

**STATEMENT OF
CHIEF JUDGE RICHARD H. BATTEY
DISTRICT OF SOUTH DAKOTA
BEFORE THE UNITED STATES SENTENCING COMMISSION
NOVEMBER 12, 1997**

Background

I am pleased to appear today to offer insight on my experiences with the United States Sentencing Guidelines (Guidelines). My perspective is that of a sentencing judge with the experience of two years pre-November 1, 1987, and ten years post-November 1, 1987. My experience in the criminal justice system, however, goes back much longer. I was admitted to the State Bar of South Dakota in 1953, some 44 years ago. After serving approximately twenty months as an infantry officer principally assigned as an Assistant S-1(personnel), with principal duties as a courts and boards officer, I entered a law office in the small rural town of Redfield, South Dakota (population 3,000). During the years following I was a county prosecutor (13 years), special state prosecutor, and criminal defense attorney (17 years). As a general practitioner I was involved in the many experiences of a generalist. In four years as a member of the South Dakota Board of Pardons and Paroles, I was exposed to the types and lengths of sentences handed down by the South Dakota state court judges. These duties included the interviewing of inmates in a parole or pardon hearing.

The Federal District Court of South Dakota

The District of South Dakota, of which I am Chief Judge, has three active and two senior judges. It is one of ten district courts within the Eighth Circuit.¹ The South Dakota court is highly impacted by criminal cases. According to the current Federal Court Management Statistics, it

¹ North Dakota, South Dakota, Minnesota, Nebraska, Northern and Southern Iowa, Eastern and Western Missouri, and Eastern and Western Arkansas.

ranks fifth out of 94 courts in criminal felony filings per judge. Contrast this to the fact that it ranks 90th in the number of civil filings per judge. Thus criminal cases and the consequent daily involvement with the Guidelines reflect the business of the South Dakota court.

Indian Jurisdiction

Criminal jurisdiction in Indian country is generally provided by 18 U.S.C. § 1151-1170. Specific jurisdiction is found under 18 U.S.C. § 1152, General Crimes Act, 18 U.S.C. § 1153, Major Crimes Act, and 18 U.S.C. § 13, Assimilated Crimes Act. The last statute is intended to establish a gap-filling code for Indian country and federal enclaves, providing for conformity in laws governing in the states in which the enclaves are located. This insures that people in Indian country are granted as much protection as afforded to those outside the enclave. See United States v. Kiliz, 694 F.2d 628 (9th Cir. 1982).

Indian country in the District of South Dakota is comprised of nine Indian reservations.² Approximately 7 percent of the population in the state reside on these reservations. The population in Indian country is approximately 50,000. The Pine Ridge Indian Reservation located in southwestern South Dakota is the second largest reservation by area in the nation. These reservations are typified by low economic status. The presence of alcohol and drugs contribute to the high level of violence. Tribal authorities struggle daily to deliver law enforcement protection to the reservation citizens. Tribal courts are either practically nonexistent or ineffective in combating crimes in Indian country. The FBI provides the major law enforcement presence on the reservations for the enforcement of federal law.

² Pine Ridge, Rosebud, Yankton, Lower Brule, Crow Creek, Flandreau, Cheyenne River, Standing Rock, and Sisseton. These reservations form a part of the Great Sioux Reservation established by the Fort Laramie Treaty of 1868.

Application of the Guidelines in Indian Country

For over three years I have perceived what I believe to be gross inequity in the Guidelines and the laws of the United States as applied in Indian country. Many of these crimes are committed by family members against family members and by one friend against another friend. I have voiced my feeling at every opportunity — to the Attorney General and her assistants, members of the Criminal Law Committee of the Judicial Conference of the United States, members of the Sentencing Commission and its staff, and basically to anyone else who would listen. I hope to address these concerns in my appearance before the Commission.

The bottom line is that as presently constructed, the Guidelines do not provide all the flexibility needed to provide an appropriate sentence under the varying facts found in Indian country cases. The law is clear. Title 18 U.S.C. § 3553 sets forth the factors which the Court must consider in imposing a sentence. Far too many times the guidelines seem not to provide the type of assistance needed to apply these factors. As such, the Court is required to look to sentence departures. While the judges of the Eighth Circuit Court of Appeals are generally sensitive to the difficulties facing a sentencing judge, the judge must be constantly aware that unless guidelines setting forth offender characteristics can be found, departures under Part K (vertical departures) and Chapter four (horizontal departures) are fraught with a certain amount of danger for remand on appeal.

