
UNITED STATES SENTENCING COMMISSION



TRANSCRIPT

**PUBLIC HEARING ON
PROPOSED GUIDELINES AMENDMENTS**

MARCH 22, 1993

TRANSCRIPT OF PROCEEDINGS

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Washington, D.C.

March 22, 1993

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UNITED STATES SENTENCING COMMISSION

PUBLIC HEARING ON
PROPOSED GUIDELINE AMENDMENTS

Monday, March 22, 1993
9:00 a.m.

Ceremonial Courtroom
Federal Courthouse
2nd & Constitution Avenue, N.W.
Washington, D.C.

MEMBERS PRESENT:

- WILLIAM W. WILKINS, JR., Chairman
- MICHAEL S. GELACAK, Commissioner
- ILENE H. NAVEL, Commissioner
- JULIE E. CARNES, Commissioner
- A. DAVID MAZZONE, Commissioner
- EDWARD F. REILLY, JR., Commissioner
- ROGER PAULEY, Commissioner Ex Officio

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P R O C E E D I N G S

CHAIRMAN WILKINS: Well, good morning.

Welcome to another in a series of public hearings the United States Sentencing Commission has held over the years. This hearing culminates the amendment process that began with the Commission publishing a series of proposed amendments and issues for comment in the Federal Register on December 31 of last year.

After today's hearing, the Commission will review the large volume of public comment that we have received since that publication, and we will begin a series of meetings during the month of April to decide which amendments, if any, will be promulgated and sent to the Congress for its review.

We have the largest number of witnesses ever who requested an opportunity to testify before the Commission today, and for this we are very pleased. It does require that we forego the pleasant, and indeed informative, sessions that to some degree we've had in the past, with extended conversations and discussions with the various witnesses so that everyone who has asked to testify will be given an opportunity to testify. I'm going to attempt the best I can to hold the Commission and all the witnesses to a very strict

schedule that has been set up.

So what I am asking the witnesses to do is to summarize as best you can the comments you'd like to make, and then leave some time for questions from the various Commissioners. It is important to emphasize that your written comments to us is where we gain most of our information, rather than the relatively brief time that we have an opportunity to hear your.

So we will be studying and have studied your written comments, but we want to hear from you as well, but we need to do it in a concise manner so that everyone will have an opportunity to speak.

Our first witness is Mr. Don Bergerson and Barry Dumont. Following these two witnesses, Mr. K.M. Hearst from the United States Postal Inspection Service will testify. I might add, if Mr. Hearst is in the audience -- yes, sir, good. Well, I was going to say, any witnesses that are in the back of the room, you may want to come forward as you, so to speak, get on deck so that we can move quickly.

Good morning, gentlemen. We would be glad to hear from you.

MR. BERGERSON: Good morning, Mr. Chairman and

members of the Commission. I am Don Bergerson and this is Barry Dumont. We are here speaking to you in support of proposed amendment 50 to the guidelines which will mandate in cases involving LSD that the drug itself be weighed in calculating a guideline sentence and that the delivery system onto which the drug has been mounted will not be weighed. Although this is a technical issue, it is crucial and important not only to the 1500 people who have been sentenced under this unfair law, but to the continued success of the guidelines as a predictable mechanism for enforcing rational sentencing throughout the criminal justice system.

I represent Citizens for Equal Justice. We are an organization of persons whose family members have been subjected to what Judge Richard Posner, who is a conservative and no friend to convicted drug offenders, has described as "sentences that are exceptionally harsh by the standards of the modern western world, dictated by an accidental, unintended scheme of punishment."

That scheme of punishment was at issue before the Supreme Court in Chapman v. United States. I was one of the lawyers in Chapman. My client was sentenced to 20 years in prison for his first offense. That offense consisted of

selling a little over \$2500 worth of drugs over a period of several months so that he and his pregnant girlfriend could obtain food and shelter.

The drug he sold was LSD, six-tenths of a gram of LSD. Selling six-tenths of a gram of LSD is a Level 22 offense carrying a penalty of 3-1/2 years. My client's sentence was well over a dozen years longer than that because in a sentencing oddity unique to LSD cases, LSD traffickers are punished not for the quantity of the LSD they sell but for the weight of the containers they place it on to deliver it to consumers. In Chapman, the Supreme Court held that these delivery containers were mixtures containing LSD. Since punishment in all drug cases is based on the weight of mixtures containing the drug, the weight of these containers is factored into LSD sentencing.

The Chapman problem arose because of the odd way in which LSD must be sold and because of an oddity about LSD itself. LSD is pharmacologically active in extremely small amounts. This Commission has determined that LSD in a typical dose weighs on 50 millionths of a gram. Because it is so incredibly light, it is impossible to handle, transport, or ingest LSD unless it is placed onto something far heavier.

Various carrier and delivery systems have been used from time to time to package and distribute the drug, including tablets and sugar cubes. The most common mechanism now is paper.

While these various delivery systems differ from one another, each has two things in common. First, as is implicit in the definition of their function, each must be far heavier than the LSD they carry. Paper, the lightest delivery mechanism known, is a hundred times heavier even in its lightest form than the LSD. Second, none of these delivery systems in any way increases the potency, volume, or price of the LSD dose which is mounted upon it. In light of this, it is difficult to justify weighing the delivery paper in order to determine the sentencing weight of the drug.

It is clear that when the House of Representatives and the Senate passed the amendments in 1986 to section 841(b) they added the phrase "mixture or substance containing a drug" in an effort to target kingpins who adulterate drugs in order to increase their apparent volume, hence their market price. As indicated, LSD delivery paper does nothing of the sort. A purchaser of LSD is not fooled by a larger tablet or piece of paper into thinking he has purchased more LSD.

I have already explained to you how harshly this

impacts on individual defendants such as my client. I have yet to explain to you how delivery system-based sentencing distorts LSD sentences relative to other drugs and thus warps the entire sentencing process.

My client, you will recall, got a 20-year sentence for selling 11,000 doses of LSD. This sounds like a lot, but to have received a similar sentence for selling heroin, he would have had to sell well over 1 million doses. Had he sold cocaine, he would have sold 5 million doses. This disparity results from the ironic fact that far from intending to single LSD out for special punishment, Congress harbored a real intent to punish LSD and virtually all other drugs, other than crack cocaine, in parity with one another.

If you review the work of various medical authorities cited in Chapman, experts on dosages of various drugs, the amounts triggering 5-year mandatory minimum sentences for each and every drug, with the exception of crack cocaine, are 20,000 doses. Pure LSD contains 20,000 doses in one gram, the amount listed as the dosage triggering the 5-year mandatory minimum. But this system breaks down when delivery-based sentencing takes effect. The minimum is triggered not by 20,000 doses but by 200 doses in the Chapman case, and in

some reported cases as little as 100 doses.

The amounts in 841(b) were set by the DEA and by other experts in consultation with Congress. They should not be toyed with. Carrier-based sentencing toys with the experts who wrote and helped to write the statute. Moreover, carrier-weight sentencing destroys the uniformity of sentencing within the range of LSD sentences. Not all paper weighs the same. The paper used by the dealer in *United States v. Rose* was so heavy that Mr. Rose was eligible for twice the guideline sentence, as was the defendant in *Chapman v. United States*, even though Mr. Chapman sold well over twice the amount of LSD.

More, even those with no sympathy for LSD defendants must surely be concerned that law enforcement resources are wasted by carrier-weight sentencing. Typical LSD offenders are naive hippies from sheltered backgrounds and were easy and safe targets for enforcement efforts. Carrier-weight sentencing inflates the value of the small quantities of LSD seized from them. Small wonder, therefore, that LSD arrests have risen. My understanding is they have risen threefold since carrier-weight sentencing was instituted. With cocaine trafficking at epidemic levels and the advent of new and

pernicious designer drugs, it is hard to justify this diversion of resources.

It is equally disturbing that carrier-weight sentencing virtually exempts really big LSD dealers from Federal prosecution because the dealers traffick in pure LSD. In a recent San Francisco case that I handled, an LSD kingpin received probation in state court because his crime, possessing 3 grams of pure LSD, was deemed too small for Federal prosecution. This man was clearly a kingpin, he had access to an LSD factory, but he was not prosecuted because he only had 3 grams of LSD, whereas my client, Mr. Marshall in the Chapman case, had six-tenths of a gram of LSD but was given a 20-year sentence federally because of the weight of his paper.

In other words, LSD sentencing is a mess. It's not what Congress intended and it's not what the Commission should condone. I realize that despite these argument this Commission may be hesitant to act. Congress has not amended the sentencing statute in response to Chapman and I know that the primary purpose of the guidelines is to implement the will of Congress. But if the Commission is hesitant to act for these reasons, I believe that it's concerns are misplaced.

Nothing in this Commission's charter compels it to

amplify Congress' mistake and continue to base punishment on the weight of LSD carriers. This Commission is under a duty different from that of Congress. This Commission has guideline-shaping powers to ameliorate palpable injustices within the bounds of existing mandatory minimum penalties provided by statute.

All that we are asking is that a first offender, like my client, Stanley Marshall, be given a 10-year sentence for selling \$2500 worth of drugs. This is not a lenient request. This is a request that simply will implement what I believe to have been Congress' intent.

If the Commission is not persuaded by that, I would suggest to the Commission that in a chart that I saw, prepared in conjunction with the study of 35 LSD cases, about 21 percent of the LSD defendants are simply being given mandatory minimum sentences anyway by judges who are fed up with the idea of carrier-weight sentencing and will reduce the sentence to the power they can do so. If that is in fact true, then what we are having is judges sentencing defendants not based on their guidelines offense, but on their disagreement with the statutory law as interpreted by Chapman. This warps the entire guideline system. In order to have unifor-

mity, therefore, this Commission should ordain that all the sentences be in fact uniform, even if Congress hasn't changed the law.

This Commission is vested with broad duties beyond merely construing and constructing the sentencing table based on mandatory minima. This Commission is supposed to insure that law enforcement resources are allocated efficiently and that sentences are proportional to one another. I realize this Commission may feel bound by the Chapman decision. Most of the members of this Commission are, after all, members of the judiciary. But Chapman was an exercise in statutory construction, not in guidelines interpretation and guidelines construction, and Chapman used the dictionary, not any scientific truth which this Commission can properly consider before it.

Most importantly, Chapman did not even address the issue of the proportionality of LSD sentences. We tried to raise an Eighth Amendment issue, but the Supreme Court didn't grant certiorari on that issue and they didn't even reach it.

So I would submit, members of the Commission, that the Commission is not only empowered to act, but it would be shirking its duty as a uniformity-insuring Commission not to

act. This Commission is under a basic and abiding duty to make sure that there is rationality in the sentencing not only of LSD offenders but of LSD offenders in relation to all drugs and all crimes. That is the mission with which you have been charged and I urge you to undertake that mission here.

Thank you.

CHAIRMAN WILKINS: Thank you, Mr. Bergerson. Mr. Dumont, do you have any comments to make?

MR. DUMONT: Yes, I do.

I want to thank the Commission, first of all, for the opportunity to let me speak to you today. I am also representing Citizens for Equal Justice. I'm here on behalf of my son, who is presently serving a Federal term of 15 years and 8 months in Sheridan, Oregon, and also on behalf of approximately 15 other sons and daughters that are serving similar, what I consider, Draconian sentences in the Federal system.

All the people that are here today on behalf of this carrier weight issue, LSD issue, I think would unanimously say to you that we don't feel that, in my case my son, we're not here to say that he did nothing, that he didn't

deserve to be punished. As a matter of fact, when he was arrested because of reasons that had to do with his lifestyle, I was relieved because I was afraid for his safety. My son got sentenced to 5 years for the weight of LSD that he had and an additional 10 years and 8 months for the paper which the LSD was delivered upon.

The main question that I'm here to discuss is whether the paper should or the carrier should or should not be weighed. I believe that Congress' intent when they dealt with this whole issue was to do away with all issues of purity and not have to be involved in becoming a drug-weighing house and have to delve into these issues on purity in every single case that came before them, so that the language was brought into being that said mixture or substance containing the technical amount of the drug itself.

In all cases other than LSD, what typically happens with a drug that is adulterated is that a dealer will take the drug and add an adulterant to it in order that he can, number one, have more doses; number two, have more weight; or, number three, and this is the most important, make more profit. The case of LSD, however, is totally atypical. What happens with the LSD, as you've heard from Mr. Bergerson, is

because of the infinitesimally small amount of LSD that is ingested, there needs to be a way to deliver this drug into the bloodstream, analogous to, for instance, a needle which would be used to deliver heroin into the bloodstream.

There is no analogy that I can see to a cut. It doesn't further the dealer's profits, it doesn't give him more doses, it doesn't really change the drug at all. All it does is enable the dealer or, excuse me, the consumer to ingest the drug.

I wanted to talk a little bit about my son. I look back at the political climate in this country when these laws were passed and I remember, you remember bombings and shootings and the headlines were full of, really, that there was an anti-drug frenzy in this country, and I'm not to say that it wasn't necessary at the time. But I think that the people that these laws were -- the targets of these laws -- are not really the people that are being entrapped, which maybe is the wrong word here, but by the carrier-weight-based sentencing laws.

Typically, my son plays chess for two hours a day. He is an honor student in one of the local community colleges that has an extension at the prison. He reads works by

Camus, Nietzsche, Tolstoy, John Barth, and he tutors other inmates. He keeps physically fit by running, playing basketball, and he has the prison record for chin-ups.

As I mentioned earlier, I was glad when my son was apprehended because I was worried for his physical safety. He was a drug addict, he had been in and out of residential treatment centers, and when I got the call that he had been arrested, I was relieved, extremely relieved. I thought that he would be sentenced to a reasonable amount of time, sober up, and with the continuing love and support of his family, that he would come out a better person.

I think that in the three and a half years that he has been incarcerated -- he was 19 when he was apprehended, by the way, a 19-year-old drug addict sentenced to 16 years -- excuse me. In the three and a half years that have transpired since he was apprehended, I really feel that he has learned a lesson and he has totally changed his life. It's probably the best thing that's happened to him since his teenage years began. Certainly if he hasn't learned his lesson, I think that he would in the next year and a half that he still would have to serve were he to be based solely upon the weight of the drug itself.

I just wonder what benefit there is to society to have him serve an additional, beyond the 5 years, 10 years and 8 months for the weight of the paper or the carrier alone.

Thank you very much for the time.

CHAIRMAN WILKINS: Thank you, Mr. Dumont.

Thank you, Mr. Bergerson. We appreciate your attendance today.

MR. BERGERSON: Thank you, Mr. Chairman.

CHAIRMAN WILKINS: Mr. Hearst? Mr. Hearst is with the United States Postal Inspection Service.

MR. HEARST: Good morning.

CHAIRMAN WILKINS: Good morning.

MR. HEARST: I am Kenneth Hearst, Deputy Chief Inspector for Criminal Investigations with the United States Postal Inspection Service. I am joined this morning by Henry Bowman, our counsel.

I want to thank the Commission for the opportunity to testify on several issues of interest to the U.S. Postal Service. The Postal Service submitted four amendments to the Commission. Our formal written comments on these proposals have previously been submitted and I will briefly summarize those comments, very briefly.

As you consider these proposed amendments, we ask the Commission to consider the unique character of the United States mail as the carrier of the nation's correspondence and the effect of mail theft crimes on the public. We have seen a continuing increase in volume thefts of mail. For example, mail thefts increased over 15 percent last year. More significantly, volume theft attacks attributed to postal vehicle break-ins and attacks on letter carriers and mail storage boxes have increased 61 percent when compared to the same period last year. It's our fastest-growing form of crime.

In these crimes, numerous pieces of mail are taken in one criminal act and the safety of postal letter carriers is jeopardized. When theft of mails occurs, not only are the citizens who send or receive mail victimized, but also the Postal Service, because it is an attack on an essential Government service provided to American citizens.

United States mail has historically been the carrier of the public papers. Due to the expectation of personal privacy American citizens have in their correspondence entrusted to the care and custody of the Postal Service, mail in our custody, unlike documents in the

possession of a common carrier, is protected by the Fourth Amendment.

Two of the four guideline amendments are in the area of mail theft. The first amendment would increase the level for mail theft two levels in addition to levels added for the dollar loss. We believe this increase in the level more properly reflects the harm caused by mail theft.

Our second amendment deals with the related issues of schemes to steal large quantities of mail -- as I said, our fastest-growing form of crime. Our experience has shown that these crimes are often committed by organized crime organizations or gangs. Large volumes of mail are stolen in order to insure the thieves of paying mail which contains items of value, such as credit cards and welfare or Social Security checks which are then fraudulently negotiated.

While mail theft crimes are sometimes crimes of opportunity, these offenses which are the product of planning and surveillance by criminals are even more serious and disruptive. They impact the economic well-being of numerous victims and cause a major disruption to our postal system. In this regard, we have proposed a new guideline which would significantly increase the offense level for schemes involving

the theft of multiple pieces of mail.

This leads to our next amendment issue which is of special importance, the public trust guideline, as applied to employees of the Postal Service. As you are aware, there are two proposed amendments on this guideline pending before the Commission. Our proposal would place language in the guideline commentary which would clarify that a postal employee, by virtue of the special fiduciary position with the American people and their correspondence, should be subject to the enhancement provided in the guideline. It is our strong feeling that the Federal criminal statutes applicable exclusively to officers and employees of the Postal Service which have been in place for over 100 years distinguish their position from that of say an ordinary bank teller.F

or these reasons, we strongly oppose a more restrictive interpretation of the public trust guideline and urge the Commission to adopt our proposed amendment. We would clarify in the commentary that the guideline explicitly applies to postal employees who abuse their position to steal mail, Postal Service property, or embezzle Postal Service funds.

In regard to our fourth and final guideline

amendment, we ask the Commission to set as one of its priorities for the next amendment cycle a study of multiple-victim crime in the formulation of a new guideline. The Postal Inspection Service as an advocate of victims' rights believes the number of people affected by a crime is an important and obvious element in measuring the crime's overall harm to society. It is our position that the guideline should include this as a factor in the sentence computation.

As a final matter, we feel no change is necessary for the money-laundering guidelines. Clearly, the legislative intent was to create a separate crime with a more serious penalty for money-laundering offenses distinct from the specified unlawful activities. For these reasons, we support the position of the Department of Justice on this issue. We urge the Commission to maintain the separate and higher offense level for money-laundering offenses.

I want to thank the Commission for this time and will be pleased to answer any questions you might have.

CHAIRMAN WILKINS: Thank you very much. You know, money-laundering, I agree with what you say, but the problem has been brought to our attention that someone who embezzles

money and then takes that money and deposits it in just a bank account then can be subject to the money-laundering guideline if the U.S. Attorney elects to charge that. I'm not sure that's what Congress had in mind when it developed the money-laundering statute. So that's one of the things.

Do you have any comments about something like that?

MR. HEARST: No, I don't.

CHAIRMAN WILKINS: Any questions from any Commissioner to my right? Does anyone have any questions? Anyone down the line?

Good. Well, thank you very much. We appreciate the effort and thought that went behind these proposals that we are studying now. Thank you, Mr. Hearst.

Vin Broderick and Mark Wolf are no strangers to the Commission. Judge Broderick as a United States District Judge is Chairman of the Criminal Law Committee of the Judicial Conference of the United States, and Mark Wolf is Chairman of the Subcommittee on Sentencing Guidelines, United States District Judge from Massachusetts. We're delighted to have all of you here.

JUDGE BRODERICK: Good morning, Mr. Chairman and members of the Commission. Thank you for the opportunity to

testify.

You have heard what we have to say sufficient numbers of times in the past two years that I am not going to reiterate it, but I do want to put the position that we have on proposed amendment 29 into a context which I think is one that has changed through the past years.

I believe that one problem with the guidelines has been that there has been an overemphasis on a statistical approach and not sufficient emphasis upon the fact that whenever there is a sentence, there is a person there being sentenced and there is a judge that has to sentence him, and the judge has a statutory mandate to sentence him fairly and effectively.

There is no way, and the Commission has made this clear in its guideline manual, there is no way that the Commission can anticipate all the various factors that may be involved in any individual sentencing, and what our amendment has proposed is that even though a factor is not ordinarily relevant to sentencing, a combination of factors that are not ordinarily relevant may well create a situation where a judge should take those elements into consideration and depart.

Now, departure is something which has had, I think,

a mixed experience during the past 5 years with the Sentencing Commission. Originally, departures were characterized by the Commission as noncompliance. The Commission certainly withdrew from that position and through the past 2 or 3 years, individual Commissioners have said, as I have been saying for years, that the power and the right and the duty of the sentencing judge to depart in appropriate cases is the lifeblood of the guidelines.

I think this becomes more and more true as time goes on. The guidelines are obviously with us for the long term. There is no question in my mind that is so, and the role that we have, the role that the judges have and the role that the Commission has, is to make sure that those guidelines are honed to the point where they are fair and they are proportional.

What we're talking, of course, in departure is departure in two directions, departure down and departure up. The argument has been made in individual conversations with respect to our proposal that if you give judges the right to consider combinations of factors that are not ordinarily relevant as being, perhaps, a touchstone in a particular case for departure, you will open the floodgates.

Well, ladies and gentlemen, this just is not so. There is a sea change between today and the time prior to the existence of the guidelines, and that sea change characterized most specifically by appellate review. Our problem, I think, our problem is really an educational problem, so far as appellate judges are concerned and so far as district judges are concerned. It's a problem of educating district judges to their right and their duty in appropriate cases to depart, and it's a problem of educating appellate judges that the guidelines that you have promulgated are not cast in stone, that policy statements are not guidelines, and that departure is, indeed, the lifeblood of the sentencing guidelines system.

We've been over this many times and it is my impression more than ever that what I have just said is basically agreed to by the members of the Commission themselves, and I think there has been a tremendous development over the last couple of years in the way that the Commission is approaching very difficult problems in the guidelines area and studying those problems, the problem of departure, for example.

I think 10 years from now we are going to have a guideline system which is a fair system, which is a propor-

tional system, and which is still going to leave room for departure in appropriate cases by district judges who are sentencing people. One danger, and it's a constant danger, is that we forget the fact that there is a human element in every sentencing, and that is something that just can't be dealt with on a statistical basis.

I just want to say one more thing, Mr. Chairman. I think this may be the last one of these hearings that you preside at, and I want to express to you my personal appreciation for the leadership that you have given to the development of the guideline system, and the encouragement that you have given to innovation.

Thank you.

CHAIRMAN WILKINS: Thank you, Judge Broderick.

Judge Wolf?

JUDGE WOLF: I would like to completely associate myself with Judge Broderick's comments, particularly including his last commendation of your leadership and indeed the work of the Sentencing Commission, and it's not intended at all to qualify that when I say that rather than accepting response to questions addressing the Judicial Conference's specific recommendation, I'd like to use my few moments to encourage

all of us to recognize where we are after 6 years and urge that together we take the leading role in revisiting and evaluating some of the very significant questions.

We have had about a 6-year track record with the guidelines and the mandatory minimum sentences. The Judicial Conference has a long-range planning committee. The Commission will soon have a number of new members, I expect. We have a new Congress and, of course, a new President and a new Attorney General. We also have the benefit of considerable academic attention to these areas. I know I found some of the writings by Professors Fried and Tonnerly to be particularly provocative and illuminating in the best sense.

But the kind of questions that we've talked about before, but maybe new to others, are the following: I think together we should be trying to get dialogue on issues like, are Federal sentences being relied on too much to combat crime? The Judicial Conference essentially has said yes, and that that's a dangerous solution. We applaud your efforts through Judge Mazzone's conference to try to put a broader spotlight on all of the causes, developments, and potential responses to crime.

Another question we shouldn't forget is whether

reliance on mandatory minimum sentences should be reversed, and again, the Judicial Conference emphatically says yes. The mandatory minimums obviously undermine the Sentencing Commission's role as an expert body in establishing sentences, but they also generate considerable unfairness in particular cases, such as when minor participants get long sentences in drug conspiracies, an issue that you wrestle with and continue to wrestle with. It also causes district judges to feel they're being compelled to act unjustly in certain circumstances. That's demoralizing and it also injures the confidence in the administration of justice.

Congress, we understand, is likely to revisit this issue and we would like to continue to work with the Sentencing Commission on this.

There's a general question, again, as to whether this reliance on Federal sentencing and mandatory minimums, particularly, is distorting our Federal system of government. Are too many state cases being brought to Federal court in order to get a long sentence?

Historically, in our system of government, law enforcement has been primarily a state and local responsibility. The Federal courts and the fact that Federal

prosecutors' investigative agencies have limited resources. They're expert, but they're not infinite, and they threaten to be overwhelmed if matters like the D'Amato amendment, which would have federalized all gun crimes, were to be passed.

Clearly, efforts have to be made to strengthen the capacity of state and local governments to deal with their responsibilities, but it's a dangerous delusion to think that the Federal system can compensate for their deficiencies.

Finally, on this general issue, I would say that I think the guidelines and the mandatory minimums ought to be reviewed not so much with a view to determining whether they meet their own primary purposes, say reducing unwarranted disparity, but to consider their other effects on the overall administration of justice.

In the District of Massachusetts, apparently mandatory minimums are charged relatively often. The plea rates in the last 6 years for all our criminal cases have fallen from about 88 percent to about 82 percent, or 87 percent to 81 percent. That represents about 48 percent more defendants going to trial and that number itself doesn't fully state the intensified pre-trial litigation even of

cases that plea.

These are having effects that we district judges clearly see in our ability to administer justice. There's less ability or time to handle major criminal cases, major Mafia matters, large drug cases, and there's less time for civil business, which I think should be a particular concern to Senator Biden, who has taken a leading role in the recent legislation to get district judges to personally manage civil business. But it's not possible to do all these things at once while continuing to delivery the quality of justice people expect.

The Court of Appeals have been overwhelmed by the explosion of cases and that injures their ability to carefully and thoroughly decide and explain what they're deciding. Generally, again, I think this injures people's confidence in the administration of justice.

There is also a series of key guideline decisions that, if I have a moment, I'd just list and hope would be revisited -- we're working on them; you're working on some of them -- that are non-violent first offenders being incarcerated too often. You addressed that in part last year in response to our amendment.

Do the guidelines allow adequate consideration of the history and characteristics of the defendant? Our amendment which you've numbered 29 addresses that.

Is there excessive reliance on relevant conduct and should punishment be tied more closely to the charges? My personal views have evolved considerably on this in the last 2 years. I think there's a problem in that area of people being punished for crimes that the Government couldn't prove beyond a reasonable doubt if they'd been charged.

Is there unwarranted uniformity with these mandatory minimums in minor participants in drug conspiracy and similar cases?

And have departures been unreasonably discouraged?

Many of us have been together for a long time and these issues are largely familiar to us. But they remain very important and there's more information that there will be a new set of actors. I don't think we should forget their importance and, as I said, I don't think it in any way disparages the valuable work the Sentencing Commission has done to say that this is a propitious and indeed an important time to revisit those fundamental questions.

Thank you very much.

CHAIRMAN WILKINS: Thank you, Judge Wolf.

You both have made significant contributions, not just to the Sentencing Commission but to the justice system over the last few years. We've had the pleasure to work with you so closely, sometimes supporting what we do, sometimes acting as the loyal opposition, but nevertheless working toward the same goal that all of us have, and we appreciate very much the extra time and effort that you and your committees give to us.

Any questions from any member of the Commission?

COMMISSIONER GELACAK: Yes, I have one.

Over the time that I've been on the Commission, one of the issues that has been in the forefront is whether or not members of the Federal bench should be able to grant motions for substantial assistance, either on authority, particular cases, and I've heard on any number of occasions that was something that was of paramount importance to the members of the bench.

In this cycle there is an amendment on the table which would allow for the bench to do that in appropriate cases where the individual in front of them was a first-time offender and there was no violence involved in the offense,

and the individual had rendered assistance but there was no motion forwarded or coming forward from the prosecutor that the bench could do that.

I was somewhat taken aback recently at a panel of judges that we have at the Commission to advise us on matters of importance to the bench to find out that there was near unanimity in opposition to that amendment, and it's my understanding as well, I think, that the Criminal Justice Committee has voted in opposition to that amendment.

I would be interested in your comments.

JUDGE BRODERICK: I think that we are split right here on this panel, sitting at this table, Commissioner Gelacak. Your information is correct. The Criminal Law Committee did consider this matter and did vote not to support the right of a judge to depart unless there was a motion on the part of the Government.

I must say that I disagree with that position. I think that a matter should be brought to the judge if there is a basis to do it and the judge should consider it. But the Committee on Criminal Law and I think Judge Wolf feel otherwise. Maybe I'd better let him speak to it.

JUDGE WOLF: Well, it is true that this is a

question on which many judges feel very strongly. It has come up in the context of substantial assistance motions and in that context it is also true that Judge Broderick and I are not in personal agreement and the majority of the Criminal Law Committee has not felt that judges should be considering downward departures, absent the motion from the Government, if the departure is going to be based on substantial assistance.

I base my view on my experience as a prosecutor and what are essentially separation of powers issues. I don't myself feel that you can tell whether somebody has fully and completely cooperated unless you know the context of the investigation -- what the Government knows, what the person said, when he or she said it. For a judge to get into those matters, particularly in a sentencing, which is ordinarily a public occasion, is difficult and in some respects potentially unfair to people whose names might be mentioned. It could frustrate ongoing investigations.

Having said that, there are very good reasons that judges are disturbed and I find, myself, an inconsistency or an ambiguity between the description of your amendment 24 in the index, which said that you were issuing for comment an

amendment about whether the court should have authority to move for downward departure when the defendant is first offender and the offense involves no violence. But then, of course, the substance adds in cooperation.

I think that we together should be looking at whether too many non-violent first offenders who don't fall into the classic white-collar mold, where I happen to think some at least short time in prison is important, are being incarcerated, and this is one of the fundamental questions I think we should go back to because the statute talks about the general inappropriateness of incarcerating non-violent first offenders. It's part of what our amendments last year, which you substantially adopted, were aimed at.

There may be a difference among judges with regard to substantial assistance, including the two sitting at the table, and Judge Broderick was a very distinguished prosecutor himself, so I wouldn't claim a monopoly on the former prosecutorial perspective, but the depth of feeling on this can't be underestimated. I think while it comes up in the context of substantial assistance, that's a symptom for something more fundamental, and the fundamental issue ought to be revisited carefully and thoughtfully.

JUDGE BRODERICK: May I just add one thing to that? I think that one of the problems here is who makes the decision at the prosecutorial level. My personal experience has been that you have a range with respect to substantial assistance which really depends on who the prosecutor is. There are some prosecutors who deal out substantial assistance on letters at the drop of a hat. They use them as a bargaining chip to get a plea, they get the plea and they deliver a substantial assistance, a 5K1 letter. There are others who you cannot shake a 5K1 letter out of.

I had one case where a man was arrested; he cooperated immediately; his cooperation led to the arrest of other people. The prosecutor refused a 5K1 letter because the assistance was given before this came over to the Federal office. It was assistance that was given to the state prosecutor, not to the Federal prosecutor, and so it didn't qualify.

The judge does have some control. I mean, once in a while you can kick a case back and say, "Before we go further on this, reconsider whether you should not issue a 5K1 letter." But, you know, we're dealing here with 30-year-old, 28-year-old prosecutors without a life experience,

without an experience, considerable experience, in the criminal justice area. Unless the U.S. Attorney in a given district takes firm control of this situation, you don't have an established policy.

COMMISSIONER GELACAK: I don't mean to prolong this, but is it fair to say that in your opinion the bench would support a departure for a first-time non-violent felony offender?

JUDGE WOLF: Let me put it this way, since I haven't surveyed people on that: I think that's what would really address a good part of the concern. And I'll tell you what I think is another dimension of the concern. But the short answer is yes, I think that's the way to be looking at it, particularly to see if you can separate out there the type of white-collar criminal, a relatively privileged person who commits a financial crime or a crime of public corruption.

If you go back -- and this is before your time, I think it was 1986 when I testified on the first series of then-proposed guidelines, I wouldn't favor something like that for a corrupt public official. He's going to be a first-time offender, he's not going to be violent. In my view, he definitely almost always should go to jail, and

that's an area where general deterrence is very important. The same thing with certain kinds of financial crimes.

There's one other area that I think this is a symptom of and it's why, I think, many of these issues need to be seen in the context of each other. This becomes a disturbing issue for judges in mandatory minimum cases. You get a big drug conspiracy. Let's say there's a mandatory minimum 10-year sentence. The so-called kingpins have valuable information. They get substantial assistance motions and end up getting significantly lower sentences than people who are morally less culpable but don't know enough to contribute, to cooperate and get the motion, unless they act very quickly before the kingpins come in.

Interestingly, in the District of Massachusetts, the statistics show that the 5-year mandatory minimum is no longer much of an impediment to pleading, but maybe those people are really subject to higher mandatory minimums. The 10-, 15-, and 20-year mandatory minimums are very substantial impediments to getting pleas, and about the only pleas we seem to be getting is when they're associated with a motion for substantial assistance.

So judges like myself, Judge Mazzone, will end up

perhaps spending a month or more trying a case that wouldn't go to trial in which we might give a comparable sentence without the mandatory minimum. Nobody would know that in advance in the absence of mandatory minimum. But the kingpin won't be part of the trial and these lower-level people ultimately will be required to receive very high mandatory minimums.

So again, I think judges groping to relieve their sense of injustice in those situations and their frustration that their very limited time in court is being exhausted in cases where lawyers say, "Judge, I'm sorry; I wouldn't try this case but we've got the mandatory minimums and we have to," judges groping for that look at the substantial assistance vehicle. I think some other vehicle has to be studied and developed.

CHAIRMAN WILKINS: It's an interesting statistic that 23 percent of all those facing mandatory minimum stand trial. Thirteen percent of those not facing mandatory minimums stand trial. So it does impact upon the judicial resources significantly.

Commissioner Nagel?

