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April 2, 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:

The Navajo word for "law" is *beehaz'aanii*. It means something fundamental, or something that is absolute and exists from beginning of time. Yazzie, "Life Comes From It": Navajo Justice Concepts, 24 N.M.L.Rev. 175 (1994). Chief Justice Robert Yazzie of the Navajo Nation notes that the Southwest Native Americans had developed a justice system prior to their contact with European cultures. *Id.* Unlike the Anglo-European legal system, which is based upon one side being right and one side being wrong and punishing the "bad guy," traditional Navajo Justice is based upon healing, unity and peacemaking. *Id.* at 77-82. A unbroken circle representing unity and oneness is the symbol of Navajo justice. *Id.* at 180.

We would like to thank the Commission for an opportunity to address Amendment 5 and the issues contained in the Sexual Predator Act of 1998. The District of Arizona and New Mexico, and their respective Federal Public Defender Offices, handle a significant percentage of the sex abuse offenses prosecuted in federal court. The vast majorities of these are Native American offenders charged under the Major Crimes Act. Thus, the proposed guidelines would have a great impact upon our clients.

Arizona and New Mexico have one of the largest concentration of Native Americans in the country. The Bureau of Indian Affairs has jurisdiction over 40 recognized tribes and 29 million acres of land. More than 400,000 Native Americans live in Arizona and New Mexico.

While we understand that the Commission must address Congressional directives, we urge the Commission to hold hearings with the Native American community in the plains and in the Southwest. Native American communities have articulate speakers, such as Chief Justice Yazzie, Dewey Ertz and others, who can speak to the needs of the Native American community, including the causes of crime. For example, the Navajo courts have analyzed their cases and found that

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approximately 70% of the offenses are related to alcohol abuse. See Yazzie at 176, n. 10. Many Native American leaders do not believe that the criminal justice system and longer periods of incarceration are effective ways to reduce crime on the reservations.

Life for many of the Native Americans on the reservations and pueblos in Arizona and New Mexico is harsh. While the geographic area covered by the reservations may be large, the land cannot support its current population. Many parts of Indian Country are isolated and do not have electricity, telephones or running water. The austerity of the land making up the reservations in Arizona and New Mexico was once described by General William Tecumseh Sherman to a letter to President Andrew Johnson as "as far from our future possible wants as is possible to discover." It can be no surprise in Navajo mythology, two of the monsters spared by the Hero Twins to remain with the Navajo people were Hunger and Poverty. To these, Chief Justice Yazzie would add the new monster of "a loss of hope," which has led to the problems of alcohol abuse, child abuse and neglect, and crimes of violence. *Id.* at 176-77.

The sex abuse guidelines have a great impact on the Native American community. In fiscal 1999, sex abuse convictions represented only 0.4% of defendants sentenced under the sentencing guidelines. However, more Native Americans were sentenced for sex abuse crimes in federal court than for murder, manslaughter, robbery, arson and burglary combined. U.S. Sentencing Commission, 1999 Source Book of Federal Sentencing Statistics, p. 14, table 4. According to the Source Book, approximately 69% of offenders sentenced for sexual abuse were Native or other indigenous Americans. *Id.* This is the highest prosecution rate of Native and indigenous Americans for any primary offense. *Id.*

Past intentional attempts by the United States Government to destroy the Native American culture, combined with poverty, isolation and a lack of hope for better conditions, have created an epidemic of depression and alcohol and substance abuse. The combination of these conditions has also led to other ills including a high teenage pregnancy rate, youth problems and a cycle of abuse. It is common in a review of our cases that the Native American sex offender is a victim of sexual abuse as a child. Until recently, with the advent of social services and additional resources for prosecution, most child victims did not receive intervention and counseling before reaching the age of maturity. Thus, the Guidelines can often victimize these individuals twice by incarcerating them for long period before giving them the benefit of treatment and healing.

As noted above, our first recommendation to the Commission is to meet with members of the Native American community in both the plains and the Southwest before acting upon Amendment 5. The causes of child abuse on the reservation are complex, often involve an offender-victim, and cannot be resolved in most cases by sentencing increases. The vast majority of Native American offenders are not sexual predators or pedophiles and are amenable to treatment with a low risk of recidivism.

If the Commission proceeds with enacting a pattern of activity enhancement, we would recommend the adoption of an encouraged upward departure, option 4. Most sex abuse offenders have little or no criminal history. In fiscal 1999, 65% of defendants sentenced for sexual abuse (132 out of 203) were in criminal history category I. 1999 Source Book at 30, table 14. First time Native American offenders should not be incapacitated until they have had an opportunity for

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treatment unless it is clear that they are a continuing danger to the community. This would be accomplished by an encouraged upward departure.

A mandatory life sentence is required upon a second conviction of 18 U.S.C. § 2241(c). Moreover, the career offender guideline (§ 4B1.1) also applies to sex offenders. Therefore, there is little need for the Commission to increase the guidelines to incapacitate repeat offenders.

The Sentencing Commission should not adopt an enhancement for incest. Upon information available to us, it appears that 85% or more of the defendants that will receive the enhancement will be Native Americans. This is significantly higher than the percentage of Native Americans that are prosecuted for sex offenses, which historically has been approximately 70%. Thus, the proposed amendment would overwhelmingly affect Native American defendants in contrast to any other group. This would be inappropriate and unjust.

An incest enhancement combined with enhancements for pattern of activity and care, custody and control would have a disproportionate and harsh impact upon Native Americans. It would result in Native American incest offenders, who represent the least risk for recidivism, receiving a greater punishment than pedophiles, who pose a greater risk to society. Moreover, the cumulative nature of the enhancements would for the most part only impact Native Americans and would double count similar aggravating factors.

Native American incest offenders are amenable to treatment. Therapy addressing the roots of the inappropriate behavior patterns and integrating tribal and community concepts can positively treat the Native American sex offender. Dewey Ertz, *The American Indian Sex Offender*, in 2 *The Sex Offender: New Insights, Treatment Innovations, and Legal Developments* (Barbara K. Schwartz and Henry R. Cellini eds. 1997). "The most important issue to keep in mind when treating the American Indian sexual offender is that the American Indian people are victims by nature of their history and life experience, and they are offenders with respect to inappropriate behavior patterns." *Id.* at 14-6, 14-7. Those patterns often find their roots in substance abuse and dependency, attention deficit and impulse control disorders, and affective disorders such as depression. *Id.* The difference between incest and pedophilia can also 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 § 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 Law Ann. § 22-22-30.1.

If the Sentencing Commission does enact an enhancement for pattern of activity, it should follow the lead of South Dakota and exclude acts of incest from being used to impose the enhancement. The dynamics of incest are very different than pedophilia. Most pedophiles do not engage in acts of abuse with their own family members, and thus, would not be subject to the incest enhancements. Therefore, without incest being excluded from the pattern of activity enhancement, Native American offenders would be disproportionately sentenced in comparison to other offenders and their risk to the community.

The Sentencing Commission should not increase the base offense level for U.S.S.G. § 2A3.2 for violations of 18 U.S.C. § 2243(a), statutory rape. The current base offense level of 15 is

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consistent with similar state offenses. For example, statutory rape, absent aggravating circumstances, has a sentencing range from probation to incarceration not to exceed eighteen (18) months in New Mexico. N.M.Stat.Ann. § 30-9-11(F). An increase to a base offense level of 18 would subject a Native American offender to a much harsher punishment than he would receive if the offense was committed a few miles away off the reservation. Such disparity is inappropriate and leads to concerns among the Native American community that they are being treated unfairly in the federal system.

We hope the above comments are useful for the Commission in its decision concerning Amendment 5. Again, we urge the Commission to meet with members of the Native American community before addressing this complicated and emotional issue. Our offices stand ready to aid the Commission if it should decide to hold hearings in the Southwest. Please contact us if you have any further questions or need additional information.

Sincerely,



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Arizona / New Mexico

Native American Lands and Reservations

