question?

COMMISSIONER KENDALL: I think so, yes.

MS. PECORA: Okay. And I’m not sure that, working in urban society as the executive director in Pierre, South Dakota, that Native American women are suffering at the hands of their abuser more often than they are off the reservation. I think they’re just becoming stronger and coming forward
and saying -- talking about what's happening to them.

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

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

MS. PECORA: Again, not speaking as an employee of the U.S. Attorney's Office, but speaking as a person, yes, that there have to be some consequences for behavior; that alcoholism or poverty cannot be used as reasons for a person committing a crime. I mean, a lot of us grew up in poverty stricken homes and have been surrounded by alcohol and chose not to lean on that. And it is
protective when somebody who is a violent person like some of the people that I referred to in my statement is taken out of the community. There's a
measure of safety in that.

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

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

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

JUDGE KORNMANN: My chief judge was speaking to me.

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

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

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

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

I think the -- you know, we’ve been talking here about disparity in sentences and how the sentencing guidelines can be changed, and I’d like to change directions a little bit and talk...
about the ultimate answer to this particular problem, and to do that, you have to understand a little bit about why we're all here and where do we get this jurisdiction in federal court over Indian country.

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

Now I think the answer to this question is, and I think that the people that are making the policy have to at some point in time really give some thought to returning some of the jurisdiction that was taken away by the Major Crimes Act to the tribal courts, and that could be done on basically
a selective basis, picking a particular tribal
court and maybe as a pilot project, picking all
tribal courts in the state or dealing with all
tribal courts across the board.

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

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

I realize that is not the situation at the
time, and I realize you folks have probably very
little to do with the situation as we find it at
the present time, but as we speak now, you know,
this is a system that's not working, and it causes a -- it breeds resentment and breeds a lack of trust in the criminal justice system. It does nothing for the accomplishments of Indian reservations, and we find ourselves sitting up here talking about disparity in sentencing which really, you know, just makes everybody feel good that's involved in this. I mean, it makes the judges feel good, it makes the probation officers feel good, it makes the prosecutor feel good because there is something that's inherently wrong about taking -- let's take Shannon County, 90 percent Indian. All crimes, virtually all the crimes that are committed on that reservation, you send the FBI down there, you take the Indian off the reservation, you bring him up here. After he commits the crime, that's about the last Indian he sees along the way. I mean, they're white FBI agents, basically they're non-Indian judges, they're non-Indian attorneys, they're non-Indian jurors, and they're 150 miles and sometimes 200 miles from where the crime was committed. A lot of people have one heck of a time even getting up here. And they just see that the Great White Father has come down and taken their particular person and they've carted him off to
jail.

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

And so, you know, this is just a -- it's not a good system, and we can sit here and talk about disparity in sentences until we're blue in the face and it's not going to do one whit of good other than, you know, we can all say, "Well, we're making the best out of a system that was given to us." And, you know, I applaud that and I want to be a part of that, too, but that is not the ultimate answer in this situation. It's not the ultimate answer to take Indian people and just take them completely out of their particular cultural system and, you know, take them out of even a scenario that would not be tolerated in any other society.
If you took a county in Mobile, Alabama, and took all -- you know, took the blacks that committed crimes there and you took them to a non -- you know, where they never had, you know, any percentage of black people, you know, in the U.S. Marshals, judges, prisons, you know, along the way, I mean, it wouldn't be tolerated. You'd have an uprising. And you could -- we could talk about the other minorities in this country, it would be the same way.

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

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

MR. PECHOTA: Oh, I think it's been brought up, you know, now and then. I don't know if it has been recently, but I know that -- I worked with the United States Commission on Civil
Rights when I got out of law school -- or while I was in law school in '72, and I know that there was a proposal then, and so it's something that gets bantered around, but very little gets done on it.

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

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

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

MR. PECHOTA: Now having said that then, I'd like to talk to a couple -- I'd like to just make a couple brief statements about disparity in sentencing in comparison with South Dakota, the South Dakota Justice System. All the things I've talked about breed resentment and lack of trust in the federal justice system, but there are a couple other things that we can talk about.
In South Dakota we have this beautiful statute, it's called the -- and it's found under 23A-27-13, and it deals with a suspended imposition of sentence, and it's used a lot in South Dakota and it's used a lot in these garden variety kinds of crimes. Now I think that -- you know, I think that we have to sort of stay with this garden variety kind of crime when we're dealing with this situation because if you have a murder or if you have, you know, a very serious child molestation case or, you know, a very serious assault, I mean, that we can all pretty much recognize and the United States Attorney can recognize, too. I mean, he would -- you know, he knows when he has to -- when that particular kind of crime has to come to the federal court system. And I have no problem with that because I think, you know, minds differ very little when we start talking about, you know, these incidents of brutality that occur.