✓ COMMISSIONER NAGEL: Judge Wolf, if the guidelines

were revised to de-emphasize quantity and to emphasize instead some other aspects, is it your sense that would be the direction in which to move? Would that solve the problem? Is it the emphasis on quantity that ratchets up?

JUDGE WOLF: You recognize that you asked two related but distinct questions. I do think there is too great an emphasis on quantity. I think that addressing that probably would not be a full solution to this dimension of the issue.

We've undoubtedly gone over our 15 minutes, but you've really picked a wonderful example of what I was trying to illustrate in my general remarks, because there is such an integral relationship between all of these things.

I don't know if Mr. Dumont is still here, but the type of thing you heard him relate with regard to his son is what we as district judges confront weekly, if not daily. We really do have human beings in front of us. Sometimes the sum is more than the individual parts that you so carefully identified in the guidelines. He was talking about how you define quantity, but there really are an infinite number of human qualities.

Sentences shouldn't depend on our individual,

perhaps, idiosyncratic reactions to what is a poignant case and what isn't. But nor should the system mask the complexity and the human dimensions of this task, because to the extent it does, we're eroding rather than enhancing public confidence in the administration of justice, and I sense that.

So I think all these things are closely related and it's a very good time, now that we have these experiences, some of them reflected in statistics, to revisit some of these issues, and I think, basically, more flexibility and some trust -- I suppose if you can't trust a judge, who can you trust? If you can't trust the first judge, you've got the court of appeals to straighten us out -- is a way to get at it. I think you need an approach, but not so rigid an equation that doesn't let all of these factors come into play, subject to review.

CHAIRMAN WILKINS: Thank you very much.

Mr. Thomas Guidoboni and Mr. David W. O'Brien;
after that, Carol Brook.

Welcome. We'd be glad to hear from you at this time.

MR. GUIDOBONI: Good morning.

Mr. Chairman and members of the Commission, I am

Thomas Guidoboni and this is David O'Brien. We are partners in the firm of Byron, O'Connell.

We're here today to testify on behalf of ourselves, really, as members of the defense bar that handle Federal criminal cases. We appreciate the opportunity to appear before the Commission.

Our primary experience and our focus here today includes representing Robert Tappan Morris, who was a defendant in the so-called Internet Virus or worm case, computer case, which resulted in a trial in New York in 1990, Mr. Morris' conviction under the Computer Fraud and Abuse Act, and his sentence. We're going to focus today on, I believe it's proposed amendment 59 by the Justice Department, which would create a new guideline, 2F2.1, to address violations of the Computer Fraud and Abuse Act.

In the interest of being brief, we're just going to touch on our main points with regard to this.

We agree with the Justice Department that it's often inappropriate to apply the fraud guideline, which is what the Commission now mandates, to certain violations of 19 U.S. Code 1030. In the Morris case, the trial court held that defense created by 1030(a)5 did not require proof of an

intent to cause damage, much less an attempt to defraud. That ruling was held up by the United States Court of Appeals, the 2nd Circuit.

As a consequence, we were able to argue to the trial court that Mr. Morris' offense was outside the heartland of typical fraud and deceit cases. The judge, Judge Munson, an experienced trial judge, agreed, and he found that under your guideline 2X5.1, there was not a sufficiently analogous guideline for sentencing Mr. Morris.

Now, that doesn't mean that we believe that it's always inappropriate to apply the fraud and deceit guideline. There are a number of different kinds of offenses in section 1030 and those defined by 1030(a)4 and (a)6 specifically require proof of an intent to defraud. So in those cases, indexing to the fraud and deceit guideline may be appropriate. In addition, subsection (a)1, which is really protection of national security information and its guideline indexed in that regard is probably also appropriately indexed.

The remaining offenses created by 1030(a) do, however, require a guideline unrelated to fraud. We believe, however, that the proposed base level offense, base offense level of 6, is too high and that 4 would be more appropriate.

We believe this is supported by reference to your existing guidelines. For instance, if you go through the crimes as we've done in our written submission and compare them to current offenses and guideline indexes, (a)2 can best be described as a theft of information by use of a computer, while you all index theft as a base offense level of 4. (a)3 can best be described, and Congress described it, as a computer trespass. You all index trespass at base offense level of 4. And the last one, the one that Mr. Morris was convicted of, (a)5 would best be described as malicious mischief or malicious damage, and that's the way that the Congress described that in the legislative history. The nearest analogy there, I would submit, is property damage or destruction, and you all index that and the base level is 4.

So the most analogous guideline offenses that don't involve use of a computer all have a base level of 4. We submit there's no principle reason for increasing that by 2 simply because a computer is the means of committing these crimes.

We have an additional objection to the Department's proposal. In virtually every case brought under 1030, we can expect -- and the trial judges can expect -- that the

prosecution will say that there was the use of a special skill involved. That's almost always going to happen because those offenses can usually only be committed by somebody that knows how to use a computer.

So we would urge the Commission to conclude that since it's almost always going to be, the sentence is going to be enhanced, the lower base level would be more appropriate.

I would speak briefly about specific offense characteristics. The ones suggested by the Justice Department, (b)1 and (b)2, on reliability and confidentiality of data, they have defined protected information just very, very broadly. The statute itself calls out certain kinds of information that Congress thought was worthy of special protection, including national defense information, foreign relations, atomic energy data, financial records of consumers and financial institutions, passwords of computers, and medical records.

We submit that if you're going to have a special offense characteristic and increase punishment because certain kinds of data were taken, rather than the broad kind proposed by the Justice Department, you look at what Congress

itself has called out and use that as the guideline.

There is also a problem with regard to protection of whistleblowers. The Congress was very specific that they wanted to protect in this statute Government whistleblowers. The Justice Department, through its use of confidential and non-public information definitions, would completely or substantially wipe out that congressionally mandated protection.

I'd like to speak a minute about economic loss. In the Morris case, this was a real problem. We learned that the calculations were speculative and inherently unreliable, and the judge agreed that they overstated the crime itself. Recently in another case which we did not handle, Craig Neerdorf, in Illinois, a 20-year-old student was accused of stealing a 911 file and Bell South, the company that created the file, went out and said that was worth somewhere between \$25,000 and \$75,000. The case was in the middle of trial and was terminated, much to the embarrassment of the Government and Bell South, when the defense was able to show that you could buy this for \$20, publicly. Also, that same information which was being sold publicly bore a "proprietary only" stamp. One of the other things that the Government suggests

that we ratchet up here is for "proprietary only" data.

Now, these are not isolated problems. In our case, one of the labs was off the network for a number of days simply because, after everybody else had figured what was going on, why the computers wouldn't work, and that they were safe to use, this one lab decided they weren't convinced. They stayed off about twice as long as anybody else and all of that time was counted in, with regard to Mr. Morris. It was just an inappropriate measure.

Finally, we would urge the Commission to consider a distinction between the unintentional costs and damages and the intentional costs and damages. In Mr. Morris' case, he created something, he set it loose, and I don't think there was a person in the courtroom, including the prosecutor and the judge, who thought that he had intended the collateral damages.

Now, I would say to you that sometimes if you use a gun or dynamite or something like that, punishing somebody for unintended consequences as heavily as intended ones may be appropriate. But there is nothing inherently dangerous about a computer. We would submit that, therefore, some distinction should be made in that regard.

Mr. O'Brien has a couple remarks and then we'll take questions.

CHAIRMAN WILKINS: Thank you, Mr. Guidoboni.

Mr. O'Brien?

MR. O'BRIEN: Thank you.

As Mr. Guidoboni explained, we both have experience in defending Federal criminal cases. I probably have done a little bit more of that recently and as a result have experienced firsthand some of the torments of the guidelines.

In looking at this particular amendment in the Computer Fraud and Abuse area, I wanted to point out, from our experience in the Morris case, that under the specific offense characteristics subsections, there is a distinction made by the Commission between altering information and obtaining information, with increases for both, the point being that one can do one or the other but not necessarily both in committing certain kinds of offenses.

Our experience, I think, points out that this is unlikely. In the Morris case, the Government's position was that Mr. Morris had entered, by use of his program, the network, and while it wouldn't have been thought that he really altered any of the files of any of the people that

were on the network, simply the addition of his worm program, under the Government's theory, would have been considered an alternation. I can't envision a situation where an alteration wouldn't occur whenever a computer offense occurs.

The other matter that I wanted to point out was that in subsection (b)4 of the proposed amendment, this has to do with economic loss, the guideline states, the proposed amendment states, "If the offense caused economic loss, increase the offense level according to the tables for the fraud and deceit guideline. In using those tables, include the following: cost of system recovery and consequential loss." It's by no means clear to me whether or not the term "include the following" was intended to be limited to just those subcategories of (a) and (b), and it seems to me that some clarification of that is in order.

Finally, out of curiosity I ran the guideline, using the characteristics of Mr. Morris's case, and I came up with a range that would have produced 108 to 135 months, in Mr. Morris's case, and I was fairly conservative in how I approached that. Judge Munson, who is not known to coddle criminals, saw fit that in Mr. Morris's case, community service was appropriate and, indeed, the statute under which

Mr. Morris was prosecuted only carries with it a maximum of 60 months. So I think that the Commission ought to take that into account as well.

CHAIRMAN WILKINS: Just a part of Morris's case?

MR. O'BRIEN: Pardon?

CHAIRMAN WILKINS: Departure case? Was it departure?

MR. GUIDOBONI: No, sir, it wasn't actually departure.

MR. O'BRIEN: No, sir.

MR. GUIDOBONI: He found there was no appropriate guideline.

CHAIRMAN WILKINS: I see. Okay, thank you.

MR. O'BRIEN: Thank you.

CHAIRMAN WILKINS: Thank you very much.

Questions?

COMMISSIONER MAZZONE: Well, the probation officer recommended the departure in that case.

MR. GUIDOBONI: The probation officer recommended there was no appropriate guideline pursuant to the amendment, I think. The addendum never was in there, that's correct. If you consider that a departure, sir, then it's a departure.

In effect, what the judge found was, he didn't think the fraud guideline fit the crime.

COMMISSIONER MAZZONE: Well, I just read the decision and it said, "The court departs for the following reason." I take that literally to mean that they departed for the reasons that the loss, the offense loss overstated the seriousness of the offense. It's just quibbling, but I think Judge Munson said he was departing for specific reasons and listed the reasons he departed, and that's how it's classified in our records.

MR. GUIDOBONI: Well, I find often with dealing with the guidelines, it is the matter of a quibble, and I would look to number 4, the very last page, page 7, where he says, "Under these circumstances, section 2X5.1 of the sentencing guidelines," and he goes on, and he says there's not a sufficiently analogous guideline. I was pleased with the result, nevertheless.

CHAIRMAN WILKINS: Thank you very much, gentlemen.

MR. O'BRIEN: Thank you.

MR. GUIDOBONI: Thank you.

CHAIRMAN WILKINS: Carol Brook, representing Federal Defenders? We are pleased to have you, Ms. Brook.

MS. BROOK: Good morning, Mr. Chairman and members of the Commission.

With your permission, if I could stand up?

CHAIRMAN WILKINS: Certainly.

MS. BROOK: It's very uncomfortable for me to talk sitting in a courtroom, just doesn't feel right.

Before I begin, I have to tell you the problem with working for Terry McCarthy is you can go nowhere without first conveying his regards. Please let the record reflect that I have conveyed Terry McCarthy's regards to all of you this morning. I want to keep my job.

I want to say that it's not only Terry, but Federal defenders across the country, although we disagree with you often on issues, have nothing but the highest respect for the Commissioners personally and appreciate your continued willingness to listen to us in these forums and within the Commission itself. I guess I should say nobody knows better than defense lawyers what it's like to continue to work with people who seem to refuse to listen to you. So we commend your perseverance and we are here as defense lawyers to go on.

As defense lawyers, you know we work in the trenches. As Commissioners, you are up above. You kind of

see and can count the bullets and the bodies, if you will. We stand there with our clients and can feel the bullets and the blood, sweat, and the tears.

You have our testimony from that vantage point. It is very lengthy. I wish I could take credit for it; I cannot. It was written by Tom Hutchinson and his colleagues at the sentencing group, and I am not going to attempt in 10 minutes to summarize it for you here.

What I would like to do instead is to talk in the beginning about something that I will characterize as a motion for reconsideration and then to discuss with you our position on several of the current pending amendments.

A motion for reconsideration is a motion for you to reconsider the in-out decision. We think circumstances change, times change. We have more statistics now; we have more experience. We have believed from the beginning that the in-out decision which, as you all know, is an initial preliminary decision before you decide how long, is prison or not appropriate for this person. It is our opinion that adding that decision with structured reasons for how you make that decision would do a number of things for the guidelines to create more fairness and more humanity, and I want to just

list four points for you.

The first is that it would implement the congressional mandate which has already been discussed this morning, that persons who are in need of treatment or rehabilitation not be sentenced to prison.

The second is that it would be a way, another way, of implementing congressional statement that first offenders convicted of non-serious offenses not be sentenced to prison.

The third is a kind of truth-in-sentencing, which is it would give meaning, up-front meaning, to 3553's "sufficient but not greater than necessary" language. It would allow a judge to say, "This person shouldn't go to prison in this case because this person is in need of medical treatment or some kind of rehabilitation or educational program, so the sentence will be sufficient but not greater than necessary for the purpose of rehabilitation here today." Judges can't do that now.

Finally, it would significantly decrease the prison population. That is something that I know the Commission is required to consider, but I want to point out the current Bureau of Prisons statistics show, and I'm sure you are aware of those, that the prisons nationally are 150 percent over

capacity. I fear that very soon what we are going to have is a national Attica. We are looking at the potential for violence and perhaps even death if something is not done to decrease the prison population and to decrease it soon. It seems to me that this Commission has the ability and an obligation in implementing something like the in-out decision to both foster important goals under the act and to decrease the prison population at a time when we so badly need it.

I would point out that the ABA has proposed an amendment 33 which I think would also have some similar effects on prison decreasing, and we do clearly support that amendment.

I would now like to turn my attention to some of the specific amendments. The first is the first amendment, although not "the" first amendment, which talks about acquitted conduct, and I am very happy to be able to say that we applaud the Commission for putting in an amendment that says acquitted conduct should not be considered in setting the relevant conduct offense level. We think it sends an important message. It is an important statement that our Constitution has meaning, that the criminal justice system is fair and goes out to everybody.

On the other hand, it does not make sense to us, having sent that message that an acquittal is an acquittal, and this is what we mean, to then take it back and say in the application note, "Well, in an exceptional case, using a reasonableness standard, go ahead and use it." It seems to me what you're doing is giving with one hand and taking away with the other, and that the underlying policy for precluding it gets lost in the trade-off.

Reasonableness obviously depends on the judge. Exceptional case, it seems to me in my experience, which is now probably longer than I care to admit in Federal court, that it is the exceptional case where there is acquitted conduct to deal with. So there is an argument to be made that whenever you have acquitted conduct, that case alone is an exceptional case, and it's troubling to me that what we might have, then, is an exception that swallows the rule.

I would also note, Mr. Pauley, in your statement, that the Department of Justice talks about there's a temptation under the Commission's amendment for prosecutors not to charge conduct that they then think might result in an acquittal and instead just try and use it kind of back-door, if you will, at sentencing. On the one hand I'm happy to see

that written out. On the other hand, it's troubling to me that Justice would take that position, and I would only say it does support our continuing concern that the guidelines shift this kind of discretion to behind closed doors, although not in this case, make those decisions that so dramatically change the balance.

The next amendment I would like to discuss is our amendment 56, which deals with retroactivity of the guidelines. That amendment has two parts.

The first part is, we request in that amendment that the third point for acceptance of responsibility be explicitly made retroactive. The second part of that proposed amendment is that judges be included in the process of reducing sentences where Commission amendments have reduced sentences. As to the third point, I guess I agree with Justice that it's going to affect a large number of people, and that's one reason why I think it's so important that it be made retroactive. There is not a Federal defender office in the country that hasn't received a flood of phone calls and letters from former clients saying basically, "Carol, this guy just came into prison and he got a third point and I only got two. How come?"

I and all my colleagues are left, really, saying to my clients, "Basically, because I say so." Because the Commission says so. And you know, that doesn't work any better with my clients than it works for me with my children, because "I say so" is just not a good enough reason.

I think it's important to tell these people, in a situation where it is so well known and so clear that the person in the cell next to you or the bunk next to you got something that you didn't get, solely as a matter of timing, that we can make this system fairer. We can apply that point to you. I do not think it would be difficult to apply. There are very clear criteria set out in the guideline. They are not difficult to discuss in front of the judges, that some of the judges have been doing it. It seems to me it would be an important statement, and it would affect people, because they would all be level 16 or above.

As far as general judicial involvement in reducing sentences, what the Commission has done, really, is taken the policy of reducing sentences and made all that policy itself, and left nothing for the judges. And we're really here today to repeat a plea that you've already heard this morning and undoubtedly have heard before, which is trust judges.

Please, trust judges.

I have never seen -- and I don't think there is -- a judge in the country that just releases people willy-nilly. It doesn't seem to me to be a realistic fear that if we give judges this power, we are just going to let everybody out of the prisons. It does seem to me that it's an area where judges have great expertise. They have an overall vantage point and they know the individual cases. Congress, in 3582, did contemplate that there would be judicial involvement in making that decision, and I would ask this Commission to reconsider and give them that involvement.

I've lost track of my time. Do I have more time?

CHAIRMAN WILKINS: You have just a couple of minutes.

MS. BROOK: I'll do one more.

Substantial assistance, which has already been discussed here this morning. I would like to discuss it one more time, just briefly.

We are not -- and I want this to be very clear -- we are not accusing Justice of any kind of wholesale misconduct. What we are saying by requesting that the Government motion be eliminated is that four problems have become clear

in the cases in and the numbers. It is clear that in some districts the prosecutors ask often and in some districts they almost never ask.

It is clear from the case law that different districts require different things. In my district, for example, the prosecutors say, "We will not give it unless the person has actually made a case, we bring the person to trial, and they're acquitted" -- I mean, convicted. Excuse me for that. A wishful Freudian slip.

And yet, the third point is that even as they say that, this prosecutor here and this prosecutor here come up with different points of view when we're negotiating, maybe because the client is sympathetic, maybe because of my relationship with the prosecutor, maybe because they really want this case to plead. I mean, prosecutors are human, like everybody else. These end up being quite subjective decisions.

The fourth reason, which this Commission really has recently brought to light, is the potential for racial disparity that occurs in those kinds of behind-the-doors decisions that are not really reviewable. We can't get at that. I know that Wade says, well, you could challenge it,

but how can we show that? What kind of pattern would we have to bring up to make any showing?

It seems to me -- again, I hark back to the same thing -- that you already trust the judges in this situation to decide whether or not to give the departure, which is, in effect, saying, "You have all the information now, Judge, you decide." All we are asking is that you move it one step back and say, "Even if the prosecutor doesn't ask, Judge, at least consider, bring it out in the open, and talk about it, so we can consider whether or not it should be done in this case."

That ends my prepared remarks. If you have any questions, I would be happy to answer them.

CHAIRMAN WILKINS: Thank you, Ms. Brook. Any questions from the Commissioners?

COMMISSIONER MAZZONE: Well, I shouldn't start you off, but you're telling us that there are cases that come into your office in which you have advised your appointed client that, "If you have substantial assistance to give, you should tell me about it now and I will go to the prosecutor and then I'll go to the judge with your offer, even if it's not accepted." Is that the situation you're talking about?

How do you -- just tell me, just briefly, because

we don't have the time, but how do you make your motion for substantial assistance? How do you call, what's the factual backdrop to your going to the judge and saying, "We offered substantial assistance and the prosecutor didn't take it."

MS. BROOK: Well, we --

COMMISSIONER MAZZONE: The Wade situation. How do you do that?

MS. BROOK: The only time that we can ever do that, and we have done it, is when we had facts which we believe support that the decision by the prosecution not to make the motion was arbitrary or in violation of a fundamental right, such as a racially discriminatory decision. And that is very rare.

We can say, and I can say to you all here today, I see what I consider to be arbitrary decisions on a number of occasions, but to show it under a standard that would meet the court standard in Wade is a whole other story. We have tried, we have litigated that issue and we'll continue to.

CHAIRMAN WILKINS: Thank you very much. Please convey our best regards to Mr. McCarthy.

MS. BROOK: I will do that.

CHAIRMAN WILKINS: Thank you.

Rabbi Moshe C. Horn is our next witness.

Good morning, we're glad to have you.

RABBI HORN: Good morning.

First and foremost, on behalf of the Aleph Institute, we'd like to thank the honorable commissioners for inviting us to share our views and experiences and we invite the commissioners to always avail themselves of our resources and, of course, working together in trying to achieve our mutual goals for improving all segments of society.

The Aleph Institute is currently working with over 4,000 offenders in Federal and state correctional facilities throughout the country, and what underlies the impetus for our current presentation is the encountering of circumstances throughout the country in different courtrooms where we've worked with offenders that face sentencing. We find that the offenders sincerely undertake actions of remorse and contrition and we present ourselves in the courtroom to give an unfettered and unbiased opinion of the actions of those particular offenders, and we find that the judges turn to us, sometimes apologetically and even, in certain cases, with a certain display of pain, and they tell us that they feel their hands are tied, due to the particular laws that are

enacted by the sentencing guidelines.

It is precisely because of those types of cases that we have found that it is imperative that we try to appeal to the Commission to undertake those laws which are more in tandem with the statutory enabling language, which state that the humanity of the individual should also be taken into consideration in sentencing. There are times when you have a particular defendant in a courtroom and the judge finds that that particular defendant takes a 180-degree turn-around in their life and that there are certainly circumstances that are overtly showing actions that try to ameliorate their conduct, akin to the type of conduct by the defendant that's cited in U.S. v. Lieberman, and they find that although there's an acceptance of responsibility, there should be something more within the guidelines, something more that they can entertain to be able to allow for a departure, due to that person's conduct.

There are also occasions where incarceration is clearly a detrimental imposition, where not only could it destroy the individual's life, but also the surrounding circumstances of the person's life, whether it be family, employment, and so on.

There are many alternative sanctions available, such as home arrest or intensive confinement, also known as boot camp. There are very novel community service types of programs that are also available throughout the country where judges feel that those type of impositions would more likely be able to equalize the interests of justice and meet the goals and objectives of the sentencing statutes. However, due to the particular score and a guideline range in a chart, they find it is something they are locked into and they throw up their hands, feeling that they cannot avail themselves of the valuable programs that are out there.

There are also cases, where we find that the individuals may also show a perfunctory type of remorse that the judges automatically take into consideration under 3E1.1, where we also feel it is not a proper level of reviewing an individual's remorse, just to take it as a perfunctory act, but the overall totality of the circumstances of any particular defendant should display that particular defendant's resolve and his particular views and guidance towards becoming a better individual and interacting with his particular community and the society overall.

So we appeal to the Commission to, in the future,

try to undertake those types of legislation in broadening the zone ranges and also the types of incarceration alternatives that are available within those zone ranges for allowing the judges to impose a humanity within the sentencing guidelines and undertake a full resolve for themselves to make sure they meet all objectives of sentencing.

Are there any questions?

CHAIRMAN WILKINS: Thank you very much. Are there any questions from any of the Commissioners?

COMMISSIONER GELACAK: Just one.

RABBI HORN: Yes, sir?

COMMISSIONER GELACAK: Rabbi, you attempt, I assume, your Institute attempts to effect the in-out decision in whatever way it can to the benefit of those people who, for one reason or another, you feel should have some benefits given to them for their conduct or their potential conduct. What is your success rate?

RABBI HORN: Thank God, it's been very successful over the 12 years of the Institute's track record, that the overwhelming majority of individuals that we have worked with, we've had a lower than 5 percent recidivist rate for those individuals that worked with our programs and, thank

God, we see that the new trend and wave in many of the state courts has been to enact those types of laws that allow for alternative programs and working with community resources that are available.

Especially at this time, where everything is under financial constraints, there is more invitations on the part of judges to have community programs that are non-profit to work with them and have judges avail themselves of the many good community programs that are out there.

COMMISSIONER GELACAK: Could you just ballpark those figures? When you say 5 percent, would that be out of -- 5 out of 100, or --

RABBI HORN: Out of about 500 defendants that we worked with in 12 years in alternative programs --

COMMISSIONER GELACAK: About 500.

RABBI HORN: -- diversion programs.

COMMISSIONER GELACAK: About 500, you say?

RABBI HORN: Yes.

CHAIRMAN WILKINS: All right. Thank you very much, Rabbi.

Two distinguished attorneys are to testify next, Mr. Donald E. Santarelli and Mr. Steve Salkey, representing

the American Bar Association.

Good morning. We're glad to hear from you.

MR. SALKY: Good morning. You have our prepared testimony. I appreciate the opportunity to appear. I'm going to let Mr. Santarelli answer all the hard questions after I spend a few minutes going over the highlights.

I notice a member of our committee sitting on the dais a member of our Sentencing Guidelines Committee from the ABA, Mr. Pauley, and Chairman Wilkins, I want to reiterate what Judge Wolf said, the ABA wants to commend you as Chairman for the work that you've been doing for many years and your fine work, and we appreciate it.

As in the past years, we've tried to speak a little bit about the process by which the Commission operates and I want to summarize briefly our comments this year.

First of all, I think the Commission has already recognized that this is the largest number of persons seeking to speak about amendments and seeking to submit comments on amendments. We think that is in some part due to the Commission's decision to publish all proposals for which a single Commissioner supports, and we continue to encourage the Commission to publish all proposals for the purpose of

encouraging public comment.

We would recommend to the Commission, if it seeks to direct the public comments to particular amendments, that it, in the Federal Register, either designate those amendments which it is most seriously considering or divide the publication process into two stages, one that would publish all proposals and then one in which the Commission would hold a meeting and in a sense grant certiorari on those proposals that will, in fact, be voted upon.

In any event, we encourage the Commission to continue its liberal publication policy, because we think it does help generate comments that, if not useful this year, will be useful in future years, and helps direct the Commission as a policymaking body over time.

We have spent many years recommending to the Commission that it rely heavily on its working groups to analyze the vast amount of data that is generated by guideline sentencing and to rely on those working group reports for its amendment proposals. We again this year commend the Commission's working groups. They were extremely open to all members of the public who wanted and had the time to give them input, and their working group reports were most

informative and contained in many respect realistic analyses of the way the guidelines function in the courtroom and in prosecutor and defense attorneys' give-and-take in plea-bargaining sessions.

We think that is the realistic data that the Commission needs to consider when it votes on amendments, and we continue to encourage the Commission to expand its reliance on working group reports as a basis for making amendments to the guidelines.

We remain critical of the Commission's failure to identify, in a sense, a prison impact statement when it looks at amendments, and to analyze the amendments in light of prison impact. As you know, the ABA is on record as supporting greater reliance on alternative forms of punishment, other than incarceration.

Mr. Santarelli is the Chairman of the National Committee on Community Corrections, which is a body that attempts to influence policymaking bodies such as your own on increasing the alternatives and decreasing the over-reliance on prison as the only form of punishment, and we think the Commission, if it sought to analyze the impact that a particular guideline amendment would have on the Bureau of

Prisons' populations and other resources in the community corrections field, would make decisions on a more informed basis, and we encourage the Commission to do that.

We've also encourage the Commission over the years to adopt administrative rule-making procedures that would govern its process and have those published, and we are working with another committee of the ABA to propose a set of rule-making procedures for the Commission, and we hope to have something shortly to you.

Our comments are informed, to a large degree, by a set ABA standards -- a set of newly developed ABA standards, I might add -- that have been in the process for a number of years. I lied in my testimony when I said I had given copies of those to your staff director and your general counsel, but I have them here today to give to you, and if you are not familiar with them, I suggest that they are worthy of a significant amount of study and consideration.

They were developed by a bipartisan section of the ABA, including a Federal judge -- Judge Wald, who sits in this circuit was a member of that committee -- by both state and Federal prosecutors, by defense attorneys. It was a very large group that worked a long number of years to develop

these sentencing standards. While they are primarily designed for use by state legislatures in developing guideline systems, I think much of the debate in the Standards Committee focused on the Federal sentencing guidelines and differences of opinion amongst the ABA committee with the guidelines. I think it is a useful document for internal consideration, for debate on some of the larger policy issues that face the Commission and, as I indicated in my written testimony, we would be more than happy to sponsor a program or a day in which members of the Standards Committee could get together with members of the Commission and discuss some of these policy issues.

I will briefly comment on some of the proposals that have been published at the Commission's request this year. Our comments are informed, in many respects, on some of these amendments by the same concerns. For instance, we have commented favorably on the amendments which would increase the reliance on role in drug cases and decrease the reliance on the amount of drugs. By the same token, we have commented unfavorably on the fraud amendments which would eliminate some of the role-based considerations such as more than minimal planning and increase the reliance on amount of

funds. We think that in the balance between complexity -- having too complex a system that cannot be understood and implemented, on the one hand, and simplicity on the other -- that we do not want the guidelines to become overly simplistic: eliminate considerations regarding the culpability of a particular offender and rely solely on the amount of drugs involved in the conspiracy or the amount of money involved in a fraud conspiracy. We think those are, there are ways, those are too gross, if I might use that word, or macro variables, and that the Commission without getting too complex or practitioners, judges, probation officers, et cetera, can continue to rely on these role-based considerations. Our comments on those two amendments are born out of that concern.

We also comment favorably on your money-laundering amendments, as well as the amendments regarding sting operations, and there both, again, informed out of the concern to avoid manipulation of the guidelines in the plea-bargaining process, which the vast majority of cases, as you know, are resolved in plea negotiations. We have encouraged, in our comments, the Commission to look at the realities of the plea negotiation process and try to amend guidelines that

allow for manipulation of the ultimate sentence by virtue of the charging decision or the plea negotiation process.

The comments we have, the proposals that we make, the primary proposal that is in amendment form is a proposal that would eliminate the requirement that the Government make a motion for downward departure before a judge could issue such a downward departure. That's been the subject of some discussion earlier today.

Commissioner Gelacak's proposal, or what I took to be his proposal in an earlier amendment, which would limit the -- our proposed amendment, which would eliminate that requirement altogether, but his would limit it to first-time non-violent offenders. We see some political compromise there, but we do not see the justification as a policy matter, and we think that the Commission, if it is serious about returning authority to Federal judges, should eliminate that requirement altogether.

I would be happy to take questions on our written testimony and defer them to Mr. Santarelli.

CHAIRMAN WILKINS: Thank you very much, Mr. Salky. Does anyone have any questions from the Commission?

COMMISSIONER CARNES: Either Mr. Salky or Mr.

Santarelli, you're fairly candid in your remarks in indicating that if we pass the acquitted conduct amendment, the next step would likely be that relevant conduct would likely go by the wayside. That is, you'd have to be convicted of a particular act before your sentence could be enhanced. I appreciate your candor in acknowledging what I think would be the next amendment that would be proposed to the Commission.

My question to you, though, is if we did that, would we not in effect be allowing prosecutors to totally control the sentencing? That is, since most cases are handled by plea bargains, prosecutors would determine the counts and they would then in effect control the sentencing. Given the great criticism we hear already about the fact that prosecutors control too much of the process, and particularly given the suggested amendments with 5K1 suggesting great distrust for the prosecutors' handling of that particular power, how can you give the fact you want essentially a plea bargaining system, a counted conviction system, with the notion that, on the other hand, there are constant criticisms of the fact you don't trust the prosecutors, you don't trust a system that allows prosecutors to set sentences?

MR. SALKY: I can start to address it by the

following: the amendment regarding acquitted conduct recognizes that acquitted conduct can be considered or suggests the possibility that acquitted conduct would still be considered for purposes of departure, though it would not be considered in determining base offense levels or other specific offense characteristics.

The same thing could be true for relevant conduct. In the ABA's standard -- which you're correct, we endorse, and it would not necessarily be a future proposal -- does not eliminate the possibility for considering conduct relevant to the offensive conviction or relevant to the offense to which the plea is made, for purposes such as departures and considerations other than determining base offense levels or specific offense characteristics or adjustments.

So I think there is some flexibility within the amendment that you are considering for acquitted conduct, and the same might very well be true of the proposals that we would make for considerations of relevant conduct.

CHAIRMAN WILKINS: You realize that if you use acquitted conduct for departure, you may end up with a sentence that is greater than the sentence that the guidelines would have required had the acquitted conduct been factored

in in determining the offense level?

MR. SALKY: Correct. I mean, it's a possibility, but since the judge is not bound and can go anywhere within the system, we recognize that. The consideration of acquitting conduct, I think, though we have disagreements within our own committee and certainly within the ABA, I think the feeling would be stronger on elimination of acquitting conduct from consideration for any purpose, as opposed to elimination for any purpose of relevant conduct beyond the offensive conviction.

But the ABA Standards Committee, after a long and arduous debate and study on this issue, and in the shadow of the guidelines determination to base sentences on relevant conduct, came out the other way, and that is one of the subjects which we think -- and we've made the proposal for comment in order to encourage debate on that very fundamental question, and ask the Commission, with the ABA, to revisit that issue.

CHAIRMAN WILKINS: All right.

COMMISSIONER NAGEL: I want to follow up on Judge Carnes' question, and I'd appreciate the complexity of the issue and your answer. One of the most frequent criticisms

of mandatory minimums is that they essentially transfer all of the judge's discretion to the prosecutor because the mandatory minimum is tied to the conviction charge.

I'm not sure how, if you alter relevant conduct, you would not have the same result, and I understand your previous comment that you could treat it like you do acquitted conduct, but I think it's much more significant, because it is so much a part of the sentence. If the defendant was sentenced purely on the basis of the charge for which he or she was convicted, then aren't you transferring all the discretion -- or virtually all of it -- from the judge to the prosecutor, and wouldn't you then have this same criticism, that I believe is true, with respect now to mandatory minimums which is far less true with respect to guidelines not anchored by mandatory minimums?

