

TESTIMONY OF CHRISTOPHER P.T. FLEMING

United States Citizen , Former New Jersey State Mobile Intensive Care Paramedic  
and Victim of a Drunk Driver

March 12, 1998

On April 30, 1997 Virginia Fleming while driving her brand new Harley Davidson motorcycle was struck head-on by Willette Thompson Whiteskunk driving her extended cab pick-up truck. In an instant I , my family and friends became victims of violent crime, alcohol related vehicular homicide. Seconds after my weeping sister delivered the message, " That mom was killed by a drunk driver riding her motorcycle " purpose supplanted the indescribable loss. Two days later I would begin a relationship with the federal authorities involved in the case without the slightest knowledge of the Federal Criminal Justice System. To date I have never met more dedicated professionals, and in a time when often the sentiment towards federal authorities is less desirable I am otherwise opinioned. Throughout the 1980's I was employed as a staff paramedic by a large urban hospital , University of Medicine and Dentistry Hospital , Newark New Jersey. My employment was not limited to the urban/industrial setting in the Newark area. I also worked in suburban and rural settings. Motor vehicle crashes occurred in each of these setting exposing me to a host of crash situations to numerous to reiterate or remember . Alcohol was frequently a contributing factor in the crashes I responded to. Suffice to say I am well aware of the consequences when drivers drink.

Within this testimony I will try to address areas relevant to alcohol consumption and drunk driving as they apply to the commissions considerations with regard to DWI/DUI fatalities. I am hopeful that the commission will find reason to draft a DWI/DUI law setting standards that far exceed the host of compromised state DWI/DUI laws and provide the Citizens of these United States protection from others who act without regard for life and limb

Pre-Columbian peoples of both North and South America were well adept at identifying vegetation with psychoactive properties . They were also proficient in ways of administering psychoactive substrates made from vegetation , which included chewing, smoking , nasal insufflation and rectal clysis . Their knowledge was not limited to vegetative engineering as such but also included wine made by fermentation of cactus fruit . Papago and Piman peoples consumed cactus wine in ceremonial settings as did Aztec people. The “ Century “ plant or “ Maguey” served the Chichimeca people as a source of food and later was discovered to have psychoactive properties through fermentation of it’s sap. The alcoholic beverage produced from the sap was called “ octli “ or “ pulque”. In fact this discovery was subsequently attributed to a goddess and associated deities were incorporated into complex mythologies to serve as example for benevolent beings responding to mans gloomy disposition. These deities were not immune to the effects this alcoholic beverage and their difficulties were to serve as examples and reasons to formulate codes of behavior and proper contexts in which to consume the alcoholic beverage. The rules of octli drinking also came about through tribal and personal experiences. Abuse of the drink was not uncommon and it is a sobering fact of similarity when comparing behavior of a people who predate the European arrival to these America’s and modern man. Drinking octli made people happy . It is said to have made them sing and dance also. Unfortunately accounts of people stumbling about, neglecting their personal hygiene, employing defiant and profane language and trading their loincloths for a drink. Scarcely a difference can be found between the kind of behaviors then and now, excluding particular avenues employed in acting out these age old behaviors. Aztecs realized the threat of unbridled drinking of octli both for a nation of people and the individual. They responded by enacting tough , conceivably cruel , punishments for illegal consumption of the drink. Consumption of the drink was strictly limited to specific ceremonial occasions such as a birth, marriage or human sacrifice to the gods. Amounts were also strictly controlled. Consumption of the drink was a group matter in large, only elders were allowed to drink independently and did so with measure seldom becoming intoxicated . Breech of the octli consumption codes invited

certain punitive measures, for example: drinking more than five gourds of octli was considered excessive and a violation , as too were “ being observed intoxicated in public , lying down in the walkways, singing , possessing octli or in the company of other drunkards “. Punitive measures for a first offender were having ones head shaven and exposure to public ridicule. A second offense invited being beaten to death with wooden canes. The deceased’s body was then put on display in public. If the first offender was a nobleman he was executed privately, away from the public eye. In cases where discretion was exercised by the nobleman , with respect to his violation, he was stripped of his rank and privileges. Alcohol and associated behaviors had been an significant part of the Indian people’s society well before the European arrival.

The use and consumption of alcohol among Native American people was to be , perhaps, influenced in significant ways once they were exposed to Europeans. Where, among Native Americans , alcohol consumption was a group activity, a collective decision and associated with ceremonial practices and governed by severe rules it was not for the European. In stark contrast to Native Americans the European consumed alcohol by individual choice ( male orientated ) and not group choice, outside of any religious / ceremonial context and being often associated with bravado or aggression. European behavior is believed to have infiltrated the Native American lifestyle. In response to economic influences alcohol became a popular source of trade note and status measurement for the male Native American . Native American men invested more and more energy into securing scores of alcohol. By doing so their expertise in hunting and gathering surely must have suffered. Such reliance and attraction to alcohol would not serve the Native American well in the future.

