
UNITED STATES SENTENCING COMMISSION



TRANSCRIPT

PUBLIC HEARING

NOVEMBER 18, 1986

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UNITED STATES SENTENCING COMMISSION
TUESDAY, NOVEMBER 18, 1986
2:00 O'CLOCK P.M.

Public Hearing - San Francisco, California
Ceremonial Courtroom - U. S. Courthouse

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JUDGE WILKINS: We'll continue now with the proceeding testimony. We are very privileged to have as our first witness this afternoon Mr. James T. Lassart.

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Mr. Lassart, come around? He is a former Assistant District Attorney of San Francisco, California. Also, in the U. S. Attorney's Office and while there, as Chief of the Drug Task Force team. He is now in private practice with the law firm of Roper and Majeski, here in San Francisco.

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Delighted to see you.

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SPEAKER JAMES A. LASSART, ESQ.
LAW FIRM OF ROPER & MAJESKI
SAN FRANCISCO, CALIFORNIA

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MR. LASSART: Thank you, Mr. Chairman. Good afternoon, public, commissioner. I had an opportunity to hear some of the testimony this

1 morning and being that I am the first person
2 after lunch I know that rule and I'll be brief.

3 I'd like to make some general remarks.
4 First of all with the change of the Federal
5 sentencing rule that are long needed and long
6 overdue, very welcome event, the need for a
7 truth in sentencing system is so far long
8 overdue and so difficult to explain and takes so
9 long to get here that I can tell you that when
10 put into effect it will be something that we can
11 all discuss in our community and keep our heads
12 high.

13 Right now, it's so difficult to tell
14 someone out there who we live with in our
15 neighborhood when the Judge says fifteen he
16 means really five and then try to come up with
17 an adequate explanation of why it is that way
18 and then in the middle of your explanation
19 decide you don't want to join that troop because
20 it really don't make any sense.

21 Now, I was a prosecutor with the San
22 Francisco District Attorney's Office for about
23 12 years and during that time I specialized
24 quite a bit in the Homicide area and it was
25 during that period of time that California

1 switched from the indeterminate sentencing rules
2 to the determinate sentencing.

3 And considering what I observed in that
4 period of time, I would suggest to you that you
5 learn from California but you surely don't adopt
6 them as a model. Their idea is very good but
7 the performance because of the various district
8 negotiations, created a system that still has
9 something in it that I will inform you of and
10 ask you not to fall into.

11 When they say "a year" in California it
12 still doesn't mean a year. That's one of the
13 problems. It's really nine months. California
14 has a thing that some of us have discussed and
15 some, myself being a critic, have called it the
16 "cheaper by the dozen rule".

17 California now has a system of -- a
18 series of offenses that are committed -- the
19 first offense is given the full accord of the
20 term. The next offenses thereafter are only
21 sentenced to the third base term.

22 So, if you commit three robberies it's
23 cheaper as you commit those offenses. Those
24 offenses don't have to be in the same
25 transaction. So, thus far, as you put through

1 the guidelines we've avoided that and I suggest
2 that you continue to avoid that because that is
3 very difficult to explain.

4 And when we step outside these programs
5 in things like all the rest of you people out
6 there who become victims of these offenses, I
7 think it's important for the integrity of this
8 system that we be able to hold our heads high
9 and say that, when we sentence somebody to the
10 three years it means three years. They do it
11 with two people it means six or at least we
12 consider the possibility of giving them six.

13 Now, I'm sure the attorneys have informed
14 you that these guidelines will create senseless
15 hearings, and a backlog that will destroy the
16 calendar system. These are old arguments and
17 they're not borne out in the test of time.

18 Well-structured sentencing limitations in
19 serious felonies, which in many cases even
20 mandate incarceration, won't by definition
21 create a backlog. The defendants and their
22 counsel have always been realists. I think
23 that's important for us to understand.

24 They operate within the parameters of
25 raised and lower expectations and it's in the

1 defendant's interest, in his interest, to
2 operate within that particular narrow range,
3 whatever it may be. After all, we're dealing
4 with sentencing, we're not there discussing
5 guilt. That's all we can determine.

6 Once the expectations are set forth,
7 defendants will be just and they'll adjust to
8 the realm of possibility. If we decide the
9 penalty should be higher, they're going to have
10 to play the game and maybe that's really what
11 we're talking about when we are changing these
12 particular rules. We're talking about sentences
13 on an overall nationwide basis. It is perhaps a
14 little difficult to explain.

15 Now, there are two specific areas I'd
16 like to address within the guidelines. They are
17 the area of plea agreement and the area of
18 cooperation and credit.

19 In the past I've heard some comment that
20 the plea agreement situation is now out of
21 control and Rule 11 may not apply. That is, you
22 didn't hear that here but that's the kind of the
23 discussion that you hear outside.

24 As I re-read these guidelines, Rule 11
25 means "still remains in tact". The new

1 sentencing act just formed is the body of law
2 written, within which the Court must now
3 exercises its discretion. Rule 11 must now
4 begin forming -- or plea agreements of Rule 11
5 must now begin to conform to the rules and
6 guidelines. The Court always had and still has
7 the power to reject any pro-offer of sentencing
8 disposition.

9 However, I think that the area which has
10 the greatest problem within the area of plea
11 agreements is the concept of the integrity of
12 the stipulation of counsel offered to the court
13 regarding factors of adjustment and factors of
14 characteristics. I feel that that particular
15 area is one in which the guidelines is somewhat
16 devoid of direction.

17 It is extremely important that the Court
18 must order and accept that stipulation as to
19 those factors of adjustment and factors of
20 characteristics and the Court must examine those
21 factors and the Court is in a perfect position
22 to examine those factors because according to
23 what it had before the presentencing report and
24 then must make a determination whether or not if
25 the Court feels those factors are for the

1 purposes of gaining a plea or for the purpose of
2 the fact that they are there and that rules are
3 the facts.

14
4 If the Court is dissatisfied with those
5 factors and that stipulation, then there are a
6 couple of other avenues the Court can take. It
7 can reject the plea -- the factors. They can
8 accept them if they agree with them or the Court
9 can look back at those two attorneys who happen
10 to put together that stipulation and say:

11
12 "You got together on the stipulation, now
13 let's understand the underpinings, the
14 basis of this stipulation. Satisfy this
15 Court that those are correct required
16 sentences".

17
18 I think that is a part of the sentencing
19 system that must be strongly enforced. It will
20 maintain its integrity and extreme requirement
21 for the Judge plays that important part, because
22 basically, you're the fact finder in that one
23 regard in this area and that's the one place
24 that you're afraid of losing discretion and
25 that's the one place the Court's afraid of

1 losing discretion, that's the one place they
2 must exercise to maintain its integrity.

3 Now, with regard to cooperation here:
4 The fact that Part 331 and 322, and 333 is in
5 existence is a very powerful statement.

6 These guidelines signal a statutory
7 regulation that cooperation is not only
8 acceptable but it deserves merit. That
9 philosophy hasn't necessarily been pervasive in
10 the justice system for a long time.

11 The system of justice will truly benefit
12 by it. The recognized policy of cooperation is
13 the accepted conduct and will assure more,
14 rather than less cooperation, especially on the
15 part of the organized defendants. And will
16 place their counsel in a position where they're
17 going to be required to talk to the prosecution
18 and you're going to be get a lot more
19 communication between both sides, because then
20 they'll have a duty to communicate offers
21 because those offers now mean something.

22 In the past, justice wasn't properly
23 served and they really weren't encouraged. They
24 were told "if you help us out we'll tell the
25 Court and maybe the Court will do something.

1 Maybe the Court won't do something".

2 That's not necessarily a very comfortable
3 position to be if you're charged with a serious
4 matter.

5 Now, the Court has to take into
6 consideration efforts of cooperation and weigh
7 those and measure those and the United States
8 Attorney has to serve by it. And that's very
9 important because that kind of cooperation helps
10 to remove the criminal defendant and the element
11 and organization from this society, No. 1.

12 No. 2. It adds some integrity to the
13 negotiations with the defense side because you
14 can say the Court has to take into
15 consideration -- the Court will consider it and
16 it encourages people to distort their profits,
17 to distort their information. We're all
18 benefactors of that.

19 Now, there's one small point I'd like to
20 make. Coming from the Drug Task Force Service
21 the reports indicating the drug portion of the
22 guidelines that concerns me, it doesn't appear
23 that there is a consideration of the strength of
24 the drugs being involved in the determination of
25 penalty. There are pros and cons on that issue

1 and I happen to be one of the people that
2 believes that the factors of strength of the
3 particular narcotic controlled substance is very
4 credible in determining whether or not an
5 additional sentence or additional facts --
6 should be additional fact that does add impact
7 to the sentence.

8 The reason being that the greater the
9 purity close to the top. Rather simplistic
10 explanation of things but also the people on the
11 defense side -- by that I mean the criminal
12 defense, understand that because that's how the
13 price of the value starts. The higher the
14 purity the higher the profit. The weaker the
15 purity the lower the value down the chain.

16 I think that the closer to the purity
17 merits a higher factor or at least higher
18 factors in aggregation. I think to disregard
19 that loses us an opportunity to place these
20 persons in a position -- places people in a
21 higher position to cooperate and you don't have
22 to go as far with someone who's cooperating with
23 maybe penalty from drugs of a higher purity.

24 Now, I said I would be short and
25 reasonably short. Are there any questions?

1 Anything I might be able to add to it?

2 JUDGE WILKINS: Thank you, very much, Mr.
3 Lassart. I think we all agree with you on the
4 issue of purity. We're now struggling with how
5 it should be factored into the guidelines
6 without making it an unnecessary mathematical
7 application and if you would give some thought
8 to that we would greatly appreciate it. It's
9 not something that we have just glossed over in
10 the past. We value your opinion very much.

11 In addition to that, wish you would give
12 some thought to what worth you would write in
13 the area of drugs to capture that situation
14 where the individuals are arrested with the
15 seizure of the amount of drugs involved does not
16 actively reflect the seriousness of the level of
17 involvement of that type of activity.

18 And you can, I'm sure, from your
19 experience and number of the examples where
20 significant drug dealers were arrested but not
21 the drugs seized for one reason or another, did
22 not reflect they're criminal activity now.

23 How do we capture that situation in
24 guideline form so that the sentence, on these
25 sentences, would be on a proportion to the

1 small-time drug dealer who got captured and
2 arrested with a small amount of drugs. I'm not
3 necessarily seeking answers today because it is
4 very difficult to deal with past experience in
5 this field.

6 Would you give some thought to it?

7 MR. LASSART: I would do that. I have as
8 a result of passing activity given thought in
9 this area and I agree with the premise that
10 because you happen to be arrested with eight
11 pounds doesn't mean that you're necessarily an
12 eight pound person. And by the same token, I
13 guess the circumstances surrounding the events
14 of the arrest dictates your probability of
15 cooperation. I will give extra thought to that
16 and be more than happy to communicate.

17 JUDGE WILKINS: Thank you, very much.
18 Any questions to my right? Any questions to my
19 left?

20 JUDGE BREYER: The point that you brought
21 up in talking to judges who sentence seems to me
22 whether ut;s the top sentence, lenient
23 sentencing, they all tend to think that you just
24 don't add up the harm to these victims.

25 I mean, I can give you a lot of examples,

1 but a person that hits somebody in the nose and
2 it hurts him seriously that may be worth six
3 months in prison. If he gets into a barroom
4 brawl and breaks 20 noses, he gets more of a
5 sentence but he doesn't get ten years.

6 And similarly, if I get drunk and drop
7 the -- drive into another car which goes off the
8 edge of a cliff and seriously hurts the driver
9 maybe I deserve three years. If it's a bus and
10 you kill 20 or 30, say I deserve more of a
11 sentence but not ten times the sentence.

12 And that's seems to be a principle that
13 exists in sentencing across the board regardless
14 of the sentencing philosophy. It tends to be
15 reflected in the fact that judges sometimes give
16 concurrent sentences and sometimes give
17 consecutive sentence. And it doesn't have to do
18 with the fact that the tenth victim is hurt any
19 worse or isn't as serious. It's just as serious
20 and is hurt as worse or as badly and it has
21 something to do with deterrents and it may have
22 something to do with notions of culpability.

23 When you lump a lot of crimes together
24 they're culpable. Just as culpable, ten times
25 as culpable. You don't punish them quite as

1 much, at least 10 times as much.

2 And if you take seriously your report
3 we're going to say when the guy who's gets
4 drunk, bumps into the bus he goes to jail for
5 the rest of his life. If he bumps into a car
6 he's in jail for a year. A person in a barroom
7 brawl is going to jail the rest of his life. A
8 person who hits one person will go to jail for
9 six months or a year. Now that contrary to
10 people's ordinary persons wishes. That's what's
11 given us the problem how to reflect that.

12 MR. LASSART: Your Honor, it's a matter
13 of where you stand when you make that decision.

14 JUDGE BREYER: You want to say you will
15 just add it up.

16 MR. LASSART: I think you look at it two
17 ways with the split of the hypothetical. First
18 of all, you described a single transaction.
19 That has a good deal of merit to the fact that
20 you don't add things up. How would you stand on
21 the other side of those that are hurt.

