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UNITED STATES SENTENCING COMMISSION

PUBLIC HEARING ON PROPOSED GUIDELINE AMENDMENTS

Thursday, March 24, 1994

Federal Judiciary Building
Education Center
One Columbus Circle, N.E.
Room C-415, South Lobby
Washington, D.C. 20002-8002

The hearing commenced at 9:07 a.m.

BEFORE:

WILLIAM W. WILKINS, JR., Chairman

JULIE E. CARNES, Commissioner

MICHAEL S. GELACAK, Commissioner

HENRY GRINNER, Commissioner

GARY KATZMANN, Commissioner

A. DAVID MAZZONE, Commissioner

ILENE H. NAGEL, Commissioner

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P R O C E E D I N G S

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2 CHAIRMAN WILKINS: If I could have your attention,
3 please. I will call this meeting to order. There are still
4 some signing in. The door will be open for those who wish
5 to come in later on today.

6 As far as today is concerned, I don't know whether
7 we will be taking any formal breaks or not, depending on how
8 we move through the large number of witnesses that we want
9 to hear from. So, if any of you need to take a break or
10 anyone here at this table needs to, simply take it on your
11 own time, and we will continue with the hearings that are
12 going to be recorded and preserved for all of us to review
13 at a later date.

14 Let me welcome everybody here to another in a
15 series of public hearings the Sentencing Commission has held
16 since its creation a few years ago.

17 I am Billy Wilkins. I am Chairman of the
18 Sentencing Commission. I would like to introduce those who
19 will participate in this public hearing today.

20 First of all, to my far right is Henry Grinner.
21 Henry is the Chief of Staff of the United States Parole
22 Commission, and he is here today representing the chairman

1 of that commission, Ed Reilly. Then Commissioner Mike
2 Gelacak, Judge Julie Carnes. To my far left is Gary
3 Katzmann. He works in the Deputy Attorney General's Office
4 and represents the Attorney General at Commission meetings.
5 Next to Gary is Judge Dave Mazzone, and next to me is
6 Commissioner Ilene Nagel.

7 Since the creation of the Sentencing Commission,
8 we have relied upon various sources of information on which
9 to make informed decisions on various issues that have been
10 presented to us. Some of you remember that we began with an
11 extensive study of past sentencing practices. Today, we
12 analyze every case of every defendant sentenced in our
13 federal courts, and that data bank now includes over 186,000
14 different cases, with a variety of relevant information. We
15 also work closely with various working groups: groups of
16 judges, probation officers, prosecuting attorneys and
17 defense attorneys.

18 We also rely upon information gathered at our
19 public hearings. That is what we are about today. I am
20 delighted that all of you are here. We, on the Commission,
21 appreciate the time, the effort that all of you, obviously,
22 have already put in to participating in this hearing today

1 through the written comments that we received. Of course,
2 the Commission is always open to additional comments or
3 ideas or thoughts that you may have, that you may pick up
4 from this meeting today.

5 Let me mention a couple of ground rules. We have
6 a large number of individuals who wish to testify, and we
7 want to be fair to everyone, so that those who would testify
8 later this morning and this afternoon will have the same
9 opportunity to be heard as everyone else.

10 Consequently, I hope you have been requested --
11 and, if not, I will emphasize that now -- to try to limit
12 your remarks to ten minutes. Just summarize your remarks,
13 and then you will be available for us to question you. Then
14 we will have your written comments as a primary source of
15 later review. We have a lighting system set up so that it
16 will be of some assistance to you. So, when the red light
17 goes on, you should attempt to summarize your remarks and
18 conclude. Then we will open the floor for questions.

19 Let us move now to our first panel of the day.
20 First of all, Mr. Marvin Miller. Mr. Miller is an attorney,
21 from my circuit. We are glad to have you, Mr. Miller.

22 MR. MILLER: Thank you, Mr. Chairman.

1 CHAIRMAN WILKINS: He is representing the National
2 Organization for the Reform of Marijuana Laws.

3 Julie Stewart, no stranger to the Sentencing
4 Commission. She is a familiar face to all of us. As you
5 know, Julie is the president of Families Against Mandatory
6 Minimums.

7 Peggy Edmunson and Alice O'Leary are here. They
8 are two members, also, of Families Against Mandatory
9 Minimums.

10 Is there any other witness to this panel?

11 MS. STEWART: Reverend Gunn will be late. He said
12 he would be here a little late.

13 CHAIRMAN WILKINS: Fine. We will go ahead and
14 hear from all of you. Mr. Miller, are you going to start
15 off?

16 MR. MILLER: Yes. Thank you, Mr. Chairman.

17 Ladies and gentlemen of the Commission, I am a
18 criminal defense lawyer. I am also a member of the board of
19 the Virginia College of Criminal Defense Attorneys.

20 In preparatory to meeting with you this morning, I
21 had conversations with federal prosecutors, law enforcement
22 agents, state prosecutors, federal judges, and state judges

1 in an informal survey in Virginia and elsewhere across the
2 country regarding the issue of marijuana and how it is
3 weighed and the guidelines, in general.

4 The main thing I wish to discuss with you this
5 morning is to invite you to consider amending the
6 commentaries and the applicable notes on how marijuana
7 weight is computed. There are some who believe that the way
8 it can be computed now is only the usable part of the plant,
9 but not everyone agrees with that.

10 The commentaries are not real clear in 2D1.1
11 because they say you take the usable part, but what is that?
12 In actuality, in a number of growing cases, I have rarely
13 had a case where I couldn't get the police and their experts
14 to agree with my experts that, when you grow marijuana, you
15 are going to lose sometimes up to half of the plants because
16 they are not all going to be female. There is no dispute
17 anywhere by anyone that the male plants are useless. They
18 just have no toxicity, no intoxication value. The chemicals
19 are not there. You can distinguish male between female. So
20 this is one of those rare areas where gender has a real
21 general applicability.

22 If you have seedlings, you cannot tell from the

1 seedlings whether they are male or female. The way the
2 guidelines can be read in the stricter sense right now, what
3 the commentaries are, if you have 80 seedlings, you have 80
4 plants. That is just not rational, because you are going to
5 lose.

6 If you ask a horticulturist this who works for a
7 professional nursery -- and I have had them come in as
8 experts in cases before, and there testimony has not been
9 refuted -- the horticulturist will come in and say "if you
10 grow from seedlings, you are going to lose anywhere from 7
11 to 20 percent just because they are not going to make it."
12 Then, of the remainder, you could have up to half that will
13 be female, which is the other half being male. Stalks are
14 useless. They have no value. Most people today, as a
15 practical matter, will only use the buds of the plant. At
16 least they do have some value, and I am not trying to make
17 that distinction, though in some cases you do.

18 Today, the way the guidelines are written, an
19 individual that has 80 seedlings would have 1,000 grams per
20 plant regardless of whether or not that is reasonably
21 foreseeable or not, and it is not reasonably foreseeable.

22 If they are commercial growers, they are going to

1 know that, out of 80, they might get 40. If they are a
2 personal user who is looking to maybe get 40 plants -- they
3 are not going to get them too large; they are going to have
4 a small operation; they just want to get some high-powered
5 buds for their own personal use -- they are still not, in
6 reality, reasonably foreseeing 50 plants, though the way the
7 guidelines are currently written they would be tagged with
8 more than 50 and an automatic kilo per plant, which is not
9 rational. You just do not get that kind of yield. If you
10 have them growing in the ground, depending on where the
11 policemen decide to pull them out or cut them, without his
12 even thinking about what was going to happen as a result of
13 that, you add or decrease weight.

14 Our position, in essence, is that only the flowers
15 and the buds ought to be considered in mature plants and
16 that the gender ought to be considered. If you get a grower
17 who has just gotten them to maturity and you can tell which
18 are which, that is a realistic consideration.

19 The automatic bump from 100 grams to 1,000 grams
20 per plant when you get over 50 is not in keeping with
21 reality and creates a lot of sentencing disparity.

22 Many federal judges and state prosecutors, though

1 not too many federal prosecutors, are very distressed by the
2 fact that they are getting ordinary state street crimes in
3 federal court in some jurisdictions. And I am just going to
4 pick counties out of my state, just as an example. If you
5 pick Franklin County, the judge is going to give a guy who
6 has 50 marijuana plants 20 years. A jury might give him 40
7 years in Virginia. So that case will go in federal court.
8 If you have a case like that, perhaps, in Fairfax County,
9 Virginia, where they are not going to get that kind of time,
10 then that will be a federal case, because they can judge
11 shop and they forum shop that way to figure who is going to
12 give the greater time. They have regional task forces, and
13 they parcel them out so they can judge shop and get
14 disparity in sentencing, depending on where you live.

15 You create an unfairness, also, in the federal
16 system because you do not recognize growing for personal
17 use. Many states do. Most states do. But there is no
18 distinguishing that in the federal system. Manufacturing is
19 manufacturing under 21 U.S.C. 841. The purpose for the
20 manufacture could be considered in guideline computation,
21 and you ought to take that into account in determining how
22 to deal with the weight, because your concern is realistic,

1 honest sentencing, in not allowing people to forum shop and
2 create unfair sentencing disparities. That is the whole
3 concept behind the guidelines; is some symmetry and
4 rationality to the process so some people are not treated
5 differently than others. The way it works now, if there is
6 that disparity, it can be changed by the commentaries and
7 the applicable notes without even, necessarily, changing the
8 guidelines so much.

9 The weights, in our view, need to be consistent
10 with the way the cases really work out. There are some
11 things about which people don't generally disagree, and that
12 is that the plants are useless and that the weight
13 computations do not give an accurate figure of the actual
14 intended weight. You have to look at reasonable
15 foreseeability in computing what the weight ought to be.

16 In another area, different than marijuana weight,
17 I want to very briefly touch on is your position that you
18 have taken regarding mandatory minimums. I have had many
19 prosecutors and police officers who have lauded you for
20 doing that, as well as many federal judges.

21 The police officers and prosecutors do it off the
22 record because they have political considerations, but they

1 really do appreciate it because they recognize the truth of
2 the system is that, right now, the big successful dealer is
3 guaranteed to get the best sentence and, if you have a good
4 organization and you make a lot of money, you are almost
5 assured to get a lower sentence than the little guy, because
6 the big guy can come in; he can turn people in; he can turn
7 in money on forfeitures; he can get a reduction in sentence
8 from 15 years down to 3 or 4 years.

9 The little guy has nobody to turn in and nothing
10 he can do, so he is going to get a 5-year or a 10-year
11 mandatory minimum. The guidelines that would factor in his
12 roles and so on can't take him below that minimum, even as
13 the guidelines are currently written.

14 Many law enforcement people that deal with drugs,
15 particularly drugs that are the more benign drugs, like,
16 marijuana, appreciate the fact that you are taking a
17 practical stance that is of practical value to law
18 enforcement. Sometimes, they feel badly about the
19 situations that they have to create by virtue of their jobs.
20 They get the big guys. They break up the rings. But they
21 sometimes feel poorly when a little guy -- and they have no
22 control over this -- ends up with a bigger sentence than the

1 big guy. The way the mandatory minimums are geared that
2 way, these days, that's a real problem.

3 I thought you should be given some praise where
4 praise is due where both sides of the aisle, so to speak,
5 seem to be in accord on that.

6 CHAIRMAN WILKINS: We will be happy to accept it.

7 [Laughter.]

8 MR. MILLER: Thank you.

9 CHAIRMAN WILKINS: Thank you very much.

10 MR. MILLER: If you have any questions, I would be
11 delighted to answer them.

12 CHAIRMAN WILKINS: Let us hear from the rest of
13 your panelist, and then we will come back to questions and
14 answers.

15 Ms. Stewart, you are next.

16 MS. STEWART: Good morning, Chairman Wilkins and
17 members of the Commission. I am really glad to have the
18 opportunity to be here and everyone else that will get a
19 chance to speak to you today. It is nice that you let us do
20 this once a year.

21 My written testimony covers three of the
22 amendments that FARM is particularly interested in seeing

1 passed this year. If you haven't already read it, I hope
2 you will have a chance to, because each of them is very
3 important, but I am only going to focus on one this morning.

4 The three are the marijuana plant weight, the
5 crack cocaine and powder cocaine disparity, and relief for
6 elderly and infirm inmates. I have provided cases for each
7 of those amendments that help you see whom we are talking
8 about that are going to prison under those laws.

9 Just for the record, although I am not going to
10 speak about those this morning, I want to say that we really
11 urge the Commission to consider the crack cocaine disparity,
12 to change it from 100-to-1, to 1-to-1, and that we do
13 believe that age and infirmity are considered extraordinary
14 reasons to depart from the sentencing guidelines, based
15 simply on compassion and decency.

16 One additional amendment which I didn't talk about
17 there, but which I would like to just mention that I think
18 is very important and FAMM strongly supports, is Amendment
19 8, to improve the drug quantity table for certain offenses.

20 This morning, my focus is on marijuana plant
21 weight. We urge the Commission to adopt a one plant, 100
22 grams weight, for each plant. We support the continuation

1 of the existing system for 49 plants or less, only we would
2 like to see that move, regardless of the number of plants,
3 to make it 100 grams per plant. Even though 100 grams is
4 still somewhat of an arbitrary figure, and you will hear
5 other people discussing this later today that are going to
6 argue for a much lesser weight than that, I think that it is
7 realistic. It is within the ball park of what actually
8 yield can be, and it is certainly far more realistic than
9 the 1,000 grams we currently have, which is "pie in the
10 sky."

11 The government's own marijuana expert, Dr. Muhamed
12 ElSohly has testified that he has never seen nor grown a
13 marijuana plant that yielded one kilo of usable product.
14 His latest research found an average yield per plant of
15 approximately 220 grams. Although his research is important
16 as a guide, it actually has some limitations, too, because
17 he only grows outdoors, and he grows under ideal conditions
18 -- the plants have full sun; they are planted three feet
19 apart; they are watered and fertilized regularly -- all of
20 which increases the yield of the plant. So he is really
21 able to tend to these plants openly in a way that most
22 illicit growers cannot. They do not have the luxury of

1 unobserved open spaces with full sun.

2 Dr. ElSohly can't tell us, also, what the average
3 yield for an indoor plant is, because all of his research
4 has been done outdoors. Indoor yield is much different than
5 outdoor yield. No one can prove that you can yield anything
6 near 220 grams on an indoor plant, and that is partly
7 because there are so many different methods to growing
8 marijuana. I have listed some of them in my written
9 testimony.

10 By the way, when you get to my written testimony
11 -- this is a disclaimer -- I am not an expert on this. This
12 is what I have learned from inmates who have written to me
13 and my brother who is serving a five-year mandatory sentence
14 for growing marijuana. My point is that indoor growing can
15 yield anywhere from 20 grams to 100 grams per plant,
16 depending on the method. So, even though Dr. ElSohly's
17 yield shows 220 grams outdoors, the average yield of plants
18 nationwide would be much less because most illicit growers
19 grow indoors where it is much harder to detect the plants.

20 FMM is not asking the Commission to do anything
21 radical. We are simply asking that the marijuana plant
22 weight be returned to what it was in 1987. I have included

1 in my written testimony a copy of the 1987 guideline tables,
2 which I am sure you have access to anyway, but I thought it
3 would make it easy for you to see that, in that table, it
4 shows that 200 marijuana plants receive the same sentence as
5 20 kilos of harvested marijuana, which is 100 grams per
6 plant. That is the kind of realistic balance that we are
7 seeking.

8 We are also asking the Commission to exclude male
9 plants from the total plant count at sentencing. As the
10 Commission knows, male plants are not cultivated. Dr.
11 ElSohly's report includes a comment that, "at ten weeks, the
12 male plants began to appear and were removed as a matter of
13 routine." Even the government understands that male plants
14 are simply not grown. To include them in the total count is
15 analogous to including the nonconsumable waste water
16 involved in the manufacture of methamphetamine. Male plants
17 are really the waste water of marijuana manufacturing. They
18 are destroyed as soon as their sex is evident. So it really
19 makes no sense to punish the grower for plants that would
20 never have been cultivated or consumed. The honesty in
21 sentencing that the Commission strives for is really
22 undermined by including male plants in the sentences.

1 Lastly, Famm urges the Commission to make these
2 changes retroactive. The sentencing disparities caused by
3 the one kilo per plant weight have created lengthy, unfair
4 sentences for a number of defendants. We have cited many of
5 them in the material you have in your hands, and you will
6 hear from the wife of one such defendant next.

7 I know the Commission seeks to make the punishment
8 fit the crime. You can do that by making the marijuana
9 guideline retroactive.

10 Thank you.

11 CHAIRMAN WILKINS: Thank you very much, Ms.
12 Stewart. Ms. Edmunson?

13 MS. EDMUNSON: I am Peggy Edmunson. I live in
14 rural southwest Missouri and have lived in northwest
15 Arkansas most of my life.

16 My husband Eric and I own 40 acres and an older
17 home, to which we have done extensive remodeling, doing most
18 of the work ourselves. For the past 12 years, we have
19 worked diligently to establish a secure home and surround
20 ourselves with the things we enjoy doing the most, including
21 gaining the respect of our friends and neighbors, all of
22 whom know they can call upon us at any time, from pulling a

1 calf at 3 a.m., in the morning, to watching their home while
2 they are away.

3 My husband Eric was a respected electronics and
4 design engineer for Clarke Industries, in Springdale,
5 Arkansas, making \$45,000 a year, designing from the ground
6 up Clarke's most profitable floor polishing machine to date,
7 along with Clarke's mainline of marble finishing and
8 polishing machines.

9 Being frugal by nature, Eric devoted all his time
10 and his money to our future and our farm. Eric grew up in
11 Boy Scouts and received the high rank of Life Scout. He has
12 always maintained these high morals, and honesty,
13 helpfulness, and kindness are his second nature.

14 In the summer of 1993, everything was going our
15 way. Eric was going to China to confirm a deal with the
16 company to make the handles for the machines he designed. I
17 was able to stay home and care for the farm, working our
18 garden, orchard, and our honey bees and, also, helping my
19 mother care for my father who five years ago was disabled by
20 a stroke and was unable to speak and care for himself and
21 has recently passed away this last March 17th.

22 On the afternoon of August 18, 1993, our world was

1 turned upside down. A confidential informant, the reasons
2 we will never understand or know, gave information to local
3 authorities that we grew marijuana. After four months of
4 investigation with no results, the DEA was called in with
5 their thermal imaging technology. With this covert
6 information and the information from the confidential
7 informant, a search warrant was obtained. We were not at
8 home at the time the search warrant was searched.

9 Thanks to our good neighbors and friends who
10 informed us of what was going on, we were not arrested at
11 the scene. We were unable to go home for two days, while we
12 retained an attorney and arranged to turn ourselves in.

13 Locals and state police and DEA agents, including
14 helicopters, did an intensive search of our property. They
15 discovered our wine cellar and, behind it, Eric's 9 x 10
16 grow room -- this is a size of a small bathroom -- in which
17 47 marijuana plants in various stages of growth allegedly
18 were taken, along with 4 plants that had been grown outside;
19 a total of 51 marijuana plants.

20 Why our case was selected for federal prosecution
21 was a question our attorney often asked and has yet to hear
22 an explanation. Despite repeated requests, the U.S.

1 attorney declined to permit Eric and our attorney to examine
2 the evidence alleged to have been taken. We would have
3 liked to have known the actual weight, since so many of
4 these plants were very small with, maybe, six to eight
5 leaves on them.

6 Eric cloned his plants, and he always had mature,
7 adolescent, and infant plants, always having more infant
8 plants due to mortality. This process seemed better than
9 buying it on the street, as Eric did not believe in buying
10 or selling marijuana. He grew only for himself. Due to a
11 very high-stress and demanding job, Eric chose marijuana
12 over alcohol and tobacco or going to doctors for drugs such
13 as tranquilizers or sleeping pills.

14 The federal guidelines call for the infliction of
15 a mandatory prison term for cultivation of 50 or more
16 plants. Cultivation of 49 or few plants is eligible for
17 probation and a lesser prison term. In Eric's case, two
18 small plants were responsible for Eric's sentence of 24
19 months in the U.S. Federal Penitentiary, in Leavenworth,
20 Kansas. Two less plants, he would have been sentenced to 10
21 months or less. Those two plants made a 14-month difference
22 in my husband's sentence.

1 The guidelines should be changed so that all
2 plants are weighed at 100 grams, and this unfair cliff would
3 be eliminated. Eric's sentence would have been no more 10
4 months, if all plants had been weighed at 100 grams.

5 I personally do not choose to smoke marijuana or
6 do any other drugs, which was proven through drug tests.
7 However, I pled guilty to a misdemeanor charge of
8 possession, in a plea bargain agreement, because it was in
9 my home. I, too, could have been sent to prison, if I had
10 not plea bargained for probation. I am now faced with
11 living alone without Eric's income for the next 24 months,
12 along with the financial burden of a \$10,000 loan we
13 borrowed to clear the criminal forfeiture that was brought
14 against our property.

15 Unfortunately, the cost of upkeep, utilities,
16 insurance and taxes do not go down with my income. The
17 closest neighbor is a quarter mile down a winding dirt road,
18 and I am left feeling alone and cheated by this judicial
19 system. And who has benefitted from this? Society has lost
20 a productive, intelligent, hard-working individual, and our
21 overcrowded prison systems have gained a nonviolent
22 marijuana grower who grew for his personal use only. The

1 DEA in its war on drugs, along with state and local
2 authorities, lost four months of investigative time and
3 money to stop one personal-use, marijuana grower.

4 I would ask that you please consider the lives of
5 real productive people like Eric and myself that your
6 decisions affect and please help restore the freedom and
7 justice that our country was founded on, and please explain
8 to me why two small plants had to make a 14-month difference
9 in my husband's sentence.

10 Thank you.

11 CHAIRMAN WILKINS: Thank you very much. Alice
12 O'Leary?

13 MS. O'LEARY: Good morning. My name is Alice
14 O'Leary. I am the executive secretary for the Alliance for
15 Cannabis Therapeutics, a nonprofit, educational and
16 patients' rights organization headquartered here in
17 Washington, D.C. I would like to thank FARM for allowing
18 ACT to testify this morning under its auspices. I would
19 like to say, at the outside, that the Alliance supports the
20 proposals put forward by FARM. We feel they are reasonable,
21 and we particularly support the retroactivity aspect of it,
22 and we hope the Commission will give that serious

1 consideration.

2 My primary purpose in being here this morning,
3 however, is to request that the Commission consider adding
4 to its Exceptional Circumstance guidelines a consideration
5 of the medical use of marijuana. The Alliance helped
6 individuals obtain legal access to marijuana under the
7 federal Compassionate IND program until March of 1992, at
8 which time the program was closed. That was two years ago.

9 In recent months, we have seen an alarming number
10 of calls and letters to our office from people who have been
11 arrested for cultivating marijuana and are facing extremely
12 long prison sentences. It is those letters and calls which
13 have prompted me to be here today.

