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.

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[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.

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[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.

STATEMENT
FOR
UNITED STATES SENTENCING COMMISSION HEARING
NOVEMBER 4, 1997

JON M. SANDS
ASSISTANT FEDERAL PUBLIC DEFENDER
DISTRICT OF ARIZONA

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

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.