Native American’s severe problems with alcohol consumption became widely known by the early 1800’s. Federal prohibition making it illegal to sell alcohol to Native Americans is said to have contributed to lethal change in drinking behaviors. For an Native American who was caught with alcohol the punitive consequences were arrest and imprisonment. Inconclusive data suggests the behavioral response to federal prohibition was to quickly consume their store of alcohol before they could be caught with it. In

combination with continuous encroachment into their resources for sustenance , land and it's fruits and the illegality of their major trade note, adopted through European exposure, few avenues to survive would be possible. The suggestion that excessive alcohol consumption , so called " Indian Drinking " developed as a protest response to prohibition offers additional negative consequences for the Native Americans , despite uncertainty such behavior really occurred. Yet the idea of drinking excessively out of anger , guilt, sorrow and a myriad of causes is universal among all people for as long as alcohol has been part of human society, a review of Table 1. Will shed some light on the commonality of behavioral indicators as universals among different types of people around the world. The reader will also recall previously mentioned evidence of alcohol abuse and dependency characteristics of the Aztec people.

Alcohol and its relation to violence and crime cannot be effectively considered without historical and ethnic perspectives. Levy and Kunitz , over several decades, observed no fluctuation in the homicide rate among one tribe during which the availability of alcohol went from rare to high . The same tribe's homicide rate is linked to alcohol today. This and other findings should continue to spur investigator's to consider other contributing factors to violence and crime among Native American's in spite of the intense focus and valuable data on alcohol and violence. Paramount as part of a revealing nature of alcohol and violence are consideration of ethnic diversities as a way to uncover differences between people and their unique attributes with addressing issues of communal concern. As an indicator to this concept the United States recognizes 556 distinctive Native American and Alaskan Native American tribes within the Union's borders . Among these many tribes at least 17 different culture areas have been identified, surely within this vast array of cultural perspectives potentials for success exist. According to the Clinton administration Native Americans receive less than half the police protection that other rural communities have. Conflict among Native American tribes over whether improvements in law enforcement would come as a result of the BIA relinquishing law enforcement control over to the Justice Department remains to be determined, but thing that all police officers and criminals know is that nothing can deter a potential criminal act better than a cops presence. In this simple way one would conclude Native Americans need more police officers working in their communities. Additionally these police officers would benefit the

community by being well trained in the elements of alcohol and drug intervention and detection .

Jurisdictional conflicts , such as “ Concurring Jurisdiction” , which take away arresting authority from law enforcement agencies such as state and county police serves to significantly reduce the combined effectiveness of law enforcement. In light of the current need for more police officers on reservations such cooperation and equal arresting powers would effectively provide better law enforcement for Native Americans. The current separation of powers fosters lax law enforcement, especially in light of an 87% increase in homicides among Native Americans over the last five years. Whereas homicide has dropped 22% among the general population in the U.S.

Among many differences between Native Americans and the general population is the extent to which alcohol effects their health and overall society. Native Americans suffer , and are understood to have suffered, proportionally more. Current and prevailing data tell of sustained economic,cultural and health issue's among Native Americans. With respect to health and alcohol Mason and colleagues, using DSM 3 criteria and the Diagnostic Interview Schedule , observed among 197 Native Americans, sampled from one tribe from The Plains, The Southwest and the Northwest, that 53% of the subjects met criteria for alcohol diagnosis ( 21% were abusers and 30% were dependent ). Alcohol diagnosis by gender was distributed, 81% men and 40% women. Greater mortality was observed among subjects with alcohol diagnosis. Other studies cite significant life long and current alcohol disorders among Native Americans ,men 77% life long and 37% current disorders , and women 39% life long and 7% current disorders, Shore, Kinzie and co-workers . As recent as a decade ago cirrhosis was the fourth leading cause of death among Native Americans, comparatively it was the eighth leading cause of death among non-Native Americans. Christian and co-workers report Native American discharge rates are three times that of non - Native Americans in Indian Health Services facilities.

Violent death pose's a serious and significant health threat for Native Americans and the general population. Vehicular crashes resulting in death occur 5.5 times more than non-Native Americans, Homicide 2.8 and Suicide 2.3 times more respectively . Acknowledgment that for Native Americans , for

all ages , risk of death by automobile crashes exceeds the comparative risk for any other ethnic group, alcohol - related being the majority of automobile crashes. Compounding this disproportionate risk those dying as a result of such crashes are between 15 and 45 years of age . Nationally car crashes are the leading cause of death for people between the ages of 1 and 34, nearly half of these crashes are alcohol related. The disturbing reality that most Americans are not aware of what the legal blood alcohol levels are for their respective states , nor the laws and penalties for driving while intoxicated , how to estimate their alcohol consumption limits and moreover what blood alcohol levels represent " impairment " is a serious concern and perhaps evidenced by the continuing high number of alcohol related driving fatalities per year, .01-.09 BAC 3,361 fatalities and .10+ BAC 11,773 fatalities based on Highest Driver BAC in the crash, N.H.T.S.A. 1996. Total " alcohol related " deaths for 1996 were 15,403. " Alcohol Related " includes other categories such as pedestrians and cyclists.

As a matter of empirical note and future consideration for the U.S.S.C. is the relationship between personal wealth, education and employment opportunities for Native American Tribal members who receive stipends from gaming profits. As has been conveyed to me, but not confirmed , a Southern Colorado Native American Tribe who has a casino operation provides stipends and jobs to tribal members. Upon a tribal members 21<sup>st</sup> birthday he or she receives a lump sum of money and thereafter a quarterly or otherwise scheduled stipend. For purpose's of illustration imagine an inexperienced licensed driver who upon his or her 21<sup>st</sup> birthday receives enough money to purchase an automobile and is legally of age to drink. Add to this equation opportunity in the form of idle time because there is not enough local employment opportunity or the individual chooses not to work or is undereducated/underqualified for area employment opportunities. And yet where one would think education , economic advantages and employment are enjoyed the likelihood of drinking and driving would be less. However " Binge Drinking " is prevalent among higher education students, as much as 44% of a subject pool admitted such behavior . For these college students intoxication was often the goal. Their alcohol drinking patterns were often established in high school and being Caucasian , involved with athletics , a resident of a

fraternity or sorority increased the likelihood of alcohol abuse/binge drinking. Binge drinking is defined as having five or more drinks in a row for men and four or more in a row for women.

Of concern is the lack of social awareness among American drivers. Most do not know the current DWI/DUI laws for their area's. Neither are most drivers able to estimate their limit of alcohol, nor are they knowledgeable of when driver impairment begins, for example: 1 drink for men weighing between 100 and 240lbs., and 1 drink for women weighing between 90 and 240lbs. (based on 1.25oz. of 80 proof liquor, 12 Oz. of beer, or 5oz. of table wine at 40 minute intervals - 1 drink for a 100lb. Man = .04% BAO and for a 200lb. Man = .02%BAO) Impairment begins at .02% BAO, SAMHSA.

While public intolerance appears on the rise regarding Drunk Driving and other lethal driving behaviors, empirically speaking, drivers themselves are not doing their individual part to reduce the incidences of such dangerous behaviors. Many drivers speed excessively (drive 15mph + above the speed limit), engage in careless and often reckless driving. Such increases in incivility on the roadways has resulted in new definitions and or categories of dangerous drivers, Aggressive and Road Rage. Probably most of us would be shocked at our driving behaviors if evaluated, it is a sobering thought and possibility.

Between 1982 and 1996 290,695 lives have been extinguished by the egregious behaviors of drunk drivers. Of the nearly three hundred thousand lives lost in those 14 years 63,460 were lost because of drivers with BAO's between .01-.09%, roughly 4000 lives a year are lost within this range. Given the pending federal legislation to establish a federal blood alcohol limit at .08% and its estimates to save approximately 600 lives a year one has to wonder where is the reasoning behind accepting the death of approximately 3,400 lives a year for our enjoyment of alcohol? As a comparison Title 49, Subtitle VI, Part B, Chapter 313 Section 31310 (a) sets a commercial motor vehicle operator BAO limit at .04%. All motor vehicle operators should be subject to the same BAO limit, the consequences are essentially the same, risk, injury, death, property and economic losses. Level of responsibility should be the burden of the driver, 80,000lbs. or 2,000lbs. a vehicle dangerously operated is a serious threat to many.

Studies among the general population indicate significant prevalence of alcohol abuse and or dependence in as many as 26% of U.S. community hospital patients. Lifetime prevalence of alcohol abuse and or dependency among outpatient settings varies between 16% and 36%. Yet with this high rate of alcohol diagnosis less than half of these patients are identified by their doctors. In another study only 24% of patients diagnosed with alcohol problems were offered treatment. However patients who are identified as being at risk, abusing or dependent in alcohol use by their primary physician responded well and significantly improved their habits and health. With regards to Native Americans and other ethnic groups evidence supports culture sensitive preventative and maintenance measures. In fact such locally tailored programs are already deemed the most promising, they are also the most cost effective.

The current Federal Involuntary Manslaughter code, 18 U.S.C. 1112, falls woefully short in its ability to reflect Alcohol Related Vehicular Homicide. As with the case U.S. vs. Whiteskunk the defendants behavior was repeatedly and wantonly defiant of the law and of known risk to others. The duration of the defendants conduct irregardless of initial police conduct and subsequent warnings, nearly striking a motorist head-on 30 minutes prior to colliding into Virginia Fleming killing her instantly. The court found the defendants conduct "exceeded reckless behavior and therefore, exceeded the guidelines" The defendant was sentenced to 24 months incarceration and 3 years supervised release. I cannot speak for the court but in following the case closely it is my impression the court was restricted from calculating an adequate criminal history score due to the nature of the defendants prior DUI Tribal Conviction and realistically reflecting relevance to the defendant's conducts leading up to and producing the death of V. Fleming.

As it was we the victims of Willette Thompson Whiteskunks crime fought tooth and nail for an upward departure that still fell short of what we felt would be reflective of the crime. W. Whiteskunk should never be allowed to drive again, she is the benefactor of a law that has yet to meet the mandates Congress gave the U.S.S.C.

Drafting a federal DWI/DUI law that encompasses minor violations to the serious with purpose to identify, prevent, deter, incapacitate and offer effective rehabilitation would satisfy the needs for the current "Heartland" issue of Involuntary Manslaughter. Below is a sketch of some components for a federal DWI/DUI law.

Federal DWI/DUI Law: by BAO Level Legal Limit = .01%; simple DWI/DUI Stop, no injury, loss of life or property damage unless noted.

.01-.02% = 2 points on drivers license and \$60.00 Fine

.03%-.04% = 4 points on drivers license and \$ 120.00 Fine, mandatory evaluation for alcohol and drug risk, abuse or dependence, and driver re-education program.

.05%-.06% = 6 points to drivers license, \$240.00 fine, immediate drivers license suspension for 90 days, mandatory evaluation for alcohol and drug risk, abuse or dependence (paid for by defendant), driver education program (100% pass grade) 20 hrs. community service.

.07%-.08% = 8 points to drivers license, \$ 500.00 to \$1000.00 fine and or 30 days incarceration, immediate drivers license suspension for 6 months, mandatory alcohol and drug, risk, abuse/dependence evaluation/treatment (paid by defendant) driver education (100% pass grade) 80 hrs community service.

.09%-.10% = 10 points to drivers license, \$ 1000.00 to \$2000.00 fine, immediate drivers license suspension for 1 year, mandatory alcohol and drug, risk, abuse/dependent evaluation/treatment (paid by defendant) driver education program (100% pass grade) and 120hrs community service.

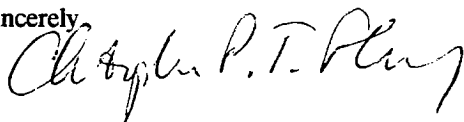
Injury of a person resulting from driving under the influence would take into account aggravating and mitigating factors, including, amount and extent of injury, past driver history , leaving the scene of the accident, speed... such specific factors would influence the penalty and rehabilitation. As an example injury would raise the likelihood of increased level of incarceration and license suspension and or life time revocation.

Death of a person or persons resulting from driving while under the influence would take into account aggravating and mitigating factors as stated and specify severe incarceration penalties in terms of years to life with the opportunity for rehabilitation.

In conclusion the wealth of historical information regarding Alcohol and Native Americans provides important insight and prompts inquiry into past practices for the benefit of people today. Recognition of cultural diversities among Native American tribes and the general population empowers local groups and individuals in their efforts to identify and combat alcohol and drug abuse. Much effort and success can be achieved through early intervention. Diligent enforcement of the propose law and associated penalties will deter and reduce significantly the current degree of drunk driving. This law will realistically clarify risk level and potential harms inherent with driving under the influence, by simplifying the acceptable standard of a drivers BAO at ZERO, and in concert identify/treat those at risk for alcohol abuse and or dependence long before they commit a serious crime of bodily injury and or death.

I am deeply appreciative for this opportunity and thank the United States Sentencing Commission for considering this law.

Sincerely

A handwritten signature in black ink, appearing to read "Christopher P.T. Fleming". The signature is written in a cursive, flowing style.

Christopher P.T.Fleming

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### **TABLE 1. Characteristics of syncretic frontier-potlatch drinking**

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1. Early appearance of drunkenness with small doses of alcohol.
2. Binge drinking over many hours or several days, separated by periods of abstinence lasting weeks or months.
3. Peer-group drinking, often involving only one gender (i.e., males only or females only).
4. Continued purchase of alcohol until financial reserves are exhausted.
5. Sharing of alcohol such that each individual has equal access to the same amount.
6. "Time out" from normal roles and social responsibility, so that misbehavior is blamed on the drink rather than on the drinker.

## **Alcoholism Among New World Peoples**

### *A Critique of History, Methods, and Findings*

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