22 JUDGE BREYER: That's true.

23 MR. LASSART: Now, the other concern I
24 have is that you don't do what California did in
25 that limiting to multiple acts in multiple

1 transactions are given the value of -- or
2 devalue -- in other words, if you have a person
3 who goes out and hits the bus on consecutive
4 weeks then I think that that person ought to
5 suffer the advantages of the penalty of each one
6 of those events.

7 JUDGE BREYER: I thought so. Judge Green
8 (sic) was saying in his experience -- he thought
9 a lot about sentencing. -- he finds even that
10 unrelated cases Judges just don't add it up. I
11 don't know what your experience -- you've had
12 quite a lot of it. What you do you think
13 haven'ts in fact ought to be.

14 MR. LASSART: If I took the crime that
15 you used, battery, and switched that to an armed
16 robbery, the other two who I particularly like
17 in the manner in which they handle these
18 matters, do give consecutive sentences. And
19 it's not as if the penalty is totally
20 determinate on the fact of whether or not you
21 can give consecutive time.

22 In other words, you can set up with a
23 combination of concurrent and consecutive
24 sentences with various penalty factors added in.

25 So, I guess to answer your question,

1 sure, you have to look at the circumstances, you
2 never lump in multiple transactions into one
3 sentence. Always separate those and then within
4 those particular transactional activities then I
5 believe you're right, you could use consecutive
6 sentence to concurrent sentencing to lessen the
7 penalty would be an overreaching sentence.

8 JUDGE BREYER: Have you thought something
9 out about this in terms of specific rules? I'd
10 be awfully interested in because I found the
11 single most difficult conceptual problem.

12 MR. LASSART: The example I would follow
13 is California's law, under 654 of the Penal
14 Code. The other one is their multiple
15 sentencing activities laws.

16 In other words, they have haven't amended
17 that in the last few years. In sex crime, where
18 you can have actually -- a single transaction,
19 be sentenced consecutively for rape, forceable
20 oral copulation and a few other sex crimes.
21 Appropriately so.

22 They haven't done that necessarily in the
23 multiple transaction robbery situation. And I
24 know that they use the third base term on that
25 and there's some good question and I'm not

1 really up to date on the California Supreme
2 Court last time around on this, but there's some
3 concern whether or not that's a multiple
4 sentence as multiple transactions.

5 JUDGE MACKINNON: Don't you think in
6 those cases where you have multiple offenses if
7 you added them all up it would be twenty years
8 beyond life in prison. In those cases you look
9 at the prisons and you say: "Well, too much is
10 too much".

11 And I remember having a boy in the Navy,
12 came into me on proposition one day and I took a
13 look at his record and he had the most horrible
14 record I'd ever seen in the Navy. And I said:
15 "You don't need any time in the brig you need
16 something to change you around here".

17 And that is about where you get with your
18 ordinary sentence. Isn't it, when you're
19 multiplying these tremendous things? If you're
20 going to impose for a mail fraud, time for every
21 single solitary event you're going to run out of
22 time. You're not going to have enough time for
23 any person to serve during this century. And
24 those are considerations that a judge really
25 looks at.

1 He looks at it and says: "Ten years or
2 15 years for this man would be the maximum of
3 any benefit that any person in society could
4 ever get from"

5 And he says: "That's my limit. That's
6 what I think is the limit".

7 Is that about the way they add those
8 things up?

9 MR. LASSART: That's the way I think they
10 do.

11 JUDGE MACKINNON: On the strength of -- I
12 was interested in your "strength" argument and I
13 had another slant to it.

14 Would you think this would have a
15 different sentence for drugs depending upon
16 their potency? For instance, Marijuana isn't as
17 serious a drug -- I don't think, although I
18 think it's serious -- as Heroin. And grouping
19 them together isn't exactly a fair proposition.
20 Is it?

21 MR. LASSART: The way I look at the
22 guidelines, the opiates, cocaine, heroin and in
23 terms of importance, how I see it. Now, within
24 those particular groups that's where the
25 strength is. In other words, once you broken

1 out the categories of penalty for each type of
2 drug then the strength of that particular drug
3 is important.

4 Quite frankly the strength of Marijuana,
5 I don't think that becomes a big factor in
6 determining value. When we're talking about
7 strength we're really talking more than anything
8 else you're talking heroin and cocaine.

9 JUDGE MACKINNON: And PCP.

10 MR. LASSART: And PCP.

11 JUDGE MACKINNON: And they ought to be
12 in a different category you would think, than
13 Marijuana.

14 MR. LASSART: As far as strength goes, I
15 don't think there is any necessity for 80 or 90
16 percent.

17 JUDGE WILKINS: Thank you.

18 PROFESSOR NAGEL: In some of the hearings
19 in the past we have been urged to consider
20 jurisdictional differences in sentencing for
21 drug offenses. Given your own experience, what
22 would your response be given the drugs perceived
23 to be a national problem? Would that be
24 something that you would advocate?

25 MR. LASSART: Not at all. I've asked --

1 we have that now. That's here. The penalties
2 for same amounts of the same posture throughout
3 the little counties are very different from
4 district to district.

5 If I were to get caught with a kilo of
6 cocaine in Idaho within a thousand feet of a
7 school and get caught for that same amount say
8 in Florida a thousand feet from the school I can
9 guarantee you there would be a different
10 penalty. That doesn't help the problem. The
11 penalties ought to be uniform and people
12 shouldn't be able to shop jurisdictions because
13 the last time someone cracked down on money in
14 this country they were from California.

15 So, you don't want people to be able to
16 shop based on penalty. It's a better place to
17 do business. Frankly, I agree these arguments
18 are a major problem. You probably -- longer
19 than I -- know sophisticates could do that --
20 shop the market.

21 JUDGE WILKINS: Thank you again. We
22 appreciate not only your testimony but the work
23 you have given the commission. Thank you.

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JUDGE WILKINS: Our next witness is Mary Woods. Miss Woods is from Victim Advocate of Los Angeles. Miss Woods, we're delighted to have you with us.

MISS WOODS: Thank you.

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SPEAKER MARY WOODS,
VICTIM ADVOCATE, LOS ANGELES

MISS WOODS: Good afternoon. I'm pleased to be part of this fine and necessary effort to create a consistent and enforceable guideline for the sentencing laws.

In looking over the agenda for today's hearing I realize I'm probably the only participant who does not speak legalize.

My knowledge of the subject is something I have learned from my heart and from my soul and from the hearts and souls of other crime victims of which I have come into contact.

Four years ago I woke up at 3:00 o'clock

1 in the morning to see a man standing in my
2 bedroom. He proceeded to rob and rape me in my
3 home. He returned a month later with a friend,
4 a young man recently out of the Marines who was
5 training in the arts of rape and pillage, and
6 let the friend into the apartment.

7 When he found out I was no longer there
8 he went in the next room and attempted to rape
9 my former roommate. She later testified how
10 lucky she was after he ran away he left behind
11 several pieces of solid evidence. Real smart
12 guy he thought his sock wouldn't leave
13 fingerprints. We saw that his name was
14 stenciled on it and in fact an important medium
15 for his later conviction.

16 Both men were apprehended the night after
17 the second attack in which there was another
18 rape and robbery. Both my former roommate and I
19 participated in conviction of the two men. I
20 also made an impact statement at the time of
21 sentencing. Both men received maximum penalty
22 on all counts. The man who attacked me received
23 15 years and 4 months. The second man got nine
24 years and ten months.

25 I'm here to address the impact of

1 psychological injury on the victim as it applies
2 to sentencing. I was speaking primarily of
3 offenses against the person but from what I
4 understand, offenses involving property also
5 reflect similar emotional response from the
6 victim.

7 Following my victimization I felt -- if
8 you'll indulge me an analogy -- at the time
9 somebody had taken me by arm and leg and flung
10 me into the deep dark gravity pit. Felt that I
11 had no choice but to lie down and make a nice
12 little bed for myself at the bottom of that pit
13 or I could start to climb, slowly fingernail by
14 fingernail up until I could see the light again.

15 Every line up or hearing or a thoughtless
16 remark by a coworker or a cruel joke heard in
17 public or every noise I heard outside my door, I
18 slipped back a little bit into the darkness
19 again.

20 But as time continued and with the help
21 of Crisis Intervention, psychological counseling
22 and support of a few support friends and family
23 members, I finally was able to climb out of that
24 pit, stand in the open and let my face absorb
25 the sunlight. It was a year and a half

1 following my attack that I woke up in one
2 morning and realized that I was on the other
3 side of that experience.

4 During that period I went to work, I
5 performed the necessary tasks for survival
6 including going through trial and all it's
7 attendant activities. But I felt bad inside. I
8 felt that my soul had been taken along with my
9 jewelry and my wallet and it took a lot of hard
10 work to get it back.

11 The problem is, as it's difficult to
12 understand unless you've been there that being a
13 victim of crime is a lifelong sentence. No
14 matter how sane and happy I am today I work very
15 hard to be. This is something I have to live
16 with every day of my life. I didn't ask for it.
17 It's not my fault. Now that I got it I really
18 know what to do with it.

19 Many people today live in a constant
20 state of fear and paranoia, baracade themselves
21 in their own homes. They don't go out at night.
22 I have lived through what they are afraid of. I
23 have felt death at my neck and yet still I have
24 to walk around my work, and interact in an
25 increasingly violent society. I have seen the

1 world as a violent place and I can never go back
2 to the way I was before. My feelings are not
3 unique.

4 As a member of the Board of Directors of
5 Victims for Victims I have spoken to victims who
6 expressed the same sentiment. This is victims
7 of assaults, armed robbery, rape, kidnap,
8 hijacking, loss of a loved one through homicide.
9 They talk of fears which can take years out of
10 them, how their relationships are affected. How
11 many marriages are broken up. How jobs are
12 lost.

13 The power over one's own life and death
14 is an issue that has been taken away by the
15 criminal. It is a long and arduous struggle to
16 gain back that control.

17 The problem is: How do you apply
18 numerical offense values to these long ranging
19 and deep-seated effects? I don't think you have
20 a number that could go high enough to reflect a
21 just punishment in the eyes of the victim who
22 has to live with the consequences for the rest
23 of his or her life.

24 I'd like to ask specifically to a couple
25 of things I've heard hear today as well as the

1 proposals outlined in your sentencing
2 guidelines. You talk about the issue of
3 disparity. I'd like you to consider that issue
4 of disparity, the impact on the victim whose
5 assailant receives a light sentence or even
6 probation for their crimes.

7 I think there's a general feeling in the
8 public, they know that the chances of receiving
9 fairness from something called criminal justice
10 system is rather slim. You have the opportunity
11 there to prove them wrong.

12 In the guidelines, I'd like to ask that
13 you re-evaluate the offense value of twelve
14 units added for victim whose vulnerable because
15 age or mental or physical condition. The
16 psychological impact of a violent crime on a
17 defenseless and/or dependent person is extreme.
18 The criminal should have to truly answer to such
19 an act of brutal cowardness.

20 Secondly, I support and applaud the same
21 base offense value applicable in attempted
22 sexual assault cases as well as if the act had
23 been completed. Certainly, the intent of the
24 criminal is clear and the impact on the victim
25 is comparable.

1 Thirdly, your guidelines acknowledge --
2 this is where I have the problem -- acknowledge
3 the assumption that in crimes of violence at
4 least the minimal level of psychological injury
5 occurs and it states that and I quote here:
6

7 "The offense value for the lowest level
8 of such injury has therefore been
9 factored into the base offense value for
10 an offense involving a person and in this
11 instance in which psychological injury
12 has been significant or extreme and
13 appropriate increase in the penalty will
14 result".
15

16 End quote. What is the offense value for
17 the lowest level of psychological injury? What
18 are the numbers? Is that enough? Who is to
19 determine when extreme or significant
20 psychological injury has occurred and who will
21 give the expert testimony, as is indicated?

22 With each victim of a violent crime be
23 thoroughly examined by a psychiatrist trained in
24 victimology. I must tell you in my experience I
25 have never seen a victim of a violent crime

1 whose level of psychological injury was not
2 significant or extreme.

3 In my view, a significant level of
4 psychological injury should be assumption. A
5 minimum level the exception. At any rate these
6 classifications and determinations must be
7 clarified. I implore you, learn to look beneath
8 the physical scars and see the emotional and
9 psychological wounds which never heal. Reflect
10 this acknowledgement not only in your sentences
11 but in your demeanor. Treat the victim who
12 comes before your court with respect and
13 compassion due a person performing such a brave
14 task.

15 Understand that each victim that you see
16 stands for a hundred more who are unable to
17 come forward or whose assailants are never
18 captured. The length of time time it takes for
19 a case to come to sentencing guarantees that
20 most of the psychological and physical signs of
21 trauma will be gone but the brutality of our
22 society with the daily onslaught of violent
23 crimes continues to rip open the clinicial
24 wounds endured by the victim. The
25 responsibility is enormous. Tough, consistent,

1 and certain sentencings provide a deterrent as
2 well as just punishment and more importantly as
3 a legal application. Show the people as well as
4 the perpetrators that violence no longer will be
5 tolerated in our society

6 JUDGE WILKINS: Thank you.

7 MISS WOODS: I'd be glad to answer any
8 questions.

9 THE COURT: Thank you, very much, Miss
10 Woods. On behalf of the commission, wish to
11 express our appreciation to come to this hearing
12 and provide this important information to us. I
13 think re-enforces what we have felt, what we
14 need to do with the psychological injury.

