

**STATEMENT
FOR
UNITED STATES SENTENCING COMMISSION HEARING
NOVEMBER 4, 1997**

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On November 12, 1997, the Commission will hold a hearing focusing on sentencing in voluntary and involuntary manslaughter offenses in federal courts. I appreciate the opportunity to address the Commission regarding these issues. Indian offenses are a major part of the practice of federal criminal law in the District of Arizona. These offenses arise from federal jurisdiction over Indian Country. As an Assistant Federal Public Defender in the District of Arizona, I have experience in representing defendants in homicide and other violent crime cases.

In addressing the Commission, I wish to focus on the following issues that will be affected by any Commission action. These issues are: (1) the effect and impact on Indian tribes; (2) the appropriateness of the present guidelines; (3) a comparison between the offenses; (4) specific offense characteristics will run counter to the goal of the guidelines; and (5) departures are appropriate for any atypical case.

1. The Effect and Impact on Indian Tribes.

It should be noted that while Indian offenses overall constitute a small percentage of the federal caseload, Indians under federal jurisdiction constitute a large portion of the prosecuted violent offenses. The Commission's 1995 annual report breaks down the approximately 40,000 federal cases as follows: 40% drug offenses, 15% fraud, 20% theft or robbery, almost 10% immigration, 7% firearms. Indian offenses made up a small slice of the 11% of cases labeled

“Other.”

In terms of offender characteristics, close to 40% of the offenders are White; close to 30% are African-American; 27% are Hispanic; and only 4.3% are Others. Indians are lumped into this “Other” category. However, the “Other” racial category is responsible for close to 20% of the assault cases prosecuted in federal courts, 25% of the murders, close to 70% of the manslaughters, and over 75% of the sexual abuse cases. Indians are prosecuted almost exclusively for violent offenses on reservations. Thus, any change in the manslaughter guidelines will have a disproportionate effect on Indian offenders.

In addition, the Commission also should note that many, if not all, of the manslaughter offenses that occur on Indian reservations involve intoxication. Defendant and victim frequently know each other and are related. The incident itself most likely occurred at a drinking party. This is the ugly fact on too many Indian reservations, where there are high rates of unemployment, poverty, and despair.

In terms of involuntary manslaughter prosecution involving drunk driving, the deaths frequently involve passengers who were as drunk, if not drunker, than the driver. The passengers frequently are the ones who ask the driver to go on a “beer run” or take the action that leads to the accident. This is tragic and regrettable.

2. The Appropriateness of the Present Guidelines.

The present guidelines should not be changed. At present, the guidelines accurately reflect

the extent of punishment felt appropriate by courts and society. This is seen by the lack of departures upward from the guidelines, and the fact that sentences will be found to be mid-range or lower. The sentencing courts demonstrate that the punishment is appropriate by sentencing within the guideline range.

3. A Comparison between the Offenses.

In assessing the appropriateness of the present guideline range, the Commission must also pay attention to the “mental intent” in the manslaughter offenses. The death of any individual is tragic and terrible. The common law, however, has long recognized that the mental intent that leads to a killing is of vital importance. The mental intent of manslaughter is one that the law treats for being less culpable than of the intent required for murder. In the case of voluntary manslaughter, the intent is mitigated by a quarrel, heat of passion or other extenuating circumstance; in the case of involuntary manslaughter, the intent is mitigated by either gross negligence or reckless indifference.

Murder, on the other hand, requires a much more calculated mental intent. In first degree murder, malice aforethought and premeditation are required. In second degree murder, malice aforethought is required. A comparison with aggravated assault is also instructive, as the mental intent for that offense is one of purposely assaulting an individual with an intent to harm them. There is none of the extenuating circumstances that mitigate intent in voluntary manslaughter, or the lesser gross negligence or reckless indifference that constitutes involuntary manslaughter.

