

TESTIMONY OF THOMAS LECLAIRE

**Director, Office of Tribal Justice
United States Department of Justice**

BEFORE THE UNITED STATES SENTENCING COMMISSION

November 12, 1997

I am pleased to appear before you today on behalf of the Department of Justice to discuss sentencing in federal homicide cases. Given that the homicide guidelines have been virtually unchanged for the past 10 years, the time is appropriate for a re-evaluation of these guidelines. The Department of Justice commends the Sentencing Commission for holding this hearing and for beginning a review of this important area in federal sentencing policy.

While the number of homicides prosecuted in federal court is relatively few because of the nature of federal jurisdiction, the relevant guidelines are extremely important because of the seriousness of the crime. The federal sentencing guidelines for homicide are also significant because of the impact of these guidelines in certain portions of society, such as on Indian reservations, where murder and manslaughter by Indians is subject to exclusive federal jurisdiction.

In its endeavor to review homicide sentencing, the Commission should not limit its efforts to manslaughter. Rather, given the starting point of the mandatory term of life imprisonment first degree murder carries, the Commission should consider second degree murder as well by examining its relationship both to first degree murder and to voluntary manslaughter.

The various homicide offenses, from first degree murder to involuntary manslaughter, are all part of a continuum of seriousness. Thus, the sentences for these offenses must also represent points along a continuum. However, it is not enough for the Commission to study homicide offenses in relation to each other. As part of its efforts, we recommend that the Commission also consider the relationship of the various homicide sentences in the federal system to those in the State systems. Finally, the Commission must also determine if improvements are necessary so that the homicide guidelines further the goals of reducing unwarranted sentencing disparity while reflecting differences in offense and offender characteristics that should produce distinctions in sentences.

Today, I would like to address primarily two forms of homicide -- second degree murder and involuntary manslaughter. As a former State prosecutor in New York, a former federal prosecutor in the Districts of the District of Columbia and Arizona, and in my current position as the Director of the Office of Tribal Justice, I have had the opportunity both to prosecute many homicides and to compare sentencing practices in these various systems. In addition, Assistant United States Attorney Randy Bellows from the Eastern District of Virginia will share his recent experience in prosecuting a highly-publicized case of involuntary manslaughter and the sentencing problems that arose in that case. It is our goal to outline for the Commission's information the operation of the guidelines in real-life situations.

While I will not separately address voluntary manslaughter in any detail, the Department also urges the Commission to give careful consideration to the guideline applicable to this offense. We thank Judge Battey for bringing to the Commission's attention problems he has noted with respect to voluntary manslaughter. Because of our concerns about sentences for this offense, the Department has recommended to Congress an increase in the maximum term of imprisonment from 10 to 20 years.

SECOND DEGREE MURDER

I shall turn now to second degree murder and explain why the Department believes that a thorough examination of the applicable guideline, §2A1.2, is in order. It is important to note that under federal law first and second degree murder have much in common. Both are the "unlawful killing of a human being with malice aforethought." 18 U.S.C. §1111(a). The difference in the two degrees of murder is that the more serious form is accomplished by premeditation or in the perpetration of one of the enumerated felonies included in the federal statute, such as kidnapping, robbery, or sexual abuse. However, the difference between the presence and absence of premeditation is a jury matter that is often difficult to pinpoint. No specific period of time must elapse for premeditation to occur, and premeditation need not involve a carefully deliberated plan made in advance of the transaction that turns into murder. Often, in Indian Country cases the difference between a finding of first and second degree murder turns on the issue of intoxication -- particularly whether the degree of intoxication negates the existence of premeditation.

While premeditation or the commission of the homicide in connection with another felony characterizes first degree murder, malice aforethought is nonetheless a requirement of second degree murder. Because of the element of malice, second degree murder is an extremely serious offense reflecting a high level of culpability that should result in very significant punishment. Accordingly, the maximum term of imprisonment authorized by statute for second degree murder is life imprisonment. 18 U.S.C. §1111(b). However, the relevant sentencing guideline, §2A1.2, carries a base offense level of 33 (135-168 months of imprisonment for a Criminal History Category I offender). With a three-level reduction for acceptance of responsibility, the sentencing range drops to 97-121 months. Thus, a defendant convicted of an intentional killing committed with malice would face a guideline sentence as low as about eight years. Despite the fact that first and second degree murder have much in common in terms of their seriousness, the relatively low sentence for the latter creates a huge gap with the mandatory life sentence for the former.

We urge the Commission to evaluate the operation of the second degree murder guideline carefully. First, the Commission should consider whether the base offense level of 33 is appropriately set relative to other forms of homicide, State second degree murder sentences, and guideline sentences for other offenses. For example, the offense level for second degree murder is lower than that for aggravated sexual abuse where the victim is abducted. It is also lower than the sentence for certain bank robberies that result in injury but not death.

Next, the Commission should determine if any specific offense characteristics should be created since the current guideline has none. Some forms of second degree murder are especially aggravated because of, for example, prolonged conduct or dominance over the victim.

Finally, the Commission should study the actual operation of the second degree murder guideline in connection with other aspects of sentencing. In this regard, we have noted several significant problems. For example, many federal homicides are committed in Indian country, but tribal court sentences are excluded from the criminal history calculations in Chapter 4 of the

guidelines. USSG §4A1.2(i). It is not uncommon for a defendant to have a tribal record of assaults and other crimes but, nevertheless, to remain in Criminal History Category I, unless the sentencing judge exercises discretion to depart upward. Multiple counts are another problem since a second count of murder results in just a two-level increase over the first, and a third count results in just a one-level increase over the second -- until no increase at all is provided. USSG §3D1.4. While such vanishing incremental sentences are a problem affecting a number of offenses in the guidelines, the seriousness of homicide makes the result particularly troubling.

Because of factors such as these, I have found that a number of second degree murder cases I have prosecuted have produced sentences that were simply too low in light of the facts of the case.

I have provided the Commission with an excerpt of the court record in the sentencing of Vincent Cling, a case I handled until appointed to my current position. In January 1996, Vincent Cling and a juvenile were stopped by Navajo Police Officer Hoskie Gene as burglary suspects. Both attacked Officer Gene and began choking him. Cling and the juvenile stopped long enough to listen to Officer Gene bargain for his life and then one or both continued to choke him until dead. The evidence at trial showed that Vincent Cling had consumed alcohol prior to committing the offense and the jury returned a guilty verdict of Second Degree Murder. The court sentenced Mr. Cling to 188 months, the top of the calculated guideline range. It is clear from the transcript, which I encourage you to read in its entirety, that the court was frustrated with the amount of incarceration that it could impose under these facts as well as the perceived requirement to credit defendant with two points for acceptance of responsibility.

Another case that falls into this category involves a Navajo man who beat his common law wife to death. The beating took place over a several hour period and while they walked or ran for approximately 1 1/4 miles. Although it appeared that the victim tried several times to escape from her attacker and was recaptured in each instance, the scarcity of witnesses to the events coupled with the defendant's intoxication suggested that a First Degree Murder conviction was tenuous at best, with Second Degree Murder and Voluntary Manslaughter very possible verdicts. The resulting stipulated plea agreement to Second Degree Murder, even though an upward departure, resulted in a sentence of only 144 months. A far lower sentence than defendant was likely to receive under the same facts in state court.

INVOLUNTARY MANSLAUGHTER

I would like to address involuntary manslaughter next. Involuntary manslaughter is the unlawful killing of a human being without malice and occurs either: (1) in the commission of an unlawful act not amounting to a felony, or (2) in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death. It carries a maximum six-year term of imprisonment. 18 U.S.C. §1112.

Under the sentencing guidelines the base offense level for involuntary manslaughter is 10 if the conduct was criminally negligent or 14 if it was reckless. The guideline includes no specific

offense characteristics. USSG §2A1.4. This means that vehicular homicide resulting from reckless driving brought about by intoxication can result in a guideline sentence of just five months of imprisonment and five months of supervised release with home detention for a first offender who accepts responsibility. USSG §5C1.1(d). It is doubtful that such a low sentence serves the purposes of punishment and deterrence necessary to assure that federal roads are safe.

Given the low sentences provided, it is not surprising that there is a high rate of upward departure from the involuntary manslaughter guideline -- 11.7 percent from 1994 to 1996 -- as revealed by recent research by the Commission staff. The Commission should determine the bases for these departures, as well as for downward departures, since a pattern of departures may suggest the need for a particular guideline amendment. In addition, the Commission should take into account the fact that federal involuntary manslaughter sentences are low relative to the State sentences studied by the Commission staff. Federal sentences should reflect current attitudes toward drunk driving and the potential deterrent effect that tougher sentences may produce.

In addition to vehicular homicide resulting from drunk driving, a new type of vehicular homicide is also of concern. It is homicide produced by "road rage." Unfortunately, this type of conduct is becoming an increasingly expected occurrence on our highways. Assistant United States Attorney Randy Bellows will describe a well-known case of road rage that occurred in the Washington suburbs to enlighten you further as to the types of offenses subject to the involuntary manslaughter guideline and the kinds of factors the Commission may wish to address when evaluating this guideline.

The involuntary homicide guideline has no specific offense characteristics that take into account heightened culpability or the extra dangers present in some cases. Thus, in addition to examining the base offense level for this offense, the Commission should consider the inclusion of specific offense characteristics for such factors as the offender's past driving history and current license status for cases involving vehicular involuntary manslaughter. For example, one consideration is whether past convictions for serious driving violations should enhance a sentence more than provided by the criminal history chapter of the guidelines. While a prior conviction for careless or reckless driving counts toward the criminal history calculation, in many cases it provides only a one-point increase -- often not enough to move a defendant to a higher criminal history category. USSG §§4A1.1(c) and 4A1.2(c)(1). In addition, serious past driving violations that do not result in conviction for careless or reckless driving and past licensing actions that are not reflected in counted convictions should also be considered as potential aggravating factors to enhance the sentence. The offender's current licensing status is another relevant factor. An offender who commits involuntary manslaughter while driving on a suspended license deserves a stiffer sentence than one who has not lost his or her driving privileges.

There are many additional factors the Commission can consider in assessing the effectiveness of the current guideline, such as: (1) the duration of the conduct; (2) the number of pedestrians, other drivers, or passengers, placed at risk; (3) the degree of recklessness involved in the defendant's conduct; and (4) the road and traffic conditions at the time of the incident.

In addition to studying vehicular homicide, the Commission should evaluate the effectiveness of the involuntary manslaughter guideline for other forms of the offense. The Commission staff's research shows that about 60 percent of federal involuntary homicides are vehicular, while fights, accidental shootings, and child abuse account for many of the other cases. Again, related past conduct is a factor particularly relevant to these offenses, but such past conduct may receive inadequate treatment in the criminal history guidelines.

Finally, the problems I discussed with respect to second degree murder are also characteristic of involuntary homicide. The exclusion of tribal criminal history understates the need for punishment in many cases. In addition, the multiple count rules, which provide at most two additional offense levels for an additional death, are a real problem, as evidenced by the Narkey Terry case.

In conclusion, the study of the homicide guidelines is an area of great importance. Although the number of cases is small relative to other offenses in the federal system, the need to arrive at sentences that serve the purposes of sentencing -- just punishment, deterrence, incapacitation, and rehabilitation -- is paramount for all offenses, especially those that result in the taking of human life. The Department of Justice would be pleased to aid the Commission in its study of the homicide guidelines and in the development of needed revisions.

Thank you for the opportunity to discuss this important area of the law.