15 On the other hand, you see, there is
16 nothing in the law anywhere that says a judge
17 should -- psychological injury although we know
18 most responsible judges do that. So, you're
19 groping for words that provide for the
20 imposition of a summons that reflect the
21 psychological as well as the other injuries in
22 terms of the victim and it's been very helpful I
23 think this idea of presumption of psychological
24 injury in the crimes of violence may go a long
25 way to accomplishing that. I think that's an

1 excellent idea.

2 Any questions to my right?

3 JUDGE MACKINNON: I was wondering, you
4 had to go to Court whether you had to testify or
5 what?

6 MISS WOODS: Yes. I testified at three
7 preliminary hearings and then finally at the
8 Superior Court trial.

9 JUDGE MACKINNON: What would you say that
10 added to your psychological --

11 THE WITNESS: Well, it's a two-edge
12 sword. Facing my assailant in court was singly
13 the most difficult thing that I had to do in
14 that whole process and I had to do it four
15 times. Being as far away as I am from you from
16 the man who attacked me so brutally was an
17 indescribable horror. Things that I had to
18 testify about were as well horrific.

19 However, I think this really came with my
20 impact statement. I'd like to emphasize how
21 much power that gave me to be able to do that
22 and how that should be emphasized to other
23 victims to take advantage of their rights as
24 they have in California to make such a statement
25 at the time of sentencing.

1 When I was able to make that impact
2 statement, I wasn't under the gun, I wasn't
3 under oath, I wasn't on the witness stand. I
4 was standing behind the DA's desk saying my own
5 words straight to the Judge, exactly what it
6 felt like to be me in that situation at this
7 time.

8 Gave me to a great deal of internal
9 power. I remember when I came out of that
10 courtroom after the men had received the maximum
11 sentences I felt like the strongest woman in the
12 world. I felt like I truly made a difference in
13 that situation, that I prevented countless
14 other victims from -- from going through what I
15 had been through. The trial was extremely
16 difficult and I do understand why victims balk
17 at doing it, yet the impact statement gave me
18 back everything

19 JUDGE MACKINNON: The statement that you
20 made to the Judge in open court?

21 MISS WOODS: Yes.

22 JUDGE MACKINNON: At the time of
23 sentencing?

24 MISS WOODS: At the time of sentencing.
25 Which was covering four months after the

1 conviction.

2 JUDGE MACKINNON: That was what court?

3 MISS WOODS: Superior Court of Los
4 Angeles.

5 JUDGE MACKINNON: Is that their general
6 practice to permit statements?

7 MISS WOODS: Well, it was unusual. I had
8 received a piece of paper, which is a standard
9 thing, telling me when my assailant was to be
10 sentenced and at the bottom -- I just happened
11 to read everything that came my way about the
12 case because I was fairly active in it and cared
13 a lot about each of the elements. And in little
14 tiny letters along the bottom of it, said: "By
15 the way, as a victim, you have a right to appear
16 that day...."

17 So, I called the DA and said: "What is
18 that?" And although she was a DA in the Sexual
19 Assault Task Force, said: "Frankly, no one has
20 ever taken advantage of that". "Well, you found
21 someone who will".

22 So, I prepared a statement and not really
23 knowing what to expect. And it was an unusual
24 situation. The courtroom was packed with people
25 because they understood that something unusual

1 was going to occur and in all of my speaking and
2 work in Los Angeles I try to encourage other
3 victims to take advantage of this and I would
4 like to encourage people over the nation that
5 they have a right to make such a statement to do
6 so.

7 JUDGE MACKINNON: You're the only one in
8 Los Angeles that you know of?

9 MISS WOODS: At that particular point --
10 this was four years ago. I have heard of other
11 cases since then where victims have made such a
12 statement. I fully intend when my assailant
13 comes up for parole to travel of course at my
14 own expense to Folsom to make a similar
15 statement at his parole hearing if I get the
16 opportunity to do so.

17 JUDGE MACKINNON: He was sentenced before
18 the new law indeterminate? He can be paroled?

19 MISS WOODS: He can be paroled, I
20 believe, in '89.

21 JUDGE BREYER: When was he sentenced?

22 MISS WOODS: '82.

23 JUDGE BREYER: He'd have to serve seven
24 years.

25 MISS WOODS: Yes.

1 JUDGE MACKINNON: Fine. Thank you, very
2 much.

3 We're delighted to have with us as our
4 next witness, the Honorable Arthur L. Alarcon.
5 Judge Alarcon is a member of the United States
6 Court of Appeals of the Ninth Circuit.

7 Judge, we appreciate you taking your time
8 to be with us today.

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11 HONORABLE ARTHUR L. ALARCON
12 U. S. COURT OF APPEALS, NINTH CIRCUIT

13 JUDGE ALARCON: Thank you, Judge
14 MacKinnon. I must say, everyone of your speaker
15 seems to be very brief for reasons of having
16 been here this morning and heard appearance and
17 comments I'm going to be brief because I did not
18 know I was on the program. And Judge Burns is
19 the Chairman of our group, the Ninth Circuit and
20 he will be following. I was going to be here to
21 make sure that he did reflect the consensus of
22 our group.

23 There are three things that I would like
24 to comment on. One, Commissioner MacKenna just
25 asked about the rights of the victims in

1 California to speak at sentencing. That is as a
2 result of the Amendment to the California
3 Constitution. It's called Proposition "P".
4 Victims in criminal matters of the State of
5 California must be given notice, have the right
6 to be present and speak at sentence.

7 The three areas that I want to comment
8 briefly on are as follows: First of all, from
9 an Appellate standpoint, and I'll speak as one
10 of the 28 Appellate Judges in the Ninth Circuit,
11 I would appreciate if the Commission would
12 consider finding if possible, more carefully,
13 the modified real offense sentencing standard
14 with reference to "other criminal conduct".

15 Judge Burns will be making our report to
16 you and he will discuss with you two alternative
17 suggestions that he will offer to you. I refer
18 you to the concern the Commission has that
19 elements can partly be bound up in conduct that
20 constitutes a crime charged, should be
21 considered.

22 As an Appellate Judge I worry about
23 language like that. I see a fertile field --
24 properly so, from attorneys who would challenge
25 concepts such as that.

1 Either of the alternatives offered by Mr.
2 Burns in his remarks that you limit the other
3 criminal conduct to conduct which is really
4 admissible under the Federal Rules of Evidence,
5 Rule 404. Or, conduct which would form the
6 basis for a count and indictment joinable under
7 the Federal Rules of Criminal Procedure, Rule 8.
8 Would be something that all of us in the system
9 are familiar with and can deal with and might
10 toughen the possible elements.

11 The second thing I want to speak to you
12 about is a concern I have, not as Appellate
13 Judge because I think a lot of these things
14 never get to us and that is the problem which
15 may follow if, from what appears to be a
16 recommendation for guidelines which will result
17 in harsher or stiffer or stricter sentences.
18 And what appears to be a down-playing of the use
19 of probation by the District Judges.

20 I fear that while reducing disparity in
21 sentencing by Judges, this may lead to a greater
22 disparity in sentencing because of plea
23 bargaining between lawyers, of charged
24 reductions, and of fact-bargaining in order to
25 prepare for the sentencing hearing.

2 1 Harsher sentences, if that is the result
2 of the guidelines may precipitate more charged,
3 more charged reduction to avoid greater
4 punishment.

5 And I also encourage the overcharging to
6 reduce the plea of guilt. I'm delighted that
7 you apparently are concerned with the same
8 things I am because that's one of the questions
9 that I have heard this morning.

10 Finally, in the later matter and the
11 second concern, is the need that you have
12 pointed out in the evidentiary hearing to try to
13 specific issues of the facts under the modified
14 real offender sentencing concept. I cannot
15 quarrel with your concerns that you are bringing
16 out in the open and providing some kind of a
17 process for things that, in the past, things
18 that now appear only in presentencing reports
19 and where there's less process in what you're
20 suggesting.

21 What concerns me is that perhaps
22 Congress -- this is not your responsibility --
23 Congress has not given sufficient concern to the
24 judicial impact of what may be a greater load on
25 our District Courts in conducting the kind of

1 hearings that we're suggesting and that may be
2 necessary for the guidelines.

3 To avoid -- unless Congress takes that
4 into consideration -- unless Congress provides
5 the sufficient personnel in the probation
6 officer's reports, investigations of that, in
7 judges to try the cases where I believe there
8 will be a greater need, we may see if we don't
9 have that consistence, we may see prosecutors
10 and defense lawyers taking care of the problem
11 by stipulating to the facts as to the proper
12 elements the Court should consider.

13 This in turn could lead to bargaining as
14 to which facts will be presented and which facts
15 may not be presented. If my concern is valid,
16 the result will be disparity in sentencing no
17 longer based on judicial discretion or where you
18 are in the United States, who is the sentencer,
19 but may well be based on the skill of
20 negotiating lawyers and the facts exposed to the
21 court?

22 The Rand Corporation in Los Angeles has
23 done an excellent study on disparity in the
24 sentence. One of the reports -- that turned out
25 about 1977 -- one of the conclusions that they

1 reached is that plea bargaining charged
2 reduction in bargaining has a tremendous impact
3 even within one county, Los Angeles County,
4 because we have about eight divisions of the
5 Superior Court. They saw differences depending
6 upon the policy of the DA charged that
7 particular division in terms of charged
8 reduction and in term of sentence work.

9 Delighted the commission is concerned
10 about the impact of guidelines in the area of
11 plea bargaining. I would hope that you come up
12 with or recommend to Congress their
13 consideration given to the impact of the statute
14 and guidelines that you have to come up with on
15 this problem.

16 I also hope that in the final report
17 there will be more concern expressed in the
18 report about the alternative probation. Judge
19 Burns will speak more to that. This may be an
20 unfair criticism. May be you are as concerned
21 as we are about giving the Judge the continued
22 option where the statute permits it to put
23 people on probation.

24 However, of view of your proposed
25 guidelines, seem to indicate to us that you

1 downplay the value of the importance of leaving
2 it to the judges discretion to put people
3 probation. That constitutes my remarks, Judge.
4 Surprise to me until about 1:45 this afternoon.

5 JUDGE MACKINNON: Thank you, very much.
6 I wonder if you would consider this, perhaps by
7 analogy, in the future. We provided a summary
8 draft approach, in view of the sentencing
9 hearing we set up a suggestion proceeding
10 meeting with your approval. I wonder whether we
11 have the power to do that?

12 JUDGE ALARCON: All right. I'd like to
13 think about that.

14 JUDGE MACKINNON: I would appreciate
15 that. I just don't know whether we have as a
16 commission the authority in fact to do what
17 maybe the Legislature or Congress should be
18 doing and of course, that will determine greatly
19 the answer to that question in terms of the
20 sentencing?

21 JUDGE ALARCON: Sure.

22 JUDGE MACKINNON: Thank you, very much.
23 Any questions to my right? Anyone to my left
24 have any question?

25 JUDGE BREYER: There seems to be in the

1 report there are persons are at fault who wrote
2 this Page 17 "modified rules of sentencing".
3 Seems to be there's been some confusion about
4 whether or not refers to. There is no standard
5 such as the one you just described.

6 What the modified rule of that section
7 says and what it intended to say is that what
8 that Judge does is he looks to the guideline and
9 the guideline tells him what conduct to look at.
10 Some guidelines will refer to "other conduct".

11 For example, the guideline for bank
12 robbery refers to "physical harm". He never
13 applies the standard that you mentioned. The
14 standard that you mentioned dealt with
15 permission to decide which specific cross
16 references should be made.

17 In other words, we decided in the
18 preliminary draft that a person who robs a bank,
19 if he's charged with bank robbery and convicted
20 and he happens to pistol-whip the teller, even
21 though that crime of pistol-whipping the teller
22 was not charged, the Judge, who chooses to
23 sentence him for bank robbery, if the Judge
24 finds that he pistol-whipped the teller, looks
25 to the harm of physical injuries listed in Part

1 "A".

2 So, it's very specific what happens.
3 When a person is convicted for tax evasion, the
4 guideline on tax evasion says that the Judge
5 does not look at the personal harm. Even if, in
6 the course of tax evasion, the tax evader
7 happens to hit the IRS man on the head.

8 All right. Now, the reason that we said
9 "go and look up physical harm when you rob a
10 bank. But don't go and look up physical harm
11 when you evade your income tax," is because by
12 and large physical harm can be bound up with
13 bank robbery. But it's a very unusual case in
14 which physical harm is bound up with tax
15 evasion.

16 In other words, that vague instruction
17 that you read is not an instruction to you or me
18 as Judges, it is an instruction to me as a
19 commissioner so that I would then write a
20 specific guideline which would then instruct the
21 Judges.

22 Now, that's the way the Modified Rule of
23 Sentencing is supposed to work and is supposed
24 to be reflected in this particular document.

25 JUDGE ALARCON: It's reassuring to hear

1 that. I'm a little concerned however, about the
2 specificity which sounds to a Judge like hands
3 tied. Why shouldn't a judge consider that
4 somebody reached over and hit the tax collector
5 on the head with his pistol?