14 When the Compassionate IND program was closed in
15 March of 1992, the outcome was sadly predictable. Those
16 people with a medical need for marijuana -- and let me
17 explain to the Commission that there are several medical
18 uses of marijuana which you are probably familiar with
19 already. They include the treatment of glaucoma, people
20 undergoing cancer chemotherapy, AIDS victims who use it for
21 the wasting syndrome and the treatment of nausea and
22 vomiting, and also for the treatment of chronic pain and

1 muscular spasticity.

2 With the closing of the federal marijuana program,
3 those people's medical need for marijuana did not close.
4 They were left with very few alternatives, and cultivation
5 was certainly among them. Many people chose to cultivate
6 marijuana feeling that it would take them out of the black
7 market and reduce their risk. It is ironic that, in many
8 ways, due to the sentencing guidelines, their risks have
9 actually increased because they were growing marijuana.

10 As Peggy's case illustrates, the inclusion of just
11 a few more plants over the guidelines can subject people to
12 very harsh sentences. I have some examples of those
13 sentences in my written testimony, which I would like to
14 present to you and also some other information which you can
15 look at later.

16 Some of the cases that we have heard from in
17 recent months include:

18 a 46-year-old cancer patient from Missouri who
19 will serve 57 months in jail for marijuana cultivation;

20 a 37-year-old private detective from Wisconsin who
21 suffers from chronic pain, the result of an accident in
22 1971, is currently serving five years in federal prison;

1 a 44-year-old multiple sclerosis person now
2 serving a five-year mandatory sentence for growing 75 small
3 marijuana plants; and

4 a victim of Crohn's disease now serving 25 years
5 in jail for cultivation and distribution.

6 In San Francisco next month, an AIDS patient will
7 be tried for growing 144 small marijuana plants. If
8 convicted, the mandatory minimum is 63 months in jail. That
9 is tantamount to a death sentence for this man. If you
10 think that AIDS patients are not going to jail for growing
11 marijuana, I can assure you they are.

12 The Alliance is aware of at least two individuals
13 who have served jail time who have AIDS. In one instance, a
14 young man served 15 months for growing marijuana. His cell
15 mate who had been convicted of assaulting his girlfriend
16 served six months. Orlin served 15. In our opinion, this
17 is not what the American people wanted when they asked their
18 government to get tough on drugs.

19 There is considerable support for marijuana's
20 medical uses. I have summarized that in my written
21 testimony. There are over 30 state laws which support it.
22 There are numerous judicial decisions which uphold the

1 concept of medical necessity. In all public opinion surveys
2 which have been conducted, over 80 percent of the public
3 supports medical prescriptive access to marijuana.

4 Unfortunately, reform takes a long time and, as I
5 am sure this Commission is aware, marijuana is a very
6 volatile issue. It has been difficult to reform the laws on
7 the federal level which prohibit prescriptive access to
8 marijuana, but we do feel it is just a matter of time before
9 these laws are changed. We feel it is unfair for people who
10 have extenuating medical circumstances to serve long periods
11 of time in jail for growing marijuana.

12 We hope that, in the future, the Commission will
13 consider adding to its Exceptional Circumstances the medical
14 necessity of marijuana.

15 There is at least one precedent that I can cite to
16 the Commission this morning involving James Cox, a 46-year-
17 old cancer patient, whom I cited earlier. His sentence was
18 lowered by a judge from 180 months to 57 months. So there
19 is precedent, and there is understanding in the judicial
20 community about this. But our feeling is that the specific
21 inclusion of medical use of marijuana under Exceptional
22 Circumstances will allow the judges to approach this more

1 realistically and with more compassion in the future.

2 Thank you very much.

3 CHAIRMAN WILKINS: Thank you very much.

4 Our next witness is Reverend Andrew Gunn.

5 Reverend Gunn represents the Clergy for Enlightened Drug
6 Policy.

7 REVEREND GUNN: Mr. Chairman and members of the
8 Commission, we know that, in order to have peace and
9 tranquility in our land, we must have good laws; laws that
10 are based on common sense and fairness and justice. Our
11 democracy has elected officials to make those laws, and
12 these elected officials create laws out of fear or anger or
13 vindictiveness that we no longer have good and just laws.

14 I am here this morning to witness to a growing
15 number of clergy and citizens who have become more and more
16 disenchanted with the criminal justice system and the law
17 and the way it is being enforced. There is growing anger
18 towards mandatory sentences, particularly, against those who
19 are nonviolent offenders. There is a growing hostility,
20 resentment, and disrespect for the injustices of our
21 mandatory sentences and the legal manipulation of the law by
22 legal professionals and by the seizure laws and the drug

1 laws. They are often counterproductive and are doing more
2 harm than good.

3 We citizens are spending \$23 billion on prisons
4 and on law enforcement with little positive results. The
5 draconian mandatory sentences are unfair. They are unjust.
6 They lack, in many cases, just common sense. They do far
7 more harm than good in the long run. They destroy families
8 and individuals. They have demonized drug offenders and the
9 whole drug problem.

10 During the time of Christ, those who had leprosy
11 were demonized, but Jesus did not demonize them. Instead,
12 he healed them and helped them.

13 Now I am the president of the Clergy for
14 Enlightened Drug Policy. I am a United Methodist minister,
15 as a pastor for 38 years. I am the pastor of a church on
16 Wisconsin and Calvert Street -- St. Luke's United Methodist
17 Church. As a president of this Clergy for Enlightened Drug
18 Policy, we receive letters from all over the country. The
19 overwhelming number of them are amazed and disturbed and
20 disgusted and outraged at the legal system and, as you might
21 guess, the mandatory sentences that had been imposed.

22 Here is one from Columbia County jail, Bloomsburg,

1 Pennsylvania. This woman who writes is in jail for 2 1/2
2 years. She is a widow and has three children who are now by
3 themselves, by the way. She writes: "Where I lived, the
4 courts prove over and over that violent crimes are the thing
5 to do. A drunken woman services 11 1/2 months for vehicular
6 homicide. A man kills an infant and gets 3 years. It
7 really makes a person wonder what is wrong with the system.
8 It is obvious that any alcohol-related crime or crime
9 against innocent children will get you a slap on the wrist;
10 yet, a drug offender who hurts no one gets a stiff mandatory
11 sentence."

12 As a citizen and as a clergyman, I am against
13 alcohol and nicotine and marijuana and cocaine and all of
14 the other hard drugs. But, on the other hand, we recognize
15 that alcohol, if appropriately used in social occasions, is
16 acceptable. Alcohol is a drug. We have legalized it. We
17 know that marijuana and cocaine can and should be used for
18 medical purposes and reasons.

19 In my judgment, we need to rethink our failed drug
20 policies. It has become an excuse for police violence and
21 corruption. The Sentencing Guidelines must be based on
22 accurate facts.

1 I am told that 1,000 grams per marijuana plant is
2 unreasonable and way off the mark. It should be 100 grams
3 per plant. Thus on this matter, the guideline should be
4 changed and made retroactive, in my judgment. I have seen a
5 chart where there is a cliff between certain number of
6 marijuana plants. I hope the Commission will consider
7 rectifying this so that there is not these steep cliffs.

8 I want to thank the Commission for the opportunity
9 to appear before you and to bring this testimony. I would
10 be glad to answer any questions that the Commission might
11 have.

12 CHAIRMAN WILKINS: Thank you very much, Reverend
13 Gunn.

14 Let me ask those to my right if anyone has any
15 questions they would like to put to any member of the panel?

16 COMMISSIONER GELACAK: Mr. Williams, we have heard
17 from all of you this morning. You used the term irrational
18 and are concerned about sentencing policies. I am not sure
19 whether it would come as a surprise to you or not if I were
20 to sit here and tell you that I think that our drug
21 sentencing policies are irrational and that I have thought
22 that quantity-based drug sentencing always has been

1 irrational. I understand your concerns, but you seem to be,
2 many of you, arguing for changes that would perpetuate a
3 quantity-driven sentencing scheme.. Is that really what you
4 want to do?

5 MR. WILLIAMS: No, it is absolutely not what we
6 want to do, but what one must do in this political arena is
7 what one might be able to do. Quantity-based sentencing
8 does not create fairness because there are differences
9 between individuals.

10 I had a client who had -- I don't know. What was
11 it? -- 9 grams of crack. He was a user. He also, for some
12 reason, contrary to many, was able to have an income and be
13 able to work with this habit, which most can't. That was a
14 personal-use amount. A 5-year mandatory minimum as a
15 dealer; arbitrary amount-based sentencing, having no
16 rational relationship to reality. It's crazy. It costs
17 money.

18 I have the good fortune to lecture around the
19 country on issues and meet people from all over the country.
20 I take that opportunity to ask questions of people
21 afterwards in these sessions. They are concerned about
22 violent people. They are distressed to hear that most of

1 the federal money and prosecutions go into drug cases, and
2 they are distressed when they find that the littler people
3 are the ones that are getting more time because quantity-
4 based sentencing does not deal with the reality of criminal
5 activity of an individual.

6 I think you are absolutely right. I am glad to
7 hear the Commission, the United States Judicial Conference,
8 and others that have said mandatory minimums are not working
9 and something has to be done to change them. We have to be
10 realistic. There has never been in my knowledge anyone that
11 has ever said: Okay, drugs are a problem. Let's get law
12 enforcement, judges, treatment, prison, and the defense bar
13 and the community organizations on a large level. Forget
14 the rules; sit down; define the problem; and come up with a
15 solution.

16 It is labels and emotionalism and not rationality.
17 Nobody has ever called a conference -- Camp David or some
18 place like that -- and said: Okay, let us just meet. The
19 result is not for attribution. There is not going to be a
20 lot of political wrangling. Let's find a practical
21 solution.

22 We are the most practical country on the planet

1 and in history. We could do it. It would cost less. \$400
2 million increase in the prison budget this year. Half of
3 that would be wonderful towards treating people and keeping
4 them out of the criminal justice system. They will spend
5 \$25- or \$30,000 to prosecute somebody because he has to wait
6 six months to get into treatment, which would cost \$6,000 a
7 year, and it costs \$20,000 a year to house him after you
8 prosecute him.

9 I think you are right. But what we are asking
10 for, very frankly, is something that we realistically may
11 get.

12 COMMISSIONER GELACAK: You are looking for an
13 interim step.

14 MR. MILLER: That is exactly right.

15 COMMISSIONER GELACAK: Thank you.

16 Ms. Stewart, you made reference to letting the
17 punishment fit the crime, which reminds me of something I
18 read somewhere.

19 MS. STEWART: Yes, I read that, too.

20 COMMISSIONER GELACAK: It is a great line from a
21 Gilbert & Sullivan opera which says that "my vision is so
22 sublime I shall achieve in time, to let the punishment fit

1 the crime." The reason I bring that up is because in the
2 Mikada where that comes from it was said in jest because
3 they realized they could never do it, and I don't think we
4 can do it either.

5 In a perfect world, where would you like us to get
6 to?

7 MS. STEWART: I think I concur with Mr. Miller
8 that, in a perfect world, they would not have weight-based
9 sentencing.

10 I certainly have heard a number of you in the
11 meetings over the years talk about the fact that maybe you
12 should consider a different kind of sentencing for drug
13 offenses. I strongly support that. What that might be with
14 any sort of guideline system, I don't know.

15 Culpability is really what we are trying to get
16 at. We are trying to put the most dangerous offenders
17 behind bars. How you grid that, I don't know. I am not the
18 expert on that, and that is why we have the body that is in
19 front of me to decide those things.

20 I concur that I would love to see weight-based
21 sentencing done away with and replaced by some level of
22 culpability. However, I also agree that, politically, at

1 this point, the most we can hope for is to get the marijuana
2 sentencing changed to 100 grams.

3 COMMISSIONER GELACAK: Thank you.

4 CHAIRMAN WILKINS: Commissioner Carnes?

5 COMMISSIONER CARNES: Mr. Miller, you would like
6 the Commission to arrive at a 100-gram calculation for a
7 female plant.

8 MR. MILLER: Yes, ma'am.

9 COMMISSIONER CARNES: I was not on the Commission
10 when this demarcation between the 49 and 50 plant curb was
11 done, but my understanding is it was done in response to a
12 statute introduced by Senator Biden indicating that it
13 should be valued at a kilogram each, if I am correct on
14 that. At some point, if we valued the plants at 100 grams a
15 plant, we are going to run into the mandatory minimum
16 statute that gives a different value to the plant. How do
17 you want the Commission to handle that? Do you want us to
18 have two separate sorts of sentencing schemes where you have
19 the mandatory operating valuing the plant at a kilogram a
20 plant, whereas our guidelines give it 100 grams? How do we
21 handle that kind of problem?

22 MR. MILLER: Right now, you have, in the

1 guidelines, computations where an individual might get,
2 level 24, 51 to 63 months, with a mandatory minimum of 60
3 months coming into play there. So you have that kind of
4 disparity between the guidelines and the minimums now. But,
5 if you go to 100 grams per plant in the guidelines,
6 notwithstanding the fact that there may be mandatory-minimum
7 conflict, what I see the consequence being is an impetus
8 towards Congress to be more rational. We are not going to
9 be able to lock up everybody.

10 In states, such as Texas and North Carolina, just
11 to name a couple where they had mandatory minimums and all
12 this incredible time and they just couldn't spend enough
13 money and build enough prisons, they had to make a "give" a
14 few years after they had that program on line. That is long
15 before the federal system went that way.

16 As the "give" comes, and I think it will have to
17 come because dollars and cents will make it come and there
18 will not be a choice, if this body can take that position,
19 which is accurate and honest and fits within what even
20 federal experts would say, then we are in a position where,
21 when the minimums move, as I believe they will, they will
22 move more in line with where the guidelines are right now,

1 and there is consideration of that on the Hill now. It
2 needs ammunition or fuel for that fire.

3 You are not considered to be a group of liberal,
4 bleeding hearts. You are considered to be rational
5 analytical individuals, and that is why you were appointed,
6 and that is how you serve. As a rational analytical group
7 making a rational analytical decision that is in keeping
8 with your mandate of fairness and reasonableness in
9 sentencing, then you are making a statement that will have
10 some validity in the system as a whole, because we are all
11 part of a whole huge system that evolves around in time and
12 moves forward but not quickly.

13 COMMISSIONER CARNES: But we will have some
14 clumping for a while. Everybody will kind of be at five and
15 then, all of a sudden, you move automatically to ten years.
16 But you think that is a better result.

17 MR. MILLER: I think that is a better result. One
18 of the Thornburgh memoranda that said whatever you can get,
19 whether it is deserved or not, hit him with the maximum
20 possible. Don't take anything else into account, as a
21 prosecutor.

22 In the prosecutor's manual, it was lifted in the

1 fall, I believe. So now, in given cases, the prosecutor has
2 more discretion because it is appropriate, and they wanted
3 it. Their attorney general gave it back to them.

4 With a guideline change, a prosecutor in an
5 appropriate case for reasons that serve law enforcement
6 interests would have more flexibility with that change.

7 MS. STEWART: Let me just add to that, that I do
8 not think two wrongs make a right, and I think that this
9 body has an opportunity to really correct what is clearly
10 wrong in the weight of the marijuana plant, for instance. I
11 agree that Congress is way behind the curve on what
12 sentencing should be for drugs, period.

13 I think you all should work independently from
14 them. Granted, they have to approve your final changes, but
15 you did it last year with the LSD changes in exactly the
16 same way that we are talking about. Now LSD sentences will
17 more or less be clumped around five or ten years. It passed
18 and retroactively, and it has helped a number of people
19 already to lesser their sentences. There doesn't seem to be
20 any negative effect from it.

21 COMMISSIONER CARNES: Thank you.

22 CHAIRMAN WILKINS: Anyone to my left, questions?

1 [No response.]

2 CHAIRMAN WILKINS: Thank you very much. This has
3 been a very interesting and informative panel. We
4 appreciate all of you coming, many from long distances.
5 Thank you.

6 MS. STEWART: May I just say --

7 CHAIRMAN WILKINS: Sure.

8 MS. STEWART: -- I have a photograph of a
9 marijuana plant I would like to give the Commission, so they
10 know what they are talking about as they debate this.

11 CHAIRMAN WILKINS: Thank you.

12 [Laughter.]

13 CHAIRMAN WILKINS: Nkechi Taifa, come around
14 please. Ms. Taifa is the legislative counsel for the
15 American Civil Liberties Union here in Washington. We will
16 be glad to hear from you at this time.

17 MS. TAIFA: Thank you. Good morning, Chairman and
18 members of the Commission.

19 The American Civil Liberties Union appreciates
20 this opportunity to comment upon the disparity in penalty
21 between cocaine base/crack cocaine and cocaine
22 hydrochloride/powder cocaine, and the appropriate

1 equivalency between these two forms of cocaine. We feel
2 that the 100-to-1 disparity in sentencing is irrational and
3 unwarranted and strongly urge this Commission to request
4 that Congress utilize a 1-to-1 correspondence.

5 The American Civil Liberties Union is a
6 nonpartisan organization of over 275,000 members dedicated
7 to the defense and enhance of civil liberties. Because
8 protection of the Bill of Rights stands at the core of our
9 mission, we have a particular interest in ensuring that
10 equal protection of the law and freedom from
11 disproportionate punishment are upheld wherever threatened.

12 Most of those who deal in 5- or 50-gram quantities
13 of crack are not the high highest level traffickers that
14 these mandatory minimum penalties were intended for.
15 Typically, they are near the very bottom of the
16 international cocaine distribution system. Crack is
17 cocaine. Scientists, such as Dr. Charles Shuster, the
18 director of the National Institute on Drug Abuse, under
19 President Reagan, have pointed out that "cocaine is cocaine
20 is cocaine, whether you take in intranasally, intravenously
21 or smoked." As you know Dr. Shuster testified before this
22 Commission in November.

1 Unfortunately, the difference in cocaine weights
2 for triggering mandatory sentences has racially
3 discriminatory consequences. Nationwide statistics compiled
4 by this Commission reveal that the race of those prosecuted
5 for crack offenses has predominately been African American.
6 Those prosecuted for powder cocaine, with its 100 times
7 higher weights for triggering 5- and 10-year sentences, have
8 predominately been Caucasian. In 1992, 91.3 percent of
9 those sentenced federally for crack offenses were black,
10 while only 3 percent were white.

11 According to the National Institute for Drug Abuse
12 survey on drug abuse Caucasians, however, comprise a much
13 higher proportion of crack users: 2.4 million Caucasians,
14 64.4 percent; 990,000 African Americans, 26.6 percent; and
15 348,000 Hispanics, 9.2 percent.

16 The ACLU has been closely monitoring issues
17 involving race-based sentencing disparities. We, along with
18 other organizations, convened in August the first national
19 symposium exploring the disparity in sentencing between
20 crack and powder cocaine, entitled "Racial Bias in Cocaine
21 Laws." This symposium featured The Experts Speak panel, The
22 Families Speak panel, and a roundtable discussion with

1 representatives of civil rights, criminal justice, and
2 religious organizations. The overwhelming testimony of the
3 experts panel was that the mandatory minimum sentences for
4 crack cocaine are not medically, scientifically or socially
5 supportable, are highly inequitable against African
6 Americans, and represent a national drug policy tinged with
7 racism.

8 Three reasons are often cited for the gross
9 distinction in penalty between powder and crack cocaine:
10 addictiveness and dangerousness, violence, and accessibility
11 due to low cost. All three reasons fail as a justification
12 for the 100-to-1 ratio in punishment between two methods of
13 ingesting the same drug.

14 First, disparate treatment in sentencing between
15 crack and powder cocaine users is not justified on the basis
16 of the alleged greater dangerousness of addictiveness of
17 crack. Cocaine hydrochloride/powder can easily be
18 transformed into crack by combining it with baking soda and
19 heat. Thus, to apply a stiffer penalty between cocaine,
20 which is directly sold as crack, and cocaine, which is sold
21 in powder form but which can be treated by the consumer and
22 easily transformed into crack, is irrational. Cocaine can

1 also be injected by dissolving the hydrochloride in water
2 and administering it intravenously. The effect on the body
3 of injecting liquefied cocaine is similar to that of smoking
4 crack cocaine.

5 During the Racial Bias in Cocaine Laws symposium,
6 Dr. George Schwartz, who is an expert in pharmacology and
7 toxicology of drugs, stated that no method of ingestion is
8 more addictive than another: smoking crack is not more
9 addictive than snorting powder. In fact, he believes that
10 intravenously injected cocaine, not smoking it, is the
11 leading cocaine-related threat to both the user and society.
12 He reports that three times as many deaths are reported from
13 snorting cocaine than from smoking it. Also, heart and lung
14 problems are much more common among intranasal users and,
15 from a public health perspective, injecting cocaine
16 increases the threat of infections, including HIV and
17 hepatitis.

18 Second, stiffer penalties for crack are not
19 justified because of violence. It has been asserted that
20 there is more violence associated with the use of crack than
21 with the use of powder cocaine, and that justifies the 100-
22 to-1 ratio in penalty.

1 Professor Paul Goldstein, who also testified
2 before this Commission in November, asserts that there are
3 no valid and reliable sources of data for policy makers in
4 either the criminal justice or the health care systems that
5 adequately explain the relationship between violence and
6 drugs. Media reports on violence, he contends, are unclear
7 and misleading, with distinctions between drug use and drug
8 trafficking often not made. Professor Goldstein also made a
9 presentation on The Experts Speak portion of the August
10 symposium. He stated that he had found no difference in
11 violence between crack users and powder cocaine users; such
12 violence that there is relates to the drug's marketplace
13 dynamics. He divided drug-related violence into three
14 categories: pharmacological -- the drug's actual effect
15 upon the user; economic compulsive violence -- where the
16 user commits a crime to support his habit; and systemic --
17 the violence related to the system of drug distribution.

18 Based on his studies, Professor Goldstein asserts
19 that he has found little pharmacological violence attributed
20 to either powder or crack cocaine; most of this violence is
21 attributed to alcohol. Similarly, Professor Goldstein has
22 found very little user-trying-to-support-his-habit economic

1 violence: only 2 percent to 8 percent of cocaine-related
2 violence is of this type. He found that almost all cocaine-
3 related violence is found in the cocaine marketplace and
4 system of distribution. "Examples of systemic violence," he
5 explained, "include territorial disputes between rival
6 dealers, assaults and homicides committed within particular
7 drug dealing operations in order to enforce normative codes,
8 punishment for selling adulterated or bogus drugs, assaults
9 to collect drug-related debts, and so on."

10 Professor Goldstein's findings provide evidence
11 that certain common assumptions about drug-related violence
12 are uncorrected or exaggerated. For example, although it is
13 commonly believed that violent, predatory acts by drug users
14 to obtain money to purchase drugs is an important threat to
15 public safety, Goldstein's data indicates otherwise. Again,
16 he found that violence is most likely to occur with respect
17 to the drug marketplace and to involve others similarly
18 situated.