MR. SALKY: No, I take your comment, both of them are well founded. We are, of course, opposed and have been opposed to mandatory minimum sentencing, commend the efforts in that regard, and I should have remarked earlier and wanted to join hands with the Commission to attempt to speak to members of the new Congress about holding hearings and possibly addressing the inequities and disparities created by

mandatory minimum sentencings that are addressed in your report.

Speaking personally, I have to come out in favor of the guideline systems for consideration of relevant conduct, because I believe but for that flexibility, there is too much of an opportunity for control of the sentence by simply the charging authority. However, from the ABA's perspective, I think the purpose of their position is that in those cases in which a crime is proved beyond a reasonable doubt, albeit through a trial or through a plea-bargaining session, it is fair to sentence the person on that conduct. To sentence the person on conduct which was not proven beyond a reasonable doubt and either the person was acquitted on or was proven simply by preponderance of the evidence I think is considered to be unfair and even if it results in the greater control, if you will, for the ultimate sentence in the hand of the prosecutor, it is the fairness concern that brings us to the position that we take.

CHAIRMAN WILKINS: Thank you very much.

Mr. Santarelli, I know it's difficult to ride shotgun. Is there anything you want to say to the Commission?

MR. SANTARELLI: It's remarkable to have an

opportunity to speak and not have anything to add that would improve the colloquy so far.

CHAIRMAN WILKINS: Thank you both very much. We appreciate your assistance.

MR. SALKY: Thank you.

MR. SANTARELLI: May I speak on another category for one moment, Mr. Chairman?

CHAIRMAN WILKINS: Yes, sir.

MR. SANTARELLI: Aside from this representation of the ABA, I do chair this National Committee on Community Corrections, and I do want to leave the Commission with one thought. Whereas the voice for alternative sanctions and the use of a variety of methods other than straight jail time to assure the public that, one, control of anti-social conduct will occur and, two, that a just punishment be delivered, I would like to remind the Commission that perhaps climate is an important consideration in this issue, the climate to at least encourage the experimentation with pursuit of an occasional mistake with community corrections certainly should be improved and should be given a little opportunity to work.

I recognize that in the business of criminal law

we're interested in public protection, and certainly when we talk about community corrections, it's important to know that we don't talk about the entire population of persons who are sentenced to a period of incarceration. Some previous Attorneys General have said that this is only the margins. Perhaps that's a little more unfair, but there are a significant percentage in all criminal cases of persons convicted who would probably benefit, and society benefit, from the fact that they not be subjected exclusively to periods of incarceration.

So selectivity, with the danger of discrimination always lurking behind the scenes, and experimentation are really essential to find a way to give credence to community corrections rather than to just repeat sort of shibboleths, or to simply adhere to it or be opposed to it on sort of an ideological or doctrinal basis.

All I am saying to the Commission is please be encouraged to open the door to this area of experimentation. The Rabbi before us was an excellent example of something that we need much more of. That is community involvement that does not cost the system in absolute dollars. If you ask the Bureau of Prisons why they are not more liberal in

their exercise of community correctional programs, they would simply tell you that they are even more costly occasionally than they are to keep the person in a minimum security or low security facility, because the private contractors in the business charge about \$35 a day.

We need to encourage community organizations who do not enter this business on terms of a profiteering motive but who are in it for the good of the community, for charitable and rehabilitative purposes -- I think of the churches, particularly, and civic organizations, such as service clubs -- to be encouraged to take on some of the responsibility for community corrections and to relieve us of this ever-growing burden we know. We have 83,000 or 84,000 now in the Federal system, and the numbers are crushing and choking.

So to that extent, I encourage the Commission to look at community corrections with an encouragement, as opposed to suspicion.

CHAIRMAN WILKINS: Thank you, Mr. Santarelli.

MR. SANTARELLI: Thank you.

CHAIRMAN WILKINS: Comments or questions from the Commissioners?

COMMISSIONER GELACAK: I have something.

I apologize, I had to take a phone call, and if I go over something that's already been discussed, just tell me and I'll stop.

Mr. Salky, I'm sure you didn't miss the point of an earlier question with regard to substantial assistance which is that the bench now appears to be opposed to that amendment. Have you found that to be the case in your discussions with members of the ABA Sentencing Committee?

MR. SALKY: That is the opposition to the elimination of the requirement for a Government motion?

COMMISSIONER GELACAK: That's right.

MR. SALKY: I don't know that I can intelligently speak to the issue. As to our ABA committee, on the guidelines, I think there is support, and within the Criminal Justice section, I think there is support for the elimination of that requirement. Certainly many of the judges that I have heard speak on the issue at seminars and training sessions, et cetera, have articulated the view very strongly that they believe that they can appropriately handle the discretion as they did for many years prior to the implementation of the guidelines. That would be provided to them were the authority to depart on the basis of cooperation returned

to their sole jurisdiction.

There is no question that the judge is forced to rely by circumstance very heavily on the prosecutor's statement regarding the cooperation -- the nature of it, the extent of it, and the value of it. There is no way of getting around that proposition and therefore, in my judgment, most judges will follow the prosecutor's recommendation as to whether departure is appropriate and the extent of departure. That, however, begs the question of where the authority should lie and whether it should lie in the hands of a Federal prosecutor or in the hands of an Article 3 judge, and we come out in the ABA favoring the reliance on constitutionally appointed, lifetime-tenured Article 3 judges.

But as far as where the judicial conference stands and the debates within the judicial conference and whether most judges would oppose the amendment or support it, I really can't speak intelligently.

Many of the judges that I appear before do seem more or less content with the rule. The groundswell of opposition does not seem to be as strong as it once was. Nonetheless, the policy considerations for the Commission seem to be exactly the same, and I don't think it's a matter

of, quote, public opinion that ought to be the determining characteristic.

CHAIRMAN WILKINS: Thank you very much.

Our next witness is Mr. Stephen R. LaCheen, representing the Pennsylvania Association of Criminal Defense Lawyers.

We are glad to have you, sir.

How are your State of Pennsylvania guidelines doing?

MR. LaCHEEN: I don't practice in Pennsylvania state court. I haven't been there 12 years, so I can't answer that question. I've had a lot of experience with the Federal guidelines, unfortunately a whole lot more than I ever thought I would want to have. We don't get as many acquittals as we used to, as you may know, and so more and more we are faced with the guidelines.

The situation about which I want to speak now -- and I am here more with regard to this one case than I am as a general spokesman for the PACDL or the American Board of Criminal Lawyers, of which I'm also a member -- is a case which I submit respectfully is the perfect, shining, horrific example of what can happen to someone who falls into the guidelines in an offense which does not involve any other

unlawful conduct that is a structuring offense, and how Draconian the penalties can be even when the trial sentencing judge attempts to give a downward departure and then that departure and that grant is overruled and reversed by the court of appeals.

I represent a man who happens to be here today with me, his name is Ronald Shirk. Mr. Shirk was convicted of two counts of structuring. The amount involved -- and this was legitimate funds, legitimately deposited into his own legitimate bank account; the Government concedes these were lawful dollars -- deposited his own money in his own bank account over a period of a year. The total involved some \$600,000. That sounds like a lot, but the business generated \$25 million in income for deposits of about \$500,000 a week, of which somewhere in the neighborhood of \$3-4,000 a day came in in cash.

Mr. Shirk had a couple of bad habits. The first bad habit was that he worked for 23 years in the same business at which he put in 18-some hours a day. He did not, therefore, have the opportunity or the occasion to run to the bank every day, which had he been able to so do, he never would have had the problem that he eventually had. He made

his deposits once a week, generally in a Sunday night bank deposit, and so when the bank opened up -- and this was a small branch of a small bank -- on Monday morning, the first thing they were confronted with was \$500,000 in deposits and \$20,000 or \$15,000 in cash, and that's the way it went until the bank decided that they could not longer exempt his deposits because he was wholesale, not retail, and so the bankers suggested that he make his deposits more often. "We've been telling you all along, get your money in the bank faster," and so Mr. Shirk changed his pattern of deposit from once a week to twice a week, the amount then being under \$10,000.

How did he get into court and how did it happen? What happened was, the IRS thought they should examine Mr. Shirk's records, and so he awoke one morning at about 7 o'clock -- well, actually he was at work for 2-1/2 hours already -- when 38 IRS agents showed up like they were crossing the river Rhine with guns -- this was to seize his records. And I think you've all heard the joke, "I'm here from the Government and I'm here to help you," the first thing they said to him was, "How much money do you have on the premises? We're just asking this so that we can make

sure that nobody steals your money." Nobody but the IRS, that is, because the minute Mr. Shirk said, "I've got about \$2 million in cash on the premises," they went out and got another search warrant and took the money. He hasn't seen it since. I mean, we know where it is -- the IRS has it.

When they went over his records, which they also took that day, they determined that he had structured his deposits for the preceding year to the tune of \$600,000. They then returned with a third search warrant and took \$600,000 of his best inventory. They took the best guns they could find. He's a wholesale gun distributor, one of the largest in the East. Never had a problem in his entire life; never had a prior criminal justice problem; never had a problem with the ATF; never had a problem with anybody, except the IRS.

They came back and they took \$600,000 of his best guns, which they're running around with now, and that wasn't enough, because then they turned around and indicted him for tax evasion, which we tried and that was acquitted. In the same case, they charged him with the two counts of structuring, which was just over this one year. Not the year, by the way, which had anything to do with the alleged tax evasion.

The tax evasion was supposed to be '84 to '87, the structuring was 1989. And they charged him -- and this is the best part -- with a criminal forfeiture because in the meantime, the statute had been amended. So now the IRS could not only go after the structured funds, they could not only go after the bank account that the money was put in, they wanted his whole business. They came around and they filed a criminal forfeiture for an \$11 million business, which they tried to take away from this man.

We went to trial, we got a total acquittal on every tax count. The jury, I don't know why, they found him guilty of the structuring. We, discretion being the better part of valor, immediately settled the forfeiture for something less than \$1 million. We then went to sentencing and the judge said, "Let me see, now, if I get this straight. There was no other offense. These were legitimate dollars. This was his legitimate business. The guidelines call for 24 to 30 months. That seems to me to be a bit much. I give the man a downward departure for 9 months for 4 reasons: One, it was lawful money, there was no other unlawful conduct involved. Two, the evidence was clear, the man didn't even know it was illegal. He knew it was not right, but he didn't know it was

illegal." He admitted to the agent when they came with the search warrant, "I put that money in in amounts of under \$10,000 because, you know, the bank doesn't want to file those -- we don't want the bank to file those reports." Third, the judge said, "This man's faced with \$10 million forfeiture. I don't want to take anything more from him. Nine months seems to be enough." The case went up on appeal, the Third Circuit -- now, these judges stand up there at one seminar after another and encourage the district court judges to consider cases that are outside the heartland until they get the case in front of them, and then it's, "Well, hell, this is all heartland stuff anyway." So they reversed it and sent it back. The man's going to go to sentencing in two months and face 24 to 30 months. You know why? Because the district court judge doesn't want to get burned again by that Third Circuit. So he says, "What am I going to do now?"

That's what I'm asking you, because fortunately for us, if the amendment goes through, then we can take advantage of it and Mr. Shirk's offense level will be 6, not 17, not 24-30 months, but 6. Less even 0 to 6, which would give the judge the opportunity, if he wanted, to put the man on probation. It would even be less than the downward departure

with the Third Circuit reversed.

I said he had bad habits. One of his bad habits was he saved \$100 bills. So first he was going to the bank once a week, the second was -- this was money, by the way, that was declared. It was all recorded on the books, the taxes were all paid. He just saved it. When the Government came in, they saw all this money and they said, "Well, I guess that must prove he's a tax cheat," so they took all the money. We haven't seen it since.

That's where we are with this case. They say that, you know, bad cases make good law, or something like that. This is the case, I submit, that demonstrates better than anything exactly why some of these sentencing guidelines, especially with regard to the structuring, create incredible penalties. This is not a case -- you know, the Government treats every structured case like it's a money-laundering case. When I say the Government, I'm talking about certain prosecutors. They don't seem to recognize the difference. But then, of course, you've given them some help in that regard, because the penalties for structuring are sometimes even more serious than the underlying offense.

Here you've got a case where there was no underlying

offense at all. It's 34 to 30 months.

So we are hoping to put the resentencing off long enough so that maybe there will be an amendment, and then we can say to the judge, "You don't have to try one more time to give this man a downward departure," because maybe the guidelines will provide what the appropriate sentence is here, which is -- this is a probation case. That's what it should have been from Day One.

It was the tail that wagged the dog. When the dog died, the tail was still alive and that's what they're thrashing this man to death with.

That's my case.

COMMISSIONER MAZZONE: Mr. LaCheen?

MR. LaCHEEN: Yes, sir?

COMMISSIONER MAZZONE: I think you probably know this, but if you don't, let me try to help your very appealing story, but it sounds to me like the conduct you described is not even a crime in the First Circuit.

MR. LaCHEEN: I am familiar with that case, Your Honor, yes.

COMMISSIONER MAZZONE: My case.

MR. LaCHEEN: Yes, sir.

COMMISSIONER MAZZONE: It is --

MR. LaCHEEN: Aversa -- here's the problem. We're a little closer to Donovan than we are to Aversa and Mento, and I know what the fence is. The fence is, you know, knowing violation, voluntary violation of a known legal duty. In Aversa and Mento and then in that other case, the lawyer's case, Bidune, there was no evidence that it was anything other than a bank policy that the customer wanted to avoid.

Our case was different. The agent testified and this statement was made under such circumstances that we were totally unable to challenge it at a later point in time, because the man hadn't returned it, it was standing there -- the agent testified that what Mr. Shirk said was, "Oh, that \$80,000. Well, I got \$30,000 of it in a cash sale yesterday and I'm going to deposit it in amounts of less than \$10,000 so that no CTR is filed."

Now, that's what we were confronted with, and it's for that reason that we have a problem. That's what we're confronted with. I can't change the facts of our particular case. So we don't have the one thing that Aversa and Mento had, which was that it might only have been bank policy. In our case, the agent said my client referred to those cash

reporting requirements, and so therefore -- I would agree with you. I would hope to be able to, if we could try the case again, to win it on that basis. But I think we do have a problem.

We were going -- let me tell you this. We were going to the Supreme Court on cert, so we may end up with a decision.

COMMISSIONER MAZZONE: What is it that we can do? It sounds like you want us to pass the so-called Shirk amendment.

MR. LaCHEEN: Yes.

COMMISSIONER MAZZONE: I'm not sure we can do that, but what do you want us to do? The conduct you described, except for the intent, might very well happen with somebody who is not a legitimate gun dealer. It might have been a very illegitimate -- and exactly the same conduct you've described except for one thing, and that is the intent in Mr. Shirk's mind.

MR. LaCHEEN: That's right, and I think that's what the guideline says.

COMMISSIONER MAZZONE: So why should we reduce the guidelines that apply to drug dealers in order to accommodate

Mr. Shirk? Isn't that what you're asking us to do?

MR. LaCHEEN: Not exactly. What I'm saying is that I agree that the cases ought to be examined on an individual basis to determine whether or not there was some intent to conceal an underlying offense.

In our case -- you know, I know about those cases where the money's illegal but they don't try to conceal it, and the defendants get a benefit on those cases. In our case, not only was the money legitimate, not only were the deposits made into his account, under his own name, so that there was no attempt to conceal the source of the money or whose money it was, I think this is the case for level 6. And I don't think it should be bumped up 100 times because of the amount involved. Because this is the kind of an offense, if a man makes a mistake once, he's going to make that same mistake 40 times if he's in business, or 50 times. And what happens is, of course, then they have all these other ways to exaggerate it when you start to consult the scales, the charts, you know, they just run up the numbers. \$600,000 becomes an offense of level 17.

The offense was done the day the man made the first mistake. So there are two things that could be examined

here, but they depend upon the facts of the case. If a man is unlucky enough to be convicted by a jury of this kind of offense under these facts, then I still think that the sentencing judge ought to have the opportunity to do exactly what the judge did in this case. He said the jury acquitted the man of the tax count, there was no other unlawful conduct, and the evidence is clear that he might not have known it was illegal, even though he knew it was a violation of a known duty.

So therefore, I think that the mistake that was made here -- the judge could have given him probation, I think, but that's beside the point -- the mistake was on the part of the Third Circuit. We've got a circuit that doesn't, you know, doesn't understand what you guys meant when you said atypical cases, you know, should be taken out --

CHAIRMAN WILKINS: There's an amendment out now for publication that would put this case at level 6. You're saying because it wasn't tax evasion or some other unlawful activity, so it's a level 6 as a --

MR. LaCHEEN: We hope it will be, yes.

CHAIRMAN WILKINS: Sir?

MR. LaCHEEN: I say we hope it will be.

CHAIRMAN WILKINS: Because that's out there now for comment.

MR. LaCHEEN: Yes.

CHAIRMAN WILKINS: Yes.

MR. LaCHEEN: And we are in favor of it.

CHAIRMAN WILKINS: All right. Any other questions from Commissioners?

Well, thank you very much, Mr. LaCheen.

MR. LaCHEEN: Thank you for the opportunity to address you.

CHAIRMAN WILKINS: We appreciate your testimony.

Our next witness is Mr. Michael Dolan from the Internal Revenue Service. Mr. Dolan?

Anyone here representing the IRS? Mr. Dolan?

MR. DOLLY: Good morning. Patrick Dolly, with the IRS. Mr. Dolan should be on the way over. I think he was scheduled --

CHAIRMAN WILKINS: Well, would you like us to wait? This is unusual, we're running just a few minutes ahead of time, but we can wait. I see Mr. Alan Chaset is here, National Association of Criminal Defense Lawyers. We could take him out of turn and wait for Mr. Dolan.

MR. DOLLY: I'd appreciate that.

CHAIRMAN WILKINS: All right, let's do that.

MR. DOLLY: Thank you.

CHAIRMAN WILKINS: Mr. Chaset? I know Mr. Chaset is ready on a moment's notice.

We're glad to see you again, Mr. Chaset.

MR. CHASET: Thank you, Chairman Wilkins, members of the Commission.

One of the benefits of appearing somewhat later on a program is that some of the prior speakers anticipate some of your comments, and in my case, probably more articulately presented the positions that we at the National Association of Criminal Defense Lawyers have included within our written comments.

I have just one minor point to make and then would be pleased to answer any questions. That point is prompted by seeing the fact that Mr. Pauley will be descending from above and coming down here and making some comments to the Commission.

We at the Association have taken the position for the last several years that we believe that there should be some representative of the Federal defenders, of the defense

bar, in an ex officio position on the Commission. Obviously, we'd love to have someone who has a background as a defense attorney be appointed as a Commissioner, but we feel it would be appropriate in at least an ex officio circumstance.

Whether or not it's appropriate to add someone from the Bureau of Prisons, to reconsider, with respect, Mr. Reilly, someone from the Parole Commission, we think that issue should be revisited and when that issue is revisited, we would hope that someone from the defense bar has at least an ex officio representation on your Commission.

If a legislative package were to be developed, we would, of course, like that to be one of your recommendations.

Other than that, and to thank the prior speakers who have said most of what I wanted to say, and probably said it better, I'm available for whatever questions you might have.

CHAIRMAN WILKINS: Thank you, Mr. Chaset. Any questions from the Commissioners?

COMMISSIONER GELACAK: I take it -- I may be wrong about this -- but I take it you would support the amendment to amendment No. 50, I believe, on the LSD weight removal?

MR. CHASET: There are several amendments that deal

with the issue of weight. Clearly, we stand for a position as individual amendments, whether it is the carrier of the LSD or the overemphasis of weight, in the guideline calculations. We've taken positions on each of those, and if you would like a specific response?

MR. GELACAK: How would you feel about removing the carrier weight but putting back in some sort of a recognition of the fact that in some cases there are sophisticated activities going on that deserve, perhaps, an enhancement. Those may not be LSD cases, but there may be sophisticated means and chemical means employed to bring narcotics into this country.

MR. CHASET: I think it's very important for the Commission as well as the Congress to realistically address relevant issues like that, if indeed there is data and information supporting it. What we are uncomfortable with, what we want changed, is some of the what appeared to be irrelevancies and unfairnesses of having someone with a sugar cube of LSD go to jail longer than someone with blotter paper, and go to jail longer than someone that uses some other lighter-weight paper.

We also, of course, have difficulties with some of

the marijuana statutes, where you have 49 plants equivalent to one weight and that 50th plant, be it a seedling or something else, being dramatically different. And we also have difficulties with the 100 to 1 ratio with crack versus regular cocaine.

I clearly think there are other ways of approaching it. Maybe the sophistication means may be one of them. I feel, however, where we are now requires study and, indeed, requires change.

CHAIRMAN WILKINS: Thank you, Mr. Chaset.

MR. CHASET: Thank you.

CHAIRMAN WILKINS: Mr. Dolan? Is he here yet?

Santina Bayerle? Is she here?

Good morning.

MS. BAYERLE: Good morning, and thank you for this opportunity and your attention and your time.

My name is Santina Bayerle and I am here today to have my voice heard regarding the proposed amendments of guidelines 2D1.1.

The language of the proposed amendment should include the fact that the guidelines as applied do not reflect the intent of Congress with regard to illegal street

drugs. Congress specified that the total weight of any mixture or compound shall be used in determining a sentence level. However, the blanket application of this stipulation by the sentencing guidelines has failed to consider the intent of Congress and therefore resulted in penalizing -- and I apologize for the misspelling of that word -- inadvertently those not falling under that intent.

It would seem that Congress' intent in using the total weight is in essence a form of penalty enhancement for those who profit from the compounding and diluting of an illicit controlled substance with another, usually inert, substance. For example, if 100 grams of cocaine is mixed with another substance to yield a 1,000-gram mixture, the final mixture is all sold as cocaine and thus the original 100 grams yields a profit on 1,000 grams.

The sentencing guidelines misapply the above rationale by including legally manufactured pharmaceutical therapeutic agents. Medicinal pharmaceutical controlled substances are dispensed in dosages with a filler added to facilitate ingestion by the patient or the user, since the doses are usually too small to be taken alone. This is the result of a legitimate manufacturing process over which a

defendant has no control. The size of the pills or capsules is arbitrary. A pill could have a 1 milligram dose in 100 or 500 milligrams total pill size. Furthermore, the purpose of the compounding is very obviously not the same as with street drugs, to enhance the profits from a given amount of an illegal substance.

Therefore, in a case in which pharmaceutical controlled substances are involved, determining a sentence based upon the total weight of the tablet or capsule is illogical and not in keeping with Congress' intent regarding street drugs.

The following examples serve to illustrate the absurdity and injustice of such an application of the total weight rule. I will read from it, because there are too many calculations here, numbers, but I will be within my eight minute limit.

In 1989, a West Virginia defendant was sentenced for selling 20,000 Tylox tablets. Tylox consists of 500 milligrams of Tylenol and 5 milligrams of occicidone, a narcotic. The total weight was 10,100 grams, of which 100 grams was narcotic. His sentence was calculated on the basis of the 100 grams of occicidone, which was then converted to

50 grams of heroin, and he received a level 20 baseline sentence. Had he been sentenced as in other cases, his sentence would have been based on converting 10,100 grams of Tylox to 5,050 grams of heroin, namely 10,000 grams of Tylenol would have been converted to 5,000 grams of heroin. This is a ridiculous proposition. The prosecutors themselves couldn't see doing that and so he was charged, and they bragged about it because in a note, in a footnote on this memorandum was, they said, "We charged you only 100 grams and the net amount of the narcotic. We could have conceded the total weight as it has been done," and they mentioned other cases.

Another case involves a Maryland man who was also sentenced in 1989 on the basis of 66 tablets of Percodan. Percodan is 5 milligrams of occicidone and 550 milligrams of aspirin, another filler. The sentencing memorandum erroneously claimed the total occicidone weight of 33.3 grams which was converted then to 16.5 grams of heroin. His sentence was based on this calculation, while in reality, the 66 pills had only 310 milligrams of narcotics, 100th part of the claimed amount.

This calculation and these sentences were never

corrected.

Finally, a physician wrote prescriptions for two controlled substances, hydromorphone and dolophin. The hydromorphone dosage was 4 milligrams, and the dolophin dosage was 10 milligrams. The tablets issued by the pharmacist from the manufacturer weighed 90 milligrams for the hydromorphone and 250 milligrams for the dolophin. Sentencing was not based on the total prescription dosage of 175 grams, but on the total pill weight multiplied by 2.5 for the hydromorphone and 0.5 for the dolophin.

So convert them to heroin. The total weight after heroin conversion was 8,059 grams, over 8 kilograms, from 175 grams. The difference is terrible. Over 16 pounds, or if you want to speak in milligrams, 8,050,000 milligrams.

There was no heroin in this case and the physician had no control over the pill size. He signed a prescription for a certain dosage and he's responsible for that dosage. He never saw the pills, he never possessed the pills, he had nothing to do with the medication whatsoever. But the sentence penalized him for something he did not do -- manufacture the pill or dilute narcotics for profit enhancement -- and for something that did not exist -- heroin.

Now, my only purpose for being here today is to appeal to your intellectual integrity and seek justice. I will ask you that the guidelines reflect the truth honestly. They should also be retroactively amendment to 1987 to correct this inappropriate application of the total weight rule so that individuals are not penalized for legalistic fiction after a process of legislative alchemy.

I think you very much for your time, your attention, and the opportunity you have given me.

CHAIRMAN WILKINS: Thank you very much.

COMMISSIONER REILLY: Mr. Chairman?

CHAIRMAN WILKINS: Yes?

COMMISSIONER REILLY: May we inquire of the witness as to who she represents or what your background is, please, if you would.

MS. BAYERLE: My background -- these calculations were all done by doctors and pharmacists, experts. I didn't because I have a Ph.D. in comparative literature and nothing to do with this.

My background, well, the third case is my son and he is slipping into insanity day by day. If he goes crazy, he is there for lactose which is milk powder. He cannot

understand why. It's a legal substance. I use it in my kitchen every day. Why should he be there?

CHAIRMAN WILKINS: Thank you, ma'am.

Mr. Eric Sterling? Is Mr. Sterling here?

Mr. Sterling represents the Criminal Justice Policy Foundation. After Mr. Sterling testifies, we'll hear from Mr. Dolan.

Good morning.

MR. STERLING: Good morning, Judge Wilkins and members of the Commission. Thank you very much for giving me the opportunity to testify before you on this matter.

In my prepared statement, I point out that I worked for the House Judiciary Committee Subcommittee on Crime in 1986 which developed the mandatory minimums which have so seriously impacted your work, and in that, I wanted to share with you just the observation that as the Judiciary Committee was processing this in 1986 and developing the mandatory minimums, they were really doing so without the benefit of the work that you were doing, that the Congress and your Commission were operating on a parallel track, and that that really, in effect, you might say, to sort of mix up the metaphor, derailed the logic of a sentencing guideline scheme.

What I want to suggest to the Commission, and I am very pleased that in amendment No. 40, the Commission is beginning to recommend that Congress re-examine many of the issues involved in sentencing, is that the Commission needs to take a stronger role in addressing to Congress the need for reform of the mandatory minimums and of the sentencing laws generally. I want to encourage the Commission in taking that approach.

I want to join with my colleagues at the American Bar Association in encouraging the Commission to consider prison impact considerations as it looks at the guidelines and as it makes its further amendments.

I would also like to join with the ABA in suggesting that the Commission give more consideration in the guidelines to alternatives to incarceration, that the guidelines are very much stacked toward the focus on incarceration and that that would be a very important direction that I think you could go in in your future work.

Looking at the matters before you specifically, Commissioner Gelacak, in your question about the carrier weight and the question of the sophisticated smuggling problem being raised, where the drugs are bonded into a

suitcase, for example, making it very difficult for a customs inspector to determine that drug-smuggling is taking place, that I think might be more appropriately addressed by a guideline that focuses on the sophistication of the smuggling attempt, and that perhaps you aggravate on that basis, but not simply on the basis of the weight.

One problem is that we have become weight-determined in this system, and that reflects in some sense an artifact of the way in which drug enforcement agents have historically looked at their work and what is a significant case. And so we now get into the language "mixture or substance" and raise that almost to a kind of icon level of reverence, rather than focusing on what the particular conduct is.

I think Judge Posner, in his dissent in Marshall, United States v. Marshall, made it beautifully. Should we be sentencing defendants on the weight of the defendant? I mean that the logic begins in sort of looking at these things is distorted.

One issue I would suggest to you is rather than looking at the weight is to look at the question of the actual market value of drugs that are involved. The weight issue was raised by the Congress in trying to focus, in 1986,

at high-level traffickers, at the highest-level traffickers, and at what the Congress had as a second priority in their report, the managerial level of the street traffick. Those were the two priorities that the House Judiciary Committee was trying to address.

We look at quantity. We see the problems that quantity presents to us. What if we were to redefine it in terms of dollar volumes?

✓COMMISSIONER GELACAK: Well, isn't that just, dollar volume is just another surrogate for quantity. I mean, it gets you to the same place, I think. And one of the problems is, there is a certain amount of sympathy on this Commission, I think, for the problems that are generated by quantity-driven guidelines. But there is also a concern as to trying to define or reach a point which is a better way of doing this.

Although I hear what you're saying about value or dollars, I think that's just another surrogate for quantity and it probably gets you right back to the same place.

MR. STERLING: The place I think that the Commission really ought to be going is the question, what is the harmfulness of the particular conduct? We've attached weight

or quantity as the measure of harmfulness. What I urge the Commission to do -- and I'm very concerned that in the drug equivalency tables that you have, I think it's on page 91 of the latest issue, there are drug equivalencies that in some respect I don't think make sense.

For example, you have 1 gram of PCP equalling 1 kilogram of marijuana. Now, a gram of PCP in its street form is a couple of PCP cigarettes. I think most people would say, to suggest that that is the equivalent of a kilogram of marijuana, of a thousand grams, doesn't make sense. You have a gram of methaqualone equalling seven-tenths of a gram of marijuana. A gram of methaqualone is many doses of that particular drug.

So what I would recommend is that you consult with the National Institute on Drug Abuse and other groups and try to get more of a scientific determination of relative harms in this area.

I want to address a couple of the amendment specifically. In amendment No. 8, in terms of the approach that the Commission is taking there, just a couple of comments. In the limitation on the potential to get mitigation, you say that the defendant would not be eligible if the

defendant had ready access to a firearm. I'm concerned that may be too general. Those of us who have any kind of experience with people who live in rural parts of the country know that firearms are readily possessed, they are kept in homes for protection of property, for protection of family, simply because one can't dial 911 out in the country and expect protection if a break-in is about to take place.

I'm concerned that if we attach almost a talismanic approach to firearms, to suggest that anybody who has a firearm, quote, "ready access to a firearm," might not otherwise be entitled to mitigation when their role in this offense is minimal, unsophisticated, unskilled, and the other kind of criteria that are directly relevant.

Also in amendment 8, I'm concerned that, for example, it seems that mules, for example, would be excluded. I would again urge the Commission to go back and look at that. It seems to me that they epitomize the unskilled and unsophisticated, in many cases, and that in appropriate cases, they shouldn't be denied that kind of capacity for mitigation.

COMMISSIONER CARNES: What about the fact that our research has shown that judges are all over the map on this?

Some judges absolutely will not give a courier or mule any reduction; some judges will give minor; some judges will give minimal.

What do you think about an approach that would make it more uniform? For example, a courier could be considered for a minor, wouldn't have to get it automatically, but given the importance of what he or she was doing in the particular scheme, could not be given a minimal role reduction. What would you feel about that kind of approach?

MR. STERLING: Well, I think, if I understood what you outline, that it not be automatic I think is appropriate. I think that it should not be automatically excluded. And I may have misread the proposed amendment, in that I had the impression that it sort of was an exclusion of mules.

COMMISSIONER CARNES: There are all sorts of permutations of the amendment, yes.

MR. STERLING: Okay. Well, recognizing that -- I apologize for not knowing all of those permutations as well as the Commissioners and your staff -- but I think that, if I understood your specific question, there is importance to give guidance to characterize what is the extent of knowledge that the mule enters into it.

✓ COMMISSIONER CARNES: And how, when you see a mule -- you've got a mule, you've got drugs, and that's just about all a judge knows. They can weigh the quantity, but they don't know much more. What would you use to distinguish the mule who gets no reduction from the mule who gets minor from the mule who gets minimal -- or courier, either one?

MR. STERLING: It seems to me that to the extent that it's able to be determined, one would try to determine the sophistication of the courier. Is this courier or mule, does their passport reveal frequent entry into the United States? Is it a first time? Is this person a tourist?

What can we learn in our pre-sentence investigation about this mule? Has this mule been tricked? How naive is this mule, or is this mule simply a part, a regular employee of the smuggling organization?

Those, it would seem to me, be the kinds of things that one would look at. I recognize that it's difficult for the court to know that, and yet to the extent that can be ascertained, it seems to me that's relevant in applying the mitigation factors.

CHAIRMAN WILKINS: Mr. Sterling, your time is just about up. Let me ask you this.

This Commission some several years ago and each year reiterates it's strong opposition to mandatory minimum sentencing provisions, not only in correspondence but in the report we've done, and there is now some legislation pending in the Congress that would abolish mandatory minimums.

What assistance can we expect from you and your Foundation to assist the Commission in this regard?

MR. STERLING: We have worked with groups to try to dramatize the injustices of mandatory minimums. We worked with Julie Stewart in the founding of Families Against Mandatory Minimums a couple of years ago. We worked with other public interest groups that are concerned about this issue. We are trying to consider ways to influence members of Congress, to better educate them about the injustices and the problems that these present to the bench.

We will continue to do that, and in whatever way that you would suggest, or your staff, well, we'd be delighted to work with you.