6 JUDGE BREYER: The reason for that is the
7 following: If the Judge is going to consider
8 these "other things", remember these "other
9 things" were not charged and therefore, when the
10 judge considers whether they happened he will
11 consider them at a sentencing hearing after the
12 trial and the standard will be perhaps a
13 preponderance of the evidence and the Rules of
14 Evidence if they do apply, if they will, will
15 not apply with full force.

16 And therefore, although that's an
17 enormous procedural improvement over the
18 present, where there are no protections to the
19 defense, none the less he is less protected than
20 if the crime's charged secondly and therefore,
21 the IRS agent who is hurt, if the government
22 wants to punish the person on the basis of the
23 tax evader having hit the IRS man on the head,
24 the government can't do it. The government
25 simply charges that offense. And then since

1 that person has been convicted of having
2 committed that offense he gets some support.

3 And then you say: "Well, why not do the
4 same with the bank robbery?" And the answer
5 predominantly is for not doing the same thing
6 with the bank robbery is that if we do that same
7 thing with the bank robbery we were worried
8 about putting too much discretion in the hands
9 of the prosecutor where the prosecutor can then
10 control the sentence by deciding whether or not
11 to charge that extra element.

12 You see? Under those considerations,
13 some of which cut for and some of which cut
14 against charged offense sentencing. Some of
15 which cut for, some of which cut against, real
16 offense sentencing, our balance on Pages 15
17 through 17, when we tried to spell them all out
18 and explain how we reached the great compromise.

19 The compromise being substantive of what
20 I described this modified rule of that
21 sentencing, and being procedurally a sentencing
22 process that provides more protection for the
23 defendant than at present, but still somewhat
24 less procedural protection than if in fact, it
25 were a full-fledged trial. I mean that's the --

1 JUDGE ALARCON: I appreciate that.

2 JUDGE WILKINS: Just a note -- I'm sure
3 Judge Breyer intends -- my understanding of the
4 preliminary draft is not a requested compromise
5 that this commission has reached, but is rather
6 one view of the public reaction --

7 JUDGE BREYER: -- public reaction.

8 JUDGE WILKINS: And in fact, there are
9 many people on this Commission who might have a
10 slightly different viewpoint than Judge Breyer
11 does. Some of us have a very different view.

12 JUDGE BREYER: I didn't mean it as a
13 compromise on the Commission. Because I have a
14 theory as a compromise of consideration.

15 JUDGE ALARCON: In your estimation --
16 maybe this is because I've been a Judge too
17 long, I could read the brief on the appellate in
18 the bank case saying "why am I not being treated
19 the way a person in tax cases"?

20 JUDGE BREYER: You would not have the
21 power to appeal, have anything to say about
22 that.

23 JUDGE ALARCON: -- challenge the
24 statute.

25 THE COURT: Yes. Yes. They could

1 challenge the statute.

2 JUDGE ALARCON: Will be equal treatment.

3 JUDGE BREYER: The reason I was
4 addressing myself to the problem you were
5 concerned with is that I do have a definite
6 standard. I think the standard is fairly
7 definite. I think the standard is served very
8 well by that. I don't know why this is put out
9 for comment. That is a standard which is a
10 theory which I think represents a compromise of
11 considerations. Is put out for comment because
12 the question in my mind as it's put forward for
13 comment, is it the correct approach?

14 California, we have learned, has much
15 more of a charged offense based system.

16 The Department of Justice at one point
17 proposed to us a system that was far more real.
18 So, I'm not saying it's the right system, but
19 I'd be happy to look through it again and see
20 why that system is put forward.

21 JUDGE MACKINNON: I presume Judge Burns
22 is going to discuss the other criminal conduct
23 in greater detail?

24 JUDGE ALARCON: Yes. He's the real show.
25 I'm just here to -- you.

1 JUDGE WILKINS: Thank you, again.

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8 JUDGE WILKINS: We have with us now
9 another representative from the Ninth Circuit.
10 The honorable James M. Burns, United States
11 District Judge from Portland, Oregon. His
12 reputation precedes this Commission for long
13 before I met him. He was known as "James the
14 Just, from Portland, Oregon". Delighted to have
15 you with us, Judge Burns.

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17 +++

18
19 HONORABLE JAMES M. BURNS
20 UNITED STATES DISTRICT JUDGE,
21 PORTLAND, OREGON

22 JUDGE BURNS: Thank you Mr. Chairman,
23 members of the Commission. Appreciate very much
24 the kindness to listen to me again and to begin
25 with I want to assure you that I am not going to
quote the scriptures.

1 In the first place, I have been handed a
2 a controlled exercise agreement of three judges
3 by virtue of the First Amendment and stipulation
4 that I'm not entitled to quote the scriptures.

5 Secondly, considering the effects it had
6 I would prefer to open with a quote from
7 Aristotle which is: "Absolute equality is
8 absolute inequality." And that, in a way,
9 capsulizes I guess really, what my view is of
10 the statute itself as suggested for a method by
11 which we will eliminate sentencing disparity.

12 Also, I want to quote a sign which is
13 over a store in Vermont as to the material that
14 I have put together in a hurry and didn't really
15 have much time to give sufficient thought to the
16 detail and comments. But, the sign over the
17 store in Vermont says: "Our best is none too
18 good."

19 And I reel that way about the quality of
20 today's presentation. I don't intend to go over
21 it. I just want to get a couple, three points
22 and then I'll answer any questions.

23 First, I have a cartoon that I generally
24 show, it shows the Judge on the bench and it
25 says: "Now, I have arrived at the job of

1 sentencing, the fun part of being a Judge."

2 And then, I have another cartoon which I
3 show ususally in conjunction with that and it
4 shows the Judge banging his gavel. Says: "99
5 years, justice triumphs again".

6 Be that as it may, NROS is a baffling
7 problem you have sketched beautifully in view of
8 the commentary and I'm frank to say I'm sorry,
9 but I have to nit-pick or criticize the
10 formulation that you end up with which is set
11 forth in the text.

12 We have offered rather tentatively a
13 couple of alternative formulations. We don't
14 claim very much for either one of them though
15 the first one, we claim at least familiarity by
16 the practioneers by formulating the standards
17 wherein more than charged with conviction would
18 be looked at.

19 The other one, the alternative the
20 defendants, I think is less injury. There is
21 perhaps a third area and I simply am not aware
22 of enough of the details of it, but I rather
23 think the U. S. Attorney's Manual Service by the
24 Department of Justice and various offices, but
25 some of the standards that they employ with

1 respect to where the prosecutor is to charge or
2 not, as the case may be. Where for example, if
3 the file charges as opposed to diversion and so
4 on. Those various prosecutorial judgment calls
5 that must be made, probably take into account a
6 variety of conduct associated with the punitive
7 defendant and what the criminal episodal affects
8 on he or she may be involved in. That might be
9 another place to locate the standard.

10 But I don't have anything more specific
11 than that. And I don't really claim that the
12 alternative we are proposing in the written
13 material are necessarily that helpful. They do
14 have some problems. I do think they're worthy
15 at least of some study by you folks and by your
16 staff.

17 Secondly, and this was referred to
18 somewhat earlier today by some of the other
19 questions and some of the other people -- an
20 in-house decision is one that on the present
21 number -- and we appreciate that the present
22 number simply says "number", they're not cast in
23 stone but that's what we're reacting to as if
24 that is what they're going to be, you
25 understand, intellectually and emotionally and

1 among other things. But on those numbers what
2 you have done is to eliminate a vast share of
3 offenses in which I would at least consider
4 probation.

5 And as I read the Statute, I am not
6 entitled to grant probation on "A" or "B" felony
7 and you folks are probably not entitled to allow
8 probation on serious or violent felonies because
9 the Statute says be sure the guidelines reached
10 have had to reach the maximum.

11 But, I'm not aware of anything that the
12 Statute forbids consideration of probation
13 except "A" and "B". And there are cases where I
14 have put a bank robber on probation and I did
15 not do so -- not very many, but there are rare
16 cases, almost universally done, it has been one
17 in which there's probation plus, perhaps the
18 split, perhaps specified period of time in a
19 residential alcohol treatment program and the
20 like. But I have felt that those were proper
21 cases.

22 Now, I agree that under the Statute I
23 won't be able to do that anymore so long as the
24 charge itself is 2113A or 2113B. But, for other
25 reasons the charges -- I think it's an in-house

6
1 decision and broad in nearly the 14. -- as you
2 know. And, third is the problem I see of
3 warning a pleading defendant who comes to you
4 without knowing all the facts which would add up
5 to the sanction units imposed in the sentence
6 and there is some other material in there that
7 you might well want to consider.

8 Maybe the answer really is: So long as I
9 tell him the maximum is 20 or the maximum is 25,
10 that that's all I need tell him. I am not so
11 sure. I'm not sure that the present requirement
12 of Rule 11 have to tell him the maximum
13 sentence, have to tell him the other direction.

14 I'm not so sure that isn't a reflection
15 of a constitutional requirement or requirement
16 that has constitutional undertones.

17 Needless to say, personally, I would feel
18 very uncomfortable telling the defendant in a --
19 let us say, an unarmed bank robbery -- telling
20 him only the maximum is 20, when I know
21 perfectly well, given the various defense values
22 that would add up to, let us say, a range of 15
23 to 18 years. And I know he's going to serve 85
24 percent of it unless he saves a woman's life,
25 seems like you can aggregate one year, he's

1 going to serve 85 percent of whatever I say.

2 I would feel personally very
3 uncomfortable, because I think it's personally
4 wrong. It's his right. I think the defendants
5 are human beings just like judges are human
6 beings. I know victims are. So are police. So
7 are prosecutors. So are defendants and so is
8 everybody in the system.

9 And it's either their strength or their
10 weakness, I'm not sure which. And where I think
11 the Statute ultimately becomes a problem in
12 administration to the extent our statement is
13 critical, we're not critical of you folks.
14 We're critical, if at all, really of the Statute
15 and our job is to try as best we know to help
16 you make a workable set of guidelines, because I
17 think that's required on the whole just as much
18 as we are here.

19 But, there are four great purposes in
20 that sentence, even though they don't really
21 call it "rehabilitation" in the Statute we know
22 that's the intent and there's a fifth great
23 purpose, "preparing". But, Congress has not and
24 so far as I see it, these guidelines do not
25 always and everywhere identify the specified

1 time or specified criminal that the predominant
2 purpose is deterrent or response or diversion or
3 is rehabilitation. And so long as that remains
4 I think there will be uncertainty. One or two
5 rather technical items. Your definition of
6 psychological injury is very troubling to me. I
7 don't have a better method to word it. All I
8 know is that it engenders endless controversy in
9 almost every bank robbery case that I have ever
10 had because it would generate the argument of
11 the psychiatrist. And if you have ever had as
12 many psychiatrists as I've had in 20 years of
13 sentencing you don't want to hear anymore and
14 that's all they're going come November a year
15 from now. I hope to add some wording, send it
16 to you that I think would be helpful.

17 And then this problem of the role in the
18 offense or relative culpability is a tough,
19 tough, tough problem. One that we wrestle with
20 all the time and I think most of you have
21 wrestled with. Three large-scale
22 methamphetamine conspiracy cases with a total of
23 9 defendants, 11 defendants or 12 defendants.

24 And trying to sort them out in terms of
25 the relative culpability. And it is a tough

1 proposition. I don't think the present wording
2 of your role in the defense is as tight and
3 precise and tidy as it could be. I'd like to
4 offer some suggestions to you. It can never be,
5 never be, as good as it should be in my
6 judgment. Those are areas where I think, to the
7 extent you think you can under the Statute you
8 must allow me some discretion and you must
9 tolerate therefore the disparity that would stem
10 from my exercise which is different than any
11 other way that judges from the Central District
12 of California view it.

13 Thank you, very much. Sorry to trespass
14 on your time. I was interested in Judge
15 Breyer's remark about the great compromise
16 because it struck me on studying this, I
17 anticipated reading Bolan's record of the
18 meeting in Philadelphia which is very
19 interesting.

20 And I saw this as I was coming on the
21 plane here, the comparability here of the role
22 that you folks play and the role that the ten
23 weeks the residents of Philadelphia played in
24 the way -- this is not as grandiose and doesn't
25 affect the whole civil government, but it's a

1 tremendous important development and I hope you
2 have the time between now and January or April,
3 whenever it is you must -- I hope you have the
4 time for the nine of you to sit behind doors by
5 yourselves for an extended period and thrash it
6 out and thrash it out the way they did in
7 Philadelphia.

8 I'm satisfied of the quality of the folks
9 have here consistent by the comments that you
10 have from the others that you will in fact
11 produce a darn good document. I hope so and I'm
12 going to do everything I can to see that you
13 attain that goal.

14 JUDGE WILKINS: Thank you, very much,
15 Judge Burns. Not only is your testimony today a
16 submission for what you have given the
17 Commission in the past, we look forward to
18 receiving the submission that you talked about.

19 We agree you hit it right on the head.
20 We, in the Commission don't want examples of the
21 area of psychological harm to turn the
22 sentencing hearing into a battle of the
23 testimony of psychiatrists.

24 JUDGE BURNS: We absolutely don't want
25 that.

1 JUDGE MACKINNON: On the other hand, we
2 want psychological harm to be a factor in the
3 appropriate cases. How do you find that
4 balance? That's what we keep searching for in
5 this and all the other issues.