19 The Department of Justice has recognized that the
20 connection of drug use with crime oversimplifies their
21 relationship and that "a wide range of psychological,
22 social, and economic incentives can combine to produce

1 violent crime." Indeed, extrinsic socioeconomic factors
2 have commonly been the indicators of crime and violence, as
3 opposed to any factors intrinsic to crack.

4 Third, stiffer penalties for crack are not
5 justified by its cheapness and accessibility. During debate
6 on the Anti-Drug Abuse Acts of 1986 and 1988, various
7 members of Congress argued that crack cocaine must be
8 eradicated because of its cheapness and availability. To
9 apply draconian penalties, however, for first-time
10 possession of crack on the basis of its low cost
11 discriminates on the basis of class, especially in light of
12 the fact that powder cocaine, in spite of its higher
13 expense, is a drug abused more in this country.
14 Furthermore, higher penalties for crack cocaine guarantee
15 that small-time, street-level users will be penalized more
16 severely than larger distributors who possess powder cocaine
17 before it is transformed into crack.

18 CHAIRMAN WILKINS: Let me ask you this, Ms. Taika.
19 I notice the red light came on and your time is up. We need
20 to leave it on, once you cut it on, because I know you were
21 not able to see it. But I want you to tell us, assume we
22 accept your position as being correct, we have a statute

1 that says the ratio shall be 100-to-1. How do we address
2 that as a Commission subservient as we all are to the laws
3 of Congress?

4 MS. TAIFA: One thing is a recommendation can be
5 made to Congress to change the 100-to-1 ratio to a 1-to-1
6 ratio. In fact, just last week, before the Judiciary
7 Committee, Congressman Hughes of New Jersey introduced a
8 proposal. His proposal was withdrawn on the basis,
9 specifically, there was no disagreement among members of the
10 Judiciary Committee that a disparity existed. One of the
11 issues that came is, okay, we will eliminate the disparity,
12 but we will raise the penalty for powder cocaine, to the
13 5-year mandatory minimum that is currently there for crack
14 cocaine.

15 CHAIRMAN WILKINS: That is not a solution you
16 would support, I assume.

17 MS. TAIFA: Absolutely not. We find that
18 extremely problematic. Hughes even stated that there has
19 been no type of evidence that has been proffered or that has
20 demonstrated that the current penalties for powder cocaine
21 are not adequate or sufficient. So, again, to arbitrarily
22 raise the penalty for that drug will, again, be irrational.

1 Also, what would happen should that occur? Other
2 representatives will most likely offer conforming amendments
3 that would raise the penalty for simple possession of other
4 drugs, such as marijuana, such as LSD, and the like. And we
5 would have created, yet, another whole range of mandatory
6 minimum sentences for simple possession, which experts, such
7 as judges and bureaus of prisons all across the country, are
8 saying that the prisons are overflowing the prisons with
9 these low-level, nonviolent drug addicts who can more
10 benefit from treatment than from warehousing them away in
11 prisons.

12 I just wanted to bring up another point. There is
13 a significant movement occurring on this issue which we
14 really would like the Commission take note of. In addition
15 to the movement in Congress, in addition to Hughes'
16 proposal, Congressman Rangel introduced a bill to equalize
17 the penalties to the current levels for powder cocaine, and
18 that bill has also been incorporated into the Criminal
19 Justice and Crime Prevention Act of 1993 that Craig
20 Washington and the current Congressional Black Caucus
21 sponsored, but there is also a significant movement
22 happening in the courts right now.

1 The most recent outcry against the disparity in
2 sentencing between crack and powder cocaine came on March 9
3 from Supreme Court Justice Anthony M. Kennedy, who in
4 assailing mandatory minimum sentencing before a House
5 Appropriations Subcommittee hearing on the Supreme Court
6 budget stated, "I simply do not see how Congress can be
7 satisfied with the results of mandatory minimums for
8 possession of crack cocaine."

9 The statement comes on the heels of two important
10 U.S. District Court cases, one right here in the District of
11 Columbia. Judge Louis Oberdorfer held the distinction, of
12 violation of the 8th Amendment's proscription against
13 cruel and unusual punishment, as it applied to two
14 defendants before him. Shortly after that, a judge in St.
15 Louis held it a violation of the U.S. Constitution's 14th
16 Amendment, the equal protection clause. Prior to that,
17 several months before, a federal judge in Omaha departed
18 from the Sentencing Guidelines saying Congress could not
19 have intended this type of disparity when it passed these
20 laws.

21 What the ACLU would like for this Commission to do
22 is to recognize that, when Congress passed these laws, it

1 did so not on the basis of the wealth of scientific and
2 pharmacological data that we have today. It did it based on
3 oversensationalized media hype that was happening at that
4 time, the desire to out-tough each other on crime and the
5 sense that they just wanted to do something to make it seem
6 that a movement was actually being made.

7 We urge this Commission recommend to Congress that
8 there was, in fact, a mistake made. I am not saying it was
9 a conscious effort on the part of Congress but, oftentimes,
10 laws that are passed have unintended consequences. It is up
11 to us to recognize the unintended consequences that have
12 flowed as a result of those policies and to correct them
13 posthaste.

14 CHAIRMAN WILKINS: Thank you very much.

15 Let me ask if anyone on my right has any
16 questions?

17 [No response.]

18 CHAIRMAN WILKINS: How about to my left; anyone?

19 [No response.]

20 CHAIRMAN WILKINS: Well, thank you very much for
21 your testimony. We appreciate it very much. This is a very
22 difficult issue. We have not only many opinions, as you

1 have expressed, but we have a statute we are dealing with,
2 and we have our responsibility. So, somehow, with
3 everyone's help, maybe we can work through it. Thank you
4 very much.

5 MS. TAIFA: Thank you very much.

6 CHAIRMAN WILKINS: Mr. Tom Hillier is our next
7 witness. Tom is a federal defender from the Western
8 District of Washington, and he represents the Federal Public
9 and Community Defenders today at this hearing. We are
10 delighted to have you. We have your written testimony. We
11 would like you to summarize and tell us what you think is
12 the most important message you would like to give us in
13 about ten minutes, and you will be available for questions
14 as well.

15 MR. HILLIER: Thank you. Mr. Chairman and members
16 of the Commission, as indicated, my name is Tom Hillier. I
17 represent federal and community defenders throughout the
18 country here today. We, as you know, represent thousands of
19 people on a daily basis, in U.S. courts across the country,
20 and have contact with virtually all aspects of the
21 guidelines that are under discussion today and the ones that
22 are already entrenched in our system. That experience --

1 that entrenched experience -- drives our interest here today
2 and also our appreciation for the invitation to be here and
3 the continuing dialogue we have had with you.

4 As suggested, Judge Wilkins, I am not going to
5 attempt to go through our lengthy comments. I would
6 indicate my appreciation for the support on those comments
7 that we have received from Tom Hutchinson and Paula
8 Bitterman, who are present today and, as you know,
9 constitute our sentencing guideline group. Without their
10 assistance, I do not think we would be nearly as prepared as
11 we are.

12 We would ask that those comments be given
13 consideration by the Commission and your staff, though,
14 because we have detailed comments on all aspects of the
15 amendments that are before us today, the ones that were
16 published in December in far too much detail as I have
17 indicated to discuss, but there are little problems with a
18 lot of the amendments that we do touch on. We feel that,
19 before any real serious consideration is given, all these
20 comments should be read.

21 In terms of an overview of some of the themes that
22 are in our written testimony, I would emphasize just one or

1 two points. First of all, as often is the case, what we
2 have is a very ambitious batch of amendments -- large
3 numbers -- some of which appear not to be necessary, which
4 is to say there seems to be no data or information or
5 experience that justifies the amendments that are under
6 discussion here today.

7 I would submit, on behalf of the defenders, that
8 passing amendments that do not have some data underlying
9 them, some reason for the passage, simply adds to the
10 confusion, the bulk of the amendments, and the complexity of
11 the system, which is really a subject of a lot of the
12 criticism you all receive from time to time.

13 Secondly, and especially with respect to this
14 particular batch of amendments, there is a proliferation of
15 cross-references, from one amendment to another amendment,
16 depending upon what occurred in the offense that is charged.
17 This proliferation, which is growing, is having the effect
18 of moving us from the charged offense with real-offence
19 characteristics, which is at the heart of your present
20 sentencing system to a real-offense system.

21 As we all know, your choice -- your philosophical
22 choice -- at the outset of this process on how to proceed

1 was the subject of a whole lot of debate; how we should
2 proceed in that regard. We would like to be a part of that
3 debate and not see this sort of wholesale movement away from
4 the system that we have without discussing the underlying
5 principles that go to that decision. This seems to be a
6 back-door way of doing it.

7 It has an additional vice. It shifts the burden
8 of proof in these cases from the charged offense to these
9 cross-references in a way which beyond-a-reasonable-doubt is
10 no longer the issue. We go from a gun case to an assault or
11 a murder on a preponderance of evidence basis and the effect
12 of that on our clients and on the system, I think, is
13 regrettable.

14 One last point, more of a practical nature, is
15 that it creates a whole lot of litigation day in and day
16 out. I can speak from my own experience. I have a case now
17 that has been lingering for two years. We have been to the
18 Court of Appeals twice. Had one summary reversal. Going to
19 get another, because of a lack of understanding about what
20 is involved in these cross-references. They produce
21 litigation time and expense that ought not to be there.

22 One final comment in the overview category and

1 that is to indicate the defender's support for the call that
2 you are hearing from today for change in the crack cocaine
3 ratios and the marijuana plant ratios that we suffer today
4 and for all the reasons that you have heard and are bound to
5 hear: the lack of scientific basis to the arbitrariness.

6 One other reason that, I think -- perhaps,
7 Commissioner Carnes and Commissioner Mazzone, you have
8 experienced from time to time and, even possibly said on
9 dozens of occasions -- in Seattle, I have heard judges say
10 to defendants and my clients, "I wouldn't give you this
11 sentence but for these guidelines, but for this mandatory
12 minimum."

13 I think this is an unfair sentence. I can think
14 of no message to a defendant who is on his or her way to
15 prison that is more troubling or more dangerous than that
16 kind of a message; planting in that person, undoubtedly, a
17 seed of bitterness, which I don't think we want to see, five
18 or ten years from now, when that person is released. Beyond
19 all the other arguments, this system is creating havoc that
20 is yet unseen.

21 With respect to some specific proposals --
22 certainly these are not quite as fun to talk about as what

1 you have been hearing so far today and will later on today.
2 First of all, in the realm of the proposed drug amendments,
3 Proposal 8A, we the defenders support lowering the offense
4 levels as described in that proposed amendment. You propose
5 going from 26 to 24 and from 42 to 38 at the top end. We
6 support that for all the reasons I have just described. It
7 still allows, in those cases where a mandatory minimum is to
8 apply, to capture that mandatory minimum, but it gives the
9 judge a better opportunity to give a sentence that comes
10 closer to what that judge feels is fair.

11 I have never heard a judge say, "I think these
12 mandatory minimums are too low." I have heard a lot of
13 judges say, "We feel they are too high."

14 Oftentimes, when you get to this 63 to 78 range
15 and the judge can go no lower than 63, it is a three-month
16 difference, but the judge wants to at least give the benefit
17 of that 60-months, that three months' difference, which
18 means something to the defendant, anyway, although it might
19 not to the general public. That message alone is something
20 that I think we ought to try to capture.

21 I have read the Department of Justice comments,
22 which say, "This will discourage the acceptance of

1 responsibility." That is nonsense. A three-month
2 difference on a five-year case or a one-month difference on
3 a ten-year case, as is the situation with a ten-year
4 proposal, is not going to discourage acceptance of
5 responsibility. If someone wants to go to trial, they are
6 going to go to trial for that three months. So I would hope
7 you would not buy into that.

8 At the top level, it makes a lot of sense because,
9 as you know, with the 42 right now, you can't capture, as
10 the practitioners' group has indicated, the adjustments that
11 occur and the specific offense characteristics that occur,
12 and you can't capture the acceptance of responsibility
13 adjustment either. So there is no incentive to plead at the
14 top end under the present system.

15 With respect to 8B, which incorporates new
16 specific offense characteristics for use of guns in
17 connection with drug offenses, the defenders strongly oppose
18 both options that have been sent with your published
19 proposals. Our argument here falls within the realm of "if
20 it ain't broke, don't fix it." There is no evidence to
21 support the need for this sort of amendment. I suggest it
22 is in response to what is happening on the Hill with regard

1 to guns.

2 You, as a Commission, are charged with the task of
3 trying to breed some reason and some responsibility into our
4 sentencing structure and to, perhaps, resist what is
5 occurring on the Hill. This particular adjustment, I
6 submit, does nothing to assist, with respect to analyzing
7 drug-related offenses.

8 If there is a gun involved, we have 924(c)
9 prosecutions that are going to be charged, particularly, if
10 that weapon is used and discharged as contemplated in your
11 specific offense characteristics, and it is going to trump
12 those specific offense characteristics, anyway. In the very
13 rare case that that might not occur, that is why we have
14 departures, and the Court can take into consideration the
15 need for departure when that occurs. In addition, it
16 creates a large potential for abuse and for misuse by
17 prosecutors in terms of a bludgeon that they might try to
18 utilize where a 924(c) prosecution would not lie.

19 Finally, option 2, which is supported by some is,
20 I believe, hopelessly confusing and is beyond all the policy
21 arguments I have just indicated and would result in a whole
22 lot of litigation.

1 With respect to 8C, which places a cap on the
2 mitigating role in drug offenses, we strongly support that
3 effort. We know it has been attempted before here, and it
4 seems that it is time to move forward in that respect. Some
5 Commissioners are not in favor of that; perhaps, some others
6 are. But it seems to me it helps to quell some of the
7 strongest criticisms of the guidelines as they are today,
8 where the small-time offender in a drug case gets pulled
9 along with all the others in those real large conspiracies.
10 Even any adjustment, absent a 5K, simply does not capture
11 that person's role. This would assist in that regard. You
12 have already done it in Section 2D1.8, the crack house or
13 the dope house guideline, and so there is precedent for you
14 to utilize this sort of a concept.

15 With regard to Amendment 9, the aggravating role
16 amendment, this is a fairly complicated amendment, as we see
17 it, and we support parts and don't support other parts. In
18 our comments, we have talked about those portions that we
19 support and those that we don't.

20 I would ask, if the Commission would like, for
21 both this and Amendment 10, which I will speak to next, the
22 opportunity, if you would like, for us to give you an idea

1 of what we would see to be an appropriate amendment, in
2 other words, write out what we would like to see in the way
3 of an amendment.

4 With regard to the aggravating role, we support
5 the amendment portions B and C, which would add some clarity
6 to those portions of the aggravating role, four or more
7 individuals, and it takes out the "otherwise" extensive
8 phrase that is in that portion of the application notes.

9 For the same reason we support A, except, we hope
10 through oversight, you forgot about the "otherwise"
11 extensive phrase. With the exception of that aspect of A,
12 we support the amendment there, also, but would add that you
13 correct the oversight and eliminate the "otherwise"
14 extensive phrase. Otherwise, again, we are just creating a
15 reason to litigate, which is something I am sure the judges
16 here, anyway, would like to see lessened.

17 In the application notes, you have indicated that
18 agents should be counted when discussing how many people or
19 participants are involved in this particular adjustment. We
20 urge you not to consider agents as part of the calculus.
21 The inclusion of agents really runs afoul of what the
22 purpose of this particular adjustment is. The reason why we

1 have an adjustment for aggravating role where there are a
2 lot of people involved is because there is a greater threat
3 to society by virtue of the numbers. An agent does not add
4 to that threat. Presumably, the agent even has a mitigating
5 effect on the size of that particular conspiracy or
6 organization. So, by throwing the agent into the calculus,
7 you are defying the real reason for this particular
8 adjustment. To the extent that it is there to penalize the
9 organizational capacity of the particular person who is
10 behind this adjustment, I would submit that cops come easy.
11 It does not take a lot of organizational skill to get
12 somebody who is a law enforcement officer to be involved in
13 the conspiracy. That is what they are paid to do.

14 Similarly, we object to the use of innocent agents
15 or participants in the calculus. These are going to be such
16 highly unusual situations that the departure authority would
17 seem to be the better way to deal with this. In addition,
18 the definition there is a full paragraph long. It is overly
19 complex. Once again, we are going to have a lot of
20 litigation.

21 With regard to the mitigating, if I could just
22 have two minutes to talk about Amendment No. 10 and, if I

1 can't, let me know. We support that commentary in Amendment
2 No. 10, which clarifies the relationship with the mitigating
3 role and 1B1.3. It is time, and we feel that is a good
4 amendment.

5 Similarly, we support No. 3, which provides a very
6 principal basis for limiting the authority of a court to
7 depart on a mitigating role. It tells, "Hey, this isn't
8 mitigating."

9 We do oppose the checklist that occur thereafter;
10 Note No. 2, particularly, as it relates to 6 and 7, which
11 really has the effect of telling the judge "you can't do
12 this." Checklists tend to be applied in a wooden road
13 fashion and, again, we get into all sorts of arguments,
14 first, with the probation officer and, later on, with the
15 court over applications there.

16 Note No. 5, which says you can't give a mitigating
17 role to someone who has a gun, we think is ill-advised.
18 Practically speaking, it is going to be rare that that
19 occurs, but there is no logical inconsistency with having a
20 gun and qualifying for a mitigating role adjustment. So you
21 ought not, simply, to tell the court that it can't do it.
22 Once again, we feel this is a knee-jerk sort of response,

1 and I don't mean that in a disparaging way of the
2 Commission, but we are dealing with what is happening on the
3 Hill and in America today. But somebody who can qualify for
4 a mitigating role should qualify despite the fact that a gun
5 is involved. Again, the potential for abuse here, where
6 there is a real attenuative possession because somebody else
7 has it and it is "Pinkertoned" in in some way creates a
8 problem with those folks who would otherwise qualify for
9 mitigating.

10 Finally, with respect to 12A, the minimal planting
11 adjustment or specific offense characteristic, we really
12 support that concept of turning that around and using it as
13 it should be used to deal with situations where there is a
14 lot of planting as opposed to more than minimal planting.
15 My client suffered greatly from the system that is in place
16 today. That extra two points is the difference between a
17 lot of my clients being eligible for a halfway house or
18 straight probation and not. So, on behalf of thousands of
19 people throughout the country, we would support that
20 particular amendment.

21 CHAIRMAN WILKINS: Thank you very much. What type
22 of cases are you talking about, Mr. Hillier, this minimal

1 planting?

2 MR. HILLIER: The main kind is semi-, low-level
3 bank embezzlement cases. When you talk about \$20,000
4 somebody here might think, well, gee, that is a lot of
5 money. It is an odd deal, but when that teller takes that
6 first thousand dollars, and then the spouse at home is
7 griping about something else, the next thousand dollars is a
8 lot easier to take. So it gets to the \$20,000 figure in a
9 hurry. These people historically have been given probation
10 and have never, in my experience, or very rarely violated
11 the trust that the court has shown in putting them on
12 probation. We are just using a lot of money and time and
13 resources fighting these matters and putting people in
14 halfway houses that can be used better.

15 CHAIRMAN WILKINS: Let me ask anyone to my right
16 if they have any questions or comments?

17 COMMISSIONER GELACAK: Just to say from your lips
18 to God's ears with respect to your comments about
19 unnecessary amendments, amen.

20 MR. HILLIER: I noticed you were nodding there,
21 Commissioner. Thank you very much. We do appreciate the
22 opportunity to talk to you.

1 CHAIRMAN WILKINS: You want us to pass some
2 amendments, don't you, Mr. Hillier?

3 MR. HILLIER: Oh, absolutely.

4 CHAIRMAN WILKINS: It is not that you are against
5 all the amendments.

6 MR. HILLIER: No. We want the ones we want. Our
7 point is there are reasons to make amendments. We know
8 that. Conflicts develop in the law. You receive criticism
9 in a particular realm day in and day out, day in and day
10 out, and we should be reacting to that criticism. But, when
11 they just come from somewhere with no apparent reason but,
12 perhaps, somebody's disgruntlement on one side or the other,
13 then those are the ones that cause us pause.

14 CHAIRMAN WILKINS: Hopefully, that will not
15 happen. That is what we are about today. We are gathering
16 information and data and so forth. Your testimony has been
17 very helpful.

18 Someone may have a question down to my left.

19 [No response.]

20 CHAIRMAN WILKINS: Thank you very much.

21 MR. HILLIER: Thank you very much.

22 CHAIRMAN WILKINS: Dr. John Morgan and Dr. John

1 Beresford. Dr. Morgan will testify first, and then we will
2 hear from Dr. Beresford.

3 Dr. Morgan is a Professor of Pharmacology at the
4 City University of New York Medical School.

5 Dr. John Beresford, who has testified before the
6 Commission last year, represents the Committee on Unjust
7 Sentencing.

8 Dr. Morgan, we will hear from you first, and then
9 we will hear from your colleague.

10 DR. MORGAN: Good morning, Mr. Chairman and
11 members of the Commission. Thank you for the opportunity to
12 speak to you briefly this morning.

13 In my work as a pharmacologist and an academic, I
14 have been interested for the past decade on the arguments
15 and questions about the potency of American marijuana. Let
16 me start with what I think are the best data. In 1992, the
17 last year of a complete year's report, the Mississippi
18 Marijuana Potency Monitoring Project, which is a NIDA-funded
19 entity at the University of Mississippi College of Pharmacy,
20 under a 1975 grant, analyzed approximately 3,500 samples of
21 marijuana. These resulted both from DEA seizures of
22 smuggled marijuana and state police seizures of domestic

1 marijuana crops.

2 These 3,500 seizures represented approximately 1.5
3 million pounds of marijuana analyzed by a sampling method in
4 Mississippi in 1992. The mean potency of this marijuana was
5 1.9 percent Delta 9 THC by weight, which is the usual way in
6 which we have calculated potency. You have been provided
7 one of the reports of the Mississippi Marijuana Potency
8 Monitoring Project. If you just take a glance at the
9 tables, you will see that, both in terms of domestic
10 marijuana and in terms of smuggled marijuana seized by the
11 DEA usually at the border, there has been no change in
12 marijuana potency by this assessment, the only systematic
13 assessment in the United States since about 1979.

14 In fact, I used a 1979 level because that was the
15 last time until 1992 that mean marijuana potency dropped
16 below 2 percent. So, in reality, there has not been an
17 increase in marijuana potency in the United States in the
18 past 15 years. If anything, there has been a decrease and
19 I, in reality, believe it has been very stable.

20 I find this surprising in the light of what anyone
21 in this room is likely to have read in the New York Times,
22 and in The Washington Post, and in the statements of a

1 variety of law enforcement officers as recently as last
2 week. Steven Greene, a DEA administrator, reported again to
3 the New York Times that we have to worry about marijuana
4 potency because it has gone up so much and the smoking of
5 marijuana today is much different than the smoking of
6 marijuana in your youth. In fact, with your indulgence, I
7 will read you a few quotes.

8 The actual escalation of marijuana potency
9 apparently began in 1974 when Andrew Tartaglino, who is a
10 deputy administrative of the DEA, said in hearings before
11 the Senate Internal Security Subcommittee, "The shift is
12 clearly toward the abuse of stronger more dangerous forms of
13 the drug which renders much of what has been said in the
14 1960s about harmlessness of use obsolete."

15 In 1981, again, an investigator for the Senate
16 Subcommittee on Internal Security said in a published
17 document, "Today's marijuana is 20 to 30 times as potent as
18 ten years ago."

19 In 1984, in Robert DuPont's book, Getting Tough on
20 Gateway Drugs, "Over the last decade, we have had tremendous
21 increases in the potency of marijuana. Ten years ago the
22 average or typical marijuana drug had a THC content of about

1 .2 percent. Today the content averages about 5 percent; a
2 25-fold increase in the potency of marijuana in the last ten
3 years."

4 The last quote I will read is actually in the form
5 of a narrative from a book by Dr. Mark Gold, published in
6 1991, and in it he was counseling parents of a young child.
7 "'What is so bad about smoking pot?' Tamara's father asked.
8 'I smoked it when I was a kid. So did my wife. We don't
9 think we were harmed by it.'"

10 Dr. Gold's response was, "'Did you ever smoke 30
11 joints at once?' I asked."

12 "'God, no.' he answered."

13 "'I want you to understand something,'" says Dr.
14 Gold. "'The marijuana your daughter is buying on the street
15 today could be as much as 30 times as powerful as the pot
16 you smoked in college.'"

17 Everywhere I turn in the newspapers, in the
18 published medical literature, these statements about massive
19 increases of marijuana potency are stated, usually without
20 reference. Occasionally, someone will refer to the
21 Mississippi Marijuana Potency Monitoring Project.

22 Incidentally, there is no regular mailing list for

1 the reports of the Mississippi Marijuana Potency Monitoring
2 Project, which are issued quarterly and, in fact, constitute
3 a summary of all of the information gathered by that entity
4 since 1975; in fact, including a few old samples back in
5 1974.

6 One can obtain these reports, although it usually
7 takes more than one phone call and more than one letter, and
8 it is my belief that these reports constitute an
9 embarrassment to the DEA and to NIDA because they continue
10 to wish to assail us with incorrect, unscientific, naive,
11 foolish, and false statements about the monstrous increases
12 in marijuana potency.

13 Now, my closing remarks are, in 1974 and 1975,
14 when the Mississippi Marijuana Project first started, they
15 indeed reported some annual low numbers. The reason they
16 reported those annual low numbers is most likely that they
17 had only approximately 100 seizures. Almost all of those
18 seizures were Mexican kilo brick material, which, indeed, at
19 that time, was quite low in potency. In fact, from 1974 to
20 1976, less than 10 percent of their seizures reflected
21 domestic marijuana.

22 So these numbers of 1974 and 1976, which

1 occasionally an enlightened government spokesman will refer
2 back to, are really spurious because, in California, Pharm
3 Chem laboratories reported between 1972 and 1975 that
4 marijuana potency in the United States ranged from between 2
5 and 5 percent with an occasional 5 to 10 percent sample and
6 even an occasional 15 percent sample. The occasional very
7 high potency sample is found just as it was found in the
8 early 1970s.

9 So, in reality, the claim of the monstrous
10 increase in marijuana potency is a rhetorical device, a
11 falsehood, a mistake, if you will, and the idea that
12 individuals today are exposed to highly potent marijuana is
13 a myth. I would point out to you that if it were so I am
14 not sure that would be such a bad thing because the chief
15 hazard of marijuana in the long term is, of course, the
16 potential damage to the lungs of smoking the material
17 chronically; analogous to tobacco cigarettes. Although,
18 fortunately, the dose of marijuana in a regular user is so
19 much less than the dose of tobacco, there is minimal
20 evidence of severe pulmonary damage.

21 If individuals were being exposed to more potent
22 marijuana, there is adequate evidence to indicate they would

1 inhale less. They would inhale less particular material,
2 less tars, less of the irritants, which constitute the
3 danger of marijuana smoking.

4 However, let me go back to my introductory remarks
5 and my closing remarks at the same time. The idea of a
6 monstrous increase in marijuana potency, in fact, if I
7 calculate this run of statements that I have collected from
8 1974 to 1992, marijuana potency has increased in the United
9 States 2,800-fold. The reality is that marijuana potency
10 today with a mix of domestic and smuggled material appears
11 to range from 2 to 4 percent, which is exactly what it was
12 in 1972.

13 This is not really terrifically surprising if you
14 look at it. Why should this plant, grown for 4,000 years
15 for its psychoactive components, yield up its mysteries of
16 potency in a mere decade to a group of inexperienced growers
17 from a nonfarming background who are growing small crops in
18 a very furtive fashion? The plant is botanically stable.
19 There has been no evidence of an important increase in
20 marijuana potency in the 20 years that we have been talking
21 about marijuana potency in the United States.

22 CHAIRMAN WILKINS: Thank you, Dr. Morgan.

1 DR. MORGAN. Thank you, sir.

2 CHAIRMAN WILKINS: We will hear from Dr. Beresford
3 now, and then we will have questions for the both of you.

4 DR. BERESFORD: Thank you, Mr. Chairman. I should
5 mention that I represent myself and not any other
6 individual. I am a member of a committee that we call the
7 Committee on Unjust Sentencing, which exists to try to draw
8 the public's attention to inequity and disproportionality in
9 the present system of drug sentencing, but I want to
10 emphasize that we are not a body that is funded by any
11 organization. We are a group of individuals who work
12 entirely on our own.

13 My own approach is both practical and focused and,
14 when I say practical, I mean that I don't think that it is
15 reasonable to address the Sentencing Commission with
16 complaints that they can't, basically, do anything about. I
17 can understand that you can make recommendations to
18 Congress, of course, but I would regard that as a secondary
19 function of your Commission which, essentially, I think is
20 to try to work within the structure that you are faced with
21 in order to ameliorate cases of unjust sentencing that lay
22 within your capacity to correct.

1 My own particular focus is on LSD injustice, which
2 I think is extremely serious. I don't believe that the
3 amendment that was made last year has made significant
4 inroads into correcting that injustice. I think it is wrong
5 to say, as the previous witness did, that the 0.4 milligram
6 amendment that was passed last year by yourselves and by
7 Congress has fixed the situation so that now we can relax
8 and say that LSD cases get 5-year or 10-year mandatory
9 minimum sentences, so that is a problem solved. I don't
10 believe that is a solution to the problem.

11 I have correspondence from numerous LSD prisoners,
12 and I would like to mention one case; that of a man, Tim
13 Dean, who was sentenced to a 78-month sentence for
14 possession for private use of two sheets of LSD blotter
15 paper totalling 198 doses that weighed 1.09 grams, just over
16 the 5-year mandatory minimum mark.

17 I have many cases of LSD prisoners who are serving
18 12, 15 and up to 24 years for LSD offenses based solely on
19 the weight of the blotter paper, and I realize that this is
20 a question that your Commission attempted to address last
21 year and did so, and I think that many people are very
22 profoundly grateful for steps that you took at that time.

1 The paper that I have submitted to you is called,
2 "The Nonetheless Rider in the 1994 Guidelines Manual" and a
3 plea to remove it. I don't know if you have had time to
4 read what I have written. If you have, I would like to make
5 a note that there is a misprint on page 5, line 8. I asked
6 Mr. Courlander to scratch out the word "not" on the eighth
7 line of page 5. But, if he hasn't been able to do that,
8 there is that --

9 COMMISSIONER MAZZONE: He did.

10 DR. BERESFORD: He did, good. Thank you.
11 Otherwise it doesn't make sense.

12 This, I think, is an example of a step that the
13 Commission can take that is practical, that is in accordance
14 with your stated intention to correct, to remedy an unjust
15 situation. I have mentioned in the paper that I believe
16 this "nonetheless rider," which comes at the end of your
17 application note No. 18, to 2D1.1, I think there are three
18 reasons why this "nonetheless" clause could be deleted.

19 The first is that it is superfluous. It doesn't
20 need to say what it says. I don't think anyone needs to be
21 reminded of the fact that there is a possible conflict
22 between statute and guidelines. I think that to insert a

1 reminder at this point is inappropriate. I can't see the
2 sense that it makes to invite people to look for reasons to
3 oppose the very amendment that you made. I was suggesting
4 that it doesn't have a purpose that I can see.

5 In the second place, I believe it is misleading.
6 I believe that it speaks to an erroneous interpretation of
7 the Chapman decision, and I wanted to point out, as I have
8 done elsewhere, that Chapman never mentions the words
9 "entire weight." Chapman mentions the phrase, "weight of
10 entire mixture," and these two meanings, I think, are very
11 different.

12 What Chapman was referring to with regard to LSD
13 on blotter paper was that both components of that mixture,
14 and the Chief Justice defined that combination as a mixture,
15 that both components of that mixture are to be weighed and
16 the weight of both components are to be calculated in the
17 determination of the sentence.

18 Chapman nowhere uses the expression "entire
19 weight," which I believe is an ambiguous phrase or term in
20 any case. Chapman specifically does not say that the entire
21 weight or the actual or literal weight of that combination
22 has to be used as the figure for determining a sentence.

1 Chapman simply does not say that.

2 It was not a question that was relevant at the
3 time of the Supreme Court hearing. It was not a question
4 that was raised by Richard Chapman himself in his appeal.
5 No one ever thought at the time that there could be a
6 different method of estimating weight of an LSD blotter
7 paper combination. That was an invention of your
8 Commission, and I think a very credible one, and I think it
9 was a very smart move to take. It was a rational decision.
10 It made sense. It did not offend either statute or Chapman.
11 It was entirely consistent with both, and I think to suggest
12 that there is a conflict at that point is simply misleading,
13 and that is my second objection to the presence of that
14 "nonetheless rider" that comes at the end of the application
15 note.

16 Then the third reason I believe is that it is
17 subversive of your own intentions. Your intention is to
18 correct an injustice and to, I hesitate to say, oppose the
19 step taken by the Department of Justice in its instructions
20 to federal prosecutors that they are to contest applications
21 for sentence modifications where these conflict with
22 statutory mandatory minimum sentences, five- or ten- year

1 sentences. That if there is any chance of maintaining a
2 five- or ten-year sentence, that this is to be opposed by
3 federal prosecutors, I think that is an unreasonable step
4 for the government to take, and I don't see that it is one
5 that the Sentencing Commission is under any obligation to
6 support.

7 I believe that, as a citizen of this country, the
8 judiciary, an independent judiciary, is our only hope in the
9 present grave situation that faces many hundreds of
10 thousands of drug prisoners, and I urge yourselves to take a
11 lead and not to be afraid that you are offending anybody
12 because I believe you have reason on your side, and I
13 believe you have the weight of the country behind you, also.
14 That is basically what I am trying to say.

15 There is a lot of argument in the text that I am
16 sure you can read if you have the interest. It offers a way
17 that a judge can use 0.4 milligram amendment from the
18 beginning, and I have personally been present at court
19 hearings where a judge has used this method of estimating
20 weight and has brought a sentence in the resentencing
21 hearing down below a statutory mandatory minimum ten-year
22 level. I have cited cases here where this has happened, and

1 I believe that this is an approach which yourselves should
2 endorse and recognize that it supports your intention. I
3 hope it is your intention that this kind of motion be made.

4 CHAIRMAN WILKINS: Thank you very much. Let me
5 ask Dr. Morgan, if there are no studies, no research that
6 shows the potency of marijuana has increased over the last
7 few years, is that your representation to us that there are
8 no studies that would support the claim that we keep seeing?

9 DR. MORGAN: That is correct.

10 CHAIRMAN WILKINS: Why does the claim continue to
11 be made?

12 DR. MORGAN: I think the 1970s and 1980s
13 represented a return of the attack on marijuana. That in
14 the early 1970s and later in the Carter Administration and
15 with the Schaeffer Commission in the 1981 NAS report there
16 was a belief expressed by the academic community and by many
17 others in the United States that marijuana should be viewed
18 as a drug of minimal hazard, and there was a strong move
19 toward normalization, even decriminalization in the United
20 States in the 1970s.

21 Then, in the 1980s, the attack by those opposed to
22 these liberalization maneuvers began to be very, very loud.

1 and profound. The method used by the attackers, and not too
2 surprisingly, was a series of somewhat obfuscatory
3 scientific claims. There is this impairment of immunity.
4 There is this diminished testosterone. There is, behind it
5 all, this monstrous increase in potency, and it just began
6 to be stated over and over again that resonated very well
7 with parent's groups and others opposed to the
8 liberalization of marijuana, the liberalization of marijuana
9 policy.

10 So they have become part of an almost sacred
11 creed, a sacred canon, if you would like, that when an
12 individual stands up to make his or her speech against
13 marijuana he starts with apparently powerful statements
14 which happen to be powerfully untrue, but they have been
15 widely accepted.

16 The New York Times' reporters have three times in
17 the past ten years written articles, one time a front page
18 article, about the new highly potent marijuana. Their
19 sources were either governmental spokesmen or individuals
20 involved actively in the war on drugs who then made these
21 statements. The Times does not call individuals who might
22 have an opposing point of view and who might have read

1 carefully the botanical and pharmacological literature about
2 the drug.

3 CHAIRMAN WILKINS: Let me ask anyone to my right
4 any comments or questions?

5 [No response.]

6 CHAIRMAN WILKINS: On my left?

7 COMMISSIONER NAGEL: This is a question for Dr.
8 Morgan. Along with the claim that there is a more potent,
9 as you say, marijuana drug, which you find there is no
10 support for, there has been a sort of a concomitant claim
11 that there has been a dramatic increase in use of marijuana,
12 in particular among young persons I guess under the age of
13 18. Have you looked at that question as well?

14 DR. MORGAN: I have. One of the reasons that
15 people became so concerned were data of the National High
16 School Senior Survey in 1979, which indicated a high
17 prevalence of use and which, in fact, 10 percent of high
18 school seniors stated that they smoke marijuana on a daily
19 basis. This was a fact of great concern to Americans of all
20 political and drug policy beliefs.

21 But from 1979 until, basically, last year, that
22 prevalence of use declined quite, quite steadily and I

1 believe, in fact, the decline, which began in 1979, had
2 relatively little to do with policy or law, but happened to
3 be the sort of change that occurs because of attitudes and a
4 variety of other factors.

5 Now, in the last report of the High School Senior
6 Survey, the bell of alarm has been rung again because there
7 was a slight upturn.

8 COMMISSIONER NAGEL: Yes. The District of
9 Columbia, for example, is reporting very, very high rates of
10 use.

11 DR. MORGAN: I think they are not very, very high.
12 They do indeed represent a bottoming out and a turning up
13 again --

14 COMMISSIONER NAGEL: They were talking 60/70/80
15 percent. Now it was not daily use. It was occasional use.

16 DR. MORGAN: The prevalence figures in Dr.
17 Johnson's survey, the High School Senior Surveys, tended to
18 show an 8 to 15 percent increase in prevalence of young
19 people in the last year of the survey. Now this kind of
20 variation in a subjective survey given to approximately
21 10,000 high school seniors might be expected.

22 Now, indeed, there might be an increase in use.

1 There might be a prevalence which would show that young
2 people have perhaps come to disbelieve all of the untruths
3 that have been tossed at them for the last ten years. I
4 don't know if that is the case. But, yes, there has been a
5 slight increase recently. I do not view it as an alarming
6 phenomenon. In fact, it may simply be in the character of
7 the way we ask the questions and the kind of data we gather.
8 There is no evidence of, as Dr. Johnson says in his annual
9 press conference, the marijuana epidemic is back. Those are
10 the kind of alarmist statements which result in claims about
11 potency, and claims about prevalence, and claims about harm.

12 There is no reason to claim that marijuana is a
13 harmless drug. There are no harmless drugs. But the idea
14 that we need to use scientific misstatements to keep
15 American parents, legislators and others terrified about
16 marijuana is not true.

17 COMMISSIONER NAGEL: Is there a particular survey
18 to which you could cite us that was tracked over time using
19 the same question both sort of daily use and casual use, et
20 cetera? Is there some cite that you can provide us?

21 DR. MORGAN: There are two. I would be happy to
22 provide them in written form, but briefly the NIDA. NIDA

1 funds two surveys; the Household Survey on Drug Use and the
2 High School Senior Survey. The High School Senior Survey
3 publishes quite regularly every year. The Household Survey
4 has had some two- to three-year gaps. These are readily
5 available from NIDA, and they are at least some measure of
6 drug prevalence in the United States.

7 COMMISSIONER NAGEL: Thank you.

8 CHAIRMAN WILKINS: Thank you very much, Dr. Morgan
9 and Dr. Beresford. Let me just say, once again, we
10 appreciate your testimony, and we appreciate the thoughtful
11 constructive criticism that you offer. You mentioned that
12 you want to help us do things that we have the ability to
13 do, and that is meaningful to us because sometimes we are
14 asked to do things that only the Congress can do. Thank you
15 very much.

16 DR. BERESFORD: I have a considerable wealth of
17 knowledge about LSD matters, and it occurred to me that the
18 Commission might want to sound me out on difficult
19 questions. There is a big controversy about a sugar cube
20 combination which is not a mixture and, therefore, should
21 not come under the Chapman ruling. If matters of that kind
22 occur to the Commission and you want to check it out with

1 me, I would be very glad to help.

2 CHAIRMAN WILKINS: Thank you very much.

3 DR. BERESFORD: Also, sir, I wanted to give you a
4 present. I have a tape here which is raw footage of an
5 interview with four women prisoners in Pleasanton taken by a
6 friend of mine. When times come that I feel discouraged or
7 tired, I have only to remember what is on this tape and
8 remember what I am told in correspondence from prisoners,
9 and my spirits revive. Thank you very much for your help
10 too, sir.

11 CHAIRMAN WILKINS: We are often tired and
12 discouraged, so we will use that a lot.

13 [Laughter.]

14 CHAIRMAN WILKINS: Thank you very much. Is
15 Inspector Hearst here? If not, is Mary Lou Soller?

16 MS. SOLLER: Yes, sir.

17 CHAIRMAN WILKINS: We will hear from you now. Ms.
18 Soller is the chairperson of the American Bar Association's
19 Committee on Sentencing Guidelines.

20 MS. SOLLER: Thank you, Mr. Chairman. My name is
21 Mary Lou Soller. As you mentioned, I am the chairperson of
22 the ABA Criminal Justice Section Committee on the United

1 States Sentencing Guidelines. I appear before you today at
2 the request of ABA President Dr. William Ide to convey the
3 ABA's views on the proposed amendments.

4 As you have known from the past, the members of
5 our committee include professionals from all aspects of the
6 criminal justice system, including judges, prosecutors,
7 defense practitioners and, also, in fact, some nonlawyers
8 have taken an interest in recent time and have come to our
9 meetings as well as academics. So we represent a wide
10 spectrum of views.

11 As you know, also, in prior years, we have
12 expressed a strong interest in the process of the Commission
13 and in the guideline amendment process. Again, we would
14 reiterate those again this year. We have, in the past,
15 expressed concern about the amendment process as well and,
16 in our written comments, we have suggested that if, in fact,
17 there is not a full Commission up by this year, we would
18 urge the Commission to postpone making amendments until a
19 later period, particularly if new Commissioners are fully
20 appointed by the time that the guideline process would
21 normally go up, that comment obviously would be moot.

22 We also suggested that when new Commissioners are

1 appointed that in certain of the areas in which the
2 Commission has requested comments or has sought input about
3 proposed amendments, specifically aging prisoners, some of
4 the criminal history and some of the organizations, that we
5 would urge the Commission to go out into the field and to
6 speak with practitioners and those who are actually involved
7 in the cases in areas that normally do not have their views
8 expressed directly to this Commission. We feel that kind of
9 outreach into some difficult areas that the Commission is
10 going into for the first time, such as the aging prisoners,
11 would be helpful, and we would urge the Commission to do
12 that.

13 In addition, we have set forth in our written
14 comments, and I won't go into them in full detail, but we
15 would urge the Commission, again, as we have in the past, to
16 consider adopting a set of administrative procedures. Now,
17 although this is not specifically covered by any of the
18 proposed amendments, we note that the Commission did seek
19 comments on other matters as well, and so we are taking this
20 opportunity to again raise that point.

21 The Commission, we feel, has made admirable steps
22 in recent years in publishing proposed amendments early to

1 allow more time, allowing more input. But we would urge the
2 Commission to take a step further and to provide even more
3 accountability.

4 Some of the suggestions we have raised are
5 promulgating rules of procedure, providing more detailed
6 statements and reasons for amendments, voluntarily adopting
7 procedures such as those covered in FOIA and in the Federal
8 Advisory Committee Act to adopt procedures for petitions.
9 In that, we are not advocating any increase in the rights or
10 any decrease in the rights of any individuals right now that
11 may exist to petition or may exist because of a change or an
12 action by the Sentencing Commission. That is not our
13 purpose. We just urge that the Commission adopt procedures
14 for that. We would also ask for a more detailed regulatory
15 agenda and that there be further involuntary compliance with
16 Sunshine Act.

17 These procedures and suggestions have not just
18 come from our Committee. In fact, they were first proposed
19 by the administrative law section of the ABA. Since they
20 have had a direct impact on the work of our committee, we
21 have also supported that and the thought is that these will
22 come before the session of the ABA at some point.

1 We realize that many of the changes that have been
2 proposed are something that would have to go to Congress.
3 As with the prior speaker, we are not going to sit here and
4 advocate that you make changes that are more rightly within
5 Congress' purview, but what I have suggested we believe
6 could come from the Commission directly even without
7 Congressional action, and we would urge you to consider
8 those.

9 Turning to the specific amendments. We have
10 commented on a limited number of amendments this year.
11 There were members of our committees who had very strong
12 views on some others, but we have picked the highlights of
13 what we thought were the important ones this year.

14 These may be somewhat out of order, but the ones
15 that we have commented on specifically in the past and would
16 urge you to adopt, No.1, the acquitted conduct, which was
17 proposed amendment 18. We believe that that is an important
18 amendment and that it is in line with the ABA's philosophy
19 and the ABA standards that sentencing should be based on the
20 offense of conviction rather than whatever real offense
21 there is.

22 We would also note that acquitted conduct, if one

1 is really talking about real offense, if a jury or a judge
2 has acquitted somebody, there may be an argument that
3 because of a lesser standard at sentencing that might be
4 considered to be real offense sentencing, but it is our view
5 that, both for perceived and actual fairness, that acquitted
6 conduct should not be considered, in general, in determining
7 a sentence. In some circumstances, it may be appropriate,
8 and I underline may, it may be appropriate as the grounds
9 for departure, but that that would be an extreme case, and
10 we would urge the Commission that if it is going to adopt
11 amendments that that be one that is considered.

12 I also note that, from what I could tell from a
13 brief run-through of the speakers today, that most of the
14 speakers will probably not be addressing the area of money
15 laundering. I know that this is an area, and this is
16 Amendment 11, that has come up in the past, and we supported
17 it in the past, and we would, again, support it, in general,
18 this year. We think that the working group report from the
19 Commission about money laundering was very helpful. It
20 indicated that there were some what we perceive to be fast
21 discrepancies in the kinds of sentences that were imposed
22 for money laundering over substantive offenses.

1 The statistics found by the working group we
2 thought were very significant in that most of the time the
3 money laundering sentence exceeded the underlying drug
4 offense sentence by in excess of 50 percent and would exceed
5 the underlying nondrug offense sentence by in excess of 90
6 percent. Those statistics indicate to us the vast power
7 that the United States Attorney's Office has in controlling
8 the sentence that exists just by the mere threat or addition
9 of a money laundering charge. We think that the guidelines
10 should be brought more in line with underlying charges and
11 would urge the Commission to look at that again this year.

12 Turning to the variety of drug offenses. In our
13 comments we tried to group the comments, even if they were
14 somewhat out of order but, turning to the drug offenses, in
15 general, we have supported the suggestions that have been
16 made by the Commission.

17 Turning to proposed Amendment 8A that would revise
18 the drug table. We supported a similar amendment last year
19 and would continue to urge that adoption. We believe that
20 the guidelines have long overemphasized the quantity of
21 drugs. As the Commission is aware, we have opposed
22 mandatory minimum provisions for quite some time, and we

1 believe these amendments would draw the quantity more in
2 line with where it should be.

3 This is also in keeping with our standards that
4 the punishment should be sufficient but not greater than
5 necessary to achieve the statutory purposes of sentencing.
6 Tied into that I think would be our comments on 33A, which
7 is dealing with the crack ratio of 100 to 1. On this point,
8 we are aware that the Commission has had a working group
9 drafting up what we have heard called the Crack Report, and
10 we would urge the Commission to release that report at the
11 earliest opportunity. We think that these working group
12 reports have been helpful both to us, informing us of what
13 else is going on in the world of sentencing, and we feel
14 that it has also been helpful in informing the Commission
15 and urge the prompt release of that report.

16 Now we know that there have been comments in the
17 past that sometimes the Commission feels that its hands may
18 be tied because of mandatory minimum sentences. We think
19 that this is true to some degree, but that the Commission
20 has gone beyond that when they have exceeded the mandatory
21 minimum sentences, and believe that this should be
22 revisited.

1 I notice that the light has gone on.

2 CHAIRMAN WILKINS: You can make your conclusionary
3 remarks.

4 MS. SOLLER: Basically, Chairman Wilkins, we would
5 urge the Commission to this year, because of the reality of
6 where things stand, to seriously consider whether making any
7 amendments. But if the Commission is going to pass some
8 amendments, particularly ones that have been gone through in
9 the past, such as acquitted conduct and money laundering, we
10 think that those might be appropriate rather than some
11 others that have come up from other sources or up for the
12 first time.

13 CHAIRMAN WILKINS: Thank you very much. Can you
14 give an example of when you think acquitted conduct should
15 be used as a basis for upward departure?

16 MS. SOLLER: Personally, I can't, but I can tell
17 you that there are circumstances that have come up, and I am
18 probably not the one who can give this because I have a hard
19 time personally seeing this. There have been circumstances,
20 I think, where, say, there was evidence that would strongly
21 support guilt if allowed at trial and that a substantial
22 amount of the evidence was left out or that some other

1 evidence was developed after the fact that was not able to
2 be produced at trial that is absolutely compelling. Those
3 are the kinds of arguments that I have heard that have been
4 made that might justify an upward departure.

5 CHAIRMAN WILKINS: Let me see if anyone to my
6 right has any questions.

7 COMMISSIONER GELACAK: What about cases where
8 there has been some sort of jury nullification with regard
9 to some of the charges, would that be something else?

10 MS. SOLLER: I think that is always a difficult
11 area. One person's jury nullification is somebody else's
12 absolute justice. I think that that has been the argument
13 why acquitted conduct should be considered, period, and I
14 think that that is exactly the area in which the appearance
15 of fairness is destroyed when acquitted conduct is
16 automatically required. Many times I have heard in the
17 press and in many of these high-publicity cases somebody
18 argues it is jury nullification until you listen to the
19 jurors about the reasoned way that they went through this.
20 I think to allow jury nullification may well then open up or
21 try to open up the process of getting to what actually
22 occurred in the jury room, and that I personally believe

1 would be a dangerous proposition.

2 So, on jury nullification, I would say, no, I
3 think that that is not an appropriate ground for an upward
4 departure.

5 COMMISSIONER GELACAK: Thank you. Just so we
6 don't misunderstand each other, I would like the record to
7 reflect that I have in the past and continue to support the
8 removal of acquitted conduct for use in these cases.

9 CHAIRMAN WILKINS: Any questions to my left?

10 [No response.]

11 MS. SOLLER: Thank you.

12 CHAIRMAN WILKINS: Thank you very much. Let me
13 introduce our next witness, Mr. Alan Chaset. Alan is no
14 stranger to the Commission. He is chairman of the National
15 Association of Criminal Defense Lawyers Post-Conviction
16 Committee. Alan, I know you won't read your support to us.
17 We have it. What we are concerned with now is your emphasis
18 to us of those points that we should give careful attention.

19 MR. CHASET: Coming in now, in fact, I am very
20 pleased that Commissioner Grinner walked in because I wanted
21 to begin my comments by some recognition of the fact that --
22 maybe some of you may or may not know it -- Henry is about

1 to retire after a very long and distinguished career with
2 the Commission, and I am pleased to see his title as
3 Commissioner Grinner today, long overdue, well deserved. I
4 wish it had been there before.

5 I have some comments that I was going to say
6 today. What I had written and indicated to you is here I am
7 at the end of the day and all of the people have said things
8 that I wanted to say and more eloquently than I have. That
9 is what I have written here, but suddenly I am before all of
10 them so maybe they can say the same things about me.

11 I really only do want to speak about one point
12 today, and that is about Amendment 16, and I know that I am
13 going to be very brief on this point. Professor Turley
14 comes a little bit later in the afternoon or maybe earlier,
15 and he clearly has devoted the lion's share of his effort on
16 that particular issue, but I think it is important, and I
17 want to emphasize it. I want to urge you. I am here to
18 urge you to start the process of exploring ways and means of
19 appropriately dealing with the aged and infirmed inmate and
20 offender. As I said, I am referring here to both the
21 defendants in criminal cases and then the inmates that they
22 soon become. Whether the issue is sentencing or a mechanism

1 for the advancement of the release from confinement and,
2 frankly, with Commissioner Grinner here, whether it is an
3 old or a new law or offender, something intelligent,
4 logical, and fair clearly needs to be done and done soon.

5 Let me give you an example. Today we are dealing
6 with examples that seemed to have worked in the last
7 session, the last round of amendments, so let me give you an
8 example. A gentleman I am acquainted with is serving a
9 fairly long period of time in a federal facility in Texas.
10 In a couple of months he will be 80 years old. According to
11 BOP data, and the last I checked was June of last year,
12 there were 70 people in the system of 75 years or older.
13 So, at 80, he is up in that one-tenth of 1 percent. He has
14 had three significant heart attacks, the last of which
15 occurred while he was incarcerated. Since entering the
16 system, he has been diagnosed with cancer. He has had two
17 surgical procedures and a series of some 39 radiation
18 treatments all at BOP, all at taxpayer expense.

19 As a result of all of these efforts, he has
20 effectively lost control over just about all of his bodily
21 functions. Basically, he has to take one set of medications
22 to start a process and then another set of medications to

1 stop that process.

2 His urinary tract problems are so severe that
3 every several months he has to go out of the facility into
4 an acute care facility for an excruciating procedure that I
5 won't go into detail about.

6 CHAIRMAN WILKINS: What is he serving time for?

7 MR. CHASET: Technically, he is serving time for a
8 very large-scale skim from a facility in Las Vegas. He is
9 no angel.

10 CHAIRMAN WILKINS: Some kind of fraud.

11 MR. CHASET: It is a fraud. There is clearly some
12 organized crime allegations here, also. Again, this is no
13 angel.

14 As I was saying, he has these painful procedures
15 every three or four months. He comes back quite sick, open
16 to infection. As a matter of fact, right now he has
17 pneumonia. Despite all of these realities, he is not
18 scheduled to be released until June 2000, I believe. He
19 will be 86, if he lives that long, maybe only through some
20 heroic efforts, expenditures of certainly a great deal of
21 money, and a lot of luck. No one believes, however, he is
22 going to live that long. Bureau physicians, private

1 doctors, even some of the Parole Commission folks have seen
2 him. Unfortunately or maybe fortunately, and I am not sure
3 how he would come out on this, he is not sick enough or not
4 near death enough for the 3582 procedures that the Bureau
5 has to come into play. He is basically being kept in jail
6 now on a rationale provided that says he is a more serious
7 parole risk, and I am not going to debate whether or not I
8 agree with that or we should agree with that. I believe
9 someone in that circumstance, that old, that sick, the only
10 risk analysis is how is he going to stay alive, and that is
11 where his attention is going to be drawn.

12 I think, however, there are better ways of making
13 the analysis here, the assessments and the decisions. I
14 think we need a set of criteria for evaluating the
15 potentials, something to guide the decision-makers in our
16 courts and in our prisons, something that is realistic
17 enough and commonsensical enough that even some of the
18 crazies -- I am not sure where we are. Maybe they are over
19 there -- will know. Maybe three surgeries and you are out
20 of prison. I don't know.

21 [Laughter.]

22 MR. CHASET: Something like that. We need to

1 balance legitimate risk with actual prognosis. We need to
2 weigh the very real and the very high costs for care and
3 treatment and who is going to pay for them. We need to make
4 very clear statements that neither the public nor the
5 individual inmate is going to be confused or misled about.
6 We need guidelines. We need guidance here.

7 If we decide to accept the fact that many
8 offenders are going to die in prison, whether it is AIDS,
9 whether it is cancer, whether it is the virulent
10 tuberculosis that is spreading now, whether it is old age,
11 then let us state that that is our policy. If we decide to
12 temper that policy with some humanity, if we decide to use
13 common sense and think about dollars and cents, then we need
14 to be fair, and logical, and precise on how we define or
15 exercise that compassion.

16 There are a lot of views here. There are a lot of
17 voices. I think the Sentencing Commission is in the best
18 position to manage that effort. Mary Lou talked about going
19 out into the field and having hearings of folks out there.
20 I applaud that. All I want you to do now is to start that
21 process and to start that process quickly. I think it
22 belongs here. The Bureau will help. The private

1 practitioners will help. There are a lot of other groups
2 who would help. I beg you to start that process.

3 That is the only thing I wanted to mention.
4 Obviously, you have my written comments.

5 CHAIRMAN WILKINS: Thank you, Mr. Chaset.
6 Questions to my right?

7 COMMISSIONER GELACAK: Was this geriatric demon in
8 Texas sentenced under the guidelines?

9 MR. CHASET: No. He is an old law offender. But
10 what I am looking for here and I think what your comments
11 addressed were both sentencing as well as what happens when
12 the individual is there and maybe even early release and
13 some supervision later. I think we need some general
14 criteria there for what is going to be a very aging
15 population and with incredibly spiraling costs.

16 COMMISSIONER GELACAK: Would you like to comment
17 on POPs?

18 MR. CHASET: Say that again.

19 COMMISSIONER GELACAK: Would you like to comment
20 on the POPs program.

21 MR. CHASET: I think I would leave that to someone
22 a lot more knowledgeable than I, who I think is coming up

1 later. Those are the kinds of things that are important.
2 My understanding of that process it has been concentrated in
3 the state facilities and we haven't done enough of it in the
4 feds. Clearly, there were some efforts at the Parole
5 Commission, and they came up with a policy which I think is
6 inadequate. I don't think it gives enough guidance. I
7 think it gives too much discretion, and it is unfairly used,
8 but those are the criticisms I have of the Parole
9 Commission, generally. But thank you for that reference.

10 CHAIRMAN WILKINS: Questions to my left?

11 [No response.]

12 CHAIRMAN WILKINS: Where is this prisoner serving
13 time; what prison?

14 MR. CHASET: He is in Bastrop in Texas.

15 CHAIRMAN WILKINS: Can the Bureau designate
16 another facility for him?

17 MR. CHASET: Clearly --

18 CHAIRMAN WILKINS: I know they can, but I mean a
19 facility that would resemble perhaps a halfway house or
20 something like that? I am not saying it should, but does it
21 have the authority to do it?

22 MR. CHASET: I think, under my interpretation of

1 their regulation, the new regulation that talks about going
2 to a federal judge and asking for a sentence reduction was a
3 part of the Sentencing Reform Act. I would argue that it is
4 now applicable to both old and new law offenders. So I
5 think the Bureau could do that if it wanted to. Right now
6 this gentleman has not been given a parole date. Well, he
7 has. He has been told he has to remain until the end of his
8 sentence. So the Bureau, I believe, has that authority.

9 CHAIRMAN WILKINS: If, of course, the aging of our
10 prisoners and with new legislation being passed and lengthy
11 sentences for certain offenses, we need to begin searching
12 for a solution, and we need to find one that probably would
13 follow the path of least resistance; that is, without
14 requiring new legislation, for example. I know that you are
15 thinking about that and have been. I know that you will
16 continue to work with us as we try to seek a solution for
17 the future.

18 MR. CHASET: And I welcome the invitation.

19 CHAIRMAN WILKINS: Thank you very much. Are there
20 any witnesses in this room here who are scheduled to testify
21 this afternoon? Oh, Inspector Hearst is here. K.M. Hearst
22 is a Deputy Chief Inspector, Office of Criminal

1 Investigations, United States Postal Inspection Service.
2 With Inspector Hearst, well, you introduce your colleague to
3 us.

4 MR. HEARST: This is Bob Vincent. He is on my
5 staff.

6 CHAIRMAN WILKINS: We are glad to have you Mr.
7 Vincent.

8 MR. VINCENT: Thank you.

9 CHAIRMAN WILKINS: We will be glad to hear from
10 you.

11 INSPECTOR HEARST: As you indicated, I am Mike
12 Hearst, Deputy Chief Inspector for Criminal Investigations
13 with the United States Postal Inspection Service. I am
14 joined by Inspector Bob Vincent, as I indicated.

15 I want to thank the Commission for the opportunity
16 to testify again this year on two issues of interest to the
17 Postal Service. We have proposed two amendments for your
18 consideration regarding multiple victim crimes and volume
19 mail theft. These two proposals are separate and distinct
20 and are discussed more fully in our written comments.

21 We believe the concepts in our amendments have a
22 great impact on the public, commerce and the postal service,

1 but are not adequately addressed by the sentencing
2 guidelines at this time. As I have stated, our two proposed
3 sentencing guideline amendments are found as Amendment 34,
4 multiple victim, and Amendment 35, volume mail theft. I
5 will address proposed Amendment 35 first.

6 In the typical volume mail theft crime, the
7 offenders target postal vehicles, letter carrier carts and
8 satchels, collection and relay boxes, and apartment and
9 residential mail boxes. A significant amount of mail is
10 stolen by those who organize these schemes in order to
11 obtain relatively few pieces of mail with monetary value,
12 such as checks, credit cards or other personal financial
13 information.

14 As an example, the average amount of mail taken
15 during a vehicle break-in is between 500 and 1,000 pieces
16 affecting hundreds of customers. During a collection box or
17 relay box attack, 4,000 to 5,000 pieces of mail may be
18 taken. The items with value are kept and used while the
19 remaining mail with no monetary value for the thieves is
20 discarded or destroyed. The guidelines do not take into
21 consideration this nonmonetary value of the items which are
22 stolen.

1 To place volume mail theft in perspective, I have
2 provided you with photographs that show mail which was
3 recovered following its theft from three postal vehicles on
4 October 1, 1993. Over 2,500 pieces of mail were taken
5 during the vehicle break-ins. Included in the mail which
6 was recovered were 270 Social Security and supplemental
7 income checks, 163 Los Angeles County Public Assistance
8 checks, 13 State of California unemployment checks, and four
9 Los Angeles Unified School District checks. Three
10 individuals were identified as being responsible for these
11 break-ins. To date, only one of the defendants has been
12 prosecuted. This defendant received a sentencing of three
13 years' probation.

14 The current sentencing guidelines under 2B1
15 recognizes the importance of the U.S. mail by providing for
16 a two-level increase in the offense level for the theft of
17 mail. This two-level increase is adequate for mail theft as
18 a crime of opportunity. However, the volume mail theft
19 crimes are not crimes of opportunity, but rather are crimes
20 committed by organized rings established for the sole
21 purpose of stealing mail and negotiating items with monetary
22 value. Although they include other crimes such as forgery

1 or fraud, the basis of the crime is the theft of the large
2 volumes of mail.

3 These rings are comprised of individuals with
4 specified roles in the overall scheme. They include
5 thieves, forgers, false identification providers, fences and
6 individuals who use or negotiate the checks or credit cards.
7 A majority of these crimes are committed primarily to
8 support drug habits. Recent intelligence also shows an
9 involvement of organized gangs that use the proceeds from
10 mail theft to finance other criminal activities such as drug
11 trafficking.

12 The volume mail theft problem is not unique to any
13 one locality, but is a problem we face nationally. Because
14 of the impact this crime has on our customers and
15 operations, our field offices have aggressively sought
16 methods to prevent these thefts. Modifications have been
17 made to postal vehicles, collection and relay box locking
18 mechanisms have been reinforced and postal customers have
19 been alerted via the news media regarding the cautions that
20 they should take in order to avoid being victimized.

21 Given time, most security systems can be
22 compromised by the criminal. Our investigations in Los

1 Angeles, for example, typify the value mail has to the
2 criminal and the extremes they will go to in order to
3 acquire the mail. After experiencing a rash of vehicle
4 break-ins, modifications were made to postal vehicles in Los
5 Angeles with a number of the more vulnerable vehicles being
6 replaced with ones which were more secure. Because of these
7 preventive efforts, the criminals sought another course of
8 action to acquire the mail, and that was robbery. We have
9 seen an increase in robberies targeting to postal carriers
10 to get mail and keys, which provide access to collection and
11 relay boxes containing mail.

12 The sentencing information which was provided to
13 us by the Commission indicates 60 percent of all criminals
14 that are sentenced for a mail theft-related crime receive no
15 sentence of incarceration. 25 percent receive incarceration
16 of 1 to 12 months and only 15 percent of all criminals
17 sentenced for mail theft-related offenses receive
18 incarceration of more than 12 months.

19 Proposed Amendment 35 is patterned after the
20 organized scheme to steal vehicles as found in Guideline
21 2B1. A reading of the commentary of this guideline
22 describes offense characteristics analogous to the organized

1 scheme to steal mail. As previously described, these mail
2 theft cases, like the organized thefts of vehicles,
3 represent substantial criminal activity. Furthermore, the
4 value of the mail stolen is difficult to ascertain due to
5 the intrinsic value of the majority of the mail stolen and
6 its quick destruction in the course of the offense.

7 From the sentencing data reviewed, the vehicle
8 theft offense characteristic has only been used in 95 cases
9 over the past five years. We believe this is due, in large
10 part, to the extrinsic value of vehicles and the
11 corresponding high dollar loss, which results from the theft
12 of a relatively few vehicles. For example, once the dollar
13 loss of the vehicles reaches \$70,000, the dollar loss for
14 the specific offense characteristic as a floor offense level
15 is met. In comparison, a similar guideline, which creates a
16 floor level of 14 for an organized scheme to steal mail
17 would apply in the majority of our volume mail theft
18 offenses.

19 Under the current guidelines, a significant dollar
20 loss is involved in these crimes if all relevant conduct in
21 the scheme can be considered. However, the total loss
22 attributed to relevant conduct can only be proven at a

1 substantial cost to the government and, even if the dollar
2 loss is proven, it still would not take into consideration
3 the nonmonetary harm attributed to the crime.

4 Even for items that have monetary value, the
5 actual loss is dependent on the victim's socioeconomic
6 status. For example, one victim in Los Angeles who was
7 interviewed by my staff detailed the long drawn-out process
8 of replacing her welfare check which had been stolen during
9 a postal vehicle attack. She and her children experienced
10 great hardship during the replacement period. They were
11 forced to borrow money from friends, forced to buy groceries
12 on credit, and the store where she bought clothes for her
13 children closed her charge account since she could not make
14 monthly payments. The most difficult experience for this
15 victim was not being able to buy even the smallest of gifts
16 for her children at Christmas as the theft occurred on
17 December 15.

18 Prosecutors have advised that mail theft for the
19 criminal is an easy-money operation with minimal risk. One
20 suspect, when arrested in his home by postal inspectors for
21 mail theft, had a sign hung above one of the doorways. The
22 sign read, "The pen is mightier than the sword," referring

1 to forgery versus robbery.

2 In another case, a foreign national convicted of
3 mail theft said, "I was told the streets of America were
4 paved with gold. I now know it is the mail boxes, not the
5 streets that have the gold."

6 Personnel from my staff have also conducted
7 background research on proposed Amendment 34. We have
8 found, based on interviews of our field inspectors,
9 prosecutors, probation officers and judges in the federal
10 judicial system, there is no probability in the sentencing
11 of criminals who pray on multiple victims or no
12 proportionality, I should say.

13 From a laymen's perspective, which crime would the
14 average person view as a more serious offense, one that
15 involves \$100,000 aggregate loss and 100 victims or one that
16 involves \$100,000 aggregate loss and 1,000 victims? Most
17 people would agree the crime that affects the 1,000 victims
18 has a greater societal harm. However, the current
19 sentencing guidelines treat both crimes equally. In our
20 testimony last year, we asked the Commission to study the
21 multiple victim issue. When the Commission asked for
22 topical issues for study this year, we, again, submitted the

1 issue of multiple victims. As an alternative to our
2 proposed victim table, we again would urge the study of what
3 we deem to be an important aspect of a crime's total harm;
4 that being multiple victims.

5 Our written testimony also contains on other
6 amendments published by the Commission as well as comments
7 on the termination of loss in cases involving credit card
8 theft. One amendment I would like to comment on before the
9 Commission is Amendment 12B, which provides for an increase
10 in the base offense level for the loss table in 2B1.1. We
11 agree with the increase in the base offense level for 2B1.1
12 to the extent it brings the loss table in conformance with
13 that of 2F1.1. We strongly disagree, however, with the
14 elimination of the mail theft offense characteristic B4.

15 The basis for the current for two-level increase
16 for mail theft is attributed to the unique character of mail
17 as the stolen property referred to in the commentary
18 background. For a consistent application of this statutory
19 distinction, a corresponding two-level increase above the
20 base offense level should be provided for in theft of mail
21 offenses, regardless of the dollar loss amount.

22 Thus, if the base offense level is increased for

1 2B1.1 to a 6, the specific offense characteristic for mail
2 theft should provide a floor guideline of 8 regardless of
3 the dollar loss involved. This will establish a floor
4 offense level for the general mail theft offenses committed
5 as crimes of opportunity as distinguished from the organized
6 schemes to steal mail covered in proposed Amendment 35.

7 I want to thank you very much for this opportunity
8 to summarize our written presentation, which was quite
9 lengthy, and will now entertain any questions concerning our
10 recommendations.

11 CHAIRMAN WILKINS: You might want to describe
12 these exhibits that you have earlier delivered.

13 INSPECTOR HEARST: One thing we did send you a
14 large book that contains a number of different cases. We
15 also provided you with a video cassette that has both some
16 specific footage of actual mail thefts being carried out
17 covered by surveillance cameras and also a number of news
18 items on that video cassette that relate to large volume
19 mail thefts and their impact on the postal service and
20 postal customers throughout the country.

21 This morning we also brought along a copy of some
22 photographs that show the kind of volume of mail that has

1 been stolen in a particular case out in Los Angeles.

2 CHAIRMAN WILKINS: Let me ask anyone to my right
3 if they have any questions of Inspector Hearst.

4 [No response.]

5 CHAIRMAN WILKINS: To my left?

6 [No response.]

7 CHAIRMAN WILKINS: As always, we appreciate the
8 time and effort that you and your staff evidently put into
9 your presentation and your written testimony. It is very
10 helpful to us, and we thank you once again.

11 INSPECTOR HEARST: Thank you very much, Mr.
12 Chairman, and thank the Commission.

13 CHAIRMAN WILKINS: Barbara Piggee is here.
14 Barbara, would you be willing to give us your testimony at
15 this time? If you are not, that is all right. I know you
16 are scheduled for 1 o'clock. We are waiting on the Reverend
17 Jackson to be here shortly and, rather than break now, if we
18 break, we will never get us all back together in a short
19 period of time.

20 MS. PIGGEE: Yes. Let me just go out in the
21 hallway and get what I need.

22 [Pause.]

1 MS. PIGGEE: We have Nicole Washington speaking
2 today.

3 CHAIRMAN WILKINS: Ms. Washington, we are glad to
4 have you.

5 PARTICIPANT: Do you want the whole panel?

6 CHAIRMAN WILKINS: Yes. I am trying to decide
7 whether we ought to -- we are all dealing with the same
8 topic here. Who else is on besides Dr. Curry? Dr. Lantz as
9 well, yes. Let us go ahead and move forward. Have a seat,
10 Dr. Curry.

11 Ms. Piggee represents Families Against
12 Discriminative Crack Laws. Ms. Washington is here
13 representing Neighborhood Families Against Unjust Crack Laws
14 and Dr. Curry and Dr. Lantz will speak to the Commission
15 about crack cocaine. They, also, represent Families Against
16 Mandatory Minimums.

17 MS. PIGGEE: My name is Barbara Piggee, and I am a
18 member of Families Against Discriminative Crack Laws. Our
19 members have traveled a great distance to be here today, and
20 we appreciate this opportunity to comment upon disparity in
21 penalty between cocaine base -- crack cocaine -- and cocaine
22 hydrochloride -- powder cocaine. Our organization

1 represents mothers, fathers, wives, children, sisters,
2 brothers, and extended family members of thousands of men
3 and women who have been sentenced under this unjust law.
4 The membership has grown to include friends and supporters
5 of families and inmates across the United States.

6 Families Against Discriminative Crack Laws has
7 been formed to protest the blatant discrimination in the
8 sentencing guidelines between those convicted of possessing
9 powder cocaine with intent to distribute and those
10 possessing crack cocaine with the intent to sell.

11 The crack laws that are now in effect are very
12 biased, racially discriminatory, and genocidal to people of
13 color. According to the crack laws, if two people are
14 arrested, tried and convicted, one possessing crack cocaine
15 and the other possessing powder cocaine equal in quantity,
16 the person who possessed the crack cocaine will be given a
17 mandatory minimum sentence 100 times greater than the person
18 who possessed the powder cocaine. However, there is no
19 medical or scientific distinction between crack and powder
20 cocaine and crack has not been found to be more addictive or
21 dangerous than the powder form of cocaine. Therefore, there
22 is no logic to this disparity.

1 After reviewing Dr. George Swartz's trial
2 testimony, who has over 30 years' experience in the field of
3 toxicology, it stated that, "It is the route of
4 administration which tends to define the addictive nature of
5 the drug." He further stated powder cocaine as being
6 dangerous and the most addictive when taken intravenously.
7 So there is no logic behind sentencing people 100 times
8 harsher for crack cocaine.

9 We are not saying that all of our incarcerated
10 loved ones are innocent or don't deserve to be punished.

11 CHAIRMAN WILKINS: Ms. Piggee, let me ask you
12 something. We have taken you out of turn, and you all have
13 been most obliging to call you from the audience. Reverend
14 Jesse Jackson is here now, and he has a very tight schedule.
15 We want to hear from him, and we want to hear from you as
16 well. Would it suit you as well to suspend momentarily and
17 then put you back on the regular agenda and hear from you at
18 1 o'clock?

19 MS. PIGGEE: Whatever this Committee would like to
20 do.

21 CHAIRMAN WILKINS: I appreciate the flexibility
22 that you have given us. We are trying to accommodate a lot

1 of schedules, and I know you all came from a long distance.
2 We want to hear you, and we want to have plenty of time to
3 hear you. So, if we can do that, we will get back on
4 schedule now, and I will call the next witness, the Reverend
5 Jesse L. Jackson.

6 REV. JACKSON: Mr. Chairman and members of the
7 Commission, ladies and gentlemen who are here, let me
8 express my appreciation for the opportunity to testify today
9 and to express my apologies for being a bit late. We have
10 been at a rather significant meeting at HUD today working on
11 alternatives to this predicament we now find ourselves
12 trapped in, and there are overlapping meetings all over the
13 place, and so accept my sincere apology for affecting your
14 schedule.

15 I would like to share with you my grave concern
16 about the discriminatory impact of mandatory minimum
17 sentences and the disparity in sentencing between powder and
18 crack cocaine. The impact of these laws and policies is so
19 discriminatory that crime and criminal justice have become
20 the preeminent civil rights issue of our time. As either
21 victims or defendants, people of color are treated unjustly
22 and inequitably in the American criminal justice system,

1 which makes it also unconstitutional, immoral, racist and
2 untenable.

3 The current penalty for possession of crack
4 cocaine in the federal system is one of the most blatant
5 examples of this discrimination. I strongly believe in both
6 preventing and punishing illegal drug distribution.
7 However, I believe that the punishment should fit the crime
8 and that those guilty of the same crime should be punished
9 equitably. None of these tenets apply to the penalties for
10 crack and powder cocaine.

11 Current federal narcotics law provides that first
12 offenders convicted of possession of 5 grams of crack
13 cocaine, about 5 Sweet 'N Low sugar bags or the weight of
14 two pennies, must serve a mandatory five years in prison.
15 First offenders convicted of possessing the same amount of
16 powder cocaine are eligible for probation. Those who
17 possess powder cocaine serve a mandatory 5-year sentence
18 only when they possess 100 times as much powder cocaine --
19 500 grams. The discriminatory impact of this law becomes
20 painfully clear when one considers that African-Americans
21 comprise 91.3 percent of those sentenced for federal crack
22 offenses and whites comprise only 3 percent. These

1 statistics become even more significant considering the fact
2 that whites comprise 64.4 percent of all crack users.

3 First time, nonviolent offense, no gun, no
4 previous record, 5 grams of crack cocaine, five years in
5 jail at \$40,000 a year. The same five years in a public
6 housing project, \$2,000 a year to live in the house. Those
7 same five years in college less than \$40,000. Those same
8 five years in jail, first time, nonviolent offender, no gun,
9 no previous arrest record \$200,000 and a lost life.

10 These statistics lead to some disturbing
11 conclusions:

12 1) Although most crack users are white, most of
13 the people in federal prisons for crack use are African
14 American.

15 2) The penalty for crack cocaine possession is
16 100 times greater than the penalty for powder cocaine, and
17 the vast majority of powder cocaine users are white.

18 There may be an amendment offered by Congressman
19 William Hughes to the crime bill being considered this week
20 before the House of Representatives to equalize the
21 sentences between crack and powder cocaine. The proposed
22 legislation will equalize the penalties between crack and

1 powder cocaine at the current sentencing levels set for
2 powder cocaine offenses.

3 However, as you review the guidelines for crack
4 versus powder cocaine sentencing disparity, I urge you to
5 consider the racism inherent within them. There is
6 absolutely no justification for this stark disparity in
7 punishment for two different forms of the same drug. Crack
8 is relatively inexpensive, readily available in poor
9 communities, and used more openly. Powder cocaine is
10 expensive, primarily used in white, affluent communities and
11 used more privately.

12 Both forms of the drug are dangerous and
13 addictive, and there is no evidence that crack cocaine is
14 more dangerous or addictive than powder cocaine. In fact,
15 scientific studies show that there is no molecular
16 difference in the two forms of the drug, and that powder
17 may, in fact, be more addictive than crack.

18 Defenders of the disparity attempt to blame crack
19 for the violence associated with the drug trade in poor
20 communities of color. However, according to a 1991 Justice
21 Department survey of state prison inmates, prisoners who had
22 used crack before their offense were less likely to be in

1 prison for a violent offense than those who had used other
2 drugs or no drugs. In fact, the survey found that of the
3 percentage of prisoners who used crack in the month before
4 their offense, 33 percent were incarcerated for a violent
5 offense, compared with 39 percent who used powder cocaine
6 and 48 percent who used any other drug. The violence would
7 exist whether the drug were crack, powder cocaine, heroin,
8 or some other drug. The violence is associated with the
9 nature of the drug trade, not the drug itself.

10 The black, the brown, the poor tend to go for the
11 cheap high from five grams of crack, and because of
12 sentencing disparity, are punished overseverely. The rich,
13 the slick, and those who can maneuver get probation.

14 On March 9, Supreme Court Justice Anthony Kennedy
15 assailed mandatory minimum sentencing before a House
16 Appropriations Subcommittee on the Supreme Court budget and
17 stated: "I simply do not see how Congress can be satisfied
18 with the results of mandatory minimums for the possession of
19 crack cocaine." In other words, it reduces judges to data
20 entry clerks. They cannot make judgment based upon
21 circumstances, situations, and context.

22 This statement follows two federal court decisions

1 which recently held crack sentences unconstitutional.
2 Senior Judge Louis Oberdorfer of the United States District
3 Court for the District of Columbia declared on January 26
4 that the mandatory sentences applied to two defendants
5 before him violated the 8th Amendment's proscription against
6 cruel and unusual punishment.

7 On February 11, Judge Clyde Cahill of the United
8 States District Court in St. Louis, Missouri used the 14th
9 Amendment's guarantee of equal protection under the law as
10 grounds for holding the sentencing disparity
11 unconstitutional.

12 The prisons are filled with young African-American
13 men and women who are serving mandatory minimums for crack
14 cocaine. Last month, The Washington Post reported that
15 Derrick Curry, a 20-year-old African-American male with a
16 promising future, will spend as much time in prison as he
17 has been alive for a nonviolent first offense. I must say,
18 if this were happening in Brazil or South Africa, these men
19 and children being jailed and killed, we would say something
20 is wrong with the system. In Washington, New York or
21 Chicago we say there is something wrong with the children.
22 I say it is something wrong with those giving this racist

1 analysis.

2 The FBI admitted that Derrick was a flunky in the
3 operation that was run by his friend. If the crack cocaine
4 guideline ratio changes, Derrick will be eligible for a
5 reduction in sentence to 78 months. However, because the
6 mandatory minimum sentence trumps the guideline sentence,
7 Derrick's sentence cannot go below 10 years.

8 Steven Cook is serving a 19 1/2 year sentence for
9 a crack cocaine conspiracy involving 32 kilos. If the
10 sentencing guidelines change for crack cocaine, Steven will
11 be eligible for a reduction in sentence to 78 months.
12 However the 10-year mandatory minimum sentence for 50 grams
13 or more of crack cocaine will prevent Steven's sentence from
14 dropping below 10 years. The change would effectively
15 reduce his sentence by 9 1/2 years. Steven is 25 years old,
16 a first offender, no previous record, no gun involved, and
17 was in college prior to his arrest.

18 Terrol Spruell, a senior at Virginia State
19 University, was caught with 5 ounces of crack in a shopping
20 mall parking lot in October 1989. He had never been
21 arrested before. The sentencing report said that Spruell
22 had sold 8 kilograms of crack in his drug-dealing career --

1 8 kilograms. He was sentenced to 30 years without parole.
2 He is scheduled to be released at age 54 in the Year 2015.
3 If he had had powder cocaine, he would have gotten a 10-year
4 sentence and been released in 1997.

5 Murderers, kidnappers, and rapists routinely spend
6 4 and 5 times less than do people who possess or distribute
7 small quantities of crack. People who possess a same amount
8 of powder cocaine get much less time. The disproportionate
9 impact of mandatory minimums on the African-American and
10 Latino communities and the issue of crack versus powder
11 cocaine sentencing are central to the crime debate.

12 Judges are required to mete out these harsh
13 sentences as a result of the laws passed by Congress in the
14 '80s requiring mandatory minimum federal sentences for the
15 possession of crack cocaine. Judges do not like these laws
16 because there is no room for judicial discretion, and the
17 sentences are arbitrary. U.S. District Court Judge Clyde
18 Cahill of St. Louis last month refused to impose a minimum
19 mandatory sentence on a small-time drug dealer, stating the
20 following:

21 "This one provision, the crack statute, has been
22 directly responsible for incarcerating nearly an entire

1 generation of young black American men for very long
2 periods. It has created a situation that reeks with
3 inhumanity and injustice. The scales of justice have been
4 turned topsy-turvy, so that those masterminds, the kingpins
5 of drug trafficking, escape detection, while those whose
6 role is minimal, even trivial, are hoisted on the spears of
7 an enraged electorate and at the pinnacle of their youth are
8 imprisoned for years while those most responsible for the
9 evil of the day remain free."

10 Laws requiring mandatory minimums were passed
11 during a wave of public outcry about crime in the '80s;
12 drive-by shootings and an increase in inner-city crime.
13 There is currently a similar public outcry around crime,
14 with the attendant media and political posturing, resulting
15 in the discussion of similar unreasoned responses, and
16 pressure for immediate answers and, therefore, bumper-
17 sticker politics. We must be more rational and thoughtful
18 in our approach at this time and learn the lessons of our
19 history. We must move towards proactive rather than
20 reactive approaches to violence. We can no longer allow our
21 communities to be unsafe, our children filled with fear, and
22 our solutions to be ineffective. More jails are not the

1 answer. Mandatory minimum sentences for nonviolent
2 offenders are not the answer.

3 Mandatory minimum sentences use cell space that
4 would be better used to house violent criminals. Criminals
5 with nothing to lose will resist arrest, demand trials,
6 process appeals. Prison will become a greater jungle
7 overrun with those who can never leave. And, as we know,
8 these laws will disproportionately affect African-Americans
9 and Latinos.

10 We, who are agents for political and social
11 change, must lead the way. The victims of neglect,
12 oppression, and abandonment have the moral and practical
13 imperative to go forward. We must use all of the resources
14 that we have in our power. While political and economic
15 resources are important, it is our moral authority that is
16 our secret weapon.

17 Leadership must bring fairness and justice to a
18 clearly unjust situation. Crack versus powder cocaine
19 sentencing disparity is a racist response to the climate of
20 fear which affects all of our communities. Sentencing
21 disparity punishes people for their socioeconomic status;
22 the poor, the black and the brown use crack, and the wealthy

1 and the white use powder.

2 We must support community leaders, parents,
3 teachers, and judges with laws and policies that are just,
4 and which address the scope of the problem with rational and
5 fair solutions. We cannot allow another generation of
6 talented young men and women to fall victim to unjust
7 policies which do nothing to rehabilitate them, and which
8 stand in the way of affecting the truly violent. The
9 Sentencing Commission must use its power and authority to
10 right this egregious wrong and correct this fundamental
11 injustice.

12 We will not surrender to fear. We must move
13 forward with hope. We will keep hope alive.

14 Thank you.

15 CHAIRMAN WILKINS: Thank you very much, Reverend
16 Jackson. As you know, I am sure, several years ago this
17 Commission, after extensive research and analysis, issued a
18 report that came out four square against the mandatory
19 minimum sentencing system passed by the Congress, and we
20 have been urging the Congress in public forum as well as in
21 private meetings with members of Congress that we need to
22 reverse the system of mandatory minimums that, as you

1 pointed out, were enacted in the middle '80s.

2 So your comments fell on very receptive ears, and
3 we want to work with you and any group that feels as we do
4 on this issue of mandatory minimums. I think it is one
5 issue where we do stand fairly united across the board and
6 continue to work with Congress. We are making progress, but
7 we have not seen the repeal of any, but at least we are
8 holding the line, I think; that is, we as a collective group
9 against new ones.

10 So it is a difficult issue. It is a moral issue.
11 It is a legal issue. It is also a political issue, and we
12 need to address it on all of those fronts.

13 Let me ask any of my colleagues to my right if you
14 have any questions or comments to the Reverend Jackson.

15 COMMISSIONER GELACAK: Reverend Jackson, I would
16 associate myself with a great deal of what you say. But one
17 thing strikes me when you comment about needing to pay
18 attention to our history, because I don't think we do quite
19 often. My wife has a habit of reminding me sometimes that I
20 am, in her words, older than I look. When I look back, I
21 can recall something, which I know you are aware of, but
22 others in this room may not be, and there is some hope in

1 this area.

2 In 1956, the Congress of the United States passed
3 the Narcotics Control Act, which instituted a number of
4 mandatory minimum penalties both for distribution and for
5 importing of narcotics. It didn't allow for parole. It
6 didn't allow for early release, and it filled up the federal
7 prisons. In 1970, that same Congress passed a Comprehensive
8 Drug Abuse Prevention and Control Act of 1970 repealing all
9 of those mandatory minimum sentences. They repealed them
10 because prosecutors wouldn't charge them any longer because
11 they felt they were inequitable and had racial impacts.
12 They repealed them because judges said that they took away
13 their discretion. They repealed them because they couldn't
14 make them work, and we are in the same box again.

15 There is hope because, from looking at history
16 over a 14- or 15-year time span, Congress usually realizes
17 that they are off on the track. It hasn't been 14 or 15
18 years, but there is some talk. We have people like this
19 Commission. We have judges around the country who are
20 opposed to mandatory minimums. We have people like you and
21 others who are very forceful on the subject and carry a
22 great deal of weight. I wish I could say to you that there

1 was more we can do. We can comment, and we can report. We
2 cannot change the mandatory minimum statutes. That is
3 something that we need Congress to effect, and I know, as
4 you say, that Congressman Hughes may offer a floor
5 amendment. He withdrew it at the Judiciary Committee mark-
6 up. He may offer it again. I am not sure at this
7 particular point in time whether that will pass, in any
8 event, but it is still a possibility.

9 I want to thank you for sharing with us your
10 comments today.

11 REV. JACKSON: Our position is that those who vote
12 for this Crime Bill should serve a mandatory minimum and a
13 term limitation because the effect of this Crime Bill, in
14 light of what we know, is racist.

15 One reason that we were able to get redistricting
16 lines redrawn in 1990, 25 years after the Voting Rights Act,
17 whether it used gerrymandering, annexation at large, schemes
18 to deny access for African-Americans and Latinos, the judges
19 determined that the effect of the system denied blacks and
20 browns access and, based upon the effect, not the intent,
21 which was the big debate that we won, they ordered majority
22 state legislatures to redraw the lines, and that is why we

1 have from Congresswoman Barbara Scott, to two blacks in
2 North Carolina and three in Florida and around for the first
3 time in this century because of effect.

4 52 percent of our jail population is black. The
5 majority of crimes are committed by whites. The majority of
6 those in jail are black. Its effect is racist. The
7 disparity between crack and crack cocaine is one evidence of
8 it. The way the prosecutors politicize crime to manipulate
9 leveraging for higher office is another form of its use.
10 The blacks and browns get more time for less crime. Its
11 effect is racist. It is very expensive, and this Crime
12 Bill, of course, is an attempt to give 2 grams of cyanide
13 and 1 gram of Kool-Aid and say, "At least it has Kool-Aid in
14 it." But Kool-Aid and cyanide, no matter what the
15 combination, equals death.

16 What we are about to do right now does not make
17 sense. If this were to happen in China, say, or any other
18 nation, Cuba, we would say this violates human rights. 100
19 persons per 100,000 is the international average of
20 incarceration -- 100 to 100,000. Russia 268 to 100,000. We
21 said that is dangerous. South Africa 311 to 100,000. We
22 say that is beyond the pale. The U.S. 450 arrested per

1 100,000. Blacks 1,300 per 100,000. Inner-cities 3,000 to
2 100,000. There is a plan for arrest and prosecution and
3 execution, far less of a commitment to education and
4 recreation. It reduces our Congress to a lynch mob. We
5 cannot stand silently by while we are socially conditioned
6 to wipe out another generation of children.

7 Now, from those same houses and mother's wombs,
8 tonight you will see and between now and Monday, 95 percent
9 of the ball players in the NCAA finals will be black. Now
10 what is the difference between those who come from the same
11 mama and the same housing project; one of them on t.v.
12 entertaining and the other one is in jail or in the
13 graveyard? Those deemed to be worthy; they can dribble,
14 jump, hop, skip, run, as in Shadrach, Meshach and Abednego,
15 they are taken out and set aside and put in Cain's household
16 and nurtured. Then they are refined, projected and they are
17 protected. Those are the begotten children. The forgotten
18 ones are left back in these expensive jails and in these
19 early graveyards.

20 We know that these youth on that t.v. we will see
21 between tonight and Monday night come from the same areas,
22 but we changed their life options through culturing,

1 mentoring and adult supervision. Obviously, they need more
2 coaching than policing, more schools than jail cells. We
3 know what works. It is a crime against humanity to move
4 from ropes to rules, which is a form of lynching people. We
5 must cry out it is what it is. It is racist. It is wrong.
6 We must do everything up to and including civil
7 disobedience. We have got to raise hell. We cannot sit
8 idly by and just kind of pass the buck kind of washing our
9 hands as if we are playing some neutral role in this Easter
10 pageant. It is just not right.

11 CHAIRMAN WILKINS: Any questions to my left?

12 [No response.]

13 CHAIRMAN WILKINS: Thank you Reverend Jackson.

14 REV. JACKSON: Thank you.

15 [Round of applause.]

16 CHAIRMAN WILKINS: We are going to take a recess
17 at this time, and we will come back promptly at 1 o'clock,
18 and we will begin with our 1 o'clock panel.

19 [Whereupon, at 12:02 p.m., the proceedings were
20 adjourned to reconvene at 1:07 p.m. the same day.]

21

1 A F T E R N O O N S E S S I O N

2 1:07 p.m.

3 CHAIRMAN WILKINS: Let us get started, please.

4 Ms. Piggey, please come around with your colleagues that you
5 had before; Ms. Washington, Dr. Curry, Dr. Lantz, and there
6 is one other individual. Who is this?

7 MS. PIGGEY: Mr. Jose Clark.

8 CHAIRMAN WILKINS: Ms. Piggey, we will be glad to
9 hear from you at this time. Your colleagues can take turns
10 as you see fit, I guess, Ms. Washington, Dr. Curry, Dr.
11 Lantz and Mr. Clark.12 MS. PIGGEY: I will just pick up from where I left
13 off.14 After reviewing Dr. George Swartz's trial
15 testimony, who has over 30 years' experience in the field of
16 toxicology, it stated that, "It is the route of
17 administration which tends to define the addictive nature of
18 the drug." He further stated powder cocaine as being
19 dangerous and the most addictive when taken intravenously.
20 So there is no logic behind sentencing people 100 times
21 harsher for crack cocaine.

22 We are not saying that all of our incarcerated

1 loved ones are innocent or don't deserve to be punished.
2 What we are saying is that the time does not fit the crime.
3 Cocaine is cocaine regardless of whether it is used in
4 powder form or in crack form. Crack cocaine is easily
5 manufactured by heating powder cocaine and baking soda on a
6 stove top. Without powder cocaine, there could never be
7 crack cocaine.

8 By no means are we trying to justify the use or
9 sale of any illegal substance. The mere use of cocaine is
10 the important factor here, not the form in which it is sold.

11 Families Against Discriminative Crack Laws are
12 requesting that the crack laws be repealed and rewritten so
13 that those convicted are sentenced on the basis of the
14 offense, as opposed to being sentenced on the social impact
15 of the drug. We want our incarcerated loved ones to be
16 resentenced according to the powder guidelines for the year
17 in which they were arrested. We are requesting this
18 Commission to persuade Congress to eliminate the 100-to-1
19 ratio and to do so with a retroactive clause.

20 The federal government wants us to believe that
21 because crack cocaine is used primarily in the inner cities
22 by people of color that it is far more dangerous than powder

1 cocaine which is used in the more affluent communities.
2 This is a lie. For too long the federal government has
3 prayed on the emotions of people and led them to believe
4 that their communities can become a safe haven if every drug
5 abuser or distributor is locked away in prison. The media
6 has also played a great part in this conspiracy by
7 sensationalizing any crime that is committed by people of
8 color. No one wants to address the fact that lack of
9 employment and poor education are key contributors to the
10 ills of our communities. It is much easier to just blame
11 crack cocaine.

12 One reason given for the distinction in penalty
13 between crack cocaine and powder is that the users are more
14 associated with violence. However, a 1991 survey of state
15 prison inmates found that prisoners who had used crack
16 before their offenses were less likely to be in prison for a
17 violent offense than those who had used other drugs or no
18 drugs. In fact, the survey found that of the percentage of
19 prisoners who used crack in the month before their offense,
20 33 percent were incarcerated for a violent offense, compared
21 to 39 percent who use powder cocaine or any other drug.
22 Those statistics are from the Survey of State Inmates,

1 Department of Justice, Bureau of Justice Statistics, 1991,
2 Act 23.

3 Politicians, in an attempt to pacify America with
4 respect to the inner cities, created the crack laws to
5 convince America that they were solving the problem. The so
6 called "war on drugs" is no more than a "war on people of
7 color." Politicians have defended their actions by saying
8 that the crack laws were never intended to be racist. Well,
9 regardless as to whether it was intentional or not, the
10 result is the same. The crack laws are racist and genocidal
11 to people of color.

12 We, the taxpayers, cannot afford another \$32
13 billion failure nor can we keep building prisons or keep
14 paying \$40,000 a year per inmate to keep feeding and housing
15 these citizens.

16 The creators of the crack laws used no logic in
17 their design. They haphazardly plucked figures out of the
18 air as if they did not relate to human beings. There is no
19 consideration given the lives of the people involved, not
20 even for first-time offenders.

21 Personally, I feel that the crack laws were
22 written with the intent to discriminate against people of

1 color. When it is brought to your attention that you did
2 something not intended you usually correct the error as soon
3 as possible. There is no question that the crack laws are a
4 complete failure. The crack laws have failed to solve any
5 of the problems that they were supposed to solve. Yet the
6 laws still remain in effect. If it were truly not intended
7 to have such a negative impact on people of color then the
8 error would have been corrected a long time ago, and there
9 would be no need for us to be here today.

10 Serial killers get less time than crack offenders.
11 A father who set his own child on fire as he slept got less
12 time than our loved ones. A woman who shot and killed an
13 unarmed teenager in the back of her head got no time at all.
14 Yet, our loved ones who are nonviolent first- or second-time
15 offenders are portrayed as the worst monsters in the world;
16 a menace to society. And why are they portrayed this way?
17 So that politicians can boast at election time about how
18 many criminals they successfully put away.

19 Why should our incarcerated loved ones serve 30,
20 40 years and life sentences while the people who bring the
21 drugs into the United States go free? The federal
22 government cannot or will not stop the flow of drugs into

1 our community. It is clear that our incarcerated loved ones
2 are being used as scapegoats to solve a problem that they
3 did not create. Our incarcerated loved ones did not bring
4 cocaine into the United States. They do not own the planes,
5 trains, and ships that the drugs are transported on. To say
6 that the federal government cannot stop the flow of drugs
7 into our community is to say that the 18-year-old kids on
8 the inner-city street corners are smarter than the local
9 police, the DEA and every other law enforcement agency that
10 is supposed to be stopping the flow of drugs into our
11 community.

12 The time has come to stop lying to America about
13 the war on drugs. Politicians have found a new catch phrase
14 to get elected; they just promise to be tougher on crime
15 than their opponents. Politicians and the media have been
16 able to convince America that somehow all crime is related
17 to crack cocaine.

18 Unscrupulous attorneys have found a new way to get
19 rich with the crack laws. Some attorneys have chosen to
20 take advantage of the grief of unsuspecting family members
21 by charging ridiculous high fees up front and then telling
22 the family that there is nothing that they can do to help

1 their loved one because of the guidelines and mandatory
2 minimum sentencing.

3 We, the members of Families Against Discriminative
4 Crack Laws, are tired of our loved ones being used. Our
5 communities can no longer afford to be pacified, nor can we
6 accept blatant solutions. We need programs implemented with
7 guaranteed funding to deter possible dealers, programs to
8 teach our children and our young adults about parenting and
9 responsibility. We need job training and retraining with
10 current information to give our young adults hope and
11 direction. We do not need our young people to be imprisoned
12 with unfairly long sentences thereby nullifying their desire
13 to reform and productively reproduce.

14 One thing that I would like for this Commission to
15 consider, when I talk to people on the streets who -- this
16 is the first time I have been involved -- they don't
17 understand why it is so hard to understand what is going on.
18 I think this Commission also has a problem, even though I
19 realize the intelligence of everyone up here. I want you to
20 look at it from a common-sense approach. If you buy a
21 bottle of rum and you just pour a glass of rum and you drink
22 it, it is just a glass of rum. If you take it home, put it

1 in a blender and throw in some pineapple juice, a few
2 cherries, you have pina colada. It still was the same rum.
3 It started off the same thing. That is the way crack
4 cocaine and powder are. You cannot have crack without
5 powder.

6 So, if you could keep that in mind, there is no
7 justifiable reason to sentence someone -- to have the
8 disparity in the sentencing the way it currently is when you
9 could not have one without the other.

10 Thank you.

11 [Round of applause.]

12 CHAIRMAN WILKINS: Thank you. Ms. Washington?

13 MS. WASHINGTON: I am deeply concerned by the
14 injustice that is being inflicted upon certain ethnic groups
15 regarding the sentences process. The government has a great
16 deal of power with federal prosecutors and the probation
17 officers in the sentencing process. The government has
18 stripped the federal judges of their authority and their
19 discretion in sentencing. The sentencing guidelines don't
20 take into consideration certain tangible facts, such as
21 mitigating circumstances, actual involvement, first-time
22 offender status, or the offender's age.

1 To sentence a young person too long for a prison
2 sentence is counterproductive to our society as a whole.
3 These people will return to society in worse shape than they
4 left. These people are offered very little opportunity or
5 incentives for productive rehabilitation.

6 Due to the sentencing guidelines, the mandatory
7 sentence federal judges are forced into giving persons rigid
8 sentences that themselves feel are not appropriate in
9 certain cases. Prosecutors are using their legal power to
10 discriminate against certain ethnic groups and drug cases
11 just the way they changed the offender. Because one ethnic
12 group is more likely to possess in the rock form and another
13 ethnic group is more likely to possess it in powder, the
14 government has set up laws giving the offender with cocaine
15 rocks more time than the offender with cocaine powder.
16 Cocaine is cocaine in any form.

17 Prosecutors and probation officers are even
18 allowed to introduce new evidence to the sentencing hearing
19 that was not presented at the trial knowing that the
20 evidence can enhance your guidelines.

21 The courts also allow the trials of hearsay
22 evidence regarding of the witness' credibility status. Too

1 many individuals are being convicted for crimes without any
2 material evidence. The government is also using conspiracy
3 laws to introduce some type of conviction using, again, the
4 questionable hearsay method. The hearsay laws and
5 conspiracy laws seem only to be enforced against certain
6 Americans; mainly the poor and ignorant. For example, when
7 members of Congress were investigating the arms for hostages
8 deal, CNN had an individual who was involved in the
9 conspiracy. His testimony was considered to be invalid
10 because it was hearsay evidence.

11 When President Bush's son was involved in the S&L
12 scandal, the president said that if his son was indicted for
13 conspiracy charges, he would direct an attack against the
14 conspiracy laws to have them declared unconstitutional.
15 This is a prime example of a statement being used above the
16 law. When the leaders of our country will not abide by the
17 same laws we have set down for all, we have fallen from
18 democracy and become a dictatorship.

19 The new guidelines in 1987 are rigid with no
20 little good time offered to offenders with no incentive to
21 even try to abide by the institution rules or get involved
22 in programs that will benefit. I do realize there is a need

1 for direct action. The system has been implemented and it
2 is not working and, in the long run, will cause more harm
3 than good.

4 Seeing that the government is partly responsible
5 for the problem by not providing adequate education or
6 employment, they should not judge so hardly. If the
7 government cared as much about the domestic policy as they
8 do foreign policy and spent as much time and money on their
9 own citizens as they do other countries, we would not have
10 so many problems.

11 The youth of America is the future, but the
12 direction our leaders are taking us almost guarantees that
13 we have nothing to look forward to. I hope my concern is a
14 concern of yours and that you will strive to do what you can
15 to make the government see the error in their ways. We no
16 longer have to worry about country destroying us. We are
17 doing a good enough job of that ourselves.

18 Thank you for your time and concern.

19 CHAIRMAN WILKINS: Thank you.

20 [Round of applause.]

21 CHAIRMAN WILKINS: Dr. Curry?

22 DR. CURRY: Thank you, Mr. Chairman, and members

1 of the Commission. I would like to thank you for the
2 opportunity to testify before you this afternoon. I
3 consider it extremely significant that you understand first
4 why I am not here. It is not my intention to point fingers
5 or to criticize judges or prosecutors nor to mark the
6 judiciary system of our country. My sole purpose today is
7 to present my son's case, Derrick Curry, as an example of
8 why we must rethink the 1986 Anti-Drug Abuse Act in general
9 and specifically the disparity that exists between powder
10 and crack cocaine relative to sentencing.

11 In passing this act, we will force prosecutors to
12 demonstrate their toughness on drugs and drug offenders by
13 the number of convictions that they get. This has meant, in
14 many cases, referring cases normally heard in state court to
15 federal court; changing trials to a more favorable location
16 so that a conviction can be made; using minor participants
17 in an undercover capacity relative to other criminal
18 activities in a large metropolitan area. I must admit to
19 you, however, that I am frustrated and sometimes angered by
20 a democratic system that I defended and promoted as a
21 soldier in Vietnam, as an educator, as a parent, and as a
22 black male in this country.

1 I was raised to believe that this system worked
2 for everyone regardless of race, gender, age, religion.
3 Now, for the first time, I am confronted with this system,
4 and I find it extremely hard to even get an audience with
5 the elected officials.

6 My son, Derrick Curry, was arrested on December 5,
7 1990 at the age of 19 and charged with one count of
8 possession with intent to distribute crack cocaine, one
9 count of distribution of crack cocaine and one count of
10 conspiracy to distribute crack cocaine. He is the youngest
11 of three children. His oldest sister is an accountant, the
12 other one a recent graduate of Carnegie Mellon. A complete
13 background check was done by the FBI, and no evidence was
14 found to support the contention that he was a major drug
15 dealer. He owned no automobile. He drove an old Citation
16 that belonged to his mother. He had no money and, like most
17 college students, he borrowed gas money routinely to get
18 back and forth to school. He had no jewelry. He had none
19 of the things that society would lead you to believe would
20 classify him as a drug dealer. He had no prior arrest
21 record, no suspensions from school and, despite having an IQ
22 of 80, he was in his second year in Prince George's

1 Community College working toward a degree, of all things,
2 criminal justice.

3 The FBI had conducted an investigation involving
4 28 individuals for over five years. By the prosecutor's own
5 admission, my son was determined to be a minor participant
6 and was given a two-level reduction. However, that level
7 was increased back up two levels because he decided to go to
8 trial. During the ensuing months, he was offered a plea
9 agreement, which called for him to plead guilty to the
10 conspiracy count and agree to work in an undercover capacity
11 in connection with any other criminal investigation taking
12 place in the area. In exchange, it would be recommended to
13 the Court that he be sentenced to 15 years in federal
14 prison.

15 My son turned down the plea agreement primarily
16 because, at that time, he did not feel that he was guilty,
17 and he did not want to work undercover. On October 1, 1993,
18 my son was sentenced to 19 years, 7 months in federal
19 prison. However, if you look at the discrepancy between the
20 powder cocaine and crack cocaine, he would be looking at 10
21 years now under the mandatory minimums.

22 Some people say does it really make that much of a

1 difference? I suggest to you that nine years and seven
2 months makes a lot of difference in the life of my son. At
3 my age now, I question whether or not I will ever see my son
4 a free man again.

5 Federal prosecutor Jay Ackelson in his commentary,
6 "What Prosecutors Know: Mandatory Minimums Work" in The
7 Washington Post, February 27, 1994, best describes the
8 subjective practices that exist when comparing the Angela
9 Louis case with my son's case. Louis was sentenced to ten
10 years for her involvement in drug profiteering. When she
11 failed to cooperate with the prosecutors, after deciding to
12 cooperate, she served only 18 months. This federal
13 prosecutor then tries to equate or lead the public to
14 believe that this is what happens; that the mandatory
15 minimum sentences are there to protect the minor drug
16 dealers.

17 I equate to you that 18 months is a big difference
18 with 15 years to cooperate. I must admit to you that I too
19 sat and watched former President Bush address the nation
20 several years ago concerning the drug problem. Without the
21 facts, I too believed that crack was the worst evil to
22 confront our nation. With those facts now or the facts at

1 hand, I believe that we need to do something and we need to
2 do something immediately. Now we have the facts. You have
3 the facts. It has been outlined today before you, and now
4 we have plenty of ammunition to make the changes that are
5 absolutely necessary.

6 I cannot understand why my son must be sentenced
7 100 times greater than if he had powder cocaine. In an
8 effort to convince you and from hearing the comments that
9 you have made this morning, I believe perhaps that I am, in
10 many instances, preaching to the choir. I offer you this
11 relative to the disparity between powder and crack cocaine:
12 First of all, is the penalty greater for killing someone
13 with a handgun or a shotgun? Is the penalty for killing
14 someone greater with a gun or a knife? Is the penalty for
15 bombing a building dependent upon the type of bomb used? Is
16 the penalty greater for vehicular manslaughter when one is
17 intoxicated with beer as opposed to whiskey? How would you
18 react to a law in the District of Columbia if vehicular
19 manslaughter was punishable 100 times greater than if you
20 were intoxicated on martinis?

21 If the war on drugs is to be successful and we are
22 to be harsh, as we say we are, I wonder when are we going to

1 communicate that to the kids? As principal of a school in
2 this metropolitan area, I suggest to you that when I talk
3 with the kids they have no idea what mandatory minimums
4 actually mean.

5 After the article appeared on my son several weeks
6 ago, I must have received 500 calls and cards from people,
7 people I had never heard from before. Here is what they
8 said. First of all, well, he can get parole. They don't
9 understand with mandatory minimums there is no parole. The
10 second thing they did not understand how can you receive
11 that kind of a sentence when murderers, rapists, et cetera,
12 pretty much get probation and less sentences. The next
13 thing that most people don't understand is what are we
14 really doing?

15 If we are going to make a difference in the lives
16 of young people, we must take the opportunity to communicate
17 to them what is happening before we catch them and we say,
18 "We got you."

19 Thank you for the opportunity to address you.

20 [Round of applause.]

21 CHAIRMAN WILKINS: Dr. Lantz?

22 DR. LANTZ: My name is Dr. Robert Lantz. I am the

1 Director of Rocky Mountain Instrumental Laboratories in Fort
2 Collins, Colorado. Rocky Mountain Laboratories provides a
3 wide variety of analytical toxicology services and drug
4 analysis services not only for the courts, but also for
5 legitimate pharmaceutical companies, so that we are
6 regulated by a variety of agencies, including the Food and
7 Drug Administration. I mention that because this will apply
8 to what I am going to talk about later on.

9 What you, as jurists, and I as a citizen and as a
10 scientist recognize that no society can survive if there is
11 no respect for law, and a necessary part of gaining respect
12 for law is that there be rationality behind the laws and the
13 judicial indecisions. But more than rationality, we have to
14 start off with the basic facts; the true facts, as opposed
15 to, as Dr. Morgan pointed out, facts which are not really
16 correct or claims that are not supported by science.

17 In the case of cocaine, one of the things that I
18 gather that the Commission has come to recognize is that
19 cocaine is cocaine is cocaine regardless of whether it is in
20 the salt or the base form, and I brought here as an example
21 this is what a chemist would recognize as a molecular model
22 of the cocaine molecule. The only difference between this,

1 which is the cocaine base, and the cocaine hydrochloride is
2 a small molecule of hydrochloric acid, the same thing that
3 you might know as muriatic acid that you would be using for
4 cleaning, for example, your porch to get the paint off of
5 it. It does not actually change the structure of the
6 cocaine molecule in the slightest. As soon as the cocaine
7 salt goes into water, for example, or blood, as an example,
8 the mucous in your nose, that this hydrochloride acid goes
9 away and it is just this molecule, the cocaine base. So
10 that, whether or not the person possesses it with or without
11 the hydrochloric acid diluent, the contaminant, makes
12 absolutely no difference. It is exactly the same molecule.

13 Therefore, this fits along with the concept that
14 not only is there easy conversion between the two, that at
15 the wholesale level the cost of the cocaine salt and the
16 cocaine base are the same. This I have been told by a
17 number of different drug enforcement agents who have told
18 me, well, of course, at the higher levels it is the same
19 cost per molecule of cocaine because people are -- they may
20 not be very nice people, but they are not stupid -- they are
21 not going to pay more for a molecule just because it is
22 contaminated with hydrochloric acid.

1 There is also no indication whatever in the
2 factual literature of the scientific literature to show that
3 there is any difference in propensity for violence, whether
4 or not the person is using or possesses the cocaine base or
5 the cocaine salt. As soon as it gets into the blood, as
6 soon as it gets into the brain, it is exactly the same drug,
7 the same molecule, not even a slight change in the
8 confirmation becoming a different optical isomer.

9 So that the real difference is a matter of money.
10 The reason why there is more violence in one area than
11 another is a matter of the different people who are using
12 the drug and fighting over the money. We find this in
13 tobacco which, of course, is extremely addictive. There is
14 not very much violence over the use of tobacco except in
15 areas where there are, for example, on the Mohawk Indian
16 Reservation, which crosses the Canadian and American border,
17 there are violent disputes over tobacco trafficking because
18 there is a difference in taxes. It comes back down to
19 money. It isn't the tobacco is especially dangerous in
20 northern New York as opposed to in Virginia.

21 To show how easy it is to convert from one to
22 another, while preparing to testify in a federal court case

1 a few months ago, I went over to a local grocery store in a
2 middle class area where my laboratory is and bought, as a
3 demonstration, a spoon, some baking soda and a Bic lighter.
4 I walked through the checkout counter. I was well dressed.
5 The lady behind the counter was well dressed. This is a
6 nice area, and she said, "Oh, you are going to have a good
7 time, aren't you?" So this knowledge is not unique to areas
8 where crack is commonly sold. This is not an area where
9 there is crack sold on the streets. So that anyone with
10 that little bit of knowledge can convert from the salt to
11 the base and back again.

12 Another thing that I noticed in listening to the
13 various speakers earlier today is that the mandatory minimum
14 sentence apparently kicks in at about five grams of cocaine
15 crack; that is, the cocaine base. This is for a crack user
16 perhaps three days' supply. It is not a huge amount. Now
17 you or I would not find that a normal amount, but for a
18 crack user or cocaine user, that is not an uncommon amount.
19 So it doesn't necessarily show that the person is a dealer.
20 It is not a Pablo Escobar.

21 Another point is that whenever you find cocaine
22 base there is cocaine salt in it, and whenever you find

1 cocaine salt, there is cocaine base in it just by the nature
2 of how the drug is manufactured with the one exception that
3 would be, with a legitimate pharmaceutical company, because
4 cocaine hydrochloride is a Schedule II drug. It has
5 legitimate medical purposes. In that case, it will be 99.9
6 or greater percent cocaine hydrochloride, but actual street
7 cocaine, whether it is the salt or the base, since it has
8 gone through the change many, many times during the
9 processing from Columbia to the street, there will be both
10 base and salt in any package that you find.

11 So the last thing that I would like to suggest,
12 and I realize that we are running a little short on time, is
13 that, as a rational scientist and pharmacologist, I look at
14 what is the effective dose. What are we really looking at
15 as far as how many molecules are present? If you buy an
16 aspirin, you buy, for example, a 5-grain tablet of aspirin.
17 It doesn't make any difference whether or not it is mixed up
18 with a great deal of lactose or other excipient or just
19 simply the 5 grains of aspirin. You would pay the same
20 amount of money.

21 What I would suggest is, rather than being
22 concerned about calling a pot plant male or female -- I am

1 not a botanist -- or calling a pot plant, for example, 1
2 kilogram, it would be very easy, scientifically speaking,
3 very easy to actually measure the amount of active
4 ingredient, whether it is in cocaine; that is cocaine rock,
5 which commonly is diluted heavily or in methamphetamine or
6 in cannabis plants. What we are concerned about is the
7 usable amount of pharmacologically active agent, and so it
8 would be really very simple and straight forward to base the
9 penalties upon the actual mass of usable molecules present
10 rather than the massive excipients. Last year you did deal
11 with this problem partially by giving a standard weight to
12 LSD paper per dose, but that isn't even necessarily correct.

13 So it would be chemically very simple to do this.
14 The objections that I have heard to this argument are that
15 this would be expensive. Well, it is very expensive to put
16 people in prison, too, and, therefore, it is not
17 inordinately expensive to do this. I know in the laboratory
18 we do very high-quality work for pharmaceutical firms. I
19 know how much it costs to do good quality work, and it is
20 still much, much cheaper than putting people in prison. The
21 other thing is it really is not difficult. I have been told
22 that it would be very difficult to do this. No. We do it

1 with pharmaceutical compounds all of the time.

2 Thank you very much..

3 CHAIRMAN WILKINS: Thank you. Mr. Clark?

4 MR. CLARK: My name is Jose Clark. I am from Los
5 Angeles, California. I come before this panel, and I
6 appreciate your allowing us to come before you, not with the
7 idea of trying to convince you as to how cocaine is made up
8 or how cocaine is used or who is doing the selling/who is
9 doing the buying. Mainly this is a Sentencing Committee, I
10 believe; a committee that will go back to Congress with some
11 type of report and some way of encouraging Congress to do
12 whatever they think should be done about the sentences. The
13 gentleman here -- I can't pronounce your name --

14 COMMISSIONER GELACAK: That is a common
15 happenstance. It is Gelacak.

16 MR. CLARK: I appreciate the comment that you made
17 to Reverend Jackson that back in the '70s the mandatory
18 sentence was declared unconstitutional. So I wonder why
19 with all of the smart people we have in Congress would they
20 pass another law knowing that eventually that one might be
21 declared unconstitutional, also? But you said they would
22 probably come around to doing that within the next 14/15

1 years.

2 COMMISSIONER GELACAK: Let me interrupt you just
3 for one second. I didn't say they declared them
4 unconstitutional. I said they repealed it.

5 DR. CLARK: I'm sorry. But we don't have 15 years
6 to wait for Congress to change their mind to do something
7 different.

8 I come to you as a parent, as a father, to give
9 you what is in my heart. My son is incarcerated for selling
10 drugs. I am not going to try to make anybody believe that I
11 thought he was right and that I thought he shouldn't have
12 gone to jail, but the way it was done, and it was a
13 conspiracy, and I think it will be proven in court in the
14 next two years, the way the federal government handles it,
15 there are conspiracies to do certain things to certain
16 people, not necessarily people of color. Sometimes it
17 spills over.

18 Now, when you sentence a kid to 15 years or 20
19 years in jail, you didn't just sentence the kid or the man,
20 you sentenced his child. As a matter of fact, you sentenced
21 his child for life because a kid that is 5 years old whose
22 father is in prison for 20 years will be 25 years old when

1 he gets out. They don't have a father, never did have one.
2 A wife of a man who is sentenced that long does not have a
3 husband, and he is awfully lucky, in any respect, if he
4 comes out with a family still halfway intact. You also
5 sentence the mother. She is sentenced for 20 years without
6 a son and without a child.

7 What do you expect to happen within the next 15
8 years with kids in the 3rd, 4th, and 5th, and 6th grade
9 using cocaine? And not just black kids. I am not talking
10 about the 100 to 1 deal. I am talking about society. This
11 is a social problem, and if we don't begin to deal with it
12 as a social problem, it is going to become an epidemic, and
13 when a kid starts using in the 7th grade, what is he going
14 to do in the 12th grade and in college? Not only mine, but
15 your grandkids involved or somebody in your family is
16 involved in it right now. You might not know it. When they
17 tell you that 20 percent of the kids in the 7th grade say it
18 is okay, when they get to college, 50 percent of them are
19 snorting and 50 percent of the kids in college aren't black.
20 So it is a social problem.

21 Now we can blame it on the blacks, which they have
22 done with a whole lot of things. They say, "Okay, we have

1 got to have it out as a political deal," and you, yourself -
2 - and correct me if I am wrong -- admitted that is part of
3 politics in this thing here. I understand this. You don't
4 have the ability or the authority to go to Congress and say,
5 "Look, these people said this thing was wrong, so let's
6 change it," and they going to change it. I know that.

7 I am reminded of some things my father told me.
8 My father is 94 years old, and he came to my 70th birthday.
9 We had a little get together. When he was in the house, and
10 I had my great grandkids, and we had five generations in the
11 house at one time, and I feel that I am blessed. I am
12 really blessed. I had ten sisters and brothers. None of
13 them died a violent death. I only lost two, and I lost them
14 because they were affected with I won't say sickle cell
15 anemia, but -- my mind went blank because I have the same
16 thing and will probably die from it some day, but if I take
17 care of myself, I might last a long time. Out of the ten,
18 nine are still living. Six of them have already retired,
19 and my two brothers that passed they were past 60 years of
20 age when they passed away.

21 But, as you go along through life, and my father
22 taught me that if you do unto others as you would have them

1 do unto you, you can live a long time. You can make a lot
2 of rational decisions, and my father didn't even finish the
3 3rd grade in school, and I think this is marvelous, but what
4 he used was common sense. Common sense. And when I go to
5 him with a question, he had an answer for that particular
6 question, but the answer wasn't in some law that was written
7 in Congress or some proposal that was made by the people in
8 Congress, and I submit to you that there is an answer to our
9 problems, and if we don't become a part of the solution
10 instead of a part of the problem, we are going to find we
11 all going to be in the same boat.

12 When my great grandkids meet your great grandkids
13 and they have all gone through the same thing, they can't
14 avoid them. This is a people country. So what I submit to
15 you is this is the answer. Any question you have that you
16 want an answer to can be found in here, and you don't need
17 all of these different laws that you have, laws on top of
18 laws. Because this law didn't quite make it, we make
19 another. This law didn't quite make it and we will make
20 another one. This law didn't quite make it and we will make
21 another one. All of the answers that you need is right
22 here. [Bible held up.] If you trust in God and believe in

1 God, we will overcome. We are going to be here. I am not
2 saying we are going to take over, but we are going to be
3 here.

4 This Constitution, this is the first draft, I
5 believe, of the Constitution, and Lord have mercy all of the
6 things we have added to it and all of the distortions we
7 have made to try and make it fit whatever it is we want it
8 to fit, and the hardest thing or the worst thing that you
9 can tell a child is an untruth. If you tell him the truth,
10 he can live with it, but if you don't, he won't. When they
11 go to prison to visit their fathers and they say, "When you
12 coming home?" he will try to get off on another subject. He
13 will talk about something else, and kids are persistent.
14 Eventually, you are going to have to tell them, "Daddy, when
15 are you coming home?" or the mother will have to find some
16 way to try to tell him. "He is off on a vacation" for 10
17 years/15 years, and when he does get out the kid is going to
18 be mad. He is not going to love his father or his mother.
19 He will be confused for the rest of his life, but we don't
20 take that into consideration. We just want to get somebody
21 to put in for this cocaine that is being sold.

22 We don't care whether we get the big man up there

1 who brings it in. Law enforcement says that they need
2 somebody to put in jail, and they need this law in order to
3 force people into cooperating, and even when they cooperate
4 they get 10/15/20 years, so what is the point in
5 cooperating? You want three strikes and you are out.
6 Everybody will be going to court. How will the court handle
7 all of them? If you can show me a case where they had
8 anybody that went to court with a plea bargain deal and got
9 what they said they were going to get, it don't happen that
10 way. I can bring you cases on cases on cases.

11 Thank you for your time and this was from my
12 heart. I appreciate your time.

13 [Round of applause.]

14 CHAIRMAN WILKINS: I want to thank the panel
15 members for their very moving testimony. I think everybody
16 was speaking from the heart, as you were, Mr. Clark. We
17 appreciate you coming this long distance and everyone else.

18 Let me see if we have any questions from anyone
19 from my right. Does anybody have a comment to make?

20 [No response.]

21 CHAIRMAN WILKINS: Anyone else?

22 [No response.]

1 CHAIRMAN WILKINS: Thank you, again.

2 [Round of applause.]

3 CHAIRMAN WILKINS: Mr. Rob Stewart is the Director
4 of Press and Publications for the Drug Policy Foundation.

5 MR. STEWART: Good afternoon. My name is Rob
6 Stewart. I am the Associate Director for the Press and
7 Publications Office at the Drug Policy Foundation.
8 Unfortunately, our Vice President and Counsel, Kevin Zeese,
9 got called out of town at the last minute on business and
10 couldn't be here to testify, so I will try and summarize his
11 testimony for you.

12 The Drug Policy Foundation is a nonprofit
13 organization made up of police officials, judges, doctors,
14 academics, lawyers, business leaders and other citizens
15 concerned about the lack of effectiveness of the current
16 drug control strategy of the United States. The Foundation
17 opposes extreme measures characteristic of a war on drugs,
18 although the Foundation does not stand for any single reform
19 proposal. The Foundation is a forum for diverse views on
20 alternatives to the war on drugs.

21 In general, the Foundation supports reform of the
22 guideline formula, both for calculating the weight of

1 marijuana plants and for the cocaine-crack ratio.

2 My testimony touches on some common themes for
3 both of the proposed amendments. First, if the Commission
4 decides to change either or both of these guidelines, such
5 changes should be retroactive. It would be unjust to
6 recognize that the current guidelines are inappropriate,
7 while allowing people to remain incarcerated under those
8 same guidelines.

9 Both of the current sentencing guidelines are
10 inconsistent with the goals of the 1984 Sentencing Reform
11 Act. One of the primary goals of the act was to reduce
12 sentencing disparity and thereby improve the quality of
13 justice. Both the crack cocaine and the marijuana
14 cultivation guidelines sentence people who have committed
15 similar crimes disproportionately.

16 Another problem with both current guidelines is
17 the lack of honesty in sentencing. There is a fact that the
18 marijuana plant cannot produce one kilogram of marijuana.
19 There is no basis for this number in the literature on
20 marijuana cultivation. As for the crack cocaine sentencing
21 ratio, both crack and cocaine hydrochloride or powder
22 cocaine are the same psychoactive substance and deserve to

1 be treated as such.

2 Finally, both of the current guidelines result in
3 inappropriately harsh sentences and, as a result, decrease
4 respect for the law. In general, the average sentence for
5 drug offenders increased during the 1980s so that now the
6 federal drug offenders serve, on average, almost as much
7 time as the average violent offender.

8 In the case of the crack cocaine guideline, the
9 sentencing disparity between the two forms of the drug has
10 produced overtones of racism. As a number of courts have
11 noted, African-Americans are being punished more often and
12 more severely because crack is more common in their
13 communities.

14 As to the marijuana amendment, there are several
15 problems with the current approach taken by the guidelines.
16 First, the current approach creates a cliff effect for
17 people involved in cultivation of more than 49 plants. The
18 current guidelines treat 49 and fewer plants as having a
19 standardized yield of 100 grams per plant. When a case
20 involves more than 49 plants, the guidelines adopt a one-
21 kilogram-per-plant standard yield. The cliff is a jump in
22 the sentencing guidelines from a minimum sentence of 10

1 months to 33 months.

2 Second, the current approach creates disparity
3 between people possessing or trafficking in harvested
4 marijuana and those cultivating marijuana. The current
5 guideline approach creates a tenfold disparity between
6 people who commit similar offenses.

7 Third, the current approach presents certain
8 problems when plants are particularly young. People who
9 grow marijuana begin with a large number of seedlings,
10 generally. However, when the plants mature, approximately
11 half of the plants are destroyed because they are males,
12 which yield very little of marijuana's psychoactive
13 ingredient, which is known as Delta 9-tetrahydrocannabinol.
14 Thus, an individual arrested for growing 50 seedlings, will
15 be disproportionately punished according to the seedlings'
16 actual potential for producing the illegal drug.

17 Fourth and finally, the one-kilogram-per-plant
18 ratio is simply not justified by any scientific evidence.
19 This was noted in United States v. Osburn, where the
20 District Court concluded: "There is no rational basis to
21 support the Commission's 1,000-gram-per-plant ratio for
22 plants in groups of 50 or more...The record clearly

1 demonstrates that a 1,000 gram equivalency cannot be
2 empirically supported." The evidence considered in that
3 case included research conducted by the legal marijuana
4 grower for the University of Mississippi, Dr. Mahmoud A.
5 ElSohly, who testified that he had never seen a plant that
6 produced one kilogram of marijuana.

7 Therefore, our recommendations for this amendment
8 are that, first, this Commission should apply a standardized
9 yield to seized female marijuana plants. The Commission
10 should consider the 100-grams-per-plant equivalency. In the
11 Osburn case, Dr. ElSohly testified that, "a sentencing
12 scheme based on 100 grams-per-plant would be reasonable..."
13 This standard has been accepted by the courts.

14 I should note parenthetically that other factors
15 may influence the sentencing ratio, such as the potential or
16 actual yield of the plants at the time they are seized.

17 Our second recommendation is that male plants
18 should not be counted when determining sentences. Male
19 plants produce marijuana with extremely low levels of THC
20 and are generally discarded by growers.

21 Third, and finally, only 50 percent of the
22 seedlings should be counted to determine sentence length

1 because generally half of all plants are males, which will
2 be destroyed by the grower.

3 As to the cocaine-to-crack ratio, the 100-to-1
4 sentencing ratio between powdered cocaine and crack cocaine
5 should be amended so that both forms of this drug are
6 treated equally. There is no scientific basis for treating
7 one unit of crack as 100 units of powdered cocaine. The
8 ratio has been described by Ronald Siegel, a professor at
9 the University of California and a leading pharmacologist,
10 as arbitrary, capricious and scientifically and medically
11 wrong.

12 The initial justification for treating powdered
13 cocaine and crack cocaine differently was based on the
14 alleged violence of crack. Research conducted in recent
15 years shows that crack is not a violence-inducing drug to
16 any degree different from powdered cocaine. In a study of
17 414 drug-related homicides in New York City involving 490
18 perpetrators and 434 victims, researchers found that only
19 one homicide could be described as caused by crack
20 intoxication. A majority of the homicides were attributed
21 to the illegal trade in the drugs themselves.

22 With the institution of this disparity between the

1 sentences of crack and powdered cocaine users, there has
2 been a dramatic racial shift in the federal prison
3 population. African-American offenders grew from 10 percent
4 of the mandatory minimum drug offenders in 1984 to 28
5 percent in 1990. In 1986, the average sentence for black
6 offenders was 11 percent greater than for white offenders.
7 In 1990, the average sentence for black offenders was 49
8 percent higher. There is also a great disparity between
9 whites, blacks, and Hispanics when it comes to the
10 likelihood of receiving a mandatory minimum sentence.

11 Evidence of the racial division between crack and
12 cocaine hydrochloride is clear. A report by this Commission
13 found that, in Fiscal Year 1992, 92.6 percent of all of the
14 defendants sentenced for crack violations were black
15 compared with 4.7 percent who were white. According to the
16 Department of Justice in 1992, 91.5 percent of those
17 sentenced for crack offenses were black, while 3 percent
18 were white.

19 While federal courts have refused to find an equal
20 protection violation due to this disproportionate impact,
21 courts have acknowledged that the racial disparity exists.

22 Thus, in addition to making no pharmacological

1 sense, the differentiation between sentences for crack
2 offenses and those for powdered cocaine offenses has a
3 significant racially disproportionate effect. For these
4 reasons, the Foundation recommends treating powdered cocaine
5 and crack cocaine equally.

6 This concludes my remarks. I would be happy to
7 take any questions.

8 CHAIRMAN WILKINS: Thank you very much, Mr.
9 Stewart. Questions from my right?

10 [No response.]

11 CHAIRMAN WILKINS: Questions from my left?

12 [No response.]

13 CHAIRMAN WILKINS: We thank you for filling in for
14 your colleague, and we appreciate your testimony.

15 Marjorie Peerce. Ms. Peerce is a Co-chair of the
16 Sentencing Guidelines Committee of the New York Council of
17 Defense Attorneys.

18 MS. PEERCE: Thank you. On behalf of the New York
19 Council of Defense Lawyers, I would like to than you for,
20 once again, inviting us to speak to you and submit a written
21 product. We have submitted an approximately 50-page
22 presentation submitting our council's views on various

1 amendments. I would like to summarize some of them briefly,
2 and we would, of course, be prepared to submit any further
3 written product, and I would be prepared to answer any
4 questions.

5 The first one that I would like to address briefly
6 is the computer crimes amendment and, in particular, the
7 suggestion of an ability to enhance a sentence if there is
8 an invasion of a privacy interest, and, in personal
9 experience from representing computer hackers, the people
10 that invade privacy are generally young kids who are
11 exploring the scope of their knowledge, and it would seem
12 inequitable to punish the kids who are simply invading
13 privacy more harshly than those who are in this for the
14 money, and that is the exact opposite result than a case I
15 handled, where everyone, including the Court, the
16 prosecution and the defense, believed that the kids that
17 were in it for the money; that is, to steal credit reports,
18 deserve to be sentenced more harshly than the kids who were
19 simply hacking. So we believe that that is an inappropriate
20 potential for upward departure.

21 We feel very strongly that the money laundering
22 amendments that have been proposed by the Commission should

1 be adopted. I understand there is some question as to the
2 Commission's future or what is going to happen with these
3 amendments, and I am not personally familiar with that. I
4 just learned of it this morning. We do feel that the money
5 laundering amendments are crucial. If I can tell you that,
6 under the current money laundering guidelines, if someone
7 simply embezzled, for instance, \$20,000 and sticks the money
8 underneath their mattress, they are in a level 10, 6 to 12
9 months. If they happen to take that \$20,000 and deposit it
10 into their bank account, they are at a level 20, 33 to 41
11 months, the only difference being that they put the money
12 into their bank account, and we strongly urge that the
13 amendments be adopted which gears the sentence for someone
14 who engages in that sort of conduct much more closely to the
15 underlying offense rather than punishing them because they
16 fortuitously put it into another vehicle.

17 We also believe that the public corruption
18 guidelines we urge the Commission to eliminate the high
19 public official designation in the guidelines. We believe
20 that that creates a great deal of confusion. It is
21 difficult to apply and can be applied inequitably. We
22 believe that focusing on the value of the benefit received

1 or the amount of money transmitted is much more appropriate
2 in bribery-type cases. We also oppose any effort in this
3 guideline as well as any others that they should be raised
4 so that every single offender has to go to jail. We think
5 that that is contrary to the Congressional mandate that,
6 when you have nonviolent first-time offenders, there should
7 be an effort made to see if there is a nonincarcerative
8 sentence that they can receive, and we oppose that across
9 the board.

10 I would like to address very briefly the proposed
11 departure amendment on diminished capacity. We believe that
12 the concept of someone who has committed a "crime of
13 violence" not being entitled to a diminished capacity
14 departure is unfair, and it deprives particular defendants
15 who had no intention of ever carrying out the crime of
16 violence and only were charged with it because of their
17 psychological problem they are precluded from this
18 departure, and we have seen it in cases up in our area, and
19 we would urge that the courts be allowed to consider one's
20 psychological condition, whether or not their charged crime
21 was a crime of violence.

22 We also would urge the Commission, as was the

1 position taken this morning by the NACDL and, as I
2 understand, Professor Turley is going to be talking about
3 after me dealing with the aging prisoners. The aging prison
4 population is a big problem, and there is really almost no
5 mechanism at this time to deal with people who have already
6 been convicted and who are sentenced and become elderly or
7 ill, but also there should be more discretion to the courts
8 when someone is in the process of being sentenced.

9 I would like to also talk briefly about the
10 proposed adjustment change in the more than minimal
11 planning. We strongly endorse that. The more than
12 sophisticated planning or sophisticated planning is a much
13 more, in our view, appropriate criteria; that more than
14 minimal planning, which is almost inevitably applied in
15 fraud cases, and it should only be applied in the cases
16 where something more was done. If someone writes a bad
17 check and happens to have opened up an account using their
18 own name, I have seen more than minimal planning applied to
19 that sort of case. Should they use a false name, should
20 they go to different banks to do it, that could entitle the
21 court to oppose a sophisticated planning enhancement, but
22 there should be some distinguishing feature, and we strongly

1 endorse that.

2 Finally, we oppose the efforts for simplification
3 purposes to change the fraud tables which will in any way
4 result in increasing the levels in the fraud tables,
5 although we applaud simplification when it results in higher
6 sentences. We think that that is an inappropriate effort to
7 simplify.

8 I am prepared to answer any questions you may
9 have.

10 CHAIRMAN WILKINS: There may be some. Thank you
11 and your group for the very detailed written analysis that
12 you submitted. It is very helpful. Thank you.

13 Questions to my right?

14 [No response.]

15 CHAIRMAN WILKINS: Questions to my left?

16 [No response.]

17 CHAIRMAN WILKINS: Hearing none, thank you very
18 much.

19 Is Ms. Winters here?

20 MS. WINTERS: Yes, I am here.

21 CHAIRMAN WILKINS: Yes, come around. Joseph
22 Timilty, Donna Messenger, Ed Rosenthal, Margaret Williams.

1 Maureen, do you know about Careen?

2 MS. WINTERS: Careen Winters is my daughter. I am
3 afraid she must be lost, and I apologize for her absence. I
4 am literally afraid that she must be lost. I apologize.

5 CHAIRMAN WILKINS: Will we be able to do anything?
6 Do you have any idea where she is?

7 MS. WINTERS: No, I don't, I'm afraid. I can, I
8 think, represent her view, also.

9 CHAIRMAN WILKINS: Surely. Well, fine. Margaret
10 Williams? Is she not here? Do you know anything about her?

11 MS. WINTERS: No.

12 CHAIRMAN WILKINS: That is all right. Well, Ms.
13 Winters, we will be glad to hear from you first.

14 MS. WINTERS: I would like to thank the U.S.
15 Sentencing Commission for giving me the opportunity to
16 testify in regard to proposed Amendment No. 18, which
17 provides that acquitted conduct be used only as a basis for
18 upward departure after a preponderance of evidence hearing.
19 As I understand this amendment, it would preclude the use of
20 acquitted conduct to increase a defendant's sentence as was
21 done in the case of my husband, Gerald Winters.

22 My husband was convicted of RICO conspiracy in

1 December of 1990. All of us his accused co-conspirators
2 were acquitted; yet, at his sentencing in March of 1991, the
3 sentencing court used the acquitted conduct to find that the
4 conspiracy continued beyond November 1, 1987, the effective
5 date of the guidelines. The RICO substantive offenses were
6 sentenced under the old law; they were all found to occur
7 before November of 1987.

8 The court sentenced my husband as follows: A
9 guidelines sentence of 235 months for the RICO conspiracy
10 and an old law sentence of 15 years for the RICO substantive
11 offenses, to run consecutively to the guidelines sentence.

12 If acquitted conduct had not been considered at
13 his sentencing, my husband would have been sentenced
14 exclusively under the old law. Receiving the harshest old
15 law sