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March 28, 2001

The Honorable Diana E. Murphy
Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500
Washington, D.C. 20002-8002

Re: Amendment 5

Dear Judge Murphy:

As a former visiting federal public defender at the Sentencing Commission, I am aware of the hard work and dedication of the Commissioners and the staff to implement fair and just sentencing guidelines. However, I believe the Sentencing Commission must use greater caution in amending the sentencing guidelines to avoid unintended and unjust impacts on the Native American community. As a federal public defender from New Mexico, I have represented a diverse Native American population on a variety of criminal charges. In my experience, there is a wide-spread belief among Native Americans that they are treated unjustly by the federal government and the Sentencing Guidelines.

Unfortunately, my practice has given me significant experience with child sex abuse cases. Native Americans charged with violations of 18 U.S.C. § 2241 represent about one-third of my caseload. I, and my colleagues, are the ones that have to sit with the individuals and their families and inform them of what they are facing under the Sentencing Guidelines. Often, I also confer with the victims, and their families.

Before I offer advice concerning the technical amendments, I wish to describe the world that the vast majority of federal sex offenders come from. I first must note that in a few sentences or even pages I cannot do justice to the life of a Native American on the reservation. There is a great diversity between the tribes. While some of the tribes have received some economic boom due to natural resources or gaming, the greatest poverty in America is on the reservations. On some reservations, unemployment exceeds 50%. A fact often ignored is that a significant number of those individuals who are employed are still below the poverty level.

According to 1999 statistics from the Census Bureau and the Bureau of Indian Affairs, 1.4 million Indians live on or near the reservations. See, <http://washingtonpost.com/wp-srv/national/daily/july99/indian7.htm>. Thirty-eight percent of Native American children aged 6 to 11 live in poverty, in comparison with eighteen percent for U.S. children nationwide. *Id.* Only sixty-three percent of Native Americans are high school graduates. Nineteen percent are homeless, and

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fifty-nine percent live in substandard housing. *Id.* Twenty percent of Native American households on the reservations do not have full access to plumbing. *Id.*

Misery unfortunately begets misery. Abject poverty, little hope of gainful employment, limited educational opportunities and isolation have led to other ills. Crime rates, while on the decline nationally, remain constant and high on the reservations. Also, the symptoms of depression are reflected in the high teenage pregnancy rate and the epidemic of alcoholism and substance abuse. Personally, I have represented clients so depressed, they have used diesel fuel, a phenomenon unique, in my experience, to Native American clients.

The federal government has been niggardly in the use of resources on the reservation. I, along with the judges and other court personnel, are often frustrated by the lack of alcohol, substance abuse and other counseling programs on the reservation. Moreover, several local AA programs on the reservations have been closed due to the lack of funds.

While prosecutors may bring individual cases to the Sentencing Commission's attention, I do not believe that the district judges in South Dakota, New Mexico and Arizona, who handle these cases daily, believe that the current guidelines are insufficient to deal with major crimes, including sex abuse cases. If the United States Attorney or the District Court believes that an individual defendant is a danger to the community, there is sufficient provision in U.S.S.G. § 2A3.1 to incapacitate an offender. In my experience, the majority of my Native American clients are usually sentenced at the low end of § 2A3.1. If anything, I believe the sentencing courts desire a greater discretion in Native American cases.

I urge the Sentencing Commission to meet with members of the Native American community in both the plains and the Southwest before acting upon Amendment 5. The causes of Native American crime are complex and cannot be resolved in most cases by sentencing increases.

Most of my clients who are charged with sex offenses are victims of abuse themselves. Currently, I represent a young man who was subject to ongoing abuse from approximately ten to fourteen years of age. He was continuously sodomized by multiple male members of his family, as well as their friends. For sport, they tied him to a chair and used him as a target for their BB guns. He was also subject to other physical and verbal abuse. The abuse led to severe depression and alcohol abuse, and he inappropriately fondled two of his family members.

My client is not a sexual predator. His acting out is consistent with his being a victim of sexual abuse. However, under the proposed guidelines, he could be subject to both a pattern of activity and incest enhancements. The psychological evaluation reflects, and the government does not dispute, that my client is very amenable to treatment and has made significant attempts to reform his life, including becoming sober and seeking counseling. But, the proposed guidelines would effectively incapacitate him before ever giving him opportunity for treatment and counseling. Thus, he would be victimized twice.

If the Commission proceeds with adopting a pattern of activity enhancement, I would propose option four, an encouraged upward departure. This would give the court the flexibility to incapacitate those individuals who are a true risk to society. The current guidelines for an offender

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with no criminal history under U.S.S.G. § 2A3.1 currently provide for a sentencing range of between 108-135 months for the sexual abuse of a child under 12 years of age without force of injury and not in the custody of defendant. If force was used, the minimum sentencing range for a criminal history category I defendant would be 168-210 months. Thus, increases due to multiple counts and an encouraged upward departure would be sufficient to incapacitate an offender who was a true pedophile.

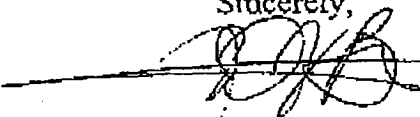
The Sentencing Commission should not adopt an incest enhancement. This would be tantamount to an enhancement for being a Native American since the vast majority of the offenders who would receive the enhancement would be Native American. Moreover, incest offenders are the most amenable to treatment and present the least risk of recidivism. The difference between incest and pedophilia can be found in the laws of South Dakota. Incest is a Class 5 felony with a sentencing range from probation to a maximum sentence of 5 years. S.D. Codified Laws Ann. § 22-22-19.1. Criminal pedophilia, which excludes acts of incest, is a Class 1 felony with a maximum sentence of life imprisonment. S.D. Codified Laws Ann. § 22-22-30.1.

The Sentencing Commission should not raise the base offense level for U.S.S.G. § 2A3.2 for Native American statutory rape cases. A base guideline sentence of an offense level 15 is appropriate where there is consensual sex between two individuals without undue influence that would be legal except for the age of one of the participants. Moreover, a base offense level of 15 would be consistent with the state laws of New Mexico and South Dakota, *see*, N.M. Stat. Ann. § 30-9-11(F) and S.D. Codified Laws Ann. § 22-22-7, which allow the sentencing court to impose a sentence of probation.

If the Sentencing Commission does enact amendments for pattern of activity and incest, they should be mutually exclusive enhancements. The greatest danger to society are true pedophiles, who prefer and prey on children. Native American incest offenders are the most amenable to treatment and represent the least risk for recidivism. However, the imposition of both enhancements would subject Native Americans to the harshest sentences and pedophiles to lesser punishment. Moreover, a cumulative enhancement for incest, in addition to enhancements for pattern of activity and custody, care and control, would result in a disproportional sentence by overvaluing similar concerns.

I hope the above comments are useful for the Commission to determine the appropriate guidelines in this very difficult area. If you have any questions, please do not hesitate to contact me.

Sincerely,



John V. Butcher
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Albuquerque Office

JVB:srf

cc: Vice Chair John Steer
Susan Hayes
Pam Montgomery