4. Specific Offense Characteristics.

The Commission, in these hearings, raises the issue of specific offense characteristics. It

questions whether there should be a specific characteristic for a prior similar conduct, alcohol, death of a child and so forth. The use of specific characteristics involves the Commission in trying to list every available feature for an offense. There is danger in this approach to manslaughter.

As the Commission warned:

A sentencing system tailored to fit every conceivable wrinkle of each case would quickly become unworkable and seriously compromise the certainty of punishment and its deterrent effect. For example: a bank robber with (or without) a gun, which the robber kept hidden (or brandished), might have frightened (or merely warned), injured seriously (or less seriously), tied up (or simply pushed) a guard, teller, or customer at night (or at noon), in an effort to obtain money for other crimes (or for other purposes), in the company of a few (or many) other robbers, for the first (or fourth) time.

U.S.S.G. Ch. 1, Pt. A, basic approach. Increasing complexity makes the system less workable.

The Commission recognized that, “the greater the number of decisions required, and the greater their complexity, the greater the risk that different courts would apply the guidelines differently to situations that, in fact, are similar, thereby reintroducing the very disparity that the guidelines were designed to reduce.” Id.

At present, the guidelines contain the means to address the very specific characteristics the Commission is considering for the manslaughter offenses. For example, the death of a child under 12 can be accounted for in “the vulnerable victim” adjustment in Chapter 3. Prior conduct can be accounted for in the criminal history chapter, and a departure sentence at the high end of the guideline might be warranted if there was prior conduct. Given the vagrancies of the types of offenses, and how manslaughter might occur, the Commission should refrain from introducing

specific offense characteristics. The focus, after all, is on intent. The guidelines as they stand now accurately reflect the seriousness of the offense.

5. Departures are Appropriate for any Atypical Case.

The Commission also raises the issue of departures in these offenses. Under Koon, district courts now have a much greater discretion to depart, both upward and downward. In the situations that involve manslaughter, a district court who feels that a specific manslaughter case is “atypical”

or extraordinary, the court then has the power to fashion an appropriate sentence. The Commission should allow the sentencing courts this discretion.

The Commission should be wary of changing the guidelines where the impact would be so disparate upon a specific race or ethnic group, such as Native Americans. This is especially true in manslaughter and involuntary manslaughter cases, where tribal authorities and tribal culture may also be involved.

This point was made at earlier public hearings with the guidelines were first being drafted. The Commission at that time heard testimony by Tova Indritz:

MS. INDRITZ: (after describing an incident where a family agreed upon a unique arrangement regarding a murder) [We need] . . . more opportunity for discretion on the part of the trial judges, who really are the only ones who can take into account the particular facts which may seem unusual or may not be so unusual.

COMMISSIONER BREYER: Well, you have something unusual to the country as a whole, but nonetheless of the particular community it may be premeditated crimes are less common and provoked more common, even though it's unusual in that community, in which case we don't have to write a guideline I

wouldn't think[,] that governs all kinds of family relationships which may be common in some parts of the world, and not in others.

MS. INDRITZ: I think that's the reason there should be more room for discretion.

COMMISSIONER BREYER: Depart.

Tova Indritz, Testimony before the Committee on the Judiciary, Subcommittee on Criminal Justice 239 (Denver, CO Nov. 5, 1986). See also Letter from Fredric F. Kay, Federal Public Defender, District of Arizona, to the Honorable William W. Wilkins, Chairman, U.S. Sentencing Commission (Aug. 9, 1989). See generally Jon M. Sands, "Departure Reform and Indian Crimes: Reading the Commission's Staff Paper With 'Reservations'," 9 Fed. Sent. Rep. 144, 145 (1996).

CONCLUSION

In conclusion, the Commission should leave the manslaughter guidelines well enough alone. They accurately reflect the seriousness of the offense as shown by the sentences within the guideline range and the lack of departures. In addition, they are appropriate for the offense given the focus on intent. Finally, the Commission should avoid complicating an already complex scheme, and increasing disparity, by not pursuing any specific offense characteristics. The guidelines, as they now stand, can account for any of the issues the Commission has noted.