CHAIRMAN WILKINS: Well, we may call upon you, because we may not solve all the problems of the world in this year, but we might can solve a few, and this would be a major step in the right direction, if we can convince the

Congress that this is not a tough-on-crime or soft-on-crime issue.

MR. STERLING: Yes.

CHAIRMAN WILKINS: It's a question of the most effective justice system we can design, and in my judgment, mandatory minimums many times run counter to that desirable goal.

MR. STERLING: Judge Wilkins, members of the Commission, thank you very much for your consideration. I don't envy you the task that you have in trying to sort through all of these proposals and these technicalities.

Thank you very much.

CHAIRMAN WILKINS: Thank you, sir.

Now Mr. Michael Dolan from Internal Revenue Service.
Good morning.

MR. DOLAN: Good morning, Judge Wilkins and members of the Commission. I appreciate the opportunity to be here. I am Mike Dolan, I'm the Acting Commissioner of the Internal Revenue Service, and I have with me this morning Pat Dolly, who is the Associate Chief Counsel for Enforcement Litigation. I will tell you that I'm a little more comfortable than I was a few minutes ago when I heard discussion on weight of

defendants. I was fearful it would move to weight of the witnesses, and I'd be in deep trouble.

[Laughter.]

What I'd like to do is, I have prepared a more extensive piece of testimony that I have advanced to the Commission ahead of time. What I'd like to do is briefly summarize from that and point out the places where we'd like to encourage your continued attendance.

First of all, I would say we very much appreciate the knowledgeable involvement the Commission has shown in the issues around tax crimes and tax enforcement historically.

What we think we will do today is state briefly a concern we have that potentially the November '92 sentencing guidelines changes have produced an unintended consequence of eroding voluntary tax compliance. Today, the underpayment of income tax is estimated to range somewhere in the \$110 to \$127 billion range. The largest part of that tax gap is something we call the under-reported gap, which is essentially people who either don't report income or overstate deductions. Additionally, the Treasury has denied billions of dollars of uncollected excise tax, payroll tax, and estate gift tax.

In order to respond to that in a somewhat more

systematic way, we have launched an effort we've called Compliance 2000, and this is an approach that is designed to be multifaceted. On the one hand, we know that there are some taxpayers who, by force of their lack of understanding or inability to seek assistance, are unable to meet their tax obligations, and for those folks we are favoring, clearly, outreach and assistance over enforcement.

On the other hand, there are a specific group of folks who for one reason or another make it a very aggressive endeavor on their part to specifically evade the tax laws, and for those who willingly evade their responsibilities, Compliance 2000 envisions that this group be dealt with aggressively, not only to redress their own violations, but perhaps more importantly, as a way of sending a message to every American, namely that there are serious consequences to failing to voluntarily comply with the tax laws.

Perhaps our most serious challenge to the integrity of the system overall is an area we call the non-filer program. Somewhere between 6 and 9 million people who should have filed tax returns last year did not, and through aggressive outreach and assistance, we are trying to encourage the vast majority of these citizens to come forward and get

assistance and get back in the system. However, some will ignore that outreach, and because they have consciously planned and executed, oftentimes through elaborate deception, to specifically evade their responsibility, in the most chronic and flagrant of these cases we will need to resort to criminal prosecution.

In these cases, the sentencing guidelines will have a significant impact on our ability to succeed in returning overall non-filers to the system. Sadly, after the '92 amendments, the guidelines may actually have impeded our effort in this area.

Last year we initiated roughly 5,000 criminal investigations and in concert with the Justice Department produced 2,651 convictions. In a context where we receive over a billion information documents every year, process 200 million tax returns, audit 1.3 million tax returns, our criminal involvement, our criminal case-making is by definition only a very small percentage of the enforcement effort that we exert.

We reserve criminal prosecution for only the most serious of tax violations that we uncover, and seriousness, in our mind, of a tax offense by our definition involves more

than just the amount of tax lost in a particular case. Equally if not more important is the nature of the offense and ultimately the threat it possesses to the integrity of the overall system.

Last year's 2,651 convictions were selected and brought to be able to send a dual message. To the vast majority of Americans who voluntarily comply and pay their fair share, it's hopefully a message of fairness and equality, a reassurance that the Government will insure that those who intentionally do not comply with the tax law will be brought to justice. On the part of those who have committed the tax crimes or who are contemplating doing so, the message is one of warning: There should be or will be severe consequences for their action.

To insure that this message permeates the system, our Criminal Investigation Program takes great care to insure that investigations cover a wide spectrum not only of incomes but of occupations, businesses, income brackets, regions of the country, and types of violations.

We are here before you today because we are concerned about the message that is conveyed to taxpayers when, after we carefully select the case, expend the scarce

enforcement resource, the violation is deemed minor enough to warrant a virtual certainty of probation for the offender. This message, we think, can hardly be clear enough to serve as the basic kind of deterrence that we think is so important to maintaining the efficacy of our voluntary system.

Given their limited number, we believe our criminal cases ought generally to hold out the likelihood of incarceration, if only for a short period of time, in order to vindicate the honest of most taxpayers and to deter the potential offender. Yet the revised sentencing guidelines virtually eliminate the prospects of jail time for all but those offenses involving the largest amount of unreported tax.

As you know, under the guidelines the recommended prison term is tied directly to the amount of tax lost, the amount of tax that was intended to be evaded. Under the sentencing table amendments to the guidelines which took effect in November of '92, the maximum amount of tax that could, with an acceptance of responsibility, result in a sentence of straight probation in an evasion case was increased from \$10,000 to \$40,000. This makes it unlikely that a taxpayer with up to \$142,000 in unreported income will ever be incarcerated under the guidelines for tax evasion.

CHAIRMAN WILKINS: Why is that, if the judge is given the option of prison or probation?

MR. DOLAN: Well, you've always got the option, but structurally what you've done is built in, I think, a predilection, if you will, to probation.

CHAIRMAN WILKINS: You mean because the judge is going to opt for probation rather than incarceration?

MR. DOLAN: Well, I think it's hard for me to read the minds of the judge, but I think you've set it up structurally so that the inference almost attaches to probation over incarceration.

I think what you do when you raise the bar like that, there are only 8 percent of Americans that have an income over that, and when you raise the bar that high and structurally, essentially, immunize 92 percent of the American taxpayers, I think you've produced, perhaps, an unintended consequence.

That result is even, I think, more dramatic in the failure to file area. In failure to file prosecutions, the maximum tax loss that could, again with an acceptable of responsibility, result in a sentence of probation was increased from \$20,000 to \$70,000. As a result, you have

taxpayers who will wilfully fail to file a tax return and receive up to \$250,000 in income over a three-year period of time and still not be incarcerated for their crimes. Again, only 6 percent of Americans would ever fall above that bar.

In sum, only the smallest percentage of the taxpayers who commit tax crimes face a certainty of some incarceration under the current guidelines, no matter how short the period of confinement.

There are other areas of concern I'd express to you today, but in respect for the time of the Commission, I won't. One of those is the E/FF electronic filing fraud, where typically what we have is crimes in the range of \$2-3,000, which while on the face of it the dollar amount is not significant, the threat it represents to the overall integrity of the tax system is formidable.

We spent a great deal of time structuring our criminal program to send the message to the American public that the tax system is fair and that tax crimes won't be tolerated. I am fearful that the tax guidelines send a different message potentially, and that is that tax crimes aren't so serious. The message is sent by a sentencing system that holds out the possibility of a purely probationary

sentence rather than certain incarceration for the 95 percent of all Americans whose incomes would fall below the level specified in the guideline. We know that last year's changes in the table were not prompted by a need to produce lower sentences for tax offenses, but actually motivated by concerns wholly apart from the sentencing of these cases. However, when they occurred and we combined their early impact on our criminal investigation inventory with our Compliance 2000 thinking, we evaluated new ways we thought the sentencing of tax crimes might be more ideally fit within our compliance efforts.

As a result, rather than simply seek to recoup the two sentencing levels lost as a result of last year's amendments, we proposed amendment 41. That amendment is designed in our view to facilitate voluntary compliance. It's designed to provide for certain confinement of most tax violators whose crime produced losses exceeding \$10,000.

CHAIRMAN WILKINS: Let me ask you this, and I commend you on those amendments you all submitted. They are well written and they are written in guideline language. Sometimes we don't receive that from outside sources, and everything you say is correct. In addition to that, this

Commission committed to the Internal Revenue Service that we would give serious consideration to a revisiting of the tax guidelines for any unintended results.

What about the amendment that we have on the table? Have you studied that one? That is No. 21, amendment 21.

MR. DOLAN: We have indeed. We've looked at 21 and I believe amendment 5, as well, and I think that we respect the work that the Commission and the staff put into both of those, and I think it does, in fact, go a considerable way towards dealing with some of the potentially unintended consequences of the early one.

In the aggregate, we think 41 -- of course, you always like the child you birth -- but 41 to us seemed to do a more comprehensive job of overall comporting with our compliance effort. Possibly the effort, possibly the aspect of 41 that we most like is the fact that we think we encourage voluntary compliance of people re-entering the system by virtue of the way that we have included the acceptance responsibility as a reinforcement to the basic sentencing process.

We recognize that this causes a departure from the general table and general approach to fraud and theft. We

would, of course, want to observe for your attention that we think tax crimes may in fact be severable and should be thought of differently from just an amalgam of fraud and theft crimes. Virtually every individual in America, every family, every business, every organization in this country, as well as many foreign entities doing business in this country come up against their responsibilities within the tax code, and in that respect it's unique, and to the extent that there's any erosion of the voluntary responsibility, their effects are insidious, because a system built on voluntary declarations and payment of tax can't weather a breach of the confidence that individual participants would have if large-scale evasion was possible or systemically appeared to be possible.

As I mentioned, we do think amendment 5 has got merit in a number of key places. We appreciate not only the work that the Commission staff has done on the amendments that are on the table, but also respect and appreciate the courtesy extended the IRS. We specifically appreciate the commitment you made early on for our attendance today, and pledge our ongoing willingness to work with the Commission in an objective we think we probably share.

CHAIRMAN WILKINS: Thank you, Mr. Dolan. Any comments or questions from members of the Commission?

COMMISSIONER PAULEY: I have one.

CHAIRMAN WILKINS: Yes, sir?

COMMISSIONER PAULEY: One of the things that our Tax Division pointed out, and I know they've worked with you to some extent in the preparation of your amendment, is that your table ends at \$800,000 and that while it's true that obviously even an \$800,000 amount is not a typical case, and most of your violations involve smaller amounts, the Tax Division indicates that they are increasingly seeing motor fuel excise cases which involve many millions of dollars in lost tax revenue and believe, therefore, that the table should be extended to encompass higher tax losses than are now reflected. Do you have any comment on that suggestion?

MR. DOLAN: Only to categorically agree with that. That's an oversight, I should have mentioned that. I do think that that's -- while as you point out, the majority of our cases are below that threshold, increasingly things like motor fuel excise have taken this well above that \$800,000 mark.

COMMISSIONER PAULEY: Thank you.

COMMISSIONER GELACAK: Mr. Dolan, do you have internal guidelines as to when you start a criminal prosecution?

MR. DOLAN: Yes, we do.

COMMISSIONER GELACAK: What dollar figure would that be?

MR. DOLAN: Well, there is not a dollar figure, per se. There are a series of criteria that evaluate dollars among other issues, and typically the other issues have to do with the nature of the offense, the kind of area in which it's being promulgated. But there is no level below which we will at least be willing to investigate potential criminal prosecution.

COMMISSIONER GELACAK: Well, what dollars would the majority of your cases involve? Would it be \$1,000, \$10,000?

MR. DOLAN: I think some of that becomes a chicken and egg because of the effect, for example, of sentencing guidelines. I think you will find that what we bring to the U.S. Attorneys is driven in some part by the sentencing experience. I would say on the whole, they probably fall around and above the \$10,000 mark.

COMMISSIONER GELACAK: That would be evading

\$10,000 or more of tax liability?

MR. DOLAN: That's correct.

COMMISSIONER GELACAK: How many cases of the 2600 or 26,000 -- I've forgotten?

MR. DOLAN: It's 2,600.

COMMISSIONER GELACAK: How many of the 2,600 would be at that lower dollar figure?

MR. DOLAN: I could certainly furnish that. I do not --

COMMISSIONER GELACAK: I mean, would it be a large number?

MR. DOLAN: Well, I think probably in the aggregate it wouldn't be a large number, but also there is no implied or explicit immunity for people below that, either. My fear is that structurally we could end up doing, with the sentencing guidelines, something that is not now the case, where people would pretty much figure they got immunity below a certain dollar amount, and they do not have that under our current case-making procedures.

COMMISSIONER GELACAK: I don't disagree with that. I guess in today's circumstances, where everybody's chasing resources that are somewhat scarce in the Government and

other places, it would seem to me that as a matter of course your criminal enforcement efforts would be directed at the higher end of that scale, so that even if there appeared to be some built in immunity, you would be more inclined to direct the resources of your agency chasing those people who are major tax evaders than you would trying to make the case that you shouldn't do it in any event because we're going to come after you no matter what you do it for.

MR. DOLAN: As a case of straightforward logic, I wouldn't argue with you. I mean, when you're trying to balance the application of your resources, you're always going to balance it against your higher profile, higher yield. But again I come back to the point that almost like some of the earlier discussion the Commissioners heard today that the dollar evaded is oftentimes not as reflective of the underlying deception, the underlying set of intent -- I mean, you may get, particularly in some areas, you may get some large dollar, relatively unsophisticated crime where, in terms of its effect and potential threat to the system, a smaller case might well be of more concern to you.

CHAIRMAN WILKINS: Yes, did you have a question?

COMMISSIONER MAZZONE: I did have a question

earlier. I don't know if you were here, Mr. Dolan. We had an appeal by a defense attorney from Pennsylvania about a tax case in which tacked on to it in an entirely separate offense was a money-laundering count. The defendant was acquitted of the tax counts but convicted of the money-laundering count. Our amendment would take care of what he is complaining about, if we adopted it. But what would your position be on that amendment? Do you understand? Were you here at the time?

MR. DOLAN: I wasn't, but I think maybe Pat was.

MR. DOLLY: You're talking about the reduction on 2S on money-laundering?

COMMISSIONER MAZZONE: Yes.

MR. DOLLY: We have been discussing the amendment with the Department of Justice. Basically, our views are the same as with the Justice Department on that, and we concur -- I believe that's amendment 20?

CHAIRMAN WILKINS: Yes, that's correct.

MR. DOLLY: We concur with the --

CHAIRMAN WILKINS: I read our amendment that we increase the penalties for true money-laundering, aggravated cases of money-laundering would increase under this, but they

would be reduced into the mere deposit case, for example, or in a case of structuring where there was no criminal activity involved, there was no tax evasion involved. It would reduce in those cases.

I'm not sure that's not a better position for the Government to take, to increase it in the aggravated cases and perhaps decrease it in those cases that are -- I don't want to call them technical violations, but not the violations that really we are most concerned about.

But I'd be interested in your continuing views. I guess you are looking to Justice to advise on that issue, is that right?

MR. DOLLY: That's correct.

CHAIRMAN WILKINS: All right, sir.

Well, thank you very much. We appreciate your --

MR. DOLAN: Thank you again for having us. We appreciate it.

CHAIRMAN WILKINS: -- your consideration and working with us, and last year and in the future, too. I know we'll continue to work together. Thank you.

Our next witness is an ex officio member of the Commission and appears today not only in that capacity, but

also in the capacity as the Department of Justice representative, Mr. Roger Pauley.

We'll be glad to hear from you now, Mr. Pauley.

MR. PAULEY: Thank you, Mr. Chairman and members of the Commission.

I will be discussing the money laundering guideline and hope to respond to your implicit questions, I guess, near the end of my remarks. We don't agree that they would increase the sentences for aggravated cases, but, rather, the contrary, as I will indicate.

The Department of Justice appreciates the opportunity to appear before you today to present our views on the pending amendments. And in order to leave maximum time for your questions, I will condense our written submission and, in doing so, intend to depart substantially from the organization therein of our comments.

The published amendments include, as you have heard this morning, many far-reaching proposals that would dramatically change the operation of the guidelines and that, in our judgment, in many cases would trigger new ways of litigation.

The department believes that, as a whole, the guidelines are functioning well and that no wholesale or

conceptual revisions are necessary. Moreover, this amendment cycle seems to us a particularly inappropriate occasion to make such changes, considering the advent of a new administration whose officials have not yet had time to focus on the guidelines in any depth or detail, and the fact that the Commission is missing two of its seven voting members.

These general views provide the backdrop for our vigorous opposition to amendments that would have a major systemic impact on the guidelines, such as those to eliminate the requirement for a government motion to reduce a sentence based on cooperation, those that would eliminate or restrict the traditional rule permitting the use of acquitted conduct in determining the guideline sentence, and the proposal that would permit departures for combinations of offense characteristics that the Commission has identified as not ordinarily relevant.

In our written statement, we have set forth several individualized reasons why each of these proposals would be unwise, but unless you desire, I shall not reiterate them here. In general, all of these proposals would in our view produce much additional litigation that the already hard-pressed sentencing process can ill-afford, while at the same

time adding nothing to and, indeed, detracting from the fairness of the guidelines.

Although we do not favor the adoption of amendments that would significantly alter the operation of the guideline system, we do not believe that the Commission should opt this year to change nothing. We think the Commission has an obligation, where particular guidelines have gaps or are clearly producing unjust results, or because of ambiguity, have produced conflicting appellate decisions, to make appropriate remedial changes.

In this light, let me focus on as few areas in which we believe that amendments are in order. First let me discuss the fraud guideline. This guideline at present is almost entirely driven by the amount of pecuniary loss caused or intended by the offense. This focus results in significant under-punishment of several species of fraud in which the causing of pecuniary loss is not the object or the result.

For example, gain is absent as even a relevant factor under the guideline. Thus, a fraud case involving misrepresentations as to the existence or value of collateral used to secure a loan, where the defendant intends no loss and none fortuitously occurs, but where the loan creates large

profits for the wrong-doer, would receive only the low-base offense level sentence, despite the fact that huge losses by the lender were risked by the scheme. Indeed, another way to view the gap in the current guideline is to focus on the absence of risk of loss as an enhancement or basis for upward departure, since virtually all situations involving gain, but no loss, will involve the creation through criminal conduct of a substantial risk of pecuniary loss.

Adding risk of loss as a criterion for the fraud guideline is suggested in Amendment No. 65, and we would welcome working with the Commission to develop an appropriate amendment in that regard.

Similarly, Amendment No. 7 properly points out that the fraud guideline does not adequately treat frauds in which in other ways loss does not capture the seriousness of the offense. For example, frauds involving the obtaining of false identification documents or cases charging mislabeling are not adequately addressed today. In other cases, the offense may cause significant trauma to a victim or may bring about his or her insolvency or near insolvency. Then, again, in food-medical fraud cases, monetary losses often do not reflect the potentially significant negative health risks

caused by defendants who distribute outdated or ineffective drugs.

We, therefore, strongly support Amendment 7, and again would welcome the chance to work with the Commission to develop an amendment to the fraud guideline to incorporate the concepts I just discussed.

Second, let me talk briefly about drugs. A number of the published amendments would affect the guidelines relating to drug sentences. Of these, one of the most important is Amendment 8, which would establish a cap of base offense Level 32, equivalent to approximately 10 years imprisonment.

For defendants convicted of drug offenses who qualify for a mitigating role adjustment, irrespective of the quantity of drugs for which they are responsible, we think we understand the view underlying this amendment, namely that drug sentences for persons who play a subordinate role in a drug transaction are currently too high and are driven too much by quantity.

However, the recent amendment of the relevant conduct guideline addresses some of these concerns. Because of its widespread effect on the system, moreover, we cannot

support Amendment No. 8 as drafted, and indeed our further trouble by the notion of using a cap, an inherently arbitrary device to address the perceived problem of overly harsh sentences. Nevertheless, if despite these objections and concerns, the Commission decides to go forward in this area, we could accept a narrow form of the amendment with the following features.

First, the amendment should be limited to minimal, as opposed to minor players, in order to reach only the least culpable class of drug felons. Second, Amendment No. 60 should be adopted and incorporated into the amendment, to make clear that no role adjustment is appropriate for drug defendants, whatever their role, whose relevant conduct consists only of drug quantities in their personal possession.

Third, a statement broader than that embodied in the amendment should be included precluding its application to a defendant who possessed a firearm or other dangerous weapon or directed or induced another person to do so, or who engaged in violent conduct. And I noted Mr. Sterling's testimony with which I guess we are just in direct disagreement.

Finally, current application Notes 2 and 4, which

the published amendment would delete, should be retained, as explained in our written statement. Amendment No. 8, as thus modified, would in our view address the concern that drug quantity drives sentencing to too great a degree, while yet avoiding radical changes in the guidelines that would generate wholesale litigation.

On another matter, we endorse in concept the adoption of Amendment No. 10, which would resolve a split among the circuits by defining mixture of substance for guideline purposes as not including the portions of a drug mixture that are both uningestible and unmarketable. If this is done, however, it would seem proper, as I think has been reflected in some questions from the Commissioners this morning, to add an enhancement or upward departure suggestion for cases in which sophisticated means are used to create a mixture in an effort to avoid detection or facilitate the offense.

CHAIRMAN WILKINS: Tell me why. What is the reason behind that?

MR. PAULEY: Simply that an offense in which a defendant has used unusual means to evade detection is, in our view, a more serious form of the offense, and I think

that is a concept that the Commission has recognized in that context.

CHAIRMAN WILKINS: So it is more difficult to detect?

MR. PAULEY: Yes, and in part because it may facilitate the commission of the offense. It may facilitate the ability to bring the drugs to a particular point, whether it is across a border or elsewhere, depending upon the vantage point. It is either facilitating the offense or it is avoiding detection, which may boil down to the same thing, but that is the essential rationale.

It also, I guess, adds to the scienter in a sense. It is like it's something more than minimal planning. It shows a defendant who has devoted considerable thought and at times considerable expense to committing his offense.

Lastly, let me briefly mention two other proposals. One is Amendment No. 57. This would cure a nettlesome problem in the case law which we believe is caused in part by ambiguity in the current commentary to guideline section 4A1.2 relating to criminal history. The commentary has resulted in some appellate court holdings that sentencing judges have general discretion to entertain challenges to the

validity of prior convictions.

This trend in the decisions, in our view, is unfortunate and threatens unduly to complicate the sentencing process. A sentencing hearing is not ordinarily an appropriate forum in which to hear such challenges and should not serve as a substitute for appeal or habeas corpus. Until this commentary, it was never the law that such challenges could be raised at sentencing, except in those rare instances where a statute or the Constitution may require otherwise.

We strongly urge the Commission to adopt Amendment 57 as published, but with a slight modification as set forth in our written statement. Specifically, we would urge that the commentary provide simply that the Commission does not intend this guideline or commentary to confer any right to attack collaterally at sentencing a prior conviction or sentence beyond any such right otherwise recognized in law.

CHAIRMAN WILKINS: Is there any offending language in the present outline that you think is used to extend that right?

MR. PAULEY: Yes -- well, not in the guideline. As I indicated, in the commentary there is language that indicates I think that this matter is left for the courts,

essentially.

CHAIRMAN WILKINS: Right.

MR. PAULEY: And I think that has given rise to some ambiguity and some judges have viewed this as an invitation, which I don't think was intended, necessarily, to engage in these collateral attacks during the sentencing process.

CHAIRMAN WILKINS: I agree. I am against the collateral attacks. I don't think it is appropriate, except in very extreme cases. But I am trying to figure out really what the language is. If we say we leave this matter to the courts, how can that encourage the courts to rule one way or the other is what I am saying. I agree with the language you have written, but we don't want to amend just to amend, unless there is some reason to change it.

MR. PAULEY: As I indicated, as a general principle, we think that where the guidelines or the commentary unintentionally involve ambiguity and have given rise to conflicting court decisions, we think that is an area that the Commission legitimately should focus on.

CHAIRMAN WILKINS: All right.

COMMISSIONER CARNES: If we said that and did

whatever you wanted us to do, what would the result be, do you know? Would courts continue to say, whatever the Commission says on this, we feel these are sentence enhancers and if the underlying convictions are constitutionally invalid, they can't be considered, so we would be back to the same situation, anyway?

MR. PAULEY: Obviously, if courts find a constitutional right here to challenge, then whatever the guidelines or the commentaries say would be trumped by those decisions, but we don't in general believe that there is a constitutional right --

COMMISSIONER CARNES: You don't think that exists right now?

MR. PAULEY: -- and I suspect we would litigate such adverse rulings. I think there is a constitutional right, and I suspect we would litigate such adverse rulings. I think there is a constitutional right that the Supreme Court has recognized relating to the use of uncounseled convictions in some circumstances, but I don't think that there is any broader right to challenge on whatever due process or double jeopardy or whatever other constitutional basis one might find a conviction which has been duly entered

by a court of record. And I think it is this Commission's legitimate authority to determine which classes of convictions it chooses to deem valid within constitutional limits for criminal history purposes.

The final amendment I would like to discuss relates to money laundering. We do strongly oppose the published proposal developed by a staff working group. This proposal would, in our judgment, markedly reduce the base levels for money laundering offenses, even those by professional money launderers, to a level consistent with that applicable to a fraud offense involving the amount of money laundered.

This decrease would apply not only to money laundering involving white collar crimes, but also to money laundering related to a myriad of other serious offenses, such as arms violations, murder for hire and other violent crimes.

In many cases, the amendment would also reduce the offense level for money laundering related to drug trafficking, which now starts at Level 23 or 26 and increases, depending upon the amount of funds laundered. The only cases generally spared from reduction are some in which the money launderer committed the underlying unlawful activity.

In our view, the motivation for the suggested change in large part relates to so-called receipt and deposit cases, that is, cases in which the money laundering conduct is limited to depositing the proceeds of unlawful activity in a financial institution account identifiable to the person who committed the underlying offense. We believe that these cases are but a small segment of the universe of money laundering, and that recent case law developments, as well as internal Department of Justice prosecution guidelines, have cured many of the problems of the past.

The overall approach of the money laundering sentencing guidelines should not, in our view, be revised because of these cases. However, we acknowledge that receipt and deposit cases, when correctly identified, are more appropriately sentenced at a lower level. This end, we have recently submitted a proposal that would carve out receipt and deposit cases from current treatment under Guidelines 2S1.1 and 2 under our proposal. Money laundering offenses for which the underlying activity did not involve controlled substances, a crime of violence, firearms or certain other offenses would be sentenced at 8 levels above the level established by the fraud table, corresponding to the value of

the funds.

The proposal specifies further conditions. The money laundering conduct must have been limited to the deposit of non-currency proceeds into a domestic financial institution account that is clearly identifiable as belonging to the person who committed the specified unlawful activity.

The principal reason for the limitation to non-currency proceeds is the currency is the most dangerous form of proceeds from the standpoint of enforcement of the money laundering laws, since once deposited into an account with other funds, there is no ability to trace it back to the specified unlawful activity which generated the proceeds.

Our proposed treatment of this narrow class of cases is identical to the Commission's proposal relating to the class of cases subject to the most lenient treatment. However, our proposal preserves current offense levels for cases which do not fall within the exception.

We urge the Commission to favorably consider our alternative which we previously furnished, but is set forth again for convenience at the end of our written statement, and I would be pleased at this point to respond to any questions.

CHAIRMAN WILKINS: Mr. Pauley, before we examine you, are there any questions you would like to ask yourself?

[Laughter.]

MR. PAULEY: Mr. Chairman, I think I have been entirely clear and concise.

[Laughter.]

CHAIRMAN WILKINS: I am concerned about the money laundering guideline as it now stands and the injustices that I think perhaps through, but certainly can result. What I would ask the department to do in the next few days, if you would, is take some cases and run them through the present guidelines. I know your proposal deals with the deposit only situation, but run it through the present guideline and then run it through the Commission's proposed guideline and see. I believe that they produce sometimes higher results, but certainly not lower results, except in these cases that we are trying to take care of.

MR. PAULEY: I think it would be a very rare case in which it produced a higher result. We have done that. I have with me, in fact, a couple of examples I can share briefly with you. One involves --

CHAIRMAN WILKINS: We are short of time, but since

we are all working together, if you would share with us all of these examples, I would appreciate it. It would help me, because I can understand better things in the flesh than sometimes just as generalities. And I haven't understood why it is a non-currency deposit that you include in your deposit. If I embezzle cash in a bank and take it down the street and deposit it in my own account, then your proposal would not cover that situation. Why is that?

MR. PAULEY: Most money laundering I think is designed to reach the end result of cash, recognizing that cash is the ultimate liquid form of exchange throughout the world. As I indicated in my statement, for that reason, although most money laundering offenses of the type at issue here in terms of the types of offenses that will be covered, do not ordinarily involve cash. We, nevertheless, believe that to the extent that they do, that they shouldn't be subject to the lower penalties which our exception would carve out.

Cash is most frequently, I am told by our experts in the money laundering section, used in connection with offenses involving, for example, arms trafficking and the like, which would be classes of offenses which we would exempt

from the scope of this exception for other reasons. So that when you are dealing with basic white collar offenses, fraud offenses, you are most frequently, and indeed all but exceptionally not dealing with cash. You are talking about checks.

CHAIRMAN WILKINS: If you are dealing with cash, why not let this amendment apply to that, to the bank teller who embezzles cash and puts it in a bank, and really the washing goes the other way. She wants to wash it so she can write a check against it, rather than have all this cash, because that is what concerns me, maybe just a few cases. But if it is injustice, we ought to try to correct it.

MR. PAULEY: I understand your argument. All I can say is we have carefully thought about it and we will do so some more.

CHAIRMAN WILKINS: Thank you.

Any questions from the Commission?

COMMISSIONER GELACAK: I have one. Mr. Pauley, I am a little troubled by your initial assertion that you think that with the change in administration and the fact that the Commission has two vacancies, that there are some areas in which we should not act, but that there are some areas in

which we should.

That seems to be a disingenuous position on the part of the department, and since you sit as an ex officio member of the Commission, in any event, I don't understand the position that you take with regard to some of the amendments and the fact that we should not seriously give them consideration, but that in other areas we should.

It seems to me that if we are going to act as a Commission, it is incumbent upon us to discharge our responsibilities with regard to everything that is before us, and not to choose piecemeal from the menu, merely because the department feels that in some cases we don't have enough of a membership or we haven't had enough input in the areas. I wondered if you could -- maybe I am misrepresenting your position, but that is the way I took it.

MR. PAULEY: My position or our position I guess is based, as I indicated, on the belief that the guidelines are functioning well. If you do not share that initial premise, then obviously you may perceive the need for many far-reaching amendments.

We think that, as a whole, the guidelines are functioning well and that there is no urgency, therefore,

with respect to consideration of some more far-reaching of the proposals, and that while some of them can be argued on their merits and will obviously produce differences of opinion even within the Commission as far as the timing of that consideration, our view is that that should be deferred in recognition of both the factors that I indicated, that is, that it seems to us to represent almost an economical method of proceeding, to wait until there is a full complement of Commissioners.

If you have two-sevenths of your voting members who will be added within the next year, they may join with what has been a minority to possibly wish then to re-raise at the next amendment cycle far-reaching changes that you will have adopted on your premise this year, and I don't think that is the appropriate way to proceed.

Similarly, I would hope that the Commission would wish the considered input of the highest level officials of the Executive Branch and of the department, and the timing of this amendment cycle is simply such that that is probably not a feasible option, and so that is just another reason. I don't place great weight on that alone. I think the actions of the two --

COMMISSIONER GELACAK: As you say, we may be in the same place on this. I think the guidelines are working and working reasonably well, and I have expressed the view on a number of occasions that I don't think we ought to have wholesale amendments and have, in fact, said that in the last two cycles that we would be better off if we didn't do anything and just let the guidelines operate for a while, so we could get some empirical data built up on a solid base, rather than changing the base every year.

Is it a fair representation to say that the department would not be overly exercised if we didn't have any amendments in this cycle?

MR. PAULEY: I think that is a fair representation, but I do want to respond to the possible assertion that we were being inconsistent in, therefore, advocating any amendments. I think I sought to explain my view that while amendments that would change the way the guidelines operate as a whole are probably not opportune now, that where there are clear gaps -- and, obviously, when I say as clear gap, what is to me a clear gap may not be a gap in your minds, but where you identify an area in which there is as clear gap in a particular guideline relating to a particular offense, or

where, as I indicated in my example of the commentary language relating to collateral attacks on convictions, where something in the guideline itself appears to have given rise to ambiguity and conflicting interpretations by the courts, those are the kinds of fixes that I think can and should be adopted on an annual basis. They don't affect the operation of the system as a whole. They simply improve it incrementally, but those incremental improvements indeed should be the grist of your mill, as we see it.

Thank you.

CHAIRMAN WILKINS: Thank you very much, Mr. Pauley.

We are going to take a break now for one hour. Let me ask, is Mr. James M. Becker with us this morning? Mr. Becker, could you be our first witness at 1:30?

MR. BECKER: Very well.

CHAIRMAN WILKINS: Fine. Then after Mr. Becker, Mr. John Beresford.

We will start at 1:30 sharp. Thank you very much. We will stand in recess until that time.

[Whereupon, at 12:30 p.m., the Commission was in recess, to reconvene at 1:03 p.m., the same day.]

AFTERNOON SESSION

[1:42 p.m.]

CHAIRMAN WILKINS: Mr. James M. Becker, representing the Criminal Law Committee of the Federal Bar Association.

Mr. Becker, we are delighted to have you with us this afternoon.

MR. BECKER: Thank you, Commissioner Wilkins and members of the Commission.

I am here on behalf of the Criminal Law Committee of the Federal Bar Association. However, it is the Philadelphia Chapter. I don't pretend to speak for the Federal Bar Association nationally.

It is a pleasure to be here and I appreciate the opportunity to have a few brief moments to just comment on a couple of points that we have touched upon in our written comments. Before getting to that, however, I would just like to point out that our committee is made up of practitioners in the criminal law arena in the Eastern District of Pennsylvania.