6 JUDGE BURNS: Just about two weeks ago,
7 three weeks ago I sentenced a bank robber which
8 was in fact an armed robbery in which the
9 defendant was armed in which the weapon was
10 discharged and the teller and the manager and
11 others were absolutely terrified out of their
12 skins.

13 The government, unfortunately, or
14 otherwise, has stipulated that the weapon when
15 fired had been accidentally discharged,
16 discharged from a robbery of -- went like this
17 (indicating) with his arm to assist the lady
18 customer who just came in the bank to get on the
19 floor as he had instructed her to do and his arm
20 went up and the gun discharged.

21 In any event, the teller in the bank
22 wrote a letter. I asked them to come in for the
23 hearing and so I asked them to testify or
24 testify rather than make statements and
25 conducted a rather lengthy inquiry of them and

1 asked them how long I should sentence him for
2 and I asked them how long they wanted me to
3 sentence -- this was a 39 year old man with an
4 absolutely clear record, no priors of any kind.
5 And a lot of other mitigating factors; chronic
6 confession and restoration of procedures and all
7 kinds of others.

8 Be that as it may, neither one could tell
9 me how long they thought he ought to stay in,
10 actually stay in behind bars. And so I finally
11 said to them: "Well, gee whiz, I shouldn't ask
12 you to do my job." And I should thank them for
13 participating. Both of them obviously suffering
14 from the events of the episode.

15 I think it most important that we have
16 the benefit of comments from the victims
17 wherever they feel comfortable in coming in and
18 appearing, otherwise the comments they -- they
19 don't care to come in and comment to us and we
20 take them with what we have.

21 JUDGE WILKINS: Thank you, very much.
22 Any questions to my right. To my left?

23 JUDGE MACKINNON: You suggested some
24 possible consideration be given the guidelines
25 that might be put out by the United States

1 Attorneys. They are definite. They apply.

2 "The attorneys for the government should
3 commence or recommend Federal prosecution
4 if he believes that the person's conduct
5 constitutes a federal offense and that
6 the admissible evidence would probably be
7 sufficient to obtain and sustain
8 conviction unless in his judgment
9 prosecution should be declined because of
10 no substantial federal interest would be
11 served by prosecution, the person is
12 subject to effective prosecution in
13 another jurisdiction or there exists an
14 adequate non-criminal alternative to
15 prosecution..."

16
17 That's the present standard and which
18 there are some more refinements beyond that.
19 But that's the present standard. I don't know
20 how the Court standard is being applied.

21 You know, I read the statement of the
22 Ninth Circuit on what they were talking about
23 on: "Other criminal conduct". And I thought
24 you were going to dwell on that more and what
25 you propose to do is limit the Judge in the

1 imposition of a sentence to other criminal
2 conduct to evidence that was rather minimal.
3 Yes. It's Rule 404 of the Federal Rules of
4 Criminal Procedure. And -- well, the elements
5 of Rule 404 are limited rather and "other crimes
6 is not admissible to prove the character of a
7 person in order to show that he acted with
8 conformity therewith".

9 "It may however, be admissible for other
10 purposes".

11
12 That was one of the things that dealt
13 relatively with character evidence. Now, in
14 contrast to that however -- and that was your
15 suggestion -- that the criminal -- Title 183577
16 provides:

17
18 "No limitation shall be placed on the
19 information concerning the background,
20 character and conduct of a person
21 convicted of an offense which a Court of
22 the United States may receive and
23 consider for the purpose of imposing an
24 appropriate sentence".
25

1
2 So, the two are sort of at loggerheads.
3 And I just make a comment on that, what would be
4 your particular observation on that? In other
5 words, as far as the Ninth Circuit's
6 recommendation was concerned?

7 JUDGE BURNS: Judge MacKinnon, I guess we
8 didn't make ourselves too clear. Our problem
9 with NROS (sic) was bottomed on the change of
10 venue proceeding. If I rob five banks a week
11 apart, standard stuff, bank robberies are
12 apparently unrelated, they're a week apart and
13 different parts of town. Now, under NROS as it
14 is presently phrased, I could consider the other
15 report. They're not inferred in some and they
16 don't result from it.

17 Now, one way of getting that is, if he
18 agreed to be tried on Bank Robbery No. 1 and the
19 government could bring in evidence on Nos. 2, 3,
20 4 and 5 under 404-B then I could consider as
21 part of the grieving offense alternatively if
22 those bank robberies were separately indicted
23 and if you joined in the Rule 8 as a matter of
24 "joined-in-the-trial". Then, when he pleads
25 guilty to one I can look at it and know about it

1 and act upon the other four.

2 JUDGE MACKINNON: You think they have to
3 be charged?

4 JUDGE BURNS: I don't think they have to
5 be charged, Judge MacKinnon. But, unless they
6 are inferred or result from under the present
7 standards you have, I would have to ignore those
8 other four and I shouldn't have to.

9 JUDGE MACKINNON: Well, I agree with that
10 because I think it's Greyson and Roberts that
11 say that even though they were charged and
12 dismissed you could still take them into
13 consideration on the sentencing.

14 JUDGE BURNS: Not as I read NROS.

15 JUDGE MACKINNON: You say, our --

16 JUDGE BURNS: The present formulation.
17 The present formulation. I will read -- I will
18 read the commentary on the formulation of NROS
19 to aim for that kind of result, but this is real
20 life and this is what we get and we struggle on
21 this stuff because of the way these --

22 JUDGE MACKINNON: You want to have
23 available the right that the Supreme Court gives
24 you in those cases to consider those other
25 offenses.

1 JUDGE BURNS: You can't have truth in
2 sentencing without truth in the charging of it.
3 If the prosecutor and defendant don't tell me
4 those then I can't evoke the truth at the time
5 of imposing sentence.

6 JUDGE MACKINNON: As I said earlier here
7 today and I happen to be on that part of the
8 assignment, I think it's going to be possible to
9 assure that you get all the facts and if you
10 don't somebody is going to be guilty of a crime.

11 The lawyers, the United States Attorney.
12 And that's very easy to do. And, I think you're
13 entitled to it in sentencing. And you don't
14 have to come up where somebody, as they say,
15 "swallowed the gun" and you don't know anything
16 about a gun and it's a bank robbery and they're
17 going to have to show it.

18 JUDGE BURNS: Thank you, very much.

19 JUDGE WILKINS: Judge --

20 JUDGE BURNS: Running over my time.

21 JUDGE WILKINS: We, I think, all agree
22 with what you're saying. The problem, I haven't
23 been able to figure out, Judge, when you say you
24 want to consider the other bank robberies in
25 sentencing today. You do that.

1 JUDGE BURNS: You bet.

2 JUDGE WILKINS: How much do you consider?
3 You see, you don't have to say how much you
4 consider today, but under our guideline system
5 we're going to have say how much because some of
6 these numerical scores, maybe as you think about
7 it for us to say those multiple crimes that you
8 would sentence for the crime and conviction.
9 And as far as the others are concerned we would
10 specifically say: I got it, Judge. This is a
11 good example and we encourage that part to
12 encompass these other things."

13 JUDGE BURNS: Part of the problem comes
14 from the fact that the example that you have
15 used in developing the commentary in NROS tends
16 to be less realistic than many of what we, in
17 the trenches think of as regular recurring
18 episodes.

19 So, that's why we have struggled to
20 accomplish this. I was hoping you wouldn't ask
21 me questions that Judge Breyer has asked me
22 earlier about concurrent and consecutive
23 sentences. I don't have an answer on that.

24 JUDGE BREYER: The box that I put your
25 problem in sometimes half-baked brain, the box I

1 put it in, the one about the bank in that
2 concurrent/consecutive sentence because the --
3 and see why I put it there, because, see what
4 good the bank tellers are toward banks and that
5 happens all the time. In other words, you
6 repeat the same conduct four or fives times.
7 How do we punish him for that and you come up
8 with an interesting idea.

9 JUDGE BURNS: Our committee isn't through
10 yet. We intend to continue working and develop
11 any material in the way of alternative
12 suggestions. We intended to get them to you by
13 the 3rd or 4th of December.

14 JUDGE BREYER: See, your 404 point. 404
15 point, you say "Gee, that's arbitrary". Because
16 404 point turns on relevance and relevance is
17 important to the facts of the individual case.
18 I mean, sometimes those three banks really tend
19 to show a common scheme in which case in our
20 Circuit decision will say --

21 JUDGE BURNS: Sure --

22 JUDGE BREYER: Whether or not they shown
23 the common scheme is relevent to the facts of
24 the individual case.

25 JUDGE BURNS: If you had the advantages

1 of the Appellate Court and I would like to think
2 I had here, but I know better than that. And if
3 the Court would say that the fact that the
4 robbery's one because he's hooked on heroin and
5 each was sufficient enough "relatedness" to
6 include them under the form, that's fine. I
7 don't see this Circuit doing that. I don't see
8 most of the Circuits doing that under your
9 policy.

10 I do promise, Judge Breyer, that if at
11 all possible our group can help you with
12 concurrent, consecutive problems which you've
13 already discussed here, we're going to help you.
14 We're going to try are best to help you.

15 JUDGE WILKINS: Thank you, Judge Burns.
16 Appreciate your work and support and all of your
17 assistance.

18 JUDGE BURNS: I ran over -- my rate,
19 Judge Wilkins, is at \$5 a minute.

20 JUDGE WILKINS: Sorry about that. Send
21 us a bill. Our next witness is Professor Curtin
22 from the University of Southern California Law
23 School, Los Angeles. Professor Curtin, we're
24 delighted to have you with us.

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PROFESSOR DENNIS CURTIN

16

UNIVERSITY OF SOUTHERN CALIFORNIA LAW SCHOOL

17

LOS ANGELES, CALIFORNIA

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PROFESSOR CURTIS: Thank you. I have

22

been for the last 16 years running a criminal

23

program here, either at Yale or USC where I now

24

am and my students have represented federal

25

prisoners in all sorts of problems that they've

1 had and we have had a lot of experience with
2 sentencing and parole.

3 And so, I have some knowledge about that
4 area and you can say I have a worm's eye view of
5 the system because I see it through the eyes of
6 my clients who are already in prison.

7 I think I probably should tell you at the
8 beginning a little bit about my biases. I am
9 probably more process-oriented than I am worried
10 about abstract notions of justice.

11 I think also from contacts with the
12 prisoners and my contacts with people who guard
13 the prisoners, the staff at the institutions
14 that I've been involved in, I think they tell
15 me -- and I think they're probably right, that
16 we have lots of incarceration now in the Federal
17 system. Enough incarceration now in the Federal
18 system, maybe even too much incarceration now in
19 the Federal system.

20 And I worry when I read these guidelines
21 that perhaps the guidelines either advertantly
22 or inadvertantly are going to raise the level of
23 incarceration quite significantly.

24 Seems to me the burden ought to be on
25 those who plan to increase the incarceration to

1 show how increased incarceration is going to be
2 more just than the system we have right now.

3 I have -- I mean more just in the
4 aggregate. I'm not talking about -- I
5 understand that one of your purposes is to
6 reduce disparities in the system and I have
7 absolutely no quarrel with that. Seems to me we
8 see them everyday, I have clients who have
9 gotten one year, six years and 50 years for
10 kidnapping, for example, the same crime and
11 somewhat the same circumstances.

12 I have two reservations that I basically
13 want to talk to you about today from my reading
14 of the guidelines. One of them is, what I
15 perceive to be a tremendous decrease in the
16 amount of probation that is going to happen
17 under the new guidelines and;

18 Second, of course, is the increase in the
19 quantum of punishment that's going to be meted
20 out under the guidelines as currently written
21 and neither increase in revenue has been
22 justified.

23 I think what I would urge that you do is
24 to develop more flexible guidelines on
25 probation, first. And second, take into

1 consideration as part of your deliberations
2 about guidelines the capacity in the Federal
3 system.

4 I have heard that you have decided that
5 it's -- that you will develop your system first
6 and then try to figure out what the impact of
7 the system will be on the Federal -- on the
8 system. Now, I'm not sure that's a correct
9 understanding on my part, I'd be happy to find
10 out that that's not true.

11 But nevertheless, I think that's in your
12 analysis of what is just, what we have been
13 doing in the past is certainly relevant to your
14 considerations.

15 Sixty percent, I think, of the sentences
16 that are now handed out are probationary
17 sentences. It seems to me that any departure
18 from that -- I might be wrong. Say it's fifty
19 percent, say it's 40 percent, say it's 35
20 percent. But whatever percent it is, seems to
21 me it would be unwise to depart immediately from
22 roughly the same percentage of probation.

23 Probation is described in your draft as
24 rehabilitation oriented. From my perspective,
25 it isn't rehabilitation oriented. It's

1 punishment. Probation is punishment just
2 like -- it's not just like incarceration is
3 punishment, but it is punishment. It's
4 punishment of a different sort and it comes
5 after a lot of punishment for -- or a lot of
6 pain for being convicted of things that have
7 already happened.

11
8 I think that there should be a way to
9 give probation in almost any sentence except the
10 ones that you are forbidden to give probation.
11 Judge Alarcon said he had given or he had seen a
12 case where the bank robber got probation and
13 another bank robber got 25 years. Judge Burns
14 was just talking about giving the bank robber
15 probation.