A case in point is my sentence in United States v. Big Crow, 898 F.2d 1326 (8th Cir. 1990). This was a case where defendant was being sentenced for assault with a dangerous weapon (18 U.S.C. §§ 1153 and 113(c)) and assault resulting in serious bodily injury (18 U.S.C. §§ 1153 and 113(f)). It involved a vertical departure downward.

The facts of Big Crow are somewhat lengthy, but essentially the case can be characterized as an assault resulting during a drinking binge involving Big Crow, the victim, and others. Big Crow picked up a block of wood during an altercation and struck the victim on the head, causing bodily injury. The injuries consisted of a severe forehead laceration with an underlying bone fracture.

Under the Guidelines, the base offense level was 15 increased by 8 levels for use of a dangerous weapon and infliction of serious bodily injury (U.S.S.G. §§ 2A2.2(b)(2)(B) and 2A2.2(b)(3)(B)). After providing a 2-level decrease for acceptance of responsibility, the adjusted offense level was 21 resulting in a range of 37-46 months. The sentence of 24 months was based upon a departure downward of 13 months under U.S.S.G. 5K2.0. The sentence was affirmed by a 2-1 panel of the Eighth Circuit Court of Appeals. In the dissent, Judge Roger Wollman did not feel that the departure was warranted under the plain reading of the Guidelines. He stated that we should not approve departures which, however appealing they may be in their result, subvert both the goal and the spirit of the Guidelines.

Big Crow has been the subject of much discussion since 1990. Over two dozen decisions in the Eighth Circuit and 28 courts of appeal and district court opinions reflect the ongoing difficulty with the decision. Defense counsel constantly attempt to bring their case under Big Crow's umbrella. Even so, Eighth Circuit cases reflect that the decision is a narrow one. See, e.g., United States v. Weise, 89 F.3d 502 (8th Cir. 1996).

**U.S.S.G. § 2A1.3, Voluntary Manslaughter and
U.S.S.G. § 2A1.4, Involuntary Manslaughter**

In 1994 I examined the maximum sentences prescribed by the statutes of each state for voluntary and involuntary manslaughter. This examination revealed a large disparate treatment of these crimes. For example, Alabama, 2-20 years; Arizona, 0-5 years; Delaware, 0-10 years; Louisiana, 0-40 years for voluntary manslaughter. In my own state of South Dakota, for voluntary manslaughter 0 to life, and involuntary manslaughter 0-10 years. These are simply random samples of the various statutes. A copy of my research will be filed with the staff for further detailed examination.³

Recognizing that the Guidelines' sentence cannot exceed the statutory sentence, the first recommendation I would make is to urge the Commission to request Congress to increase the statutory maximum for voluntary manslaughter to a much higher range, perhaps life, maybe 50 years, maybe 30 years. Manslaughter is the unlawful killing of a human without malice. It is of two kinds (18 U.S.C. § 1112). Voluntary manslaughter is the unlawful killing of a human being upon sudden quarrel or heat of passion (10 years maximum). Involuntary manslaughter is the killing by the committing of an unlawful act or the commission of a lawful act in a negligent or reckless manner (6 years maximum). The difference of four years in the statute under 18 U.S.C. § 1112(b) results in vastly disparate treatment of those persons who are the victims under the varying types of situations occurring in Indian country.

Under federal law there is much difference between the statutory sentence of second degree murder (killing with malice) (0 to life) and voluntary manslaughter (killing in sudden

³ This research has not been updated since 1994 and may not be the current state of the law in each state.

quarrel or heat of passion) (0 to 10 years). The Guidelines also provide little difference. The base offense level for voluntary manslaughter under § 2A1.3 is 25. Assuming a Criminal History Category I, the range of imprisonment without enhancements or adjustments would be 57-71 months. Second degree murder under 2A1.2 and a base offense level of 33 with a Criminal History Category I comports to a sentence of 135-168 months. This difference of 6½ years at the low end and 8 years at the high range provide the court with little help in fashioning an appropriate sentence. Specific offense characteristics would be much help to a sentencing judge.