We don't exclusively consist of defense lawyers. We have some representatives of the U.S. Attorneys office on our committee, but they don't usually deliberate in the kinds

of deliberations that occurred toward the submission of our comments, so I don't want to suggest that we have prosecutors who have voted on these things and endorse the comments that we have submitted.

What we have tried to do is not address all of the amendments, but to focus on some that we think are extremely important and of particular interest to our members, and I think at the top of that list is Amendment No. 20, having to do with the money laundering guidelines.

We concur with some of the findings of the working group report suggesting that the money laundering guidelines as initially promulgated contemplated offenses in which the money laundering activity in some very definite way facilitated the commission of other crimes or was aimed at concealing the proceeds of an offense.

Our group has identified several instances in the Eastern District of Pennsylvania, and we think they exist nationwide, where the mere addition of that money laundering charge, especially under 18 U.S.C. sections 1956 and 1957, artificially raises the guideline level beyond that of the underlying offense, when there is no real money laundering activity that somehow makes the person's conduct more

culpable than if they were just charged with a fraud offense. So for that reason, we applaud the proposed Amendment No. 20, heartily endorse it.

I was here for Mr. Pauley's comments from the Department of Justice, and I think he properly raises some concerns about certain kinds of offenses, whether the guidelines would result in a high enough level, and I think the appropriate approach there is to do as the Commission has done in the context of drug related offenses, where in that identifiable category you start out with the higher offense level.

I suppose people could disagree on exactly what the right number is there, but I think there is a very definite need, or we think there is a very definite need to make the clear statement, as this amendment does, that the mere addition of a money laundering charge, where the conduct of the defendant is no different than that of the underlying offense, if it is really just a fraud offense, then there shouldn't be such a different result under the guidelines.

Secondly, we very definitely oppose Amendment No. 5, having to do with the fraud, theft and tax tables and basically the elimination of the consideration of a more than

minimal planning adjustment of two levels, and in the tax end the use of sophisticated means.

Our committee's view on this proposed amendment is that the underlying premise which seems to be that we really can get away from that and assume that certain kinds of offenses, one they reach a certain dollar level, necessarily have a certain amount of planning, so that that upward adjustment should be triggered.

Our committee's experience is that there are just simply too many examples of relatively simple straightforward crimes that don't involve any kind of sophistication or planning to any great extent, that there are a large number of those cases where the dollar amount can be fairly high. For example, more than \$40,000, it can be a fairly straightforward offense.

I cited examples in our written submission of social security deceased payee cases, there are a fair number of these in our district, where the relative of a payee, the payee dies, the social security checks keep coming, the relative may even send a few of them back initially, but they just keep coming and the relative signs the checks very quickly, because the government keeps sending the checks and

the amounts go up in excess of \$40,000.

Our view is that kind of case ought not to have this built in, there ought not be an assumption that that involves more than minimal planning, and the reason for that is two-fold: I think, number one, there is some logic to having an enhancement for something that involves extensive or sophisticated planning, and I think that is, as Mr. Pauley suggested, those offenses are harder to detect, and once they are detected, there probably ought to be a stronger message to those who commit them or would think about committing them.

Also, that notion of sophistication captures to some degree a more culpable state of mind. We think the preferred approach would be the one invited by the amendment for comment, that is to better define an upward adjustment in terms of sophisticated or elaborate planning and to get away from what, in our view, the courts have made an automatic adjustment for more than minimal planning in large part based on just repeated acts.

We support Amendment No. 23, which would I think narrow the number of case in which an upward adjustment is made for an abuse of position of trust, by couching that amendment in terms of special trust. We applaud that

proposal, because in our committee's view there are simply too many cases where a relatively low-level employee does nothing more than breach the employee's fiduciary duty to the employer. I guess the low-level bank clerk or the postal employee is a good example of that, and we think that would do away with that and narrow the category of cases in which there is some upward adjustment for the abusive position of trust.

I guess we question whether at the next level up, however, the amendment as written might sweep broadly and that we wonder whether the mid-level manager in a corporation who, with the assistance of employees below him or her, carries out some type of an offense.

As written, I think this creates an open-ended area where judges will have to decide at what level of the management chain does this notion of special trust attach, and that poses a somewhat separate problem. But I think our committee very strongly feels that the basic approach of narrowing the category of cases in which this applies is appropriate.

Our committee also strongly endorses the approach reflected in Amendments 8 through 10 to the drug guidelines,

not that this is the only approach, but we very much believe, especially because of the problems of quantity driven system. In Philadelphia, there is a very large number of multiple defendant drug cases where these kinds of changes become very meaningful.

Specifically, No. 8, the idea of putting a ceiling at some level for those who would qualify for a mitigating role, and, even more importantly, doing something that hasn't been done before and that is to better define what kinds of factors make up a mitigating role.

For example, the application Note 5 we think identifies some factors that have been long overdue in terms of identifying who a person is that warrants the mitigating role adjustment, getting away from just what are the physical acts that someone performed and getting more at the notion of did this defendant profit, were they managing or directing other people. We think that represents a substantial improvement, as well as the companion Amendment No. 9 of trying to reduce the ceiling on the drug table back to where it was originally.

Our committee supports an amendment to section 5K1.1. I recognize there are three different proposed

amendments. One of them came from the Criminal Law Committee of the Judicial Conference, and, as I understand it, not all the judges may support that.

Here our point is a simple one: We don't think that the substantial assistance motion should depend in any way on the characteristics of the defendant, whether criminal history category or nature of the offense. It should be just like any other determination that judges make day in and day out, both legal and factual, under the sentencing guidelines. And we think that this one belongs with the judge, just like all the others. We question why treat this any differently than any other factual or legal determination.

It is certainly true that the Department of Justice, as a practical matter, will have perhaps the loudest voice in persuading the judge on whether assistance has truly been substantial or not. But we think this amendment is a sensible one, largely for the sake of the appearance of justice. It would just eliminate a category of cases where people complain about unfair treatment, not so much because they felt, of course, the individual feels I provided substantial assistance, the government said I didn't.

But I think you would be advancing the cause of the

appearance of justice in large measure by saying that that person could come into court and have his or her day in court. That is not to say they are going to prevail, but at last if they lose, they will now that that decision, like all other decisions in the sentencing context, was made by a judge and not by the individual adversary, the prosecutor handling the case.

Those completed the areas that I wanted to highlight. I noticed some discussion earlier this morning about whether amendments are a good idea or a bad idea, should be a moratorium on them or not.

Our committee, although this is the first time we have gotten into this process, we are certainly aware of the cumbersome process that results from amendments every year. On the other hand, we welcome this kind of opportunity, based on our own experience, to propose amendments, comment on amendments, and we don't see any reason to discontinue the Commission's laudable effort of trying to identify problem areas and cure them.

Five and a half years certainly might seem a long time, but in the guidelines experience, it is relatively short. Presumably, over time, the need to create amendments

will narrow, but it doesn't seem to us that it would serve any legitimate purpose to put a halt on the process.

Thank you.

CHAIRMAN WILKINS: Thank you, Mr. Becker.

Any questions or comments from the members of the Commission?

[No response.]

Hearing none, we appreciate very much the work of you and your committee, Mr. Becker.

MR. BECKER: Thank you.

CHAIRMAN WILKINS: Thank you.

Dr. John Beresford?

DR. BERESFORD: My name is Dr. John Beresford. I am a psychiatrist. I live in Canada. I am a United States citizen, and I have come to address the Commission on the subject of the carrier-weight provision as it applies to the sentencing of individuals convicted of LSD offenses.

I realize that a number of other witnesses are interested in this issue, and I hope I have some original remarks to make to you.

I belong to an organization which tries, among other things, to help dependents, children of families where

one or both parents are serving prison terms for LSD related offenses. And the reason for targeting this group is the inordinately long period of sentencing that LSD offenders are liable to.

In my correspondence with prisoners in United States prisons, I have found that a 10-year sentence for possession of just the two slips of LSD impregnated blotting paper is quite a normal sentence. I even have one case of a woman who is currently serving a 24-year term in Federal prison, therefore, without chance of parole for the possession of I think it was about 16 slips of blotting paper impregnated with LSD, and the reason for the length of her sentence was that the weight of the blotting paper was 58 grams.

Her husband received a sentence of 40 years for the same offense. I understand they were arrested together, and this couple left behind two children now ages 11 and 13 who are among the dependents that our organization is trying to do something to help.

Now, the measure responsible for these inordinately long sentences is, of course, the carrier-weight provision, and I realize that this is a provision which Congress has authorized and which the Supreme Court has ruled to be not

unconstitutional, so I am not arguing against it before you on grounds of unconstitutionality.

But I do have a different argument, a different set of arguments that I would like to present to you, and the objective is to show that the provision is irrational, was never properly thought out in the first place, and has no place in a rational system of sentencing.

Remember first that the use of blotting paper is a common method for distributing LSD illegally, and then consider that blotting paper is, by definition, a highly absorbent substance. This means that a given slip of blotting paper is going to absorb not just the drops of LSD solution that have been deposited on it, but a quantity of moisture from the atmosphere, sweat from the hands of the individual just arrested or possibly from the arresting agent, as well, and a number of other possible contaminants that one could think of.

So that when a technician is reporting the total weight of a sample of blotting paper in a trial procedure, he is in fact reporting the weight of three components, the LSD, the blotting paper and a number of other contaminants, principally I think what is called ambient moisture.

Now, I submit that Congress never authorized the determination of a sentence on the basis of the weight of this component, and I think it would have got itself into an enormous muddle if it had.

For example, added moisture cannot be construed as itself a carrier, because, if anything, it is a substance carried by the blotting paper. There is an argument going on at present as to whether blotting paper itself constitutes a mixture, part of a mixture. In any case, I think that it is not possible to construe ambient moisture as part of the mixture, since in some cases this moisture will have been absorbed from the atmosphere subsequent to an individual's arrest.

Now, these are some examples of what I mean by the irrationality of the carrier-weight provision. I am further contending that a judge who pronounces a sentence, in keeping with carrier-weight thinking, is not in an enviable position. In part, he is imposing a sentence in keeping with the will of Congress, but in part not. Because to the extent that a sentence is determined by the weight of substances belong to this third component, his sentencing I believe is outside the sanction of the law.

Now, you may not think that the weight of added water amounts to much. I suspect it does. We all know the difference between a piece of blotting paper that feels damp and heavy on a wet day and the same piece of blotting paper on a dry day. And I don't know how many weeks or months of prison sentence that such added water or other contaminants may add up to and translate to in terms of weeks or months in prison, but I think that even the addition of one week of unauthorized sentencing is reprehensible.

Now, that is one leg of my argument and it rests on the ground that the carrier-weight sentencing provision contains an in-built element of the irrational and is of questionable legality. But there is another side to the argument which I believe is equally disturbing, and that is the presence of inequity.

There are two sources of inequity that I can think of, but I think I just have time to mention one, which could be called the geographical. I would ask you to think then that a technician who weighs a sample of blotting paper in a region of the country where the atmosphere is naturally humid is likely to report a weight in excess of the weight that would have been reported if the sample had been collected in

a region that was dry.

So we face the incongruous situation of a Federal offender whose sentences varies according to the part of the country that his offense has been committed in. An offender in Massachusetts, let us say, would be awarded a longer sentence than an offender committing the same offense in the State of Nevada.

So on these two grounds, the questionable legality and the probable inequity, I respectfully ask you to forward to the Congress the following two recommendations: One, that the carrier-weight provision be deemed unworkable insofar as it relates to LSD, and that the sentencing of present and future LSD cases proceed on the basis of the LSD weight alone; and, two, retroactively that prisoners serving time on sentences determined by the carrier-weight provision be entitled to release as soon as that part of their sentence has been completed which corresponds to the sentence that would have been imposed if the provision had never gone into effect.

I want to say that, in conclusion, the reason for my appearance here has nothing to do with a personal issue. I have no member of my family in prison. I have no personal knowledge of anybody in jail. I believe it is as matter of

common sense and ordinary decency that this situation be corrected.

Thank you.

CHAIRMAN WILKINS: Thank you very much, doctor.

Sentences could vary from State to State or region to region because of the precipitation of air, is that what you said?

DR. BERESFORD: Yes, within a Federal jurisdiction, yes.

CHAIRMAN WILKINS: Because moisture in the air would weigh in on the paper?

DR. BERESFORD: Very much so, and that is a question which has never been considered.

CHAIRMAN WILKINS: Very interesting.

Any questions from Commissioners? Yes, sir.

COMMISSIONER REILLY: Doctor, you said you were a resident of the United States and also Canada.

DR. BERESFORD: I am a resident of Canada. I am a citizen of the United States.

COMMISSIONER REILLY: A citizen, excuse me.

DR. BERESFORD: Yes.

COMMISSIONER REILLY: I am curious, though, if you

would comment on what the penalties are in Canada.

DR. BERESFORD: I wish I could help you there, but I cannot. I have recently retired and I have only just taken an interest in this field.

COMMISSIONER REILLY: I see. Thank you.

DR. BERESFORD: I do believe, though, that the sentences in the United States are draconian in comparison to those in Canada.

COMMISSIONER REILLY: But you are not familiar with any of the Canada --

DR. BERESFORD: I'm sorry, no.

CHAIRMAN WILKINS: Anyone else?

[No response.]

Thank you very much. We appreciate your testimony.

DR. BERESFORD: Thank you.

CHAIRMAN WILKINS: We would be happy to hear from you as time goes on on this issue, if there is anything that you have in your research and your work, write us and let us know.

DR. BERESFORD: I can tell you stories.

CHAIRMAN WILKINS: All right, sir.

DR. BERESFORD: But these are all tales I have been

told from people in jail.

CHAIRMAN WILKINS: Thank you very much.

We have a panel now of Gene Brown, Faye Flanagan, Douglas Thrasher, Denise Helou and Marlene Miller. Please come around. Do you have one spokesperson, will you all speak, or how do you want to do it?

Well, I hope you will allot your time however you want to, so it suits us fine. Thank you.

MS. HELOU: Hi. My name is Denise Helou and I am here today to present to the Sentencing Commission information that I have collected in the past 6 months about the LSD carrier weight issue. I have collected this information for families against mandatory minimums.

This information has come to me in the form of a survey which I have mailed to over 120 LSD offenders serving time in Federal prison. My intent in conducting this survey was to show the inequities in sentencing that have been created by the judicial policy of including the carrier-weight of the LSD when determining the total weight of the drug.

The results of the survey have been put into graphs which you all have. LSD is not like most drugs, in that it

is sold by doses, not by weight. The value of cocaine, heroin and marijuana is determined by their weight. Six grams of cocaine is worth twice as much as 3 grams of cocaine. With regards to LSD, the drug cannot be cut to increase street value. The drug potency remains the same, regardless of what type of carrier is used.

To show how the actual sentence of each offender is not congruous to the weight used, let's begin by describing how there is no correlation between the amount of drug and its weight when the carrier is included. Let's look at our first graph, which charts the amount of LSD on the horizontal axis against the weight of the drug on the vertical axis. This is the graph that is hand-drawn.

The data on this graph represents information from 64 prisoners who responded to the survey. As you can see, the weight of the drug does not increase proportionately with the amount of drug. The graph does not demonstrate any such pattern in drug weights. Look, for example, at offenders who are charged with 1,000 doses. There were 8 altogether, including two pairs of co-defendants. The six separate weights are, in grams, 5.789, 6.53, 8.745, 8.9, 9 and 29. This range includes guidelines 28 through 32.

Some of the other carrier examples are even heavier. Reed Styers, 156-month sentence was severe, because his 8,000 doses were on 160 grams of tablets. Charles Smith was originally convicted for 360 hits on blotter weighing 2.9 grams. At his sentencing hearing, 5 hits on sugar cubes were added to his total weight. Those 5 sugar cubes weighed 11 grams. Those 5 doses raised his guideline level from a 26 to a 32. There is just no connection between the amount of drug and its weight. Likewise, there is no connection between the weight and the sentence.

The second graph attempts to show the disparities in sentencing that occur when the carrier-weight is included by demonstrating the inequities when assigning the initial base offense level.

I limited my study group to first offenders placed in criminal history Category 1, to reduce the variables caused by sentencing procedures. If the sentences were reflective of the drug amounts, the base guideline levels, the guideline set before enhancements and reductions would steadily rise as the weights increase. This is clearly not the case, as we can see the guideline level jump from 30 to 32, back down to 30 and 28 again, and then do the same for

the higher levels. This results in disproportionate sentencing.

Lester Liston had a distribution charge for 2,500 doses which weighed a heavy 33 grams. His 10-year sentence was more than Doug McMillan's 97-month sentence, whose 5,833 doses only weighed 25.84 grams. Michael Gage also received a 97-month sentence for his 1,545 doses, simply because his blotter paper weighed 13.5 grams. Chris Boothe, with only 599 doses, received a 121-month sentence because of heavy blotter paper, which put him in the guideline level of 32.

The lower line charts what the guideline would have been if the dosage equivalency of .05mg per dose is used. The equivalency was set by the Commission and is using cases where there is no actual LSD-2A, a circumstance which only happened once in my study. The figure appears to be fairly accurate for those offenders whose LSD was tested and weighed without the carrier weight.

In the examples of James Wehring, the 7,000 doses he was charged for conspiring to distribute did not exist. As a result, the court had to use the .05mg figure, giving him a guideline of 18. His is the only case in which this method was used to determine a sentence, thus creating even

more inequity in the sentencing process.

If such a uniform method, be it a formula or the weight of the actual LSD, were used for all defendants, the courts would not see many of the sentencing problems that exist today. An offender with 599 doses would not receive the same guideline level of 32 as someone who has 5,833 doses. The same applies to a man charged with 2,400 doses and a woman with 17,767, both of whom were placed in Level 34.

As it stands today, those with smaller amounts of drugs are often punished more severely than those with larger amounts. LSD sentences are not based on the amount of drug, but, rather, on the weight of the carrier. Using the actual weight of the LSD or an accepted uniform weight results in a fair and sound sentencing structure.

CHAIRMAN WILKINS: Thank you very much.

Anyone else?

COMMISSIONER MAZZONE: How again did James Wehring get down to Level 18? You say there was a conspiracy to distribute 7,000 doses?

MS. HELOU: Right.

COMMISSIONER MAZZONE: And that was not proven or was --

MS. HELOU: No, it was proven, but the government did not have any actual LSD to weigh, since it was a conspiracy charge, so they were forced to use the .05mg equivalency.

COMMISSIONER MAZZONE: I see. There was no paper, there was no physical evidence, no carrier?

MS. HELOU: There was no physical evidence, and there have been other cases where they have been no physical evidence, but they used someone else's drug, someone's connected weight, but in this case they could not do that, so they were forced to use the .05mg.

CHAIRMAN WILKINS: Other questions?

[No response.]

MS. FLANAGAN: Good afternoon. Excuse my voice, first of all. I do apologize. I have had a cold.

My name is Faye Flanagan and I am from New Orleans, Louisiana. I am here today to speak with you about my son Gordon. Can you hear me okay?

He was arrested in Pensacola, Florida in October of 1990, with intent to sell 9.9 grams of LSD. He was 22 years old at the time. My son had never been in trouble before. He had a full-time job in New Orleans at the Windsor Court

Hotel. He was a bartender there in their lounge. He was living at home and he was saving his money to go to school. So he was enticed by this extra money that he thought he could make.

Gordon received a 6.5 year sentence, 78 months under the Federal guidelines. Of the 98 grams, the blotter paper which held the LSD weighed 9.5 grams and the LSD weighed .75 grams. There is a great difference between the true amount of the substance and the exaggerated weight which includes the paper. The blotter paper, the sugar cube, whatever the carrier, is used to market the drug, but it does not enhance the drug or increase the price of the drug.

I fully realize the weight of the blotter paper does not release or excuse my son of possessing an illegal substance such as LSD. But should his sentence and the sentence of others be made to reflect the exaggerated weight?

Please take into consideration this testimony that you have heard today and try to understand that we believe that we are not trying to excuse the crime, but just to make sure that the punishment reflects the true weight of the illegal substance.

We urge your full support for proposed Amendment

No. 50 to the Federal guidelines and specify that Amendment 50 be fully retroactive.

Thank you for your consideration and I hope you understand our situation.

CHAIRMAN WILKINS: Thank you very much, Ms. Flanagan.

MR. BROWN: Good afternoon. My name is Gene Brown. I am from New Hampshire. I am here in association with the Families Against Mandatory Minimums and the Citizens for Equal Justice.

My son Adam is currently serving a 10-year-8-month sentence as a first-time nonviolent offender for the sale of LSD. Adam was 22 years old when he was sentenced. He will be 33 when he hits the streets. To date, I am thankful to say that the system has not been able to sew any hate in his heart.

If we were to break down the components that went into making up Adam's sentence, he would have received 3.5 years for the acid and 7.25 for the paper.

COMMISSIONER CARNES: Is that based on evaluation of the dosage or evaluation of what the weight of the LSD was?

MR. BROWN: The weight.

COMMISSIONER CARNES: Do you know what it would have been under a dosage sort of system?

MR. BROWN: No, I don't, ma'am.

It is really difficult for a person like me to come into a situation like this and not be intimidated or confused and still be able to speak coherently and somehow convey the intensity that I feel about this. And I have really agonized over how could I really address the truth of the situation and convey to you the situation, and I always come back to the form of a question, and I want to ask you that question.

If Congress, through the sentencing guidelines, or if Congress established the sentencing guidelines to eliminate the disparity in the sentencing of similar cases, and if Congress established sentencing guidelines to punish major drug offenders, why then are LSD offenders being punished 50 to 100 times for similar amounts? Why is this happening?

Why are the lowest level offenders, why are the jails filled with the lowest level offenders, and the people that are manufacturing and/or dealing with the actual powder or the substance getting lesser sentences?

My initial reaction to this was that I just could not figure out how it was happening. I thought I was in

another country. I mean you don't have to be a rocket scientist to see that this is unfair.

I am hesitant to give any more examples, because I think everybody sort of goes in another land, but I am going to do it, anyway. Whether it is heroin or cocaine or LSD, a 5-year mandatory minimum starts with 20,000 doses. That is where it starts. Now, for heroin, 20,000 doses is 100 grams. For cocaine, 20,000 doses is 500 grams. For LSD, 20,000 doses is 1 gram.

The problem is when you weigh the paper, one gram of LSD on paper translates into 114 doses. The value of 114 doses is \$171, as compared to the 20,000 doses of cocaine, which is \$17,000, or the 20,000 doses of pure LSD, which is \$30,000.

COMMISSIONER MAZZONE: Did you mean LSD?

MR. BROWN: Pardon me, sir?

COMMISSIONER MAZZONE: Did you mean LSD?

MR. BROWN: Yes, LSD.

COMMISSIONER MAZZONE: \$30,000.

MR. BROWN: According to the FARM circular, LSD without a carrier, 1 gram --

COMMISSIONER MAZZONE: Without a carrier?

MR. BROWN: Without a carrier, 20,000 doses valued at \$30,000.

My question to you folks is where is the equal justice. Furthermore, it's not like this has just happened. I mean this has been around for a while. This has been like 6 years, 5 years. What is the scoop?

CHAIRMAN WILKINS: Thank you very much.

Anyone else?

MR. THRASHER: My name is Doug Thrasher, and I am here from nearby Annandale, Virginia. I am here with the folks from FMM, Citizens for Equal Justice, and some members of my family.

My son Michael, who was 19 years old at the time of his arrest in Portland, Oregon, as a first-time non-violent offender, was sentenced to 121 months for possession of LSD. Had the carrier-weight not been weighed, he would probably have been sentenced for from 15 to 21 months. I would submit that if carrier-weight was not included routinely, he probably would have been tried in State court, rather than in Federal court, and have received a sentence appropriate in that State, which would have been even less.

The effects on my family and myself of his arrest

and conviction have been great, and the effects on him have been great. Some of those effects, in my opinion, are beneficial ones. He has now served some 18 months, we are able to talk on the phone regularly, weekly. He has changed. There has been a benefit. I am glad that his life has taken a turn from the course that it was on. That was an important event.

I suspect that by the time he finishes what would be the sentence he would have received without carrier-weight involved, that he will have gained all the benefit there is to gain from his punishment for this crime, and that he will spend, as things are now, an extra 8 years in prison at his own expense, at the taxpayers' expense, at the expense of the other inmates in the crowded facilities for the paper that the drug was on.

LSD is sold by the dose, not by the weight. It is ingested by the dose, not by the weight, and it seems to me only fair that you would be sentenced by the dose and not by the weight.

After listening to all of today's testimony and hearing the statements made by the Commissioners themselves, I am comfortable that you all know and understand this issue.

Today has been enlightening for me. It has made me aware of just what the level of knowledge on this subject is, and I am heartened by that.

By adopting Proposal 50, this Commission can stop these unjust sentences, and if it was instate retroactively, they could undo some of the injustice which has been done. As I am sure you are all aware, this is an item that is now very much before the public, as is evidenced by today's article in USA Today, on page A2, about the proceedings here today and this proposal. And there is legislation in Congress to deal with mandatory minimums, and so there are things under way that can move forward to change this problem.

Adopting Proposal 50 would be a step in that direction. It would work to more quickly solve one specific problem, and there are many of us working to raise the awareness of Congress. Chairman Wilkins your comment earlier that the FARM group is working to work with Congress, and we are organizing and getting more members all the time and would like to know of anything we might do to help this Commission with its deliberations on this matter.

If Proposal 50 is adopted, my son most probably won't be affected, but it would be a way to keep others from

being affected the same way, so I urge you to adopt it.

Thank you.

CHAIRMAN WILKINS: Thank you very much.

Anyone else?

[No response.]

Thank you very much.

Julie Stewart? Ms. Stewart is speaking on behalf of Families Against Mandatory Minimums.

MS. STEWART: Yes, I don't think I need to introduce myself. You have heard from several of our members today. A year ago when I sat in front of you, we only represented 4,000 people who were affected by mandatory sentencing laws, and today I represent 14,000. This is a growth industry, as you all know, and I expect our numbers will probably double again between now and next year when I sit here. But many of our members are also serving guideline sentences, either alone or in combination with a mandatory minimum, and what is going on here today is very important to them.

It is clear that our organization is mostly focused on the repeal of mandatory minimums, and I know that this Commission cannot grant us that wish. But I also know that your voices are vitally important in convincing Congress that

mandatory sentences do not work and to stop the enactment of future mandatory sentences.

I urge you to use your position on this Commission to more visibly and vocally oppose mandatory minimums. There are already three new bills in the Senate being floated that ask for more mandatory sentences, and this is just the beginning of the 103rd Congress. Now is your opportunity to stop these proposed mandatory sentences. It really calls for an all-out attack, a full-throttle campaign to educate the members of Congress about the sentencing guidelines, to convince them, to let them know that you have already got tough sentences and we do not need more mandatory minimums.

You are located only blocks from the Senate now in your nice new building, and it is very easy for you to walk over to the Senate and talk to these people, these Senators and the other side of the Hill, tell them why mandatory minimums do not work, urge them to stop messing with the very carefully calculated system that you all have been working on for 5 or 6 or 7 years. In fact, the system that Congress requested you put together in 1984.

I really cannot stress how important I feel it is to go public with this issue, the fact that sentencing

guidelines exist and that they are doing the job. I think if I could say what I would like to see you doing, I would love to see you hold press conferences every time some member of the Senate or the House introduces a new bill offering a mandatory sentence, and that you would immediately turn around and say, "Wait a minute, we've already taken care of this, we've got this sentence already established for it," and if you don't have one established, figure out what it would be fast and say this is what they would get under the guidelines.

I mean if we do not react as soon as these things come up, they are going to keep escalating and keep showing up year after year in Congress. And I think reporters would be interested in finding out that, in fact, you do have tough sentencing already under the guidelines. I do not know if you have seen today's USA Today article, but it does as good job of explaining what is going on here. And although the guideline system and mandatory minimums are very complicated --and I explain them a lot and try to explain the difference between them, and it does take some effort -- I think we can give the public this story and they will understand it. But they are not going to hear it, if we do not talk and if you

do not talk.

Also, I think that some of the arguments that you can use, of course, came out of the report from 1991 that Judge Mazzone sponsored, I guess, about racial discrimination and counterproductivity, et cetera. I mean the arguments are all there, why mandatory sentences are bad, and you certainly know them.

I sort of feel that if I was not already employed, albeit without pay, I would apply for the position of press secretary here at the Commission to get this word out, because I just do not think the public understands it, and not only the public, but members of Congress do not know what the sentencing guidelines are and what they are doing and what the differences between them and mandatory sentences.

I have taken the liberty of bringing a few letters from different Senators mostly, I think there is a Representative in here, who have responded to our members' letters, and I am just going to read you a couple of lines from some of them, because I think they give you an indication of what is not known on the Hill.

This is from Lloyd Bentsen: "I understand your concerns about mandatory sentencing laws. The Senate

Committee on the Judiciary informs me that any Federal crime involving drugs has a mandatory sentence of 10 years. If a firearm is involved, the sentence is automatically increased to 20." Where did they get that?

This is from Tom Coleman: "Unfortunately, the advent of mandatory minimums are a response to the intolerable practice of granting suspended sentences and early parole to recidivist offenders."

Orrin Hatch writes: "Thank you for writing to me and expressing your thoughts regarding mandatory minimum sentencing set forth by the Federal Sentencing Guidelines Commission." You are being blamed for it.

Strom Thurmond, in response to the U.S. Sentencing Commission report to Congress, writes: "The report concluded that, clearly, Congress has the power to pass mandatory minimums." That wasn't the conclusion I got from the report.

Finally, Jack Fields writes: "Despite popular belief, mandatory minimum sentencing laws do not eliminate all the judge's discretion. Although he must set the punishment according to the statute, the determination of the initial charges are still at his discretion."

There is a lot of confusion. I grant you that

these letters were not written by the Senators and the Representatives, but if they are staff are trying to accurately describe the Congressmen's positions, then we have got a real problem here.

Just in general, the political posturing for tough mandatory sentences is not going to go away, because it is too tempting. It is just too tempting to say "I'm going to be tough on crime and make this new stalking bill a mandatory 2 to 5 years," or whatever it is. So they are never going to go out of fashion of their own accord, and I foresee the day that there will be more mandatory sentences than there will be guidelines sentences. We will have another three or four added this year and seven or eight next year, and so on and so on, until basically all but a handful of crimes will carry a mandatory minimum, and your job will be defunct.

So I feel that the Commission really, really has to make it clear to Congress that the guidelines are already working and already provide tough sentences. It is incumbent upon you the Commissioners to talk to the members of Congress. You have some excellent staff people working for you who I know do a good job, but your voices carry more clout.

Really to insure the success of the sentencing

guidelines, we pretty much have to stop mandatory sentences, and this body, the Sentencing Commission, is the right now to educate Congress and to be outspoken in its criticism of mandatory sentencing and to do everything in its power to make the public and Congress trust and understand the sentencing guidelines.

Now, before you jump on me, because I know you have done a lot on this, I want to commend you, Chairman Wilkins, for being very outspoken about your opposition to mandatory sentencing. It has increased dramatically in the last year and have since I have been following your statements, and I really appreciate that. I refer a lot of media calls to you and you never shy away from them, so I do appreciate that very much.

Also, the report that you gave to Congress in 1991 was excellent and it is very valuable in pointing out some of the problems that we have with mandatory sentencing, and it is an unbiased and very valuable report for us.

Just briefly, I am not going to touch on many of the amendments, since I don't want to take up more time, and the panel that spoke before me represented FAMM's views quite clearly on Amendment 50. But I certainly want to say that we

wholeheartedly endorse that amendment.

We also support the proposed changes to relevant conduct that prevent acquitted offenses from being considered during sentencing. I have heard from many inmates who are just shocked, to say the least, when they go to sentencing and their sentences are ratcheted up for crimes that they were acquitted of. I think that the average American would just be floored to know that this is what is going on in the courts in America. I mean you are being sentence for something that you have been found not guilty of. It is such a common sensical thing to not do that, that I am surprised it is being practiced, and, in my opinion, Amendment 35 Option 1 seems to offer the best correction to that abuse.

FAMM also strongly supports Amendments 8 and 9, which establish ceilings for drug trafficking guidelines and reduce the upper limit of the drug quantity table to Level 36. I think that any non-violent first offender with a mitigating role can certainly learn his lesson in 10 years, and without a mitigating role in 15 years, and I would argue that they could learn it in a lot less than that. But FAMM supports these amendments, because they are headed in the right direction toward sentencing fairness.

Finally, a brief comment on the issue for Comment No. 40 regarding the distinction between crack and powder cocaine: Again, it is hard for me to believe that this distinction was ever made, because on its face it is so racially discriminatory, and we have certainly been enlisting the help of the Congressional Black Caucus and the NAACP and other groups that are offended by this law.

It is also absurd, because to make crack cocaine, you have to have powder cocaine. Again, we are punishing the low-level offender, the guy with 5 grams of crack more than the supplier, the guy with 100 grams of powder, and it is much the same as the LSD disparity.

I think I have said enough. I thank you for this yearly opportunity to come and nail you, and I hope that we can work together, because I think you are doing some very good work and I really want to work with the Commission in whatever way we can to see that the guidelines succeed, because they are the right direction to go, not mandatory sentencing.

CHAIRMAN WILKINS: Thank you very much.

Let me just say one word on the acquitted conduct. It is not something the Commission invented. It is an

approved fact of sentencing consideration in pre-guidelines and it has been going on for a couple hundred years in this country and is approved by the United States Supreme Court, as well, so we just did not come up with it as a concept.

In any event, on mandatory minimums, this Commission stands united in what we have said and the position we have taken, and we try to do it all the time. But it is almost like just a drop in the bucket each time we try to talk and convince and education, because some of the letters that you read. I know a bill the other day was going to be introduced to abolish parole at the Federal level, and that was done away with in 1985.