But when you have the garden variety kinds of things, these statutory rapes, these assaults, you know, where somebody gets two or three stitches in their head or, you know, or breaks their arm, or burglaries or larcenies, those kinds of things, under South Dakota law, I mean, unless you have a
record, you're basically -- you know, you basically will get a suspended imposition of sentence.

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

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

MR. PECHOTA: Okay. That has an enormous effect on the ability of people to make a
meaningful life for themselves. And so I just feel that if there would be something where that could be incorporated into the guidelines so that you could have that opportunity given to the judges, you wouldn't have to saddle all these young people that are coming before the court system with felonies for the rest of their lives. Thank you.

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

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

In thinking about the issues before the commission today, I would probably put them into four areas that it to me makes sense to think about, and that's understanding the issue of context, the issue of consultation, the issue of
study, and the notion of consent. And what I mean by context is a little bit building on what Terry and other people have said. I think it's difficult for the commission to really have a full grasp of these issues unless they have some sense of the historical context, because if you just step back for a minute, isn't it odd that the United States Sentencing Commission would be here getting input about what happens to people who commit crimes in Indian country? Why aren't they routinely prosecuted in tribal court? And unless you have some understanding of that background alluded to by discussions of ex parte, Crow Dog, the Major Crimes Act, I think the commission really can't come to grips with what is actually happening here. And so I hope it's not presumptuous, maybe it's the teacher in me, but hopefully members on the commission who don't have a sense of the context would do some reading in the area, have a sense of how the distribution of criminal jurisdiction in Indian country came about, because part of this is friction, racial friction, colonial friction between the federal government and Indian tribes, and that can't just be swept away because you've heard a number of people testify there's concern.
about why and how the tribes lost jurisdiction in the first instance. And certainly that's outside the purview of your authority to do anything about, but I think it's important that you be informed about it so that you can make informed decisions in the context of the guidelines.

And so I think this notion of context is important when people continually give the examples which are very powerful and provocative examples, if you have an Indian person commit a crime against an Indian person on the reservation, he or she is in the federal system, but if a non-Indian commits the identical crime against a non-Indian person, they're going to be in the state system. Well, that's odd; that's not rational. Why is that the case? And if you go to United States v. Antelope, the Supreme Court said that that's not a denial of equal protection, and I agree with that decision because it vindicates tribal sovereignty in a way, but it does lead to some very, very practical problems when you have an Indian perpetrator and a non-Indian perpetrator potentially involved in the very same action, as the several examples were given, and they're going to be treated in different systems. I mean, it's hard to kind of mesh and put
that together and see how you're going to get a just result and how that plays out in the community, particularly an Indian community, because people just say, "Well, how is it that I get dragooned into the federal system and my best buddy who I grew up with who's a non-Indian is going to be in the state system?" I mean, it's hard to make that case rationally to those individuals. And I think those of you on the commission have to at least understand the historical routes and the thinking of the court in making that decision, particularly United States v. Antelope.

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

As a member of the South Dakota Advisory Committee to the United States Civil Rights
Commission, when the United States Civil Rights Commission came here through the wonderful work of Elsie, there was still a concern, "Well, you came, and they came in the '70s, but they left, but there was very little change." And so people look, I think, with a slightly jaundiced eye to the feds when they come here, even though they come in good faith.

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

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

The notion of additional training in Indian country, here in Indian country, about how the guidelines actually play out for both professionals, but perhaps even the opportunity for members of the community to participate in that training, to see that training, to hear themselves how this stuff is supposed to work, because oftentimes the gap in communication is huge. And we have to -- this is an exercise in closing that gap in communication, but I think it has to be an ongoing exercise in closing that gap in communication.
And then the third area is this notion of study. We've heard several references to a state study that is about to start. We have Steve Feimer, a colleague of mine at the University of South Dakota, who's going to be leading that study. I think it probably goes without saying that we need some kind of a matching federal study about how the guidelines actually work in Indian country. We have feelings, we have opinions. There are very few studies out there about disparity. I mean, how does the --

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

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

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

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

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

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

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

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

We're starting our study with 1994 data and we'll go up through 1999 looking at
approximately 60,000 felony cases filed in the State of South Dakota. At this point what we’re doing is conducting focus groups with members of the Native American community. We’ll be doing focus groups with state prosecutors and judges to make sure that we have their input in terms of the kinds of variables that we should include in the study. We don’t want any gaping holes left in this, and we’ve provided you with a copy of some of the variables that we’ll be extracting from the data, but we’re looking for anything else.