The base offense level for involuntary manslaughter under § 2A1.4(a) is 10 if the conduct was criminally negligent and 14 if reckless. Again assuming no enhancements or adjustments, a Criminal History Category I would comport to a sentence of 6-12 months for negligent conduct and 15-21 months for reckless conduct. Again, there are no specific offense characteristics. In most cases the court is required to depart upward if the dictates of 18 U.S.C. § 3553 are to be observed.

With these facts in mind, I would like to examine two cases which illustrate the need to (1) change the statutory maximum, (2) reexamine the base offense level, and (3) add specific offense characteristics (as many as can be reasonably applied).

United States v. Keester, 70 F.3d 1026 (8th Cir. 1995), was a case of voluntary manslaughter. The per curiam opinion is somewhat sketchy on the facts. The more detailed facts are that Keester and his former wife happened to meet in a bar one night. After drinking for a time they ended up at the wife's home where the drinking continued. Eventually they went to bed together which resulted in consensual intercourse. Later Keester asked her "Who are you sleeping with these days?" Arguably she should have declined to answer, but she did not. Keester then beat

her so viciously about the head and body that she was rendered unconscious. When Keester arose in the morning he found his former wife comatose. Rather than seek medical aid, he deposited her at her mother's home in this comatose condition. Her mother took her to the hospital. She died four hours later. Other facts appear in the opinion.⁴

At sentencing it appeared that an upward departure was warranted. There existed no specific offense characteristics would give guidance. A sentencing range of 57-71 months hardly seemed to satisfy the sentencing factors found at 18 U.S.C. § 3553. A departure to nine years (108 months) was made. Why nine years? I really did not know except that somewhere, somehow, at another time and place a more heinous crime might occur which would justify a sentence at the maximum of ten years. This is hardly a scientific conclusion, but perhaps a rational one. The decision would have been made clearer had there been specific offense characteristics in place.

Should the Commission be unsuccessful in getting Congress to raise the statutory maximum, the base offense level should be raised to somewhere near the statutory maximum or, in the alternative, use the specific offense characteristics found in § 2A2.2 for aggravated assault, adding perhaps a base offense level for acts committed against a spouse or other family member. As it stands now, it is conceivable that a defendant would receive a lesser sentence for killing a victim than for assaulting a victim.

⁴ The government charged Keester with voluntary manslaughter under 18 U.S.C. § 1112, the unlawful "killing of a human without malice" upon a sudden quarrel or heat of passion. While arguably the case was undercharged since there were multiple beatings which took place over time, a reasonable jury could find malice and therefore, return a verdict of second degree murder.

A second case which illustrates the need for Guidelines' change is the unpublished opinion of United States v. Two Crow, No. 97-1411 (8th Cir. Sept, 17, 1997). Two Crow drove his pickup truck over the center line of a highway and collided head on with another vehicle. Two Crow sustained only a minor concussion. He had been driving about 77 miles an hour and his blood alcohol level registered .318 several hours later. In the other vehicle was a grandfather and two of his young grandchildren. He and one grandson were killed. The other grandson survived with extensive injuries.

Two Crow was charged with involuntary manslaughter. The Guidelines' sentencing range was 10-16 months based upon § 2A1.4. Without any specific offense characteristics or a guide, the departure upward was to 60 months. The departure was affirmed, but again specific offense characteristics, if present, could have obviated the need for an appeal issue on the departure.

Application of Analogous Guidelines to Assimilated Crimes

Finally, I would urge the Commission to amplify or expand U.S.S.G. 2X5.1 for crimes committed under the Assimilated Crimes Act (18 U.S.C. § 13). To be instructed to find and apply an analogous offense guideline presents little direction to the court. For example, in deciding which guideline would be analogous to South Dakota Codified Laws (SDCL) 22-16-42 (vehicular battery), should the analogous guideline be § 2A1.4 (involuntary manslaughter) even though death did not occur, or § 2A2.2 (aggravated assault), even though in vehicular battery there need be no intent. Perhaps a compromise could be made applying both guidelines as analogous. There must be data on the many cases applying the Assimilated Crimes Act in Indian country and federal enclaves. I would urge the Commission to explore such data.

I want to express my appreciation to the Commission for hearing me this day.