MS. STEWART. . That is right.

CHAIRMAN WILKINS: So it is kind of frustration. But I hope we will have hearings. There is some talk about having some hearings, and I hope you will be there to testify.

MS. STEWART: I think I will be invited. They are hoping to have them in April or May in the Crime and Criminal Justice Subcommittee.

CHAIRMAN WILKINS: Are there questions or comments from the members of the Commission?

COMMISSIONER CARNES: What you are saying, Ms.

Stewart, is you are just trying to hold the line against more mandatory minimums. You don't have much optimism that anything would pass in this climate. For example, LSD, it sounds to me as if the witnesses have made a very strong case to change to a dosage system. You don't have any hope that that kind of thing would be undone?

MS. STEWART: I think that could definitely be undone. The Edwards' bill asks for the full-out repeal of mandatory sentences going back to the 1800's, all of them, as you probably know, and I think getting from A to Z in one year is dreaming, but I do think we can make steps toward that, though, and I think that the LSD carrier-weight is an excellent way to step in that direction.

We have thousands of letters in our office from people serving sentences, and the conspiracy law is one of the major problems that ropes people into these long sentences, and I think there can be some room for improvement in conspiracy law in the next year or so. I am not naive enough to think we are going to get to the end quickly, but I do think we are moving in that direction and I am ready to fight until we get there.

CHAIRMAN WILKINS: Yes, Mike.

COMMISSIONER GELACAK: I have always been fascinated by the debate over mandatory minimums, because they have been around for a considerable period of time. And in the state system, depending upon what the offense is, allow for mandatory minimums to be imposed. For example, in New York, if you are convicted of murder, you would probably be sentenced to 8.5 to 25 years, and 8.5 would be a mandatory minimum, although it is not couched that way in the statute.

It seems to me that the argument at the Federal level is not really over mandatory minimums. It is over the impact that the Federal attempt to deal with drugs has had on the system in general, and we are trying to find a response to quantity-driven sentencing. We are trying to find a response to low-level people being roped in by conspiracy laws into maximum sentences.

We are trying to find a response to all of that, and we couch it in terms of mandatory minimums, but I am not sure that gets us anywhere with Congressmen, because they look to politics, as you say, and being tough on crime is good, from a political perspective, and being weak on crime is not. Maybe we would be better off getting away from the terminology or trying to find a legitimate response to

quantity driven.

MS. STEWART: But then you are only talking drugs. I mean Barbara Boxer will be introducing a bill apparently for stalking and she wants a 2-year mandatory minimum up to 5 years, so--

COMMISSIONER GELACAK: You run up against those and we are going to continually run up against those, no matter what happens. The last time up, they did not pass it, but they were talking about a mandatory minimum for car-jacking of 15 years, which some people would argue is not even a Federal offense, it shouldn't be a Federal offense, it shouldn't be a Federal offense.

I guess I am saying is we don't seem to be winning the argument on mandatory minimum grounds, because there are some legitimate purposes to be served by mandatory minimum sentence. There are some areas where mandatory minimum sentences are recognized as serving a legitimate public purpose. I don't think that is necessarily true of the way they have been handled in the Federal area with respect to drugs in particular. And maybe we would be better off trying to bring our arguments in from a different perspective.

MS. STEWART: Well, I think it is a good point.

CHAIRMAN WILKINS: Thank you, Mr. Stewart.

MS. STEWART: Thank you.

CHAIRMAN WILKINS: Our next witness is Nkechi Taifa, representing the American Civil Liberties Union. We are delighted to have you with us.

MS. TAIFA: Good afternoon, Mr. Chairman.

My name is Nkechi Taifa, Legislative Counsel for the American Civil Liberties Union. The American Civil Liberties Union appreciates this opportunity to comment upon several proposed amendments to the guidelines, policy statements and commentary in the guidelines manual.

The ACLU is a nonpartisan organization of over 275,000 members dedicated to the defense and enhancement of civil liberties, because protection of the Bill of Rights stands at the core of our mission, we have a particular interest in insuring that due process and equal protection of the laws, as well as the right of freedom of association and freedom from disproportionate punishment are upheld wherever threatened.

The Executive Branch and the Congress have increasingly responded to public pressure to "get tough on crime" through enacting legislation that creates new criminal

Federal offenses, thus, emerging criminal laws, just not in the purview of state courts. Now Federal courts have broader jurisdiction. This trend of federalizing criminal law has decreased access to the Federal courts for civil cases, especially civil rights cases, and it has created a patchwork quilt of laws for which punishment is often inconsistent and, in our view, extreme.

It is incumbent that this Commission not simply rationalize Federal crime policies which, for the most part, have been sensationalized, but, rather, insure the civil liberties are not compromised in the process.

Our comments are specifically directed in support of drug trafficking amendments which seek to achieve consistency in drug sentencing in favor of eradicating the distinction between powder and crack cocaine, in opposition to increased sentences for so-called gang-related crime, and in opposition to imposing a guideline level for the recently enacted car-jacking statute.

Although the focus of our comments is narrow for the purpose of this testimony, we are also in general agreement with the recommendations that the government disclose to the defendant information relevant to the

application of the guidelines prior to the entry of the guilty plea, language clarifying and increasing the courts' ability to depart tailored to individual circumstances and offender characteristics, prohibiting use of acquitted conduct in determining guideline offense level, imposition of sentences other than imprisonment, and retroactivity of amended guideline range and ability to reduce a sentence not listed, if consistent with the purposes of sentencing.

Although I just recently came into this room, I am aware that a number of previous witnesses have testified extensively in support of amendments which seek to insure consistency in drug sentencing. Thus, I would like to simply state that the ACLU strongly believes that because a defendant's sentence pursuant to the guidelines is calibrated to the specific weight of the substance, it is essential that the substance be appropriately defined to include non-adjustable portions of a substance and the calculation of drug quantity for sentencing purposes would be unjust.

A differential effect would occur solely based on the weight of different carriers. There has been no showing, however, that the extra weight is related to increased culpability. Sentences for selling a specific quantity of

LSD could differ by over 2,000 percent, solely on the method of marketing.

Ironically, the sentences of people at the lower end, usually the young and poor of a chain of distribution, who handle the drugs in a more diluted form, such as on blotter paper or sugar cubes, is astronomically greater than those who are able to sell the drug in a more pure form, the so-called drug kingpin who receive lighter sentences. They feel you maintain that such a sentence being disproportionate to the crime is unconscionable and constitutionally suspect.

Although the Supreme Court in the case of Chapman v. United States held that such an arbitrary scheme of punishment was not violative of the Constitution, the dissent correctly observed that the ruling will "necessarily produce sentences so anomalous that they will undermine the very uniformity that Congress sought to achieve when it adopted the sentencing guidelines."

If we want a consistent and rational sentencing scheme to send unambiguous messages to drug dealers, such sentencing disparity must be corrected wherever it appears in the drug laws. The adoption of amendments which seek to insure consistency in drug sentencing will be a first step

towards the implementation of a rational drug sentencing scheme which carries on the mission of the Sentencing Reform Act, the elimination of unwarranting sentencing disparity.

The ACLU also supports amendments calling for the elimination of provisions that distinguish between the punishments for powder and crack cocaine. One gram of cocaine base, crack, carries the same penalty as 100 grams of cocaine powder for the purpose of determining an individual's base offense level under the sentencing guidelines.

Pursuant to this Commission's preliminary report detailing statistics of race and drug types, a disproportionate impact by race between the punishment for powder and crack cocaine is clearly demonstrated.

With respect to cocaine base, crack, and cocaine powder, the study concluded that 92.6 percent of black defendants were sentenced for crack, as compared with 4.7 percent of white defendants. The available evidence indicates that cocaine base is used principally by African-Americans, while cocaine powder is used primarily by Caucasians.

The resulting disparate sentencing scheme dramatically impacts in a negative fashion on African-Americans who are subject to long mandatory minimum sentences

for simple possession of small amounts of cocaine base, while those first-time offenders convicted of possession of a much larger amount of cocaine powder are subject to minimum sentences.

The much harsher treatment of a form of cocaine more likely to be possessed by blacks than metered out for possession of another form of cocaine that is more likely to be used by whites implicated fundamental equal protection concerns.

However, with the exception of the Minnesota Supreme Court decision of 1991, which held that the Equal Protection Clause was violated because there was no genuine and substantial basis for the distinction in sentencing between powder and crack cocaine, all courts to date have rejected unconstitutionality arguments.

Although the Eighth Circuit, in the case of U.S. v. Simmons, declared the 100-to-1 sentencing ratio rationally related to Congress' objective for protecting public welfare, and similar circuits have made similar rulings, creating a separate set of tougher sentences for low-income people of color is unjust, regardless of Federal court interpretations.

It is constructive to note, however, that the court

in Simmons stated that it was bound by precedent to reject arguments that the sentencing scheme was constitutionally disproportionate. It stated that we are writing from a "clean slate." It might have accepted as valid that the 100-to-1 ratio constituted disproportionate punishment.

The ACLU submits that Congress' decision to distinguish between cocaine powder and cocaine base is arbitrary and irrational, and the substantially higher term for possession of crack discriminates on the basis of race, in violation of the Due Process Clause, the Equal Protection Clause and the Eighth Amendment's prohibition against cruel and unusual punishment.

With respect to gang-related crime, the ACLU opposes enhancement for felonies committed by a member of, on behalf of or in association with "a criminal gang," and we feel that the proposed definition for criminal gang violates the First Amendment's right of freedom of association and is unconstitutionally vague.

The First Amendment guarantees freedom of association. It protects expression and association, without regard to race, creed or political or religious affiliation of the members of the group or to the truth, popularity or

social utility of the ideas and beliefs which are offered.

It is not accurate to assume that ever single member of every "gang" is involved in criminal or drug-related activities. The motivations for joining a group or complex often involves issues of acceptance, trust and responsibility. It is incorrect to classify away a whole segment of our youth, because of the economic circumstances, their color and/or where they live.

An additional infirmity in the proposed amendment is its vagueness of terms. As our courts consistently recognize, vague language not only deprives potential offenders of notice with regard to unlawful conduct; its effect is to open the door to arbitrary police enforcement.

Under the proposed amendment, this problem is particularly acute with regard to the definition of "criminal gang." For example, the suggested language fails to specify how it is to be ascertained who a gang member is. Also, just what is the definition of a serious drug offense? It is insufficient to define a criminal gang as "a group, club or association of 5 or more persons whose members engage or have engaged within the past 5 years in a continuing series of crimes of violence and/or serious drug offenses."

The absence of standards for making such a determination of guilt is repugnant to both our criminal justice system and to the values inherent in a free democracy. Critics of the police in the black community argue that African-American men are being characterized as gang members because of their race, class, neighborhood and/or the clothes that they wear, not as a result of their conduct.

Moreover, the definition of criminal gang is simultaneously too inclusive and too exclusive. The statute may be used against peaceful striking workers whose peers may have been involved in criminal and violent activities. On the other hand, the law would not apply to inside traders or S&L swindlers who, nevertheless, are engaged in "criminal behavior," because the definition specifies violent or drug crimes.

Like the crack powder distinction, this sentencing change will be used against poor people of color, while allowing wealthy white criminals to escape enhanced penalties. Ominously the vague definition is broad enough to include other political and union "gangs" who may be fighting for social change.

In addition, vagueness of statutory language gives

police officers uncontrolled power to arbitrarily select individuals for arrest and jeopardize the rights of members of unpopular or controversial groups. It is not possible for the police or prosecutors to know with any certainty whether an individual on trial is a member of a gang, whether he or she is peripheral or central to the alleged criminal activities, or whether the person just "hangs out" with the group.

It has been our experience that vague laws vesting broad discretion in police officers have inevitably resulted in sweeping within their enforcement large numbers of law-abiding persons who are not the targets of the legislative bodies that passed these laws. This clearly was the result of the efforts of the Chicago Police Department in the early 1980's, when as many as a quarter of a million Chicagoans a year were swept off the streets in an effort to stop gang activity.

The thousands of persons from communities of color who contacted the ACLU to complain about the sweep arrests of the 1980's were decent, law-abiding persons whose only "crime" was to be young, a person of color and being present in gang-infested neighborhoods.

Finally, we are particularly concerned with the potential effect of these vague provisions. Vague statutes are typically applied in a discriminatory manner and have an overwhelming detrimental effect upon the poor and upon communities of color. Because we will all be the losers, if the rights guaranteed by our Constitution are eviscerated in the midst of combating crime, we oppose the proposed amendment and recommend its complete rejection by the Commission.

The final issue we will comment on is that of car-jacking. Towards the end of the 102nd Congress, Congress approved a bill making armed car-jacking a Federal crime punishable by up to 15 years in prison or a life sentence, if death occurs.

Although vehicular theft is a serious problem, prior to the death of Maryland resident Pam Bassou, car-jacking was not a Federal crime. After her death, however, a full-scale assault on car-jacking became a national priority. Car-jacking, however, is simply a new name for an old crime, robbery. Car-jacking represents a tiny percentage of either auto theft or armed robbery, the two crime categories that most police departments issue it under. It is much more frequent in cities than in suburbs. A few notorious cases

have occurred in the suburbs, however, and motorists died, and suddenly an old crime became a national priority with a new Federal law.

Billy Davis, a spokesperson for the Chicago Police Department, stated, "We don't even like to say car-jacking. it's robbery and it has been going on for a long time." There is a whole lot of hype going on right now. Deputy Inspector Charles DaVinsu, of the New York City Police Department's auto crime division, agreed. He said it is a crime that has been happening for many, many years, but car-jacking is a name that simply just rolls off the tongue and it sounds good.

In most states, penalties of up to 10, 20 and more years of imprisonment often apply to crimes of armed robbery or armed assault. Pursuant to the sentencing guidelines, robbery has a base offense level of 20, that is from 33 to 87 months. If a firearm was discharged, a seven-level increase is mandated, 70 to 162 months, with other level increases dependent upon the specific offense characteristics. Car-jacking is nothing more than robbery, armed or otherwise, and sufficient penalties exist for such crimes.

In conclusion, we request that this Commission adopt those amendments which seek to eliminate distinctions

which undermine concepts of due process and equal protection, and reject those amendments which abridge fundamental constitutional rights.

We implore the Commission to perform its task of revising guidelines to recognize that the "war on drugs and crime" need not be a law on our Bill of Rights.

Thank you very much for this opportunity to comment.

CHAIRMAN WILKINS: Thank you very much.

Any comments or questions from Commissioners?

[No response.]

Thank you.

Michael Stepanian, Drug Policy Foundation, is our next witness.

MR. STEPANIAN: Members of the Commission, good afternoon.

This is probably the first time in 25 years that I have been in a Federal court where I have been called before the docket was called. Thank you very much.

I come from San Francisco to address you. I am a criminal lawyer for 25 years. I began practicing law in 1966, in San Francisco. I am also the Chairman of the Board

of the Haight-Asbury Free Medical Clinic, and I have been for 15 years. Our clinic sees about 1,500 patients for detoxification alone on a monthly basis.

We also have a grant from the City and County of San Francisco and the State of California to take care of all jail psychiatric services in all of the jails in the City and County of San Francisco, a considerable job. I am also on the Advisory Board of the Drug Policy Foundation.

I have changed my remarks. As a working criminal lawyer on a day-in and day-out basis, we complain constantly about the inflexibility and the lack of discretion in the guidelines, and I hear it every day, because I am before judges sentencing and arguing cases with probation offices day-in and day-out.

But I want to tell you that your attitude towards minimum mandatory sentencing and the questions you have asked I will bring back to my criminal lawyer brothers and sisters the idea that the Sentencing Commission at least has an open ear to problems that are occurring and working every single day, day in and day out, before a very, very, very difficult and disheartening, in many respects soulless criminal system right now, frankly.

In answer to the Justice Department representative, I think that it is imperative that you look into and fine-tune and change, if necessary, areas in the guidelines which would make imbalance the job that we have, and it is a very, very difficult job.

In answer to your question concerning what LSD is in Canada, I called up my office and I must say that I am heartened by my secretary of 20 years, heartened by the fact that she in 10 minutes found out from Brian Sedgwick, who is the Crown Counsel of the Department of Justice, who stated that 1,000 hits of LSD is a 3-month sentence in Canada, and if in the event they are good in jail, that that sentence can be cut by a third. I don't know what it is in larger quantities. I can only say that is part of the information that I received.

Also, if you have less than a certain amount which can be deemed for personal possession, the Canadian government does not consider LSD a drug, a narcotic, but it comes under the Food and Drug Act. So this is what we are dealing with, in response to the good doctor's reference to it.

Needless to say, I have never had an opportunity to address as commission or a body of this nature, and when I

came in the courtroom I was happy enough to see a familiar face whom I have done battle with in San Jose, California, in the Northern District of Columbia, and it was nice to hear the answers and questions here, and it is good to see the representative of the United States Attorneys Office, whom I have had and tried very, very difficult cases, argued the guidelines again and again with her, and had very, very difficult time and tried a very, very complicated case over a period of time.

I can be very objective, by the way, because I lose a case, so I can speak very objectively when I refer to her, but I want to commend the Commission with respect to that.

The LSD amendment, I think from what I have heard before, it goes without saying. I am on the panel of the Northern District of California. The magistrate says go and speak to that young man, he has got an indictment here in the charging district. I go back and I see him and I talk to him for 10 minutes and he seems like a harmless guy. He goes back and 6 months later he comes back, and I say, "Gee, by the way, what sentence did you receive?" He was called as a witness in another case involving a co-defendant and he called me up to seek some advice. I said to him, "What did

you get?" I didn't realize how much he had, but just for my first take on the kind of a person he was, he said to me, "I received 22 years in prison, 54 days a year off." I basically couldn't believe it, but that is only one of many stories that get around.

I am not going to talk about the proportionate cases that I am having all the time involving the IRS cases, of which I am representing as fellow who owes \$4 million to the Federal Government. And I am standing up there and I am whining and complainant before the court about whether or not he should have electronic monitoring for 8 months or 11 months, or complaining about how much he has to pay in fines and penalties.

Now, as far as substantial assistance is concerned, by and large, on the day-in and day-out cases of which I am in Federal court 90 percent of my time, the fact of the matter is that sentencings do not take a whole lot of time, unfortunately. Because by the time you get to sentencing and you have had the 5-day report and you are talking to the probation officer and you are back and forth and you are filing your objections to the probation report and you are fighting over the statement of the offense, it is settled.

By the time you get to the judge, everybody kind of knows basically what the parameters are in this case.

So that when we are arguing about taking time in the Federal court, we are not really talking about a substantial amount of time. Frankly, the idea -- and I know you feel a little uncomfortable and I got a sense that you feel uncomfortable about getting into priors -- but getting into areas of priors and having a judge take a look at a prior, it might be constitutional in a strict sense, that is, he did have a lawyer, she did have a lawyer.

But did the lawyer have 50 or 60 cases when they pled him to possession for sale of a tiny bit of cocaine and he received straight probation, and the lawyer said to him was, "Don't worry, if you plead to possession for sale, you can leave this courtroom right now," yes, it was a constitutional representation for the Sixth Amendment purposes, but was it a real understanding of a plea when he went through the liturgy of, "yes, I understand, yes, it's voluntary, yes, I understand," et cetera.

And when you come before the graph and he has a prior for possession for sale, and when it was only about a gram or a couple of grams of cocaine, where he could have got

diverted, if he had a high-priced lawyer or somebody who hammered on the prosecutor for a couple of hours, that maybe it would turn out to be not a prior for purposes of the schedule. So I think that these are important considerations.

Reverse stings -- I don't have to get into reverse stings. You are fairly sophisticated, when it comes to the idea that who else in the world has marijuana for \$400 a pound, except the government? I mean you would think to yourself, if anybody was involved in marijuana and fairly sophisticated, who in his right mind could even conceive of \$400 a pound for marijuana, when in Humbolt County, it is selling for \$3,000 and \$4,000 a pound? Obviously, this is oregano or it has got to be a cop. But they don't know that, they think it is a good deal. They don't know that. It is ridiculous.

[Laughter.]

As far as cocaine, I remember when cocaine -- the drug wars, excuse me -- I remember when cocaine was selling for \$62,000 a kilo. I remember that in 1968, 1970, 1971, cocaine, a pound of cocaine was a huge thing. Then in 1980, it was \$40,000. Now, on reverse stings, they are coming up to these people and they are saying you can buy a kilo of

cocaine for \$14,000. I never heard of anything like that.

That should be another indicator. Who in his right mind can get this cocaine away from the hoodlums in Colombia and finally get it up to San Francisco, California, and say, "Excuse me, here's some cocaine for \$14,000 a kilo." I will tell you, when it got to that number, when it got to that number, that's when crack came. There is no question about that.

I have a son 16 and I have a daughter who is 12, so I can speak from a father's perspective, and that is I am seeing, in view of the fact that these -- what should I say to the Commission? The premise of the idea that people do not want to get high is a very difficult concept for adults to understand, myself included, to some extent, and that is that people are going to get high, and the sad part about it is that the marijuana is very expensive. The underground is terrible, it is very difficult to get drugs in some respects. They say you can get it on the corner, but what is it that you are getting?

The fact of the matter is the kids and a lot of these people are using 30mg of LSD, and that is what is being sent around, basically, and they are about to get high for 5

or 6 hours, and the only threshold for hallucinogenic aspects is 100mgs. I mean that is the reality of this.

I think, frankly, please put it into another department. Think in terms of giving a lawyer some discretion. That is all I am asking. The reason I say that is because lawyers are the only people who defendants listen to. They don't listen to the probation department. They didn't listen to their parents, or we wouldn't be representing them. They don't listen to anybody else, and prosecutors, they don't listen to anybody except lawyers, and lawyers are being railed left and right about the fact that we are out there trying to get people off. In reality, we are trying to get people not to get slammed or crashed.

I am a famous lawyer. I lose 75 percent of my cases. I am pleading people all the time and I am supposed to be successful. I can imagine what is happening day in and day out. The fact of the matter is we lose most of our cases. We don't have hearings on motions to suppress. Nobody is getting off on a legal technicality. I haven't seen a legal technicality in years. I mean whenever somebody wins on a legal technicality, the whole courthouse is turned around -- he won, he won a motion to suppress, on a rare

occasion that it happens. What does it happen? I never heard it happening. But that is what happening, the legal technicality.

Please give us a little discretion, so we have an opportunity to say to them -- I represented a guy who got 7 years. For some bizarre reason, the judge took 6 months off. I don't know, no one complained, no one even cared. But the idea that when we walked out -- excuse me, it was discretionary -- when we walked out of the courtroom, it was amazing. We went to the elevator and the client just got 6 years and I'm kind of moping around, and he says, "Boy, the judge gave me a break." I go, "Okay, he gave you a break," but it was a little break, it was something, it was discretion. He thought that he was as nice person. The judge felt he was as nice guy. The judge had a sense, when he read the "probation report," that in the probation report he didn't have any priors and he was a decent human being.

Frankly, before the guidelines, lots of my clients were going to jail for long periods of time in the Northern District of California, and I wish that I was the lawyer that the Justice Department was talking about, about how I got people off. I don't know who those people were, those

lawyers who were getting people off. Edward Bennett Williams, maybe, I don't know.

But the fact of the matter is that if you can give us a little discretion, we will be able to say to the person, "Look, I got you a year off, okay, I did something, it's not like 152 months or 182 months." What good am I? What good are the lawyers now? I mean when it is all figured out on the graphs, I am going to walk in and I say, "Gee, I got you the minimum."

Do you know what we talk about now in court? "I got him 10 years." And I tried cases under the Jones-Miller and the Harrison Act, where it was a 5-year minimum mandatory for marijuana, and we used to have to have court trials, because the judge didn't want to send these kids away for 5 years minimum mandatory, and they would sort of look for a way to get them out.

So that is what is happening. I have nothing more to say. Thank you.

CHAIRMAN WILKINS: Thank you very much.

Any questions from members of the Commission?

[No response.]

We appreciate your testimony. Just keep filing

those motions to suppress.

MR. STEPANIAN: I might win one of them one of these days.

[Laughter.]

CHAIRMAN WILKINS: Thank you.

David Stewart. Is Mr. Stewart here?

[No response.]

We will come back to Mr. Stewart.

Chuck Morley and Charles Blau. Is this Mr. Morley?

MR. MORLEY: Yes, sir.

CHAIRMAN WILKINS: Glad to see you.

MR. MORLEY: Judge Wilkins and members of the Commission, my name is Chuck Morley. I am a financial investigator in Arlington, Virginia. I had hoped that Charles Blau could be with me today, but he does not appear to have arrived yet, so we will proceed without him.

I would like to note several things before I get into the meat of my testimony. Number one, I am not an attorney. I am a financial investigator and an expert on the subject of money laundering and currency reporting laws under the Bank Secrecy Act.

My knowledge in these areas goes back to prior to

1979, when I was a Criminal Investigations Division special agent with IRS, and after that the chief investigator of the U.S. Senate Permanent Subcommittee on Investigations.

In that position, we did a series of hearings and investigations on the subject of money laundering, which has been hailed, I suppose, by the Justice Department and Treasury as the seminale work in this area. It was during this period, also, that Congress was looking at the issue of money laundering and holding hearings on money laundering, what became the Money Laundering Control Act of 1986.

As a matter of fact, if you look at the legislative history of those laws, you will see that our work on the subcommittee was quoted quite frequently. I tell you that to put my remarks in context.

I would also say that I worked with the Working Group of the White Collar Crime Committee of the American Bar Association, of which I am an associate member, and I wrote several monographs for the staff, which you have in the papers I submitted to you, for their deliberations on the proposed amendments which we have now come to.

I also do a significant amount of training of State and local law enforcement and prosecutors, and I have also

trained internationally extensively law enforcement agencies and prosecutors worldwide.

I come here today to urge you to approve the money laundering and the structuring guidelines as proposed by the committee staff. I want to commend the staff's work. They did a tremendous job on the report with limited resources, under very strict time frames, and they uncovered a tremendous amount of information that I think has been very helpful.

As the staff notes -- and I would like to quote a little bit from their report, because I think they said it better than I could ever say it -- they said that the revised guidelines reflect greater sensitivity to such factors as sophistications of money laundering conduct. That is really the heart of my testimony today, and I will elaborate on that.

The scope of the problem is also set out fairly carefully by the staff, and it was based on the evidence they gathered during extensive research. They said, "The Commission expected that the guideline 2S11 would be applied in cases in which financial transactions encouraged or facilitated the commission of further crimes and to offenses that were intended to conceal the nature of the proceeds or avoid a transaction reporting requirement."

The report continues and said: "Thus it appears that the base offense levels may reflect a view that 18 U.S.C. 1956 would generally be applied primarily to traditional or perhaps large-scale professional money launderers." However, the staff found that, historically, prosecutors have been stretching these guidelines significantly, and that I think is the crux of the problem we are addressing today.

In their words, "Offense that technically qualify as money laundering are frequently simply incidental to or component parts of the underlying crime. This has given rise to extensive disproportionate sentencing."

I give an example in my paper that I would like to elaborate on just a little bit. Take Mr. White, who is a corporate officer. Mr. White wire-transfers funds from his corporation to his own bank account and then uses those funds to bribe an official offshore. In other words, it is a violation of the Foreign Corrupt Practices Act. Mr. White is kind of stupid. He has just simply sent the money to his bank account and paid it out of his bank account to effect a bribery. Nonetheless, he would still qualify under the Money Laundering Control Act as being violating that act.

On the other hand, we have Mr. Black, the same fact

situation, in essence. He takes money from his corporation, but the way he takes it is not to wire it out of his own company's bank account, but he disguises it through a complex system of machinations in his corporate records. He moves it through several companies, offshore companies through several attorneys, runs it through a number of accounts in secrecy havens and really hides the proceeds of this crime, and then he uses that money to make the bribe payments.

We have two situations that get the same type of sentence under the current guidelines. One person has not taken much attempt at all to conceal the transaction, and the other one has taken draconian steps to conceal the transaction, and yet Mr. White and Mr. Black receive the same sentence.

I don't think that is what we are trying to do. I don't think that is what we want to do with these guidelines. I don't think that is a just result. This kind of outcome, again, as the staff says, this kind of outcome conflicts with just punishment principles and gives undue weight to charging decisions.

I think this has occurred because of a tension between the guidelines and what we all recognize as

traditional definitions of money laundering. There is a congressional definition of money laundering, and then there is the accepted definition. What is money laundering? What are we talking about here?

Money laundering is, in essence, the attempt to conceal the source, ownership and proceeds of money. It is an attempt to conceal, and I think the new guidelines address that perfectly. Concealment is the key, and the proposed guidelines address concealment in all its efforts.

The guidelines as they exist today do not necessarily consider concealment. As a matter of fact, the evidence shown by the staff indicates that 40 percent of the cases they looked at do not have any concealment evidence at all. There is no concealment in those cases. Only 20 percent of the cases they looked at involved any kind of sophisticated concealment. Yet, all were charged under the guidelines and all could be charged as similar types of offenses. So 80 percent of the cases don't fit the categories envisioned by the Commission, 80 percent of the cases they surveyed.

Now, the Justice Department said that they believed those cases were rare, but I would say to you that the staff

does not believe the staff presented evidence that shows we have got a problem here, and that evidence is in front of you.

Now, the structuring of offenses also has similar disparities. The sentencing report indicated that 68 percent of the defendants convicted of structuring either didn't know or did not believe the funds were illegal -- 68 percent, that is a tremendously large percentage of people we are talking about. These are not isolated cases here. These are not exceptions to the rule. Yet, these people could still get the same type of sentence as a major money launderer, somebody involved in a huge smurfing operation.

So do the guidelines work? I don't think they work. I don't think they work, unless what we are trying to do is fill the jails up with people like Mr. Shirk. Consider Mr. Shirk for a minute. Mr. Shirk was found guilty of failing to continue to accumulate his daily receipts during the week. That is what he was convicted of, and he is going to go to prison for that.

I don't think they work. Under those circumstances, I don't think the guidelines work. I think we need to address that, and I think the proposed guidelines on structuring address that very well, and that is why I urge

you to consider them.

I urge you to take the guidelines out of the driver's seat. I think we have the tail wagging the dog here, as was stated earlier. Take the guidelines out of the driver's seat. The Justice Department has said to me informally that we are trying to decriminalize money laundering or that we are trying to greatly lessen the offense of money laundering. But that is just not the case. I also would like to see case examples from the Justice Department showing how that would happen. Because if you take any type of serious offense and you apply the guidelines as we have now proposed them, you will see that we have not made this a non-serious offense, that the guidelines are still putting very heavy offenses, very heavy guidelines on people who launder money.

But there is a very distinct difference. There is a very distinct and important difference. The proposed guidelines don't do this on an arbitrary basis. The proposed guidelines match the punishment with the severity of the crime. They match the punishment with the degree to which the defendant attempted to conceal the proceeds, and that is what we are trying to do here with money laundering.

I looked this morning at the exceptions drawn by the Justice Department with respect to currency. Unfortunately, I am not sure I understand why they have carved out the currency exception, and I was here earlier to hear that testimony, as well.

Let's go back to Mr. White and Mr. Black and the example that you have before you in my papers. If Mr. White had taken currency out of his company and put it into his bank account, he would still face the same penalties as Mr. Black up set up this huge draconian sophisticated laundering system. I just don't think that is what we are trying to do here.

Currency is not what the launderers are trying to get to. Currency is what the launderers are trying to get rid of. These guys, especially the drug traffickers, have so much currency that they are walking all over it. They would throw away one dollar bills. That is how useless those things are to them, because they are trying to get rid of this massive amount of currency, and they are trying to hide it, hide the source of it and put it into something that looks legitimate.

Now, granted, currency may be a bit more difficult

to trace, but, again, the Justice Department states that there is no ability to trace currency back to specified unlawful activity which generated it. That is why they want the currency exception.

I have been training state and local law enforcement and Federal law enforcement and prosecutors for years how to trace currency back to the source. Maybe this says something about the effectiveness of my training, I don't know. But you can trace currency back to the source, absolutely. They do it all the time. The case books are full of cases where they have done that. So that is not a reason to carve out an exception for currency at all, as far as I can see.

Again, with structuring, we are not trying to get rid of the punishment for structuring. We are simply trying to make it more realistic. We are trying to say if you structure transactions, you will be punished, but the punishment will fit the crime. If you structure transactions, knowing the currency comes from an illegal source or believing the currency comes from an illegal source, you are going to have an enhanced sentence, you bet. If you don't know or believe it, you are not going to get the same punishment as some guy who is structuring transactions of a major money

laundering operation. You are going to have the punishment fit the offense, which I think makes a lot more sense.

I would also like to say that the proposed guidelines, in my opinion, are a classless approach to punishment. Again, I was told by certain people that what we are trying to do here with these guidelines is make life easy for the white collar criminals. That is just not the case at all. That is not the case at all.

Again, when you look at the proposed guidelines, you see that the enhancements come based upon the degree of sophistication or the degree of the attempt to conceal the amount of money being laundered. It has nothing to do with class, it has nothing to do with whether or not it is a drug trafficker -- drug trafficker is a bad example, because there is an exception for drug trafficker -- it has nothing to do with whether or not you are a white collar criminal or some other type. It has to do with the type of laundering you are conducting, and that is the way I believe it should be.

Strangely enough, the staff found that money laundering guidelines were higher in 52.5 percent of the cases than the drug transaction guidelines, which I found was interesting. In 25 percent of non-drug cases, money

laundering was higher in 96 percent of the cases, and the disparities in both of these situations, both the drug and the non-drug cases, were tremendous, in some cases up to 21 levels of a disparity between the money laundering guidelines and the underlying offenses.

The disparities appear to be a function of the underlying offenses, not the severity or the sophistication of the laundering. Again, I think we have to get the sentencing guidelines out of the driver's seat. The disparities should be a function of the mechanics of the laundering, the severity, the methods of concealment. The proposed guidelines make no such disparities. The proposed guidelines strictly limit it to the type of concealment that is going on.