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

DR. FEIMER: I don’t know the answer to that question, sir.

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

COMMISSIONER JOHNSON: No Native American judges?

DR. BRAUNSTEIN: There are a few state’s attorneys as well. I’m not sure that there are more than a handful.
COMMISSIONER JOHNSON: But how many state's attorneys, period?

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

COMMISSIONER SESSIONS: 66.

DR. BRAUNSTEIN: -- 66.

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

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

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

MR. PECKHAM: Back to you, Frank.

MR. POMMERSHEIM: Okay. One thing in the context of the study, for example, another
recommendation that came out of the South Dakota Advisory Committee's report was to look at the issue of racial profiling in the context of state arrests, and there was a bill proposed in the state legislature this year to keep track of potential racial profiling statistics, and that bill failed in the South Dakota Legislature so it didn't pass, and so that's another recommendation of the advisory committee that was at least temporarily rejected by the state.

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

And I would suggest at least as a way of thinking that perhaps that's a model that the
commission could take a deeper look at. That perhaps the strict use of the guidelines in Indian country would be based on a consent model. That each tribe, through its political process, could decide whether it wanted the Federal Sentencing Guidelines to play out exactly as they do now, or whether they would not want them to play out and to go to more of the discretion model that has been described.

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

The very last thing I'd like to touch on is that I would hate to see a greater divergence between what the feds are doing and what the tribes are doing. There was some discussion about the tribes, I think, are trying to move more towards a
restorative model where the view of a perp -- and this is somewhat simplified and not always true, but I think it is accurate. I think in most tribal communities, the view of a perpetrator is that he or she is a valuable member of the community, and we want to do what is necessary to bring him or her back into the community and serve that community with honesty, integrity and distinction.

The view of the Federal Sentencing Guidelines would appear to be to get rid of that person, to cull him or her out of the community for a long time, don't give them any help along the way, and just let them loose when finally they get out. And if I'm accurate about that, I think we have a fairly large divergence between where the Federal Sentencing Guidelines appear to be taking us in Indian country and what more and more tribal people are trying to do within their own tribal criminal justice systems. And this is not to be romantic about restorative justice, that it's going to make everything better, but I think that there is a lot of very valuable ideas in the notion of restorative justice; if you view a perpetrator as a member of a community and you want to heal that person to bring him or her back into the community
or if you regard that person as totally outside the
framework of the community and always to be held at
arm's length, or worse, from being a productive
member of that society.

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

CHAIRPERSON MURPHY: Thank you.

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

MR. HANSFORD: After listening to
everybody all morning, I think just about anything
that I could have said has already been said. The
Bureau of Indian Affairs Office of Law Enforcement
Service as a group generally supports the idea of
the judges having more discretionary authority in
their decisions, but at the same time, we’ve also
got some reservations as to the judge, what sorts
of changes should be made.

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

I’ve seen some federal judges that are
fully supportive of Indian country. I’ve seen
other federal judges that basically made the
comment that they felt that all tribal police
officers should be arrested for impersonating
police officers.

There’s a lot to be considered in a
decision like this, and whatever decision you
ultimately make, you know, we only ask that full
and careful consideration to all aspects of the
victim, suspects, the community, that every possible area be considered before any drastic changes are made.

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

MR. HANSFORD: Same experience.

COMMISSIONER CASTILLO: Some good, some bad?

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

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

MR. HANSFORD: I think they do a good job of recruiting, but Indian -- people coming off the reservation, you know, we're handicapped by our educational systems, different language barriers, cultural barriers. There are not a lot of our folks that can afford or even want to come off the reservation and go to a major university. They can't afford it. It's too far away from home. And with the standards that the FBI sets for their
agents, there’s not a large pool of Indian people
to draw from. So it’s not that the FBI’s not
trying; it’s just that there’s a lot of improvement
that could be done in education.

COMMISSIONER CASTILLO: Thank you.

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

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

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

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

CHAIRPERSON MURPHY: Well, I think we’re
all interested in learning more about it. I’m sure
that Professor O’Neill in particular, who is always
thinking of various interesting surveys and
research projects that can be done, he’ll be
particularly interested, but we all will be and
want to learn more about it.

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

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

You know, when I walked in, there was one
person sitting at one of the tables, and that was
President Kindle from the Rosebud -- from your
tribe, and so I went up and introduced myself, and
he said, "What are you going to do about this?"
That was before we had heard anything, and I said,
"Well, we're going to listen, and then we're going to go back and we're going to ponder." And we're going to have a lot -- people have been taking notes, people have been thinking, you know, there have been questions.

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

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

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

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