16 It seems to me that under the guidelines
17 as now promulgated -- not promulgated, as
18 drafted -- that it would be extremely difficult
19 to see instances like those and I think there
20 will always be instances like those that I think
21 you should provide for.

22 You should find a way to get zero time as
23 well as to give 20 years time even in cases in
24 which have laid out the high number of points.

25 One way that you might do that -- I might

1 say I'm extremely defident, I've been involved
2 in the system for so long that I'm extremely
3 defident about talking to you because I know
4 that you've been thinking really hard about it
5 and it's an extreme, extreme, difficult subject
6 to deal with. And I know that you've been
7 working very hard at it and thinking about it a
8 lot longer than I have and so I have a lot of
9 respect for the solutions that you come up with.

10 On the other hand I think that along the
11 way we've gone wrong in two important respects.

12 One way to put it, one way to simply take
13 care of the probationary problem is to say
14 "alright, whatever, say 35 percent of the people
15 get probation now, say, okay, whatever 35
16 percent of the grades fall under the numbers
17 fall under, that is presumptively a probationary
18 sentence and that's what we're going to do. Or,
19 at least we'll consider probation first and if
20 that's not the case then we consider if there's
21 some aggravating factor".

22 Of course, as now structured you have a
23 heck of a time doing that because there's lots
24 of narms that you would not encompass by
25 incarceration.

1 On the other hand, you wouldn't be true
2 to the system that we now have, you would not be
3 increasing the prison population or you would
4 not be increasing punishment in the aggregate.

5 The other thing that I really -- the
6 other way to do it is simply give Judges more
7 authority if they need reasons to decrease the
8 numbers.

9 You have, and I think it's on Pages 314
10 on Page 123 of your guidelines, the Judges need
11 a little more participation in certain crimes to
12 enable to multiply the number by .5 to .7

13 In my view, you might be able to give a
14 little bit more discretion than that, remember
15 you're going to have to give reasons for every
16 multiplication factor. You might think of
17 saying: "All right, you can have from .1 to .7
18 or, if you can justify it, No. 1 or you might
19 say can think of more reasons than simply lesser
20 participation in the crime such as some moral
21 reasons for going below the guidelines than
22 simply lesser participation of the crime than
23 they have.

24 And there, I think some sort of mental
25 state, departure from the guidelines, claim of

1 right. Chairman Breyer can fill you in on those
2 better than I can.

3 But, basically, I would try to give the
4 Judges a lot more flexibility in their dealing
5 with the probationary sentences because I think
6 it's extremely important both for the system of
7 justice and not to increase the aggregate of
8 punishment that we have now.

9 The other thing is, I think that you
10 overtly should take the capacity of the system
11 into account in setting up your guidelines. I
12 see a nod from Judge Breyer. So, maybe I better
13 not say anymore.

14 But it seems to me you can't -- what I
15 would hate to see is some tying up of harms.
16 Some adding up of harms which I see as I was
17 going through your guidelines and attempting to
18 kind of replicate the job that you must have
19 done. And everytime I saw harms I could always
20 think of three or four harms to consider even as
21 I sit in my room, can think of more harms than
22 you thought of, because you have them down on
23 paper and that's a very seductive thing. And I
24 think a very dangerous path because at the end
25 of that you have to put numbers on those harms

1 and you have to say: "All right. How much does
2 somebody deserve?"

3 What I'm really afraid of when you do
4 that you cast loose all of your wards (sic).
5 (inaudible) You're not bound to anything.
6 You're just sitting in your room: "What do you
7 think this crime deserves?".

8 Of course, you're seven people who are
9 who are expressly -- supposed to be, on the
10 other hand, I would feel much more comfortable
11 and I think the American people would feel much
12 more comfortable if you said: "All right, what
13 have you done in the past?" What's the medium
14 of the sentences that have been handed out in
15 the past? What is the average? How do they
16 break down?

17 Why should we go outside of what we have
18 done before? Should we increase it anymore and
19 for what reason? Maybe we should go under. At
20 least you're starting with some number that has
21 some basis and practice in your history and
22 acceptance not from everybody, at least from
23 some portion of the room -- of the public.

24 So, I think in addition to the fact that
25 Congress has told you to take into account --

1 told you, suggested to you, also suggested in
2 the sentencing Judge's interim period, take the
3 capacity into account. Should be a very
4 significant part of it. I think that's the
5 problem.

6 If you get away from some sort of
7 capacity system what's going to happen? You're
8 going to have the system itself avoiding your
9 guidelines.

10 I can tell you when you talked today
11 about several ways to do that, one of them is
12 fact bargaining which goes on. I don't myself,
13 and Judge MacKinnon I think, sometimes it's not
14 as bad as you think it might be. There are
15 reasons to do it.

16 That the charge bargaining that's going
17 on in some cases, I think might be transferred
18 to State prosecution. That's happening all over
19 the country now with cross reference of U.S.
20 Attorneys, State District Attorneys.

21 You find cases being tried back and forth
22 to Federal Courts and State Courts and easy way
23 to avoid the guidelines is to simply shuttle
24 something over to State Court when you want to
25 make a deal that would give the prosecutors a

1 lot of power that they don't now have.

2 I think there are other advantages (sic)
3 that says that it might be put into effect, not
4 to mention, which could grow into the
5 guidelines' system. So, basically, what I'm
6 worried about is losing control. You're losing
7 control of the process if the process is getting
8 out of your hands and getting into the people
9 before you or after you in the criminal justice
10 system and if that happens then you'll have more
11 discrepancies. Then we can even trim off -- or
12 maybe we'll have the same discrepancies that we
13 have now in the system that we're trying to
14 correct.

15 I think it would be terrible in my
16 judgment if we ended up with unnecessary
17 punishment as a result of your efforts.

18 I'd be glad to answer questions you might
19 have.

20 JUDGE WILKINS: Thank you. Let me assure
21 you that we share your concern about handling
22 the detailed analysis. We do not have that in
23 detail and will have it in the next few months.

24 It is more that we understand what the
25 current practice is, although, as you probably

1 know it is not easy to find out exactly what the
2 current practice is. You can't go to any agency
3 and detail what we need to do.

4 PROFESSOR CURTIN: The kind of research
5 that you actually need to have done because it's
6 been gone over decades. It's a very difficult
7 thing to do. Any numbers that mean anything
8 especially in the Federal system, some States
9 are far more easy to get it in, in the U.S.--not
10 the Federal system. I hope to do that.

11 JUDGE WILKINS: It's not completed.
12 Would have to be completed before we submit
13 anything. Any questions to my right?

14 JUDGE MACKINNON: I find one of your
15 suggestions interesting but perplexing. The
16 question of keeping the same percentage of
17 probation. You make that suggestion. Following
18 the suggestion or at least the enforcement of a
19 higher reduction in disparity. Do you see any
20 contradiction in that?

21 PROFESSOR CURTIN: You do it without --
22 well, if you assume that every probationary
23 sentence is a disparity sentence then you short
24 out different points.

25 JUDGE MACKINNON: I'm not saying that.

1 PROFESSOR CURTIN: What I would like to
2 try to do, I think for any client is --
3 absolutely all I could do is, you base a lot of
4 things that you're not going to be able to do
5 but keep the same percentage if possible of
6 probation that you have now.

7 JUDGE MACKINNON Keep the same average
8 which means the only thing I can do for
9 disparity?

10 PROFESSOR CURTIN: One way you can do it
11 is to say: "We are going to have a system in
12 which certain people down at the lower end of
13 our guideline range get probation."

14 And that cuts you off - going to be in
15 the 35 percent mark. So that you can surely
16 predict with the guidelines that you have now,
17 how many points somebody's going to be where
18 the 65 percentile -- 35 percentile is going to
19 fall on the point system. If you say
20 everyone, presumptive basis, you won't do
21 anything, the fact that you raise --

22 JUDGE MACKINNON: I'm still perplexed.
23 If you leave the same percentage at zero in
24 terms of probation, keep the average the same
25 and you wanted to eliminate disparity there's

1 only one place you can get it from, are those
2 who are apparently in prison.

3 PROFESSOR CURTIN: No. Maybe I'm not
4 making myself clear. I guess I'm not. If you
5 have 65 -- say you have fifty percent. Let's
6 take a number. Let's say you have fifty percent
7 of the people getting probation. Fifty percent
8 going to prison. I suggest you keep that same
9 percentage in your guidelines.

10 One way that you do that without reducing
11 disparity in the system is to say that anybody
12 who has a point score in the lower 50 percent
13 gets probation. There's a lot of ranges where
14 you obviously don't want to do that, if you do
15 it any other way. On the other hand, reducing
16 that from a disparity is better than not having
17 any amount of probation. To that effect, I'm
18 being consistent.

19 JUDGE MACKINNON: Disparity is coming
20 upon the positive sentence. Keeping it to
21 fifty. Taking your example, who gets probation,
22 now, half of all those sentences have to still
23 get probation. So, there's no disparity between
24 giving fifty percent probation and fifty percent
25 sentences. The only disparity is that those are

1 actually sentences in prison. I find that a
2 strange notion of reducing disparity. Don't
3 you? Disparity has nothing to do with the
4 proportion of getting probation, only to do with
5 the length of sentencing of those who are
6 incarcerated.

7 PROFESSOR CURTIN: I think, if I add --
8 if I presume -- suppose your factors go up from
9 zero --

10 JUDGE MACKINNON: I think I understand
11 the technique.

12 PROFESSOR CURTIN: Everyone in the fifty
13 percent, presumptively get probation. Then you
14 have, in essence, a similar system that you have
15 right now. The only way you could so that the
16 guy with the knife and the guy with the gun gets
17 probation. So you have disparity there. If
18 that's what you're saying. But we have a one --
19 we had -- worthy enough to be in prison
20 (inaudible) and in that case there's nothing
21 wrong with continuing. Only way to avoid it, it
22 seems to me, is to give everyone except people
23 who are almost innocent some --

24 JUDGE MACKINNON: No.

25 PROFESSOR CURTIN: Otherwise, if you want

1 to do away all you can have is people down at
2 the very low end with 6 points or less getting
3 probation.

4 COMMISSIONER HELEN G. CORROTHERS:

5 Professor Curtin, I think you indicated that our
6 commentary reflected the idea that probation is
7 not punishment. I was not aware of that and I
8 only think we intend to say that probation is
9 not punishment.

10 PROFESSOR CURTIN: Some were.

11 COMMISSIONER CORROTHERS: Is punishment
12 simply a matter of discretion if we didn't do
13 that?

14 PROFESSOR CURTIN: In my notes, I recall
15 saying for the purpose of rehabilitation. I
16 think that that's not true. I think there are
17 probation lots of times imposed and under our
18 system I think this is punishment.

19 COMMISSIONER CORROTHERS: Yes, with that
20 point.

21 JUDGE WILKINS: Any other questions.

22 JUDGE MACKINNON: Depends on the
23 individual, hardened criminal, rather than spend
24 an extra year in prison then three years on --

25 PROFESSOR CURTIN: That's right. Some

1 people can't stand probation.

2 JUDGE MACKINNON: And others -- somebody
3 like that is just a brief, as I indicate, what
4 you're really advocating, in an action or except
5 as we have a practice (inaudible). How are you
6 going to -- we have a thousand judges throughout
7 around America. Can't come up with any
8 proceeding that you're going to guarantee that
9 you have, just as many probation cases, prison
10 cases that you had.

11 PROFESSOR CURTIN: You can come close,
12 Judge. The other thing is my point is really
13 this: I would say rather you say: "Look, this
14 is essentially what we have been doing in the
15 past. It has some validity because it is the
16 (inaudible) of a group of judges thinking hard
17 about crime and there's some solid reality to
18 it.

19 Now, the Judges are distant. They give
20 distance sentences. But this bank robber gets
21 five years in time. Seems to me it's telling
22 us. That's all I'm saying, If you want to do
23 ten years seems to me you ought to say we
24 thought it ought to be ten years instead of five
25 years." But that's a very difficult judgement

1 for me to make. That's my point.

2 The other point in the guidelines that
3 you have in your possession and the tools that
4 you have in your possession I think you can
5 pretty well, you can pretty well design
6 guidelines that are out there with your thousand
7 Judges sitting out there, are going to be able
8 to put eight thousand people in jail or ten
9 thousand.

10 JUDGE MACKINNON: How do you think about
11 probation for income tax offenders.

12 PROFESSOR CURTIN: You know, Judge it
13 seems to me your better at that than I am. I
14 don't want -- I don't want to dodge the
15 question. If I were a Judge I would say I
16 might be a little more conservative than members
17 of this panel. I think that crimes of violence
18 I would say incarceration is necessary. Income
19 tax violations, I think are probably not,
20 depending on what I know about recidivism. I
21 don't know much about recidivism in income tax
22 cases.

23 Really insensitive there. In terms of
24 giving time, as far as I think that for the
25 first offense in an income tax case, I certainly

1 would give probation. I hope you don't think
2 the worst of me for that.

3 JUDGE MACKINNON: When I was a U. S.
4 Attorney I had an income tax investigator come
5 in to see me after I'd been there about a year.
6 He said: "You don't realize the kind of work
7 we're getting. Some of the kinds of prosecution
8 that you have been bringing in", he said,
9 "they're coming in evading taxes in the
10 hundreds".

11 It isn't that we see so many of the
12 individuals, it's the continuance of the effect
13 there and I think there's a wide -- I'm only
14 speaking for myself, but certainly doing a lot
15 of -- consideration going to be given to
16 providing the income tax violations in
17 reasonably, substantial amounts -- might get
18 some time, not five years or two years but some
19 time.

20 PROFESSOR CURTIN: Let me just say one
21 thing: If you give somebody three months you're
22 doing that person -- you're giving him a shot,
23 certainly. On the other hand, you're making a
24 heck of a lot of trouble for prison people just
25 to process that guy in and out if you try to.

1 We're getting paid for that.

2 You're also making -- you're putting that
3 person in a place he's going to take up for
4 three months and it seems to me that when you
5 try to cross all these things out you might end
6 up, in our judgment, we think it's a --
7 (inaudible) to run these people through in
8 lighter cycles.

9 On the other hand, you certainly might --
10 not because you fit it in. We have six -- six
11 bank robbers waiting for a place in this prison.
12 We have got 250 million people in the United
13 States. When you factor out the juveniles, you
14 got 150 million filing income tax returns and if
15 they see that they've got to file an honest tax
16 return the number of cases that you're going to
17 prosecute in the future, if they don't or if
18 they file an honest tax return as a result of
19 the imposition of some time for a few offenses
20 in the next couple of years, I wouldn't be
21 discouraged, Judge, that you couldn't look upon
22 prison as a source of resource -- not a resource
23 that we can spend with complete impunity and if
24 it turns out that income tax people are very
25 important to put in jail, remember they're

1. occupying scarce space.

2. JUDGE MACKINNON: They're depriving the
3. government of millions of dollars and they're
4. just the tip of the iceberg. And the fact that
5. they get off as easily as they do a lot of them
6. feel it's just a business proposition or a
7. business risk that they continue to underpay
8. their taxes.

9. Now, I don't know whether you have ever
10. prosecuted any tax evaders, but the general way
11. that the ordinary tax evader is discovered he
12. goes down and talks to the Internal Revenue and
13. a lot of this is pure avoidance of the law.

14. A lot of people feel something has to be
15. brought home to those people and they are most
16. repentant, they are not repeaters. Once you get
17. a person for income tax evasion he's generally
18. not going to repeat it. But somebody else is
19. going to repeat it because he got off easy.

20. I think that some person along the
21. line -- I don't know about my colleagues might
22. bear, something that might bear a little time,,
23. I'm not saying going to make a career criminal
24. out of him but again, he ought to get some time,
25. maybe.

1
2 MR. COOK: My name is Michael Cook. I'm
3 with the Federal Offenders.

4 JUDGE WILKINS: Have a seat, Mr. Cook.
5
6
7
8

9 MICHAEL COOK
10 FEDERAL JUDGES OFFICES
11 NORTHERN DISTRICT OF CALIFORNIA
12

13 ---
14

15 MR. COOK: All right. I'm with the
16 Federal Judges Offices, Northern District of
17 California. I sat through this hearing all
18 today. I appreciate the opportunity to be a
19 member of the public, also to have the input in
20 listening to what's happening today and the
21 comments I heard.

22 There were a couple of thoughts I had.
23 First, it was interesting to see the clearcut
24 contrast between prosecutors who seem very
25 satisfied with the number at least in terms of

1 sanctions and what that equates to in terms of
2 length of sentence in the preliminary draft and
3 the defense seems very concerned about the lack
4 of flexibility from the lower-end sentence where
5 there's a lot of limiting factors, we should all
6 agree upon, doesn't seem to be included in the
7 potential draft before us now.

8 I think it's very important to have the
9 flexibility before the lower end. I practice in
10 front of three Judges in San Jose. I don't
11 consider them to be soft nor do I consider them
12 hardened sentencers to me when I get -- because
13 there's some people that maybe the case is
14 different than the recent bank robbery cases
15 that we have to deal with. And so my concern
16 really is to allow the present system we have
17 now full discretion. The Commission seems to
18 deal fairly effectively with the high end
19 sentence outside the normal -- what we would
20 expect. I appreciate the Commission's concern
21 about how you can hurt those mitigating factors.

22 There's one thought I had, was one of the
23 areas that you left quite wide open is how does
24 one convert non-custodial type of sentence, be
25 it probation, house arrest, fines, into

1 equivilents that are inconsistent to be used.

2 It seems to me if the concern really is
3 for the low end sentence and that seems to be
4 certainly the public concern, though in my
5 experience in representing clients who are
6 people who I don't want to see treated as though
7 this is an appeal, this is an average in terms
8 of time.

9 So, I have to present that it's important
10 that that flexibility be there and if the
11 concern is whether one includes that within the
12 guidelines or takes it outside of the
13 guidelines, if your concern is some control over
14 that process, I guess it ends up within the
15 guidelines and ends up with some sort of
16 procedure of conversion factor of one year of
17 probation, would be the equivilent to six months
18 in custody.

19 Whatever it is, it seems to me that's the
20 Commission's concern and Congress' concern is
21 limiting discretion. That's one way of doing
22 it, still allowing flexibility for those
23 mitigating factors. I think we all realize it's
24 important.

25 I'm very concerned also about the

1 question of the standard of proof. Whether, to
2 what extent the Rules of Evidence apply. Seems
3 to me, if you deal with a standard of proof we
4 ought to be applying or formalizing particular
5 rules. Be it Rules of Evidence if you're
6 talking about a clear and convincing evidence
7 standard. Maybe there is more justification for
8 applying a lesser standard.

9 Seems to me there's some flexibilities
10 there in terms of the applicability, in terms of
11 Rules of Evidence and the standard of proof
12 that's going to be required ultimately when we
13 have appeals. That will happen, certainly.

14 I think there will be a tremendous number
15 of appeals. Certainly, the defense or the
16 government who may be disputing the application
17 for what they contend to be wrongful application
18 in the first place, sense it's going to be a
19 factor-down type of determination by the
20 sentencing judge.

21 And I can envision a lot of sentencing
22 judges are going to be having the Appellate
23 Courts reviewing, mostly clearly erroneous
24 standards which is an extremely sentencing Judge
25 which to me is all the more reason why there

1 should be the higher quantum of proof, higher
2 degree of evidence in our determining the exact
3 factors that the Judge must produce, must
4 consider in imposing sentence.

5 So specifically, our comment of Rule 32,
6 which is going to be modified, fits correctly
7 the portion that will now require the Probation
8 Department to disclose as part of the
9 pre-sentence in terms of what they believe the
10 guidelines the Judge should follow will be what
11 they should apply.

12 However it, still leaves open the
13 ultimate recommendation by the probation officer
14 still has not been exposed to the defendant.
15 And I'm not clear whether that's intended for
16 the probation officer making a recommendation
17 below the guidelines or above the guidelines.
18 Even though they have made their computation,
19 whether that's going to be a part of that
20 confidential recommendation that I don't think
21 he'll receive, whether it's going to apply to
22 recommendations within, whatever the guidelines
23 that the Judge may have, to impose sentence.
24 Doesn't seem to me that's clear what the change
25 to Rule 32 is going to be.

1 That's certainly very important to, I
2 think, any defense attorney. Quite frankly,
3 there are some judges who disclose what those
4 recommendations are, some are apparent and I
5 think it's a good idea to have sentences as open
6 as is contemplated by the Statute by this
7 Commission's mandate.

8 If it's going to be I think those
9 recommendations where the probation officer may
10 indicate to the judge that the factors should be
11 below the guidelines or above, ought to be
12 disclosed also to the prosecution or defense.

13 I'm really troubled about what's going to
14 happen to all my clients I have represented in
15 the past and who keep asking me "what's going to
16 happen to me when the Commission is out of
17 existence?" That certainly is not clear at this
18 point nor do your guidelines seem to agree
19 except in this one case.

20 I had one of these cases that my client
21 was convicted of First Degree Murder whose
22 appeal is pending and as I read the commentary
23 of your guidelines on Homicide you propose to
24 convert the sentence which is now eligible for a
25 parole, ten years mandatory release, 30 years

1 with life without possibility of parole.

2 I have some great problems with that and
3 really concerned that I don't think the
4 Commission has dealt with those. How you
5 propose to deal with converting sentencings
6 ultimately.

7 Another problem I see with Rule 32, every
8 sentencing Judge are mandated to consider all of
9 the factors that can be set out effectively.
10 Eliminate that section of Rule 32, will not
11 consider disputed factual information for
12 purposes of sentencing. If that happens are
13 going to be lot of sentencing. What is
14 practically happening now. Most Judges have
15 decided not to consider that disputed factual
16 matters in the pre-sentence report.

17 What happens? Judges no longer have that
18 discretion. He's going to have a lot more
19 sentences and ultimately my reading of these
20 guidelines, they get enacted in a fashion
21 similar to, they don't have included the
22 mechanism to deal with mitigating factors.

23 Lot of my clients are going to say to
24 me, "what happens if I plead guilty?"
25 (inaudible) Must have very definite idea as I do

1 not. I have a lot of uncertainty in that. If I
2 end up telling them "it really makes no
3 difference what mitigating factors are available
4 because the judge wouldn't be able to take into
5 consideration..." as it will actually affect
6 upon me of getting to trial.

7 Quite frankly, I don't see another
8 rational thing I can say if you're going to be
9 treated as a certain individual charged with a
10 certain offense if important factors such as
11 background and drug abuse and other relative
12 factors of my client are not going to be
13 available as mitigating factors.

14
15 I don't see what, if any motivation there
16 is for a client not to take his chances and go
17 to trial. I'd like to thank the Commission for
18 the opportunity for allowing me to be heard. We
19 ask for compassion for our work you now consider
20 for purposes of the system today. (inaudible)

18
21 JUDGE WILKINS: I was a little surprised
22 to read complaints about the studies suggesting
23 ways of protecting your client's rights. Just
24 as I'm not going to consider -- I don't know
25 whether you consider that or not, so you have to

1 give a reason.

2 MR. COOK: I understand that. And I
3 guess my response in part to that is the way the
4 system is presently structured now, the parole
5 commission with its guidelines roughly cleans
6 out that process. Whatever standard in the
7 Parole Commission instead of by statute is by
8 preponderance of the evidence.

9 JUDGE WILKINS: Review proceedings.

10 MR. COOK: -- just came out. Isn't
11 clear, enough discretion. Their calculations of
12 guidelines, nor is it a violation of the expo
13 facto law to apply through guidelines to deal
14 with previously sentenced under older
15 guidelines.

16 JUDGE WILKINS: Any questions to my left?

17 JUDGE BREYER: You make it to accommodate
18 sentencing in terms of proceedings. Then you
19 can slow down the system to the point where you
20 might as well say: "Charging -- that's the
21 charged offense sentence, get rid of it." But
22 then the power goes to the prosecutor.

23 I think you're absolutely right on the
24 right track, trying to figure out some kind of
25 negotiable criteria to work with.

1 From that point, would you think the same
2 thing -- I think you heard Professor Zimring
3 (sic) and Commissioner Baer say it was a
4 technical point. You're bringing that out.
5 You're trying to suggest what we should do in
6 order to make it easier for a Judge to give
7 probation. Easier than in the --

8 MR. COOK: That's true. It becomes a
9 function of to what extent you want to bring in
10 discretion and to what extent to do that.

11 JUDGE BREYER: You're making some
12 conversion of guidelines. This is what I'd like
13 to think about. All the suggestions come down
14 to three. For the first time each has a fault
15 and one of them -- I think -- one thing you can
16 do, you can raise the floor to 14, 16, 18.
17 You're floor is too low. It's 14 points now.

18 Now, the floor in raising is that we have
19 the statute that ties the ceiling to six months.
20 You know what I'm talking about?

21 MR. COOK: Yes.

22 JUDGE BREYER: So, if we raise it to 18
23 or 20 that means that whatever category the
24 Judge has the right to give probation whatever
25 that category of offenders. If the Judge can't

1 give more than six months in prison to that
2 person in that category who he would like to
3 send to prison, that's a flaw. That doesn't say
4 you should do it. Each method has a flaw.

5 The second method is the one, kept
6 proposing all day, the threshold. Decide
7 whether to look at probation or not. If you do
8 that as a threshold, the category of guys like
9 bank robbers, bad guys for the most part in that
10 category -- wasn't so very bad, but what you're
11 asking the Judge is, you either give him
12 probation or 25 years. There's no in between,
13 and that's sort of weird.

14 MR. COOK: There, the Judge could still
15 say there's some factors not really covered
16 adequately.

17 JUDGE BREYER: If you say only that you
18 produce that weird result. If you say that --

19 MR. COOK: Ultimately, the sentencing
20 Judge doesn't consider anything literally.

21 JUDGE BREYER: The third one is, you say
22 judging outside the guidelines, that's what
23 you're saying right now, if you think he needs
24 probation go outside of the guidelines. The
25 flaw in that these are not key flaws. I'm just

1 saying that too often people tell us "you got to
2 use guidelines".

3 And now, you suggested a fourth, which
4 I'd like you to think about, which is there some
5 way of increasing the encouragement to go
6 outside the guidelines when the sentencing of
7 prison that otherwise would be relevant is low
8 but less encouragement when it's high.

9 In other words, if the sentence of
10 imprisonment for people in this category were
11 normally a year, the Judge would somehow be
12 inclined to look more closely at the possibility
13 of no sentence at all. In a sense, in this
14 category is 20 years.

15 You say, not -- if you're going to
16 depart, not send him to prison at all, that's
17 better than if your flaws are few and far
18 between for very, very, good reasons.

19 MR. COOK: Seems to me, too and it's
20 surprising the limitations, you handle five
21 years maximum probation imposed, seems to me the
22 possibility if one is concerned about the lack
23 of flexibility that most longer periods of
24 probation is an alternative to assert. All of
25 the traditional prison sentences, the types of

1 probation in bank robbery cases, I think
2 everyone is concerned from the defense point of
3 view, that there needs to be some flexibility in
4 the system to accomplish that other than what I
5 see now, which is the Judges can do it, but the
6 onness is putting all to the --

7 JUDGE BREYER: I can think of two things
8 to be helpful. One is both the technical
9 problem, trying it as a technical problem. How
10 to do it on probation, not as an average policy
11 problem. Technically, what there is (inaudible)
12 and secondly, as you pointed out in Murder,
13 Section 1111, that's a problem. What happens is
14 that that Statute U.S.C-1111 imposes a penalty.
15 It says: "Penalty is life." And that didn't
16 mean life prior to this new law but this new law
17 parole, appeals, bank robberies.

18 MR. COOK: Bank robbery is five years for
19 people who are going to be getting dates before
20 they allow disposition.

21 JUDGE BREYER: You're pointing out
22 something of policy. I'm not talking about
23 policy. I'm talking about something that the
24 law says if I agree in terms of policy I still
25 have to pay this statute which for technical

1 reasons says whoever is guilty of Murder in the
2 First Degree shall be sentenced to prison for
3 life.

4 MR. COOK: We have that problem of the
5 statute and there I think it would be useful for
6 people like yourself who see these analogies to
7 make a point to call it to the attention of
8 Congress.

9 JUDGE BREYER: I'm glad that you call it
10 to our attention but we are operating under the
11 status, as far as I know, there's no way out
12 that. You see the statute says "life" and the
13 provision which allows the parole authorities to
14 grant parole is gone.

15 MR. COOK: That's true for the armed bank
16 robber. 15 years. Your guidelines don't tell
17 somebody. Seems to be intimidating is the --

18 JUDGE BREYER: Statute says that it will
19 be a minimum number of five years. That's the
20 maximum number.

21 MR. COOK: No, it doesn't -- that's
22 right.

23 JUDGE BREYER: We can't say less. Any
24 statute that has a minimum. We can't go beyond
25 any statute that has a maximum number. We don't

1 go above the maximum. The Murder statute does
2 not provide minimum or maximum.

3 MR. COOK: Based on -- it is truly the
4 way it's written, a discretionary life
5 sentence --

6 JUDGE BREYER: That's base --

7 MR. COOK: Unfortunately, it's not
8 published?

9 JUDGE BREYER: You ought to get it
10 published.

11 MR. COOK: Asked him to write an opinion,
12 unfortunately, he didn't.

13 JUDGE BREYER: It calls for decision by
14 the jury too. Doesn't it? And the Department
15 of Justice -- have to go to the jury. Let me
16 ask you this: You realize the contents in which
17 these sentences are going to be imposed. Now,
18 they're going to specify the exact reasons and
19 that the exact reasons enumerated in open court
20 are going to be the sentence. Have you focused
21 on that?

22 MR. COOK: I think that's an improvement.

23 JUDGE BREYER: They have to support the
24 sentence either aggravaton or mitigation.

25 MR. COOK: Seems to be still steeped

1 (sic) with the standards the Appellate used
2 also. The fact that the process of determining
3 is this factor proved by the preponderance of
4 the evidence or isn't it. I think we're going
5 to have a great deal of lengthy review of that.
6 I think we're going to have clearly
7 erroneous --

8 JUDGE BREYER: I agree with you entirely.

9 MR. COOK: I think it is a much better
10 process of opening all -- that's why I think
11 it's important the process or whatever the
12 probation officer's recommendations are either
13 within the guidelines or outside which appears
14 in every way, Rule 32 is going to read 1976 as
15 part of the process of open --

16 JUDGE BREYER: Let me ask you now you
17 feel on it tax evasion cases?

18 MR. COOK: Public Defender's Office
19 rarely defend people. But they do as a favor --
20 I have represented some people in tax evasion
21 cases. Quite frankly, I can think of a case
22 specifically where the fellow was convicted --
23 imposed probation with a condition that returns
24 of the past be filed at a certain time and all
25 returns are filed within a limited probationary

1 period, timely fashion and that's the fraud,
2 late filing, of fines to be paid in a timely
3 fashion.

4 And those I think are genuinely fair
5 sentences. The problem is, most of the case
6 that get prosecuted for tax evasion fail to file
7 tax returns and quite frankly, that's deterring
8 the rest of the world out there related the
9 defendants I don't think it really happens.

10 There's a tremendous amount of penalty
11 for people that I represent who are indigent by
12 definition of the crime that justifies acts the
13 penalties of administrations imposed the IRS..
14 Themselves are very open be ½TER½ just .

15 Of I'm,

16 JUDGE BREYER: I'm not talking about
17 Substantial tax evader. Not your protest a
18 number of them might stand trial. Many of them
19 plead guilty. You think they ought to get time
20 or some small amount of time or.

21 MR. COOK: Your largest --

22 JUDGE BREYER: All right. I'm talking
23 about evasion cases.

24 MR. COOK: I guess my answer to you is
25 one you find that satisfactory in the sense it

1 depends on the circumstances. To me what is
2 important in representing that person would be
3 the individuals mitigating factors.

4 JUDGE BREYER: Like what you got three
5 years for instance the average case, three years
6 tax evasion. Substantial. With mitigation. It
7 depends. Got two wives. His business was going
8 down the tubes. Maybe he had really financial
9 Pressures. His motivation to do it, other than
10 shear greed. For example, See, he do sentence
11 from the other end of it I have an individual
12 who I didn't represent being in front of those
13 three same Judges in San Jose who make the same
14 in every case, look to the person I present and
15 was it that got them to the position where
16 they're at. We got a lot in terms of sentence
17 not only trying to deal, what happened with that
18 but also trying to convince the judge of some of
19 the things we have done. So that Judge wills ay
20 I wouldn't be coming back in the system. I
21 can't say that every one of those people should
22 get jail time. No.

23 JUDGE BREYER: Would you think that they
24 did not all of them but most of them that it
25 might reduce tax evasion substantial it tax

1 evasion.

2 MR. COOK: Quite frankly in my experience
3 it is the rare case that I have had my client
4 who actually has fought in terms of the
5 deterrants rational that a plea across the board
6 in simply a part of the process that they have
7 gone through. It is now, but there'll be
8 additional factors if somebody begins to get
9 time. In my experience most people, even bank
10 robbers that really hasn't been part of the
11 calculation.

12 JUDGE BREYER: At least I know the bank
13 robber --

14 MR. COOK: People who know they were
15 going to get caught never thought about the
16 process. "If I get caught what will happen to
17 me?"

18 JUDGE WILKINS. Neither of us will be
19 able to decide today. Will the guidelines make
20 a difference? We'll have to find out through
21 the next few years. We appreciate not only your
22 input but all the public defenders. Most
23 helpful in this Commission's proceedings. Great
24 assistance to us during the past six or eight
25 months.

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JUDGE WILKINS: Anyone else wish to speak? I'm informed that Mr. John Conrad is in the audience. Mr. Conrad--we're delighted to have you -- among other things has spent a number of years with the California Department of Corrections, Director of Research of the Federal Bureau of Prisons.

Thank you for coming.

MR. JOHN CONRAD
DIRECT OF RESEARCH
FEDERAL BUREAU OF PRISON
CALIFORNIA DEPARTMENT OF CORRECTIONS

MR. CONRAD: Thank you. Had a long day. Hope not to detain you unduly. I want to focus

1 entirely upon guidelines. The way in which they
2 might affect the correctional system of the
3 United States Government.

4 Any major change in the system of
5 sanctions cannot fail to affect on the
6 correctional system that are affected by it. So
7 that I will give you some idea, by me,
8 California -- in 1977, adopted -- changed the
9 entire system of sanctions from indeterminate
10 sentence to a determinate sentence.

11 The result has been a drastic -- drastic
12 increase in the population of California prisons
13 which are grossly overcrowded now. Millions of
14 dollars invested will be necessitated and the
15 extension of the budget program, budget
16 foreseeable in the future exceed a billion
17 dollars a year which the Department of
18 Corrections worked many years ago -- total
19 budget was less than hundred thousand a year.

20 Similar situation occurred in the State
21 of Ohio. Indeterminate sentence was adopted.
22 Pretty complicated. Had some very unfortunate
23 side features which resulted in an increase in
24 the populcation of Ohio from around nine
25 thousand in the late 70's to over 20 thousand.

1 Over time, there was a substantial
2 increase of available space. This is a very
3 serious situation from the standpoint of the
4 safety of the inmates, also safety of the staff.
5 It's important that in my view, that any change
6 in the system, that the government should take
7 into account the probably impact on both the
8 system, of changes upon the Bureau of
9 Corrections, and the probation system.

10 The system of guidelines is a well buffer
11 between the legislature and the judiciary. The
12 system of guidelines can insure that the
13 legislature is not increasing the delay. Any
14 increase in the sanctions between the present
15 situation -- I'd note the guidelines are only as
16 good as their capability for modification in the
17 light of experience.

18 The best example of the successful use of
19 guidelines is the State of Minnesota which has
20 managed to maintain a little prison population
21 in the last eight or nine years during which the
22 guidelines were in use.

23 The guidelines of Minnesota are regularly
24 reviewed by the sentencing commission for that
25 State and the Minnesota Statute requires the

1 Sentencing Commission to be impacted of any
2 changes in the guidelines.

3 For a prison population this has been a
4 very successful arrangement and I recommend that
5 some of the provisions be arranged for the
6 program that you adopt.

7 I have four recommendations to make to
8 you. First: I think that it is merely
9 practical and very desirable -- for
10 guidelines -- to make a preliminary analysis of
11 the impact of the guidelines which you adopt on
12 the prison population. This is a personally
13 practical thing to do and shouldn't take you
14 much more time to do it.

15 Following that, there should be an annual
16 review by the Sentencing Commission of the
17 impact of the guidelines on the prison
18 population, the population on probation.

19 And I remind you of the severe stress on
20 an over-populated probation system which is
21 worse then no probation at all in my view and I
22 think I should remind you that it's essential
23 that if probation is to make any sense at all it
24 does require a staff which is capable of
25 maintaining regular and future contact with the

1 probationee.

2 The second -- third recommendation I make
3 to you has to do with the question of intensive
4 probation. A number of your witnesses this
5 afternoon referred to the desirability of
6 strengthening the probation system -- at least
7 maintaining a stronger emphasis on probation and
8 guidelines, prison draft seems to apply. I
9 would like to add that it would be very
10 desirable to consider a system of intensive
11 probation such as that now in the State of
12 Georgia. And I would want more relief of prison
13 population.

14 And the fourth recommendation, in dealing
15 with the guidelines program, there should be
16 some explicit provision for the allowance of
17 good time in long term -- good time is a
18 judicial way of regaining some time for the
19 purpose of behavior and that is the secondary
20 purpose of making possible some reduction
21 including the prison population.

22 Good time has unjustly, historically been
23 abused by prisoners and by those in authority.
24 Often, the good time, when extended to anybody
25 who has not had similar favor, unless the system

1 of good time is very carefully administered and
2 supervised by the sentencing commission itself
3 abuses occur and those are my four
4 recommendation.

5 Preliminary review of the impact of the
6 present proposed guidelines system upon the
7 present prison population followed by annual
8 review of the impact on the prison population
9 and various other impacts that might apply.

10 The incorporation of intensive
11 probation -- probation, that is for those
12 programs and finally probation for a program of
13 good time. Thank you, Commissioners.

14 JUDGE WILKINS: Thank you, very much, Mr.
15 Conrad, for the suggestions that you make. Any
16 questions to my left?

17 PROFESSOR NAGEL: Mr. Conrad, I would
18 just like to assure you on your four
19 recommendations, your first one, the
20 accomplishing, we have been directed by the
21 Congress to do an impact analysis.

22 Your second recommendation, also been
23 assigned the mission, the monitory mission by
24 the Congress subject to the development and
25 promulgation of the guidelines.

1 The third: Intensive probation, I
2 wouldn't be surprised if you'd see that.

3 And the fourth: We are limited by the
4 Congress concerning the good times provisions in
5 that 54 days per year is all that is committed.

6 MR. CONRAD: I only say 54 days a year or
7 whatever is allowable by law be very carefully
8 administered and supervised, so is not
9 automatically guaranteed to anybody and
10 prisoners earn good time.

11 JUDGE MACKINNON: Clear that you go to
12 one year, get that good time, that from that
13 point on that's personally done. Feel that's a
14 good idea. That's the law.

15 JUDGE WILKINS: Any questions to my
16 left. Thank you, very much much. Anyone else
17 wish to appear and testify? None coming. We
18 thank all of you for attending today. We stand
19 in recess

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