So I think that if you accept the proposed guidelines the way they are, what you will do is advance your original goal, which was to severely punish sophisticated laundering, and you will also match the penalties to the severity of the crime, which is what we are supposed to be doing, as far as I can tell.

To continue under the current guidelines is to ignore the realities of money laundering totally, while

continuing to mete out disproportionate and unfair sentences to both drug and non-drug defendants. So I urge you to approve them as stated, and I would be happy to answer any questions that you have.

CHAIRMAN WILKINS: Thank you, Mr. Morley.

Any questions from the Commissioners?

[No response.]

Hearing none, again, thank you very much for your participation today and sharing with us your views.

MR. MORLEY: Thank you, sir.

CHAIRMAN WILKINS: Mary Shilton represents the International Association of Residential and Community Alternatives.

We are delighted to have you with us.

MS. SHILTON: Good afternoon.

My name is Mary Shilton, and I live in Alexandria, Virginia. I come to you today on behalf of IARCA, the International Association of Residential and Community Alternatives.

I am going to shift gears a little bit and I am going to talk a little bit about our view of the guidelines and how they might draw on existing alternatives and how I

believe that the political climate is changing somewhat for using alternatives, being a perennial optimist.

Before I do that, I just want to let you know who I am. I am an attorney. I am a member of the D.C. bar. I have worked as a criminal justice planner on the regional level. I have also been in the private practice of law, and I have worked for the National Association of Criminal Justice Planners.

In that capacity, I have studied community sentencing alternatives. I have written articles and books on probation and the use of community corrections. When IARCA asked me to testify today and to write these comments, I came at it from a person who has worked with helping local governments and states develop correctional alternatives in probation and also in intermediate sanctions as distinguished from probation.

With that, I would like to just start on here. IARCA represents more than 250 private agencies and they operate over 1,500 programs for states, for courts, for the Federal Bureau of Prisons and so forth throughout the United States and in other places around the world.

IARCA members are primarily private nonprofit

organizations, but about 10 percent of IARCA's membership is for-profit, and so it is a very wide range of members and service providers, both individual and organizational. The kinds of services that they provide are community-based correction centers, education and vocational services, drug testing and treatment, tutoring, day treatment, crisis intervention, family and individual counseling, victims services, community service supervision, bail supervision, home detention, electronic monitoring, neighborhood outreach, after-care, and I am sure many others, but those are primarily. About 80 percent of the adult community corrections facilities in the United States are members of IARCA.

First off, I would like to commend the Commission for this opportunity to comment on published and also the solicitation for additional comments which I am providing, and also to commend the position which you all have taken with respect to the mandatory minimums and the impact of the Anti-Drug Abuse Act and penalties that have flowed therefrom.

I have provided you with a very simple graph which is the last attachment of my testimony, which outlines the rapid growth in drug related crimes over the last 10 years and

the prosecution of them in summary form. It is such a graphic depiction of what we are about, that statistics tend to kind of gloss over, even wide statistics like those, the individual circumstances, and so I am just going to say that I think there is a human impact here and IARCA is very concerned about that human impact.

Some of the typical kinds of cases which may come through the doors of IARCA, either on the front end or the back end, are such as the one which is Maffet Pound. He is serving 20 years for conspiracy to distribute marijuana and it is a first offense. Maffet is 52 years old. He is an owner of a Mississippi resort. He purchased marijuana for his own consumption and friends. His wife is also in prison for 5 years. She did not turn him in when he was using the drugs, and so she got a 5-year term, even though she was not using the drugs herself.

We have the case of Charles Dunlap, a 46-year-old father who worked for the Army as a fireman and as an emergency medical technician. He rented a truck for an informant to offload marijuana. He is serving 8 years for conspiracy to import tons of marijuana.

There are many other cases like this. My point is

that these are human people and their lives can be reclaimed. To the extent that the Federal guidelines can participate in that reclaiming or that rehabilitation process, I urge you to examine once again how that can happen.

One of the areas that I would advocate is that the guidelines should adopt a capacity based approach to sentencing a la the Minnesota guidelines. It would give priority in our crowded prison system to the most serious and violent offenders being held in the prisons, the guidelines could, in fact, consider existing capacity and should be studying existing capacity and reporting on that as part of the overall strategy.

In one of the more comprehensive articles early on about sentencing guidelines reform, Suzette Telarico reviewed several semiole research pieces, Al Bloomstein's, Lynn Goodstein's, John Petersilia's, and Sandra Shane Debo's, and concluded: "To varying degrees, all the work cited emphasized that scientific, philosophical and political issues converge in sentencing reform. More generally, they substantiate that criminal law itself requires the same determinations."

This interaction is highlighted in Bloomstein's discussion of the unavoidable policy choices inherent in

sentencing reform. These choices clearly require empirical philosophical and political judgments, as each requires some assessment of facts, some judgment related to sanction priority and some consideration of public pressures and political exigencies, as emphasized in each of the works reviewed.

Sentencing reform schemes have failed and will continue to fail, if they are grounded in only one of the dimensions. Philosophically acceptable policies will fail, if the underlying empirical assumptions are not assessed and the exigencies of politics recognized. Scientifically rigorous schemes will fail, if they are not philosophically grounded and politically acceptable.

My point is that I think we have a system now which is in peril of failure, if it is either overly scientifically grounded or insufficiently philosophically grounded. And I would say that among all the purposes of sentencing, they are recognized under the statute, that rehabilitation has been the most neglected, and I urge you to reconsider it as a philosophical principle for your sentencing policy.

I am going to go on and say that the guidelines should set forth specific provisions to develop opportunities

for intermediate sanctions and community based punishments throughout and for all but the most serious and violent offenders who would ever be released to the public.

Rehabilitation is more likely to occur in an alternative sentencing program. Now, I realize that is a highly controversial statement, that people have been arguing that for years. The challenge of crime in a free society indicated that rehabilitation was as likely to occur in a community setting. Normal Morris and Michael Tawnre, in between prison and probation, reiterated that idea, when they talked about interchangeable punishments and how to advance this concept further.

But there is growing evidence that rehabilitation is more likely to occur with the use of half-way houses or other alternatives. Ralph Ardidio, who is President of the Federal Probation Officers Association, says, "Unlike prison, intermediate programs deal with some root causes of why people commit crime. They help offenders get a job and they receive treatment for their addiction and counseling for them and their families."

I have studied intermediate sanctions programs throughout the country and have a compendium, and I know the

Commission does, too, of evaluations which have been done in those programs. Many of them show that some programs are lower cost, either because they have a shorter term or also because they have lower overhead. But even those that are even more expensive than incarceration tend to have equally as good a rate, if not better rates, when looking at recidivism.

I believe the Commission should also expand the guidelines to permit courts to consider sentencing non-violent first offenders to alternatives as a presumption or as suggested in Issue 32. It is just imperative that either the zones be expanded or the departure procedure be changed to allow a more comprehensive treatment of alternative sentencing in the guidelines and as part of the guidelines.

IARCA believes that this political thing has gotten to the point where people are willing to consider alternative punishments and understand that if people are working in a rehabilitative situation and they are getting drug treatment and they are paying back for the harm that they have caused society, that they in fact are being punished well and hard.

And there are a number of surveys, and you have all known them, but the Wirsling group indicated the Americans

support community corrections, and we are talking mostly about non-violent offenders in surveys. The Public Agenda Foundation, the Figgey Report, Gallup and Harris Polls all have entertained these questions about tough rehabilitative community programs, and the public will support them at least for non-violent offenders, and I think the guidelines should incorporate this politically, is something that has to be done.

One of the tough areas is how you go about creating community creations. In the states, there have been incentives to local governments to participate in programs through the sentencing front-end diversion, working with probation and setting up all kinds of incentives, and through the back-end by working with the departments of corrections that are overcrowded.

By analogy, in the Federal arena, I am just asking you to look at what incentives can be given to judges to learn about the options that are available to help create options for sentencing alternatives and to use them and to use them well. I think it just takes more on the front end to do that, and then on the tail-end, with the Bureau of Prisons, giving the Bureau of Prisons the discretion to -- and

I know that you do in many instances, but to fully utilize the space which is now available. As you know, the GAO is reporting 27 percent utilization of half-way houses by the Bureau of Prisons. Certainly, there could be more release to half-way houses safely on the tail-end of community corrections.

In the planning area, I understand the reasons why there have not been recidivism studies, because of the short length of time of changes in the guidelines. I think we need to get a better handle on the costs both for prisons and also for alternatives, as well as recidivism rates for both. And I think to the extent that the Commission can do statistical work and reporting in that area, that it will benefit all of us and it will improve our system of justice.

I thank the Commission for this opportunity to discuss expansion and use of alternatives and commend them for their willingness, and I commend you for your willingness to consider these issues. It is my belief that the Commission will not have adequately addressed the area of fairness in sentencing until all sentences short of life include a community corrections sanction component.

Thank you.

COMMISSIONER NAGEL: Thank you very much.

Can you tell me, when you made reference to non-violent offenders, do you include offenders convicted of drug distribution in that category?

MS. SHILTON: Yes, not with weapons or a battery or some other --

COMMISSIONER NAGEL: So drug distribution is included in the non-violent?

MS. SHILTON: Yes.

COMMISSIONER NAGEL: Any questions to my right?

COMMISSIONER MAZZONE: Ms. Shilton, we had sort of an informal, but informative survey a few years ago at a seminar or conference, when we had even fewer alternatives available to sentencing judges, and I think these judges sitting at the seminar would not favor alternatives. Given the option, I think 30 percent of them favored jail over probation, 70 percent of them favored some kind of split sentence over probation. We had, astounding to me -- not astounding -- surprising results from this survey among our colleagues who have an opportunity to impose a less severe sentence, including half-way houses, and did not do it. I believe you said 17 percent under-utilization, isn't that --

MS. SHILTON: GAO's estimate is 27 percent fewer.

COMMISSIONER MAZZONE: All I mean to point out is we have done some things to make these available, but they are not being utilized, and I am not sure that is because we can make them. We cannot mandate. You want mandatory alternatives?

Ms. SHILTON: That is a loaded question. I think some people probably would say mandatory alternatives. Commissioner Caruthers did the telephone survey, as you know, of the 255 judges. I was just reading or refreshing my memory on that, and it depended on the alternative, how the percentages went, but overall, of the respondents, there was a majority that favored alternatives. That was my memory, but not every alternative was favored in the majority.

My understanding is that another study is perhaps planned in that area, again, a survey of the judges to try and get a little better handle on what it is they would be inclined to use. I think judicial --

COMMISSIONER MAZZONE: Were you here early this morning?

MS. SHILTON: Yes.

COMMISSIONER MAZZONE: Well, maybe you heard a

judge this morning say that, in his view, some touch of jail, some jail was necessary. Now, how do we do that? How do we convince that person that some touch of jail or a taste of jail, I think probably in the white collar area, is where he was headed -- how do we convince him that that is not a wise sentence or a wise exercise of discretion?

MS. SHILTON: There has never been a study, to my satisfaction, that shows the criminogenic effects of prison, which has been speculated about, based on -- if you take people who have been put in alternative programs, who have never been to jail or prison, and people who have gone to prison who have the same offense and the same characteristics, you tend to get a slightly different result. There have been a couple of people who have speculated that there is a criminogenic effect a prison has. It is highly speculative. It has never been proven that I can see.

COMMISSIONER MAZZONE: I don't disagree. I am just saying how do we --

MS. SHILTON: That would be the main argument that I would make, is that when one sits in jail too long, one learns other ways to misbehave, and particularly for the young offender, and I have worked in prisons and jails and I have

talked to these young people. And when one talks to them, one learned that there are many artful things that are learned in a confinement situation. I am not sure that that is at all the answer that you need.

The clanging of the gates is the term that I see in your work and I see elsewhere, you know, the idea that somehow one will be deterred, and I think shocking incarceration is a good example of a program which may have that benefit of a short-term back and then a quickly phasing out into a program which is very positive and tries to reorient the person to society.

COMMISSIONER REILLY: I might inquire, in your testimony, Ms. Shilton, page 4, you mention the cost for a cell today in the United States. Where do you come up with the \$110,000?

MS. SHILTON: I believe it is from the Bureau of Justice Statistics. It is not a national -- my understand is it is a national average. I may be wrong on that, but it is not the Federal rate. The other thing that is in that -- and I should qualify it -- is that I believe it is \$30,000 a year or \$20,000 per year -- that is not the Federal cost, either, that is the national. I believe it was from BJS initially.

This was IACRA material, but I could write you a letter and let you know exactly the citation on that.

COMMISSIONER REILLY: I was curious. Recently, we asked in Kansas for an assessment, as a matter of fact, in January, of the cost. They just built a new facility for the U.S. Marshals there and we have three or four other prisons in that location, and the figure for maximum security was \$50,000 per cell. So that is why \$110,000 caught my attention.

MS. SHILTON: It may be that \$110,000 is the rate which includes the maintenance of the deck on into the future over 10 years for the actual funds that are floated on the bond over the prison. It just seems to me that there is a book by Roger Lowen, where he goes into the actual debt in construction costs and then that is -- I remember that figure from that book and I am wondering if that isn't the source of this. Actually, I used some IACRA publications for that, but I would be happy to provide that to you.

COMMISSIONER REILLY: Thank you.

COMMISSIONER NAGEL: Questions from my left?

COMMISSIONER GELACAK: Yes. Ms. Shilton, I am somewhat fascinated by your inclusion of drug distributors as

necessarily non-violent offenders, merely because there is no instant violence or no weapons associated with the distribution.

There is a large number of people who would argue -- and I think I would probably be one of them -- that one of the reasons we have mandatory minimums in the drug area is a direct response to the public's concern about the crime that drug use generates and the fear that is generated in the public's mind with regard to the fact that there are people who are not necessarily involved in the distribution, but in the use of drugs who support their habit, if you will, through violent activity, and that absent the drug distributor, a certain amount of that violent activity would not be generated.

I at least have trouble with affording drug distributors who haven't themselves been involved in a violent offense, the designation of non-violent offender, because they may well have distributed drugs to hundreds of violent offenders who wouldn't be out there committing those offenses, absent the need to support their habit. I just wonder if you would care to comment about that.

MS. SHILTON: Again, I think that the term "violent

offenders," I was thinking of it more in terms of how it is used for screening for community corrections programs around the country. If we excluded drug offenders from community corrections, we wouldn't have any customers.

In fact, I was just working on a task force in Northern Virginia where we were working on the exact problem of people who have a drug habit being excluded from half-way houses. It is a serious problem, because of its perceived threat and "violent" connotation.

I think that there are traditional ways you can say that it is a serious offense, without saying that it is a physically violent offense. The other exclusion that you commonly see is mental illness or past history of physical violence, physically violent acts as indicating an inability to not be amenable, and what we are really talking to is amenability to being rehabilitated, which, again, the guidelines don't really consider amenability, in the sense of direct amenability, and maybe that is why we are all around this idea of non-violent behavior, because it is in a way one indicator that people have used to screen for programs.

I don't have an answer, but I think that it would require a longer dialogue than we have, but I think it is the

kind of thing that people who provide alternative service could work on with working groups to come up with indicators of behavior.

In Canada, they are working on a daily needs risk assessment which looks at how actual risk in the community goes up when needs are not being met in a program, the kind of thing that we could do with our programs to try and reduce the risk of violent behavior in a program, which is what I am really concerned about.

COMMISSIONER NAGEL: Thank you.

Is Mr. David Stewart here? Mr. Stewart is from the law firm of Ropes and Gray.

MR. STEWART: Good afternoon.

I appreciate the opportunity to appear here. I apologize for not having been here when my name was called earlier. I understand you have been moving rather briskly today and I will try not to obstruct that too much.

I wanted to testify solely on the question of Amendment 20, which relates to the money laundering guideline and revision of section 251.1. I am in private practice with a generally with a white collar defense practice and I have become interested in the question that is addressed here

through my experience in cases.

The basic principle announced by the Commission, which I strongly endorse, is an attempt to tie the base offense levels for this offense more closely to the underlying conduct that was the source of the illegal proceeds. Again, in the cases I was involved in, the inclusion of the money laundering count resulted in the extraordinary increase in the potential sentence, gave great leverage to the prosecutors over potential defendants.

I think, frankly, the principle that is announced there is consistent with the principles that are announced in other parts of the current guidelines. In particular, I would point to Application Note 13 of the fraud guidelines, section 2F1.1.

I think it is also consistent with what the working group on money laundering offenses found, which is that in non-drug offenses you really do get an extraordinary increase in the penalty by including the money laundering charge. I have cited in the written testimony I submitted a variety of cases where that was achieved in bank fraud or pension fraud and similar cases. I would even report that prosecutors confirm that is why they add money laundering accounts,

because they guidelines are so powerful with them. It is a bigger hammer. One case I saw that was 27 months in prison versus 6 months in prison.

Although I endorse and commend the basic principle, I am troubled in the way it has been implemented in the proposed guideline and urge the Commission to reconsider it. I have done a crude calculation of the impact of the change in the working group's sample of non-drug money laundering cases, and you find from that an average of 9 offense levels difference between what the non-money laundering offense would have caused the sentence to be and what it become when you add money laundering.

Under Amendment 20, the proposed approach is to take the fraud guideline table, take the amount of funds involved and add 8, and the difference between the two situations, our current situation is found by the working group of 9 guideline levels difference, on average, and the 8 guideline addition under the proposal is really not terrible material, it would seem.

I think this is enhance because of the distinction between loss under the fraud guidelines and value of funds under the money laundering guidelines, which has led me to

question whether using the fraud guideline table makes sense.

Loss is a particular concept that was explicated very interestingly I think by the Tenth Circuit in the Johnson case decided. It relates to what the victim has suffered. The money launder value of funds concept is much more what is the cash that has been involved in the entire transaction.

I used an example in the written testimony of an overcharge to the Federal Government in a Medicare program or a defense contracting program. The value of funds involved might well be \$750,000, but the actual loss would only be \$100,000. You end up with a much higher guideline by using the fraud guideline table, which is supposed to measure loss, when you are trying to find the correct offense level for the money laundering guideline, which is value of funds.

So for a fraud guideline, you have \$100,000 as the proper measure, under money laundering it is \$750,000, and you go from a Level 6 to a Level 10 plus your 8 eight additional levels. You are 12 levels up the scale from there, so my great anxiety is that we will end up back where we are. Although the principle is adopted and embraced in an appropriate way, the way it is being implemented doesn't get

to where the Commission has said that it hopes to get.

I think the table needs to be rethought. I think some version of the money laundering table that is currently used should be used, and I think that the 8-level distinction is just far too much in order to reduce this disparity.

Finally, I would note my agreement with the observation to the American Bar Association on the subject of stings, again, the concept of the money laundering offense to the underlying offense seems to me very important in that context, as well. It is a little trickier, of course, because there is no true underlying offense, so it has to be the represented underlying offense, but, again, it seems to me the proper ways to approach the problem.

Those are my basic concerns, and I would be happy to respond to any questions.

CHAIRMAN WILKINS: Thank you, sir.

Questions from any Commissioner or comments?

[No response.]

Thank you very much. We appreciate you coming and spending time with us.

MR. STEWART: Thank you.

CHAIRMAN WILKINS: Mr. Charles Blau? Mr. Blau, we

were a little ahead of schedule, so it is not your fault that you were not here when we called your colleague to the front, so we will give you an opportunity to make your comments.

MR. BLAU: Thank you, Judge. You can blame American Airlines.

CHAIRMAN WILKINS: That is better than blaming the Commission. Don't blame us.

[Laughter.]

MR. BLAU: I am here as a private citizen and I guess also colored as a criminal defense lawyer. I am here to vigorously support these proposed amendments to the money laundering statute that you have made.

I bring a sort of unique background to this, if you will, spending 20 years as a prosecutor. In the early 1980's, I ran an operation for the Department of Justice and Treasury called Operation Greenback in Florida. Following that, I was Chief of Narcotics for the department, and following that, I had certain duties as Associate Deputy Attorney General for Mr. Lowell Jensen and later Steven Trott as Associate Attorney General.

One of my principal duties in all of this, I suppose, was looking after and seeing that there was some

order in the drafting and the presentation of the money laundering statutes that have been passed by Congress for the Department of Justice. I played an active role in drafting, although I think that the principal author is seated up there with you, and also basically in the legislative process to get these two bills passed through Congress.

Finally, I guess I was tasked with the responsibility of drafting a memorandum of understanding between the various law enforcement agencies delegating the responsibility for those agencies in using these statutes.

In looking at these statutes, I think basically the intent, or at least my intent, was to create a broad criminal statute which would reach every kind of sophisticated money laundering that was out there. In short, I thought, and I think basically the people that were in the process with me felt that the real intent of this statute was to get at professional money launderers, principally those associated with narcotics and organized crime.

I make I think no apologies for the breadth of this statute, because I think basically it is the kind of statute that was definitely needed and is needed even today in dealing with sophisticated money laundering.

In retrospect, I think there are probably two mistakes that we made, that I think if I had to do it over again I would change. Second, the first mistake is that I think I would have liked to have limited this statute to instances where there was sophisticated criminal activity present, either with narcotics or with organized crime.

Secondly, I think that I would have required the department to have exercised some central control over the use of this statute much more so than we did.

The department, in my view, basically has failed to have what I would call a realistic or a centralized process dealing with the use of this statute. There are, in essence, 94 separate policies, and each U.S. Attorney, basically, in essence, decides how the statute is going to be abused or used, as the case may be.

What we are seeing at least in my part of the country, which is Texas and the Southwest, is a continual threatening of the use of the money laundering statute in non-drug and non-organized crime cases. As an example, I represented a fellow not more than two weeks ago who was presented a 2-year plea opportunity or face three counts of money laundering, in addition to the false statement that he

was charged with.

Now, I suppose one could legitimately argue -- and the department, in raising these issues, has indicated that it is not bad for prosecutors to threaten the use of the money laundering statute.

My view, however, I think is that this statute is a very, very important powerful prosecution tool. I think that it has tremendous potential to be abused. I think in at least my area of the country, and particularly in the white collar non-drug area, we are seeing an abuse of the use of this statute. Plea negotiations, in short, have been replaced by threat negotiations, and using a very substantial and heavy-wielding club, the money laundering statute. This is a real threat. One may argue that it is either good plea bargaining on the part of the government or, alternatively, it is a little bit overzealous and coercive of the criminal justice process.

The question that I raise with the use of this statute, without any centralized controls, is whether the criminal justice process is being undermined by the use of a very easily proven criminal statute which is not connected in any way, shape or form with any organized crime activity or

organized drug activity. And the question with these guidelines has been should a person be subjected to severe criminal sanctions, when his conduct amounts to no more than the base underlying offense. It is a bit like using a nuclear weapon against a single individual.

I think that these changes proposed by the Commission are essential in bringing a little reality back into the prosecution charging process. I would have preferred that the department basically would have taken this on itself, would have overseen basically the use of this statute and would have culled out the cases where it was clearly an abuse of process to bring such an enormous charge against underlying conduct which did not deserve it.

My view of these guidelines, until basically Congress gets around to amending the statute, is that the underlying offense should be a relevant and important factor in determining what penalties for money laundering connected with those type of offenses are.

I do believe that the courts are going to I think reach a position where they will not forever tolerate these charging abuses, and a very valuable prosecution tool will be unnecessarily limited, or bad case law. So I support your

amendments completely.

Thank you.

CHAIRMAN WILKINS: Thank you very much. Your testimony is very enlightening, having seen it from both sides.

Any questions or comments from anyone?

[No response.]

Thank you very much, sir.

John Zwerling? Mr. Zwerling represents the National Organization for the Reform of Marijuana Laws.

Mr. Zwerling, we are glad to have you.

MR. ZWERLING: Good afternoon.

I would like to thank you for the opportunity to appear here. My name is John Zwerling. While I do come here today to represent the National Organization for the Reform of Marijuana Laws, I think you should know that I am also a practicing attorney who has been practicing criminal law for 22 years, and I am represented I am sure over 1,000 individuals who have been charged with drug offenses in that period of time.

I think that one thing that I lament most is that during the last 20 years as an attorney -- and this comment

goes to the guidelines and mandatory minimums in general, and not just for marijuana -- I used to practice with the theory that when a client would come into my office, that person would be facing a crisis of their life, and it gave me a unique opportunity to do something to benefit my client and society, in general, and that is we had the philosophy that if you got your client to straighten up his or her life at that point of crisis, got them into drug treatment, if that was called for, vocational treatment, employment, whatever it was, have the person really face the mirror and get them to help themselves, you could help them with their criminal case to a very large degree, and that was something that we could use to get them in the right direction.

That has evaporated over the years. Doing those things has very little benefit in the end for these individuals, because it doesn't affect what their punishment is going to be to a great degree. Becoming a cooperating individual is really the only way to help yourself nowadays, and that is not necessarily a long-term benefit to that individual's lifestyle or benefit to society.

Putting that aside, let me address myself to why I think that the guidelines do not adequately take into

consideration the difference in potential harm between marijuana and other controlled substances, and why I think that that failure is producing very unwanted results.

We have been involved in an 18-year battle with the DEA in a lawsuit known as NORML v. DEA, trying to get marijuana reclassified for medical use. Most recently, a couple of years ago, we had hearings around the country in front of a DEA administrative law judge, Judge Young, at the end of which he found, as a matter of fact, based on the testimony and the affidavits and the arguments of both sides, that marijuana was perhaps the least toxic medicinal substance known to man. He compared it to raw potatoes, as far as the amount of harm it can do to an individual. There has not been a single reported death from an overdose of marijuana.

Having said that, then you look at the guidelines. Now, you can get life without parole for distribution or being a member of a conspiracy which distributes enough marijuana to qualify for that penalty. That is as much time as you can get for being the same identical person doing the same identical role in a conspiracy involving cocaine.

Now, you could distribute, for example, 600 kilograms of marijuana, 30 tons of marijuana and be punished

the same as if that was cocaine. The punishment is the same, life without parole.

Now, on the extremes, which that size of a distribution is one extreme, and on the small extremes is where you really see the damage that these guidelines are doing. When people are involved in a conspiracy to distribute drugs, let's say the drugs come from Colombia, it is merely the stroke of luck as to what weight will be considered relevant conduct in that conspiracy.

What I mean by that is that if the police at the time this individual is arrested had followed the drugs down from the cartel through the importation scheme to the border area where the person gets arrested as the mule, they are held to what was foreseeable to them, they knew this was an ongoing route, and if it is at the large end, they are going to get hit with the weight and they could wind up with life without parole, minus a couple of adjustments, perhaps, for role in the offense. But if it is their second or third trip, they are not going to get any help with role in the offense, et cetera. And it won't matter whether it is cocaine or whether it is marijuana, if it is large enough.

Now, through the business person -- and I submit

that the people who are involved at the very large end of the distribution network are business people -- what we are telling them is that it is fool-hardy to deal in marijuana, because cocaine carries the same penalty for much less substance. In other words, you can put 2,000 pounds of cocaine in a duffel bag or two, you would have to use an ocean-going barge to hide that amount of money worth of marijuana, the equivalent in money of marijuana.

On the small end, let's say 100 kilos, where you have the 5-year minimum mandatories, let's look at 5 kilos of cocaine which you could carry in an attache case or a briefcase, versus 5 20-kilo bales of marijuana, which you would have to put in a pickup truck.

To a business person, which makes more sense? Where are you less likely to get caught, if you are looking at it purely from a business point of view? Which one smells less to the policeman who stops the vehicle? It is clear that you have less chance of being convicted, less chance of being caught and the same penalty for dealing in a much harsher drug. That doesn't make any sense.

Now, when you are dealing with plants, the presumptions with the plants are really -- I don't mean to be

too harsh, but I would consider them to be ludicrous. You take 100 seedlings, total weight maybe half an ounce, and you are going to treat that as if it was 100 kilos of marijuana, a 5-year minimum mandatory. Where is the sense in that?

We know, I mean the evidence is before you, I am sure -- and Ed Rosenthal will be testifying later -- that when people plant marijuana, especially in their homes, they throw in a bunch of seeds and see what comes up. You never know what is going to come up. Many of them are infertile. Many of the seeds are infertile. You see what comes up. If you get arrested when these things are half an inch high and you've got a whole planter-full, you could have 100 plants, wherein, you are really only intending to grow two or three, the best that come up. That is a 5-year minimum mandatory offense. That is the same as if you were selling 5 kilograms of cocaine. It is just a bizarre result.

I would like to address your comments about the violence, is this a violent crime. Whatever you might say about the acts of users who are in need of money to purchase their drugs, when you are dealing with an addictive drug, a physically addictive drug such as cocaine or heroin, your observation, while I don't agree with it, has more validity

than it does with marijuana.

I don't think that anybody is aware, I have never come across in my 22 years of an individual who committed a crime of violence in order to obtain their supply of marijuana. Yet, we consider the marijuana offense as a violent crime just like we do distribution of cocaine or anything else.

I would like to also ask you to focus on why the NARA Act is not available any more to judges. It is on the books. That is the Narcotics Addict Rehabilitation Act. It used to be, while it was funded. And we are having a battle right now in a case where the United States Government is saying, well, it is on the books, but Congress has appropriated no money for it and, therefore, the court can't utilize it, and the judge said that is regrettable, but he thinks that they may be right.

When an individual commits a non-violent crime as a result of their addiction to drugs, but it is not a sale for profit, the court used to have and still I think has the power to order a study by the Surgeon General to determine whether this individual is an addict and amenable to treatment.

Our judge wanted to do that in a case that is pending and the U.S. produced a letter saying there are no funds for the Surgeon General to do such a study, even though we know that there are thousands of drug treatment programs that receive Federal funds.

That is something that I think perhaps this Commission could recommend that Congress look at, because I think it is something that is very important. The court, if the Surgeon General so certified, then he could send that person I think up to 6 months or more of inpatient treatment, if the individual asked for it and was willing to go, and upon completion of the program could dismiss the charges.

Now, that is a very worthwhile carrot. Society comes out way ahead in the long run. The individual comes out way ahead in the long run. Cost-benefit analysis would indicate that that is a way we ought to be going in many of these cases. But that is just not available right now and the sentencing guidelines do not provide any real incentive for treatment that is of real worth to these individuals.

That is all I have to say.

CHAIRMAN WILKINS: Thank you very much. We appreciate your sharing your testimony and thoughts with us.

Questions from anyone?

[No response.]

All right, we will move to our next witness, Paul B. Bergman. Mr. Bergman is representing the New York Council of Defense Lawyers.

MR. BERGMAN: Thank you, Mr. Chairman Wilkins. Thank you for providing us this opportunity to speak to the Commission. This is our third year here. It is kind of a rotating thing, and this time it has befallen to me, as the current chair or co-chair of the Sentencing Guidelines Committee.

The NYCDL, the New York Council of Defense Lawyers, is an independent group of criminal defense specialists in New York. We are about 135, and for the most part almost exclusively practice in the Federal court. We count among our membership 10 former chiefs of the criminal divisions in the Eastern and Southern Districts of New York, and I think the vast majority of us, including myself, were former Assistant United States Attorneys, and we are all active practitioners.

We have submitted to the Commission today a 34-page document -- we had hoped it would be kept to 25 pages, but we

couldn't work it out that way -- which covers approximately 22 issues for comment and proposed amendments. Many of the positions that we have taken, in fact, probably exclusively all of them, are positions that have been shared by the other criminal defense attorneys and criminal defense organizations that have spoken before you, particularly Mr. Blau's remarks concerning the money laundering guidelines quite eloquently and more eloquently deal with that issue than ours.

We have extensively addressed the proposed elimination of the minimal role in the offense from the fraud guidelines, which is a proposal that we oppose. We oppose it primarily because we think that the fraud guidelines themselves require jail in instances in which, frankly, the monetary value and the type of crime that was committed and the individual is not in keeping with the congressional mandate that non-violent first offenders should essentially not receive a jail sentence. And we think that particularly with the fraud guidelines, that is a particular area which really should be used to implement that particular mandate from Congress.

There are a couple of questions I thought that deserve kind of extemporaneous remarks by me that were raised

by former witnesses and by members of the Commission. There is a proposal, and it is just for comment at this point, regarding the substantial assistance departure.

I believe the Commission has proposed discussion of an amendment which would permit, in the case of a non-violent first offender, a downwards departure reached and arrived at by the court along without motion of the government, and we endorse that proposal and we think that it should eventually find its way into a concrete amendment. We think it is very sensible, and I think that to the extent that judges -- and judges, by the way, for the most part we are aligned with. I drop a long footnote.

In the Eastern and Southern Districts of New York, I don't think that the defense bar generally before the guidelines felt that there was a great disparity in sentencing. There is a tremendous regard by the practicing bar in New York on both sides for the bench that we are blessed with in both the Eastern and Southern Districts, and, with some few exceptions, we have always been very happy to leave to the discretion of the judges who sit on those courts the fate of our clients, because, for the most part, we have seen fair sentences.

I might say that, despite the guidelines that drive to harsher sentences under this regime, the Eastern and Southern District bench, at least as borne out by the statistics, have achieved a departure rate which is probably second to none in the country, and we think that is justified in that district.

But let me return just briefly to the 5(k)(1) issue. The reason I suspect that the judges don't recognize the problem that we as practitioners recognize in that area is that they don't see it. As a practical matter, a cooperation agreement that is entered into in either the Southern or Eastern Districts of New York, and I dare say throughout the country, is really a contract of adhesion, and part of that contract of adhesion is a requirement, number one, that a defendant will never be able to challenge the good faith of the government, essentially. The government unilaterally determines under those agreements whether or not it will move for a departure.

In those rare instances, and they are very rare, in which you think for a moment that you can establish fraud for the kind of bad faith that the cases now require, you would have to be insane, as a defense lawyer, to tilt against the

government. Number one, you have no discovery on the issue, you have no means of determining, in fact, whether or not the government has acted in bad faith.

Moreover, you have, even before you have entered into the cooperation, subjected your client to extensive debriefing by the government. You may have even signed a cooperation agreement.

At that point, considering that you no longer have the right to withdraw the plea, because that is in the cooperation agreement, the issue of whether or not your client's participation in the cooperation aspect should allow a departure is a dead letter. You simply can't raise it to the court. The suggestion for discussion, I believe, represents a narrow departure from the existing regime that we have in this, and I think it is worthy to be explored on an experimental basis.

I noted earlier this year, in September, that there was supposed to be some kind of an exploratory effort to determine how this is actually implemented in practice, the 5(k)(1), and we wrote a letter to the Commission. I don't think that anything concrete was done in that respect.

But if you spoke to defense lawyers throughout the

country, you will find, I think, unanimity and a feeling that the process has been skewed, unfairly skewed by virtue of the government's exclusive authority to move for 5(k)(1)'s. And if you permitted this one small area with non-violent first offenders to be left to the court, you would be creating an experimental area by which you can in almost a laboratory way test as against the future whether or not the existing requirement of the government motion is an appropriate motion.

COMMISSIONER MAZZONE: Well, what is a non-violent first offender, in your experience? Is that a person charged with a drug offense?

MR. BERGMAN: Well, it may or may not be. I don't know that we have had generally characterized every drug offender or every person who is charged with a drug offense as himself or herself being involved in a kind of violent episode that would suggest to her that they should not receive a particular benefit that is available to somebody else.

You have people I think who are essentially non-violent individuals, and where their relationship to the violence that does normally accompany large-scale drug transactions is so attenuated, that it would be difficult for

a judge on an individualized basis of particularized inquiry to say that that person shouldn't be treated as a non-violent offender.

So I think it can be particularized, but I certainly think that there is a class of defendants that fall out under the fraud guidelines and under the tax guidelines who are people, and I don't know to what extent people on the Commission have practiced and have come into contact with people, but you have no idea of the human devastation of an individual who has been an upstanding member of their community, maybe a lawyer who is going to lose their license to practice law, because they have committed a crime involving fraud or something else or it is a tax crime. They have lost their license, they have lost their standing in the community, they are going to be reporting for probation for 3 to 5 years, they are going to be paying a staggering fine.

I am aware that there is a very substantial body of thought currently and going back 15 years that everybody should get a taste, but I don't necessarily think that the taste has to be in a prison in order to impress upon individuals the seriousness of their offense and their degradation in society.

I must say I have never had a client come to me in all the 27 years of practice, 20 or so as a defense lawyer, and say to me, "Gee, I thought by evading my income taxes I wasn't going to jail, I thought I got one free bite." I mean it is not a deterrent. There is no pink sheet out among would-be white collar criminals by which they are told, "Oh, you're going to go to jail." They are all very surprised by this.

Now, maybe the answer is quite the opposite of what I am saying. Maybe there should be a massive advertising campaign telling everybody they are going to go to jail. But that is not what Congress decided here. Congress has a specific provision in the statute that says that non-violent first offenders should not basically go to jail.

CHAIRMAN WILKINS; Non-serious violations?

MR. BERGMAN: Non-serious.

CHAIRMAN WILKINS: That is the question, what is serious and what is not?

MR. BERGMAN: Well, there are some people that say that anything that makes it into Title 18 is serious, that is the definition of serious.

CHAIRMAN WILKINS: We don't say that.

MR. BERGMAN: I don't think so, but there is a class of fraud -- I mean even under the proposed fraud tables, somebody who is involved in a fraud that touches \$40,000 --

CHAIRMAN WILKINS: Let me ask you this: If the substantial assistance amendment passed that you just talked about, would the government be required to debrief your client, say, in credit card fraud, conspiracy, you have got a client involved, does the government have to debrief your client if you ask them to?

MR. BERGMAN: Do they have to --

CHAIRMAN WILKINS: Otherwise, they are going to say we don't need his testimony, we don't want it. You say, well, he can give you a lot -- but we don't want it, so then you go to court and you say my client attempted to provide substantial assistance, Judge. What would happen then?

MR. BERGMAN: Gee, I have never confronted that situation. Obviously, they don't have to debrief your client. I have a client in an ongoing investigation where the government has basically said forget it, we are going to take your client to trial and we are going to put him up against the wall and we're going to hang him from the highest yardarm.

CHAIRMAN WILKINS: So this wouldn't carry the requirement that the government debrief those who want to be debriefed, that is, an attempt to provide substantial assistance?

MR. BERGMAN: No, I don't see that as being the primary purpose of this. I am talking about the situation, and it is the normal situation, where the government offers the cooperation or holds out the possibility of a 5(k)(1) departure, you bring your client in under a kind of "queen for a day," as we call it in New York, but it is kind of a proffer agreement, sits down and tells the government everything that he or she knows, and you as the attorney hope that is going to be sufficient for the government.

And the government says yes, we will enter into a cooperation agreement, and that is the second step, and you are very happy. You have a client who is remorseful, who wants to reduce their sentence and wants to cooperate with the government, and you go forward and you sign the agreement.

Now, that agreement is uniformly a contract of adhesion. There might be some areas by which you can negotiate with the government, but basically these agreements are forged out of long discussions within the U.S. Attorneys

offices. They are not going to alter it for Attorney Bergman or Attorney Morvilla who might come in in a particular case. They say, look, that's it, take it or leave it.

Part of that provision is that down they line, they unilaterally will determine whether or not only to issue the 5(k)(1), but whether your client is telling the truth in certain respects, whether your client has told everything that they know. And when they come to you after your client has pled and can no longer withdraw the plea, and they say sorry, we think your client has lied to us, you can talk until the cows come home, and there is no relief that you can get. And if you go to the court of any judge in the Southern District or Eastern District, they are going to point you to the line of cases --

CHAIRMAN WILKINS: Why do you say your client lied, because he fought the polygraph?

MR. BERGMAN: Oh, no, I have had situations in which I have offered to take a polygraph by the FBI and the government has refused, and I have had a private polygraph.

CHAIRMAN WILKINS: How is the judge going to decide whether your client lied or not, that is what I am asking?

MR. BERGMAN: He can't at that point, because --

CHAIRMAN WILKINS: The judge can't, then what good is a motion that you can make on your own for substantial assistance, if the judge can't determine it one way or the other?

MR. BERGMAN: Because within that, the government would be able to, the court would be able to make a determination, subsumed within the court's authority to reduce the sentence based upon cooperation. It would also be the judge's authority to conduct an independent inquiry into whether or not the individual is telling the truth. As it stands now, we are bereft of any --

CHAIRMAN WILKINS: Do you have cases like this?

MR. BERGMAN: I had one and he is serving in jail right now.

CHAIRMAN WILKINS: Do you know that in the last two years substantial assistance motions have more than doubled, went from 7.1 percent to over 15 percent throughout the country?

MR. BERGMAN: You mean by the government.

CHAIRMAN WILKINS: That's right. So there may be not enough being made, but there are twice as many as there were 24 months ago.

MR. BERGMAN: Oh, I think the answer to that, at least from my limited small experience, is that everybody is racing to cooperate. I mean that raises a whole host of other problems, but my time doesn't include comment on that.

CHAIRMAN WILKINS: Well, it is a very interesting point and it is a difficult area, and we have got two statutes by Congress, one statute and one rule where the government has to make the motion, you know, and this is kind of sandwiched in between.

MR. BERGMAN: I think what the issue for comment does, which is really intriguing, is add something very real to what I think is the kind of experimental period of the Commission. As the defense bar, at first when these guidelines came down, we were all horrified. We were essentially horrified, because we didn't understand them and the judges didn't understand them, and there was that natural reluctance.

Now there has been a small priesthood that has developed, and I tried to gain entry into the priesthood and I don't know if I am there or not, but it calls upon lawyers to do what they are supposed to do. It is to solve problems and the problems created by the guidelines are a mine field

for lawyers and it is wonderful, and I think that it is not nearly as bad as the defense lawyers thought it was going to be when they first came out in the Eastern and Southern Districts.

But you are trying to, or at least one of the proposed amendments is taking away something that the Eastern District judges have thought very important, and that is that there be recognition for these mules that come in constantly into JFK Airport. There is substantial comment in our paperwork on that area.

I just want to leave you with one thought: You are talking about a very high-powered U.S. Attorneys office in the Eastern District. Nobody is calling them sissies, and neither are the judges, for them have recognized that these mules that come in from Nigeria, that come in from Colombia, people who are so desperate that they swallow the drugs, and they are as poor as can be and their families are starving and they are offered a couple thousand dollars, and the judges and the probation department in the Eastern District have recognized that these people do deserve to get a minimum role adjustment.

Don't turn your back on Application Note 7 that you

have. Don't turn your back on the combined experience of those judges in the Eastern District and that probation office.

That completes my remarks.

CHAIRMAN WILKINS: Thank you very much. We appreciate the excellent brief that you submitted and those mule problems that you talked about are significant ones we are wrestling with.

Any questions from the members of the Commission?

COMMISSIONER PAULEY: Yes, Judge.

I refrained from asking this of my own colleague Mr. Blau, and you are the unfortunate successor. With regard to the money laundering proposal in which you essentially say that you endorsed Mr. Blau's and others' presentations, is the reason that you endorse the published amendment that, in your judgment, it will reduce the amount of leverage that prosecutors are currently, and I guess you and Mr. Blau are occasionally misusing? If that is the case, is that because of your perception or calculation that the effect of this guideline is to significantly reduce base offense levels for money laundering?

MR. BERGMAN: I think that this proposed amendment

on the guidelines for money laundering goes one way towards eliminating what we consider to be unfair leverage and sometimes abusively exercised leverage with money laundering.

You take a simple crime conspiracy, which inevitably is going to have some ingredient of money laundering, now the crime conspiracy, you are looking at, depending on what the money is involved, 10 or 11 or 12 or something like that, is moderate, but if the prosecutor all of a sudden says to you, well, your client took \$10,000 or \$15,000 and constructed the transaction and he changed his invoices and so forth -- and these, of course, are the hallmarks of a crime conspiracy -- that is not the money laundering that Congress was talking about -- we are going to charge that.

You may have a defensible case, and that is really where the unfair leverage strikes at the core of the adversary system and the system of justice. A defendant might have a case to defeat the crime of conspiracy, let's say, but as a lawyer, you sit down with him and you say, look, the government is putting on the table an offense level 19 here, and if you are convicted of that money laundering, and well you might be, even though you might not be convicted of the underlying tax -- and I hark back to the gentleman who I

think is the Shirts amendment or something -- as a lawyer, you're involved in a risk analysis, as well. We don't stand on top of ivory towers when we advise a client as to what course to take.

So the client who might have a defensible case is going to be stripped of that, because of the threat of this money laundering, and I think the amendment goes a long way towards alleviating that unfair advantage.

COMMISSIONER PAULEY: Thank you very much.

CHAIRMAN WILKINS: All right. Thank you, Mr. Bergman. We appreciate your time and effort.

MR. BERGMAN: Thank you.

CHAIRMAN WILKINS: All right, Mr. Rosenthal is our next witness.

MR. ROSENTHAL: Thank you having me here.

I come with a background of studying the cannabis plant, which is one of the products of which is marijuana, and also as functioning as an expert witness in marijuana cases mostly regarding cultivation. What I wanted to talk about specifically were the guidelines as they pertain to 49, 50 and 100 plants.

As you now, if there are 49 or fewer plants in a

garden, they are considered 100 grams for sentencing. If there are 50 plants, then they are considered a kilogram for sentencing. Of course, I have met some marijuana growers at trial who would like to find that 45-kilogram plant.

The simple fact of the matter is that the Justice Department has been deceived into believing that an average marijuana plant weighs a pound or a kilogram or something like that, and there is no actual weight for a marijuana plant. Each garden has to be considered on its own, and to do anything other than that doesn't present justice to the defendant.

Let me give you an example. I was involved in a case in Oregon, Federal case which was under the 1988 guidelines, where each plant was considered 100 grams, and these plants were grown indoors and they were mature when they were seized, and they only weighed 10 grams each. Now, he was sentenced under the 100 grams, so that means that he was sentenced to ten times what the actual amount of his marijuana was. If he had been sentenced under the 1989 guidelines, he would have been sentenced at a ratio of 100-to-1. That certainly isn't justice.

Let me explain why I say there is no one specific

weight for a marijuana plant. First of all, marijuana is a dioecious plant, which means that it has male and female flowers on separate plants, and only the female plants are used. Those are the female flower part of the plant that are used.

Let's say a person's garden is seized one day that might have 100 plants, but once a marijuana farmer detects a male plant, he pulls it from the garden. So the next day, after pulling all the male plants, the garden might have only 50 plants, and yet the yield of that garden will be the same, because those male plants were never intended to grow to maturity, but they would be pulled as soon as they were detected.

Then there are things like cultivation techniques, such as spacing, the amount of water, the amount of light, the planting time of the plant, the soil conditions, temperature, humidity, also animal pests, insects, rain, all of these can affect the yield of a plant.

Let me give you an example. If you gave 10 people tomato plants, each of them would cultivate them a little differently and each would get a different yield. They would not get the same yield. Some people are good gardeners and

they will produce a lot. Also, there is question of spacing, because marijuana will grow into a certain space, but if it only has a small space to grow in, then it won't grow very large.

Indoors, many marijuana growers grow up to 4 plants per square foot and they yield 10 to 20 grams per plant, and a garden can easily have 100 plants. For instance, if you have a 4-by-4 area, that is 16 square-feet, you might have 64 plants in that 4-by-4 area, and then you might have some clones, cuttings that you have taken, and that would be a 100-plant minimum, and a person would go to jail for 5 years for a little garden of 4-by-4 feet that would yield, at most, 8 ounces.

CHAIRMAN WILKINS: Because the marijuana plants are growing so close together, they only yield a small amount?

MR. ROSENTHAL: That's right.

CHAIRMAN WILKINS: If you took half of them away, they would produce the same amount or more marijuana, because the plants would yield more?

MR. ROSENTHAL: Perhaps. It depends. You know, when you are dealing with farming and gardening, marijuana is no different than any other plant. I mean there are a lot of

variables and a lot of risks. So that to ascribe a 1-kilogram or even 100-gram value to the plant, it just isn't realistic.

The other part that I wanted to talk about was the fact that in the 12,000-year history of the use of marijuana by humans, there has never been a case reported of anybody dying from the use of marijuana. The Dawn statistics show a rate of .0047 emergency room hospitalization.

If we wanted to really prevent drug abuse and wanted to prevent harm from drugs, we would be better off taking liquor dealers and tobacco dealers and putting them in jail, because 400,000 people a year die from alcohol and tobacco. According to the DAWN statistics, which are government statistics, there is not one person last year who died from the use of marijuana.

So we have to question whether the marijuana laws themselves are valid. And I think that this is something for the Commission to do and to bring to Congress to look at, not only whether we should change the mandatory minimums, but also whether we should change this and make this into a civil regulatory process, rather than a criminal process.

For now, I have several suggestions: No marijuana

offense should be above a level 26, and that would meet the mandatory minimums on the 100 plants, and yet it would not have these grotesque sentences such as life. It is kind of ridiculous that a person can get life imprisonment for marijuana and a rapist can go free. I mean it boggles the mind, and it is repugnant to millions of Americans.

There are 50 million people who smoke marijuana now in the United States. This is a sizable proportion of our adult population. I am not saying that they are a majority, but what I am saying is what we are doing is disaffecting a significant portion of our population and criminalizing them and making them into outlaws, when most of these people are non-violent, productive people. And there is absolutely no reason to take a productive person who uses marijuana recreationally and give them one day of jail. There is absolutely no reason for it. It doesn't help society.

You know, we are trying to look at how we can help society, not only the defendants. Society isn't helped by the marijuana laws. It is hindered. It hinders the police department, it crates animosity between the population and the police, it is needless, useless work for the police to do. About 10 percent of our criminal court system is tied up

with marijuana cases, that is 400,000 cases a year. We have a significant number of our Federal prisoners in court for this, and this is for something which is less harmful than legal drugs such as alcohol and tobacco.

I haven't been able to figure out a rational reason for the marijuana laws, for the mandatory sentencing or for any guidelines that have any criminal penalties for marijuana. If we are talking about violence, there is no violence associated with marijuana. In fact, Anslinger, who was the first Commissioner of the Bureau of Narcotics and Dangerous Drugs, complained about marijuana, because he felt that if people smoked it, they would not be able to be good soldiers, they would be too non-violent.

So we are not talking about a case where there is violence associated with a drug such as cocaine or PCP. We are talking about a drug that is more known for Woodstock, where 600,000 people were together and there was peace.

Thank you very much.

CHAIRMAN WILKINS: Thank you very much, Mr. Rosenthal. You bring issues to us over which we have some control, but as you are correct, part of our mission is to recommend things to Congress that we think should be addressed

through the congressional process.

MR. ROSENTHAL: There is one more thing that I wanted to say about this, and I know that this isn't exactly the Commission's purview. But let's say that we had, instead of a criminal, but a civil regulatory process for marijuana. Instead of spending billions of dollars a year, we could raise \$40 or \$50 billion a year in taxes, and I think that can be used by the Federal and State governments I think incarcerating people for a recreational drug.

Thank you.

CHAIRMAN WILKINS: Thank you very much.

Any questions from anyone?

[No response.]

Hearing none, Mr. Rosenthal, thank you very much.

We will move on. This is our last scheduled witness. Is there anyone in the audience who would like to come forward and address the Commission? If so, come forward.

MR. PARKS: Hi. My name is William Parks. My wife is incarcerated for 7 years and 3 months in a conspiracy, and the Commission is considering some things that are of interest to us.

We have two children, and the first-time non-violent

offender -- I guess you have heard this in letters or whatever hundreds of times, because I have met a lot of women in the prison system when I visit my wife who are also in situations like this. Whereas, she had a wiretap on her and went to work for the prosecutor and all of that. This is all factual stuff that can be substantiated. Yet, at the end, like this lawyer said earlier -- well, never mind.

She was involved for 90 days in a conspiracy that was under the DEA's eyes for 18 months, but when the conspiracy was busted, of course, you get the whole ball of wax, because it is conspiracy. And although she had that 90-day minor role, her sentence was based on what the overall conspiracy had done throughout the length of time that she didn't even know existed.

I met her in treatment and she had two and a half years of productive living and straightened her life out, community support like crazy, and just a totally different person. But two and a half years later, she had to go to prison for a 90-day involvement in a conspiracy that the overall kingpins testified against her to get a lesser, they got lesser time. This is all factual stuff. They are serving 5 years, the ones that actually flew it in, broke it down and

distributed it, cut it in her house. So it was like she worked in a bar at the time and had two kids on her own, but it was like greed. I mean she will be the first to admit that she needed the money, and okay.

I am just saying to the Commission that there are some changes I think -- I am just a carpenter and I really don't understand real good a lot of this stuff, but for 8 months my wife has been in prison, I have tried to look into it and I am just real confused how that can happen, how that the lawyer we had in Baltimore, he is like -- the judge actually said in open court in front of all of us, there's nothing I can do. If the prosecutor doesn't do what he is going to agree to do with your wife -- she actually wore the wiretap, put her life in danger. I was against it entirely, but she was so scared of going to prison that she did it anyway, and then come to find out they said, well, that is not enough, so we really don't need you now, although all that happened.

We explained that all to the judge or tried to, and he just said that unless this man puts a proposal before me, it will get turned down in the court of appeals and I am not going to depart and have that happen.

So everybody seems to say that another place, when we are talking about a 90-day wonder in a conspiracy, where the people that actually testified were two-time losers, this is their second time and in Federal prison for drug conspiracy and knew how to work the prosecution, knew how to work the system and do that, and my wife is not --

CHAIRMAN WILKINS: You mean the others testified in trials, the others testified or what?

MR. PARKS: They didn't have to.

CHAIRMAN WILKINS: They cooperated with the government, so they --

MR. PARKS: Yes, they cooperated with the government and said that there was -- so now in the Federal prison where my wife is, although she has never been arrested, incarcerated or charged in her life with anything, they are saying your severity level, because of the amounts of drugs that these conspirators who brought it in said you were involved in for 90 days, your severity level, because they said it was this amount -- although she wouldn't even know what 59 kilos looked like, my wife couldn't even, if you showed it to her and said how much is 59, she would have no idea -- her severity level is that she will never be on work release, she will never be

afforded an opportunity for weekend furloughs, because of the severity level that the higher-ups said the overall conspiracy netted.

And although her personal involvement with that wasn't, you know, for the 90 days she was involved, still double-jeopardy is there. So we are talking about if the guidelines were set up to get the disparity out, that the people that knew more or whatever have eventually used that very thing to make it okay, to make them in better shape and take whoever is more cooperative, who has got more information for the prosecutor is going to get the best deals and stuff.

So what it looked like it was attempting to do just went haywire somewhere along the line. Of course, there is no parole and all. I know this is an individual case and we are not dealing with individual cases here, but I have to come here today and took off work. I talked to my wife last night and I told her that I was going to tell somebody here. I have tried to tell everybody I have met.

CHAIRMAN WILKINS: We are certainly glad you did come and to hear from you on what happened, and I think this is probably not an isolated case, because substantial assistance does work to reward those who many times are more

culpable than those that testify against, because they have knowledge of the other people's activity, and it is a policy decision and one that reasonable people can differ about as to whether or not the government should have this authority and, if so, whether or not they use it or abuse it and so forth. But you vividly paint one side of the picture.

MR. PARKS: Are there any amendments addressing the issues that I have laid out that would possibly --

CHAIRMAN WILKINS: Well, there is one that talks about where the court could make a substantial assistance motion on its own motion, without the government being required to make the motion, the court could do it, say you have cooperated, therefore, the departure from guidelines will give you a lesser sentence.

MR. PARKS: Yes, sir. Thank you.

CHAIRMAN WILKINS: Thank you, sir.

Any other potential witnesses, please come forward.

MR. VEETS: Good afternoon.

My name is Dan Veets. I am an attorney in private practice from Columbia, Missouri. I am Vice President of the Missouri Association of Criminal Defense Lawyers. I also work with the National Organization for the Reform of

Marijuana Laws.

I appreciate the opportunity to speak to you here today briefly. I want to emphasize that the guidelines presently are extremely harsh on marijuana offenders. I want to echo the comments of a couple of earlier speakers in pointing out to you that there are virtually no crimes of violence committed by persons because they are under the influence of marijuana.

Yet, the guidelines and often Congress, which is making policy in this area, fails to make any distinction whatsoever among the various illegal drugs. It is as if we had the same laws governing alcohol, tobacco and valium, as if we didn't recognize the important distinctions among various types of drugs. Guidelines fail in many cases to make any distinction, and the injustice that results from that is most apparent when it comes to people being sentenced in Federal court for marijuana offenses.

I am seeing in the State of Missouri, and I suspect this is representative of what is happening throughout the Nation, more and more very small scale marijuana cultivators being prosecuted in Federal court. I am talking about people who have no prior criminal history whatsoever.

CHAIRMAN WILKINS: Why is that?

MR. VEETS: Beg pardon?

CHAIRMAN WILKINS: Why is that, in your judgment?

MR. VEETS: Well, sir, my speculation is that the Federal prosecutors simply have more money than they know what to do with. I don't mean to be sarcastic in that regard. I know from speaking with county prosecutors in the State of Missouri that cases which would have stayed in their courts just a couple of years ago are now being picked up by the Federal prosecutors.

I know that we have a new Federal prosecutor's office opening in Jefferson City, Missouri. The fact is those offices need to have some work to do. There is no other rationale that I am aware of for why small-scale cases of cultivation by people with no criminal history and no acts of violence are being now prosecuted in our Federal courts.

Chief Justice Rhenquist himself also pointed out the terrible overload of cases we have in the Federal court system, and it is largely due because of the increase in criminal cases which should never be in the Federal courts in the first place.

Now, I know that not all of those factors certainly

are under your control or your ability to influence, but you certainly can influence the way in which offenders are sentenced on small-scale marijuana offenses. And I simply want to suggest to you that any opportunity you have to do so, you consider reducing any mandatory imprisonment that is required for marijuana offenders.

Again, I am talking about a number of cases in my own small practice in Columbia, Missouri. I see people frequently who are very good citizens in every other regard, who are law-abiding in every other regard, who are productive, who are good parents, who are taxpayers and hard-working people, who happen to smoke marijuana, who don't want to pay the prices that the present black market prohibition situation requires for marijuana, and for the simple wish to provide themselves with some supply without being involved in that black market, cultivate less than 100 marijuana plants, in some cases far fewer than that.

As Mr. Rosenthal pointed out, the number of plants is certainly not an indicator of what the yield is going to be. There are so many other factors that go into that. It may sound like there is a lot of marijuana, when you have got a dozen or so plants. I have a man next Friday who is going

to be sentenced in Federal court in St. Louis by Rush Limbaugh's uncle, Judge Limbaugh there in St. Louis. He had a pan of marijuana sprouts that you could hold in your two hands quite easily, but there were 80 sprouts there.

Now, the guidelines don't differentiate between male and female plants or, of course, what the actual yield is going to be. That man is in Federal court, he has got a young child and a wife at home. He has worked all his life. He has a two-year college degree. He has never ever been in any sort of serious trouble with the law, but he will go to prison mostly likely for 3 to 5 years.

It is a terrible shame and I hope that you will bear that in mind when we make these policies that fail to differentiate between PCP and crack cocaine or marijuana, that the terrible injustice results, and that more and more often these Federal cases involve merely the cultivation of small amounts of marijuana and the guidelines need to take that into account.

Thank you very much.

CHAIRMAN WILKINS: Thank you very much.

Do you have a question?

COMMISSIONER NAGEL: Could I ask you a question,

sir?

MR. VEETS: Certainly.

COMMISSIONER NAGEL: Fortuitously, I was told yesterday in a non-formal setting, and this was by an elected public official in Missouri, that in Missouri the second crop behind corn production most often grown is marijuana.

MR. VEETS: There are many estimates. Of course, one of the costs of prohibition is no one knows for sure, but there are certainly credible estimates that place it at the number one cash crop, and even in California that estimate has been made.

COMMISSIONER NAGEL: Can you help me understand why that is the case?

MR. VEETS: Of course, it is only because it is a prohibited crop. It is a function like any other commodity of supply and demand, and especially when the penalties are so harsh, then the risk factor in producing that commodity increases and the price increases.

We are in a vicious cycle here, and I don't mean to lecture you in elementary economics, but we are in a vicious cycle. When the penalties are increased, the risk in producing that commodity increases, the price necessarily

increases, but we don't see less of the production going on. The increased price provides the continued incentive for people to produce more.

We obviously cannot warehouse, we cannot imprison all of the millions of Americans who choose to use marijuana. And whether they should or not use it is not really the issue here. The issue is how can we best reduce the harm that results from that use of marijuana or any other substance, for that matter, and surely imprisoning those people is obviously not working. It is just not helping anyone.

There is no shortage of poor people in this country or in the world, of course, and that is who is tempted into this. When we up the ante, when we increase the stakes, when we increase, in effect, the price of marijuana, that is what happens when you increase the sentence. In effect, you increase the price. There is no shortage of people who need money badly enough that they will take the risk of growing it, transporting it, selling it and, of course, consuming it.

Again, the folks I am talking about mostly are ones who sit at home and just grow it and use it themselves and they don't bother anybody else, and yet they are caught up in the same scheme that is set up to deal really with major

international and large-scale traffickers.

CHAIRMAN WILKINS: Thank you very much.

MR. VEETS: Thank you.

CHAIRMAN WILKINS: Would anyone else like to come forward?

MS. PIGGEE: My name is Barbara Piggee, and I am representing my son. I am from Los Angeles, California, and my son is incarcerated at the Federal correctional institution in Phoenix.

There has been a lot of people who have spoken before me on this same issue that spoke quite eloquently, but since I traveled so far to get here to speak, I decided that I would speak on it again.

I am not here to give you my poor son's speech and ask you to open up the doors and set him free and all of this. I figure that to whatever extent my son was involved in his cocaine conspiracy case was too much and that he should be punished, but I feel that the crime does not justify the time.

My son was involved in a cocaine conspiracy case and was sentenced to 17.5 years for just short of one kilo of cocaine. The idea that the sentencing involving powder

cocaine compared to crack cocaine seems quite ridiculous to me, that there could be such a wide range of fines, considering the fact that cocaine is cocaine, and the only difference was that some baking soda and water changes it from powder to crack.

COMMISSIONER CARNES: Was your son involved with cocaine or crack?

MS. PIGGEE: Well, cocaine base is crack cocaine.

COMMISSIONER CARNES: But was it crack that he was involved in?

MS. PIGGEE: Yes. So the sentence, for example, for 50 grams of powder cocaine, you are talking 21-27 months, without a minimum mandatory. The same amount of crack cocaine, and you are talking a minimum of 10 years, and that just does not seem to make sense to me and I don't understand how and where this all came from, the difference in the sentencing. That is my main point for being here today, is to find out how and why and what can be done about it, since they both start out the same, how it could end up with such a difference in the sentencing.

After spending a day here, I do realize that I am not alone with my feelings. I am not part of any formal

organization. I was just coming as a parent and I was quite surprised and happy to see that there are a lot of supporters that feel the same way that I do, and I am hoping that something could be done about it.

Another issue I have is in reference to guilty pleas that are made in court. In my son's particular case, he was arrested in Oklahoma, and I flew to Oklahoma for a trial. When I got there for the trial, when the judge asked the bailiff to go and bring the jury in, between the time the bailiff left and came back, my attorney, Michael Gasaway, he told us that he had received some revolutionary new evidence, that they were going to try my son as a career criminal. I didn't know what that meant and I panicked and he told us that he could get 60 years in prison.

Naturally, I really panicked then and I begged my son to plead guilty, because my attorney said that if he pled guilty, he could get a 10-year sentence and he would only have to serve three-fourths and he would be out in 6 years and it would be all over with. Well, 10 years compared to 60, it logically made sense to me that we had better take this deal here. We didn't find out until two days later that it was all a lie. It was all a lie. There was never any of

this new evidence or anything.

So on behalf of other defendants, I do know that the judge asked the question, he did ask have any deals been made to you, do you understand what you are doing, and my son looked at the attorney and he didn't give a sign to speak, so he didn't say anything, you know, he just stood there and nodded yes, he understood. He didn't know what he was saying. He was thinking that the attorney was supposed to say something. When he didn't, he just went along with it. I was right there and I didn't think anything was wrong, either. When we found out that there was, it was too late.

I would like to suggest that judges ask defendants, especially ones who change their plea only minutes before trial, make sure that they do understand what they are saying. Just because they say yes or no, that is not good enough. If you could ask the defendant to repeat in your own words what you think this means, what you're doing, do you understand the consequences of your plea, and let them repeat it back to the judge, and then the judge can understand for himself whether that person really knows what he is talking about.

I don't think that is too much to ask. I don't

think it would take a whole lot of extra time out of the court's schedule, but it would give the judge an opportunity to hear for himself that this person does or does not understand what he has just done.

Thank you.

CHAIRMAN WILKINS: Thank you very much. We appreciate you driving such a great distance to share your testimony with us.

Would anyone else like to come forward?

MR. SMITH: Good afternoon, Commissioners.

Just something briefly I would like to follow up on.

CHAIRMAN WILKINS: State your name for the record, please.

MR. SMITH: Robert Smith.

CHAIRMAN WILKINS: Thank you.

MR. SMITH: In regards to marijuana, also, a good friend of mine was involved in a marijuana purchase. He was buying marijuana, the government was selling the marijuana, and he was buying I think about 20 or 30 pounds of marijuana. He obviously didn't know the guy was an agent and the agent had befriended him and so forth.

When they did the transaction, he gave the agent

the money for the marijuana and the agent gave him additional marijuana, at which time my friend said, "I only want what I can pay for, I don't want additional." You know, he didn't really want to take the marijuana from him. Anyhow, the agent said it was no problem and that they wanted to do more business and so forth, so he agreed to take the additional amount of marijuana, even though he couldn't pay for it.

When he got arrested, he went to court and he pled guilty. He accepted the responsibility for the amount that he could pay for. At the sentencing, because they had talked about an additional amount of marijuana that the agent had suggested, he was sentenced for the higher amount, which I think he got 4 or 5 years of time.

I think it is unfair that the government can do this type of operation, first of all just to put a drug that they say is illegal on the street and then to inflate the sentence on top of it. Whereas, the person was willing to take responsibility for his actions, but it is like rubbing salt in a wound, you know, when you inflate the sentence and make it worse than it actually was. That is the main point I would like to talk to you about.

Secondarily, there has been a lot of talk about

marijuana today, and I would like to just say one thing that hasn't been talked about, is the issue of hemp, which from an environmental standpoint is a tremendous economic issue which could really help this country a lot.

Hemp could be used for many reasons, such as a fuel, as a food, as a medicine, as a fabric, a textile. There are many uses for it, so I think perhaps even in the context of a drug we could look at it as more of a way of trying to maybe bring about some kind of industry. In fact, it is being used quite a bit in other parts of the world right now.

There have been publications on it. In fact, ex-President Bush, when he was in the war, was involved -- they say when he was flying his plane, the parachute was made from hemp, the oil for the plane was from hemp, the paper used and many other things were made from hemp at that time. So I think perhaps we could look at the marijuana issue differently in terms of a drug and also in terms of realizing hemp to be used in industry.

Thank you for your time.

CHAIRMAN WILKINS: Thank you very much.

Any questions?

[No response.]

Thank you very much.

Anyone else wish to come forward?

[No response.]

Having no other witnesses, we thank those in attendance now and all those who participated, particularly all of you who stayed with us until this late hour. Thank you.

We stand adjourned.

[Whereupon, at 4:59 p.m., the Commission was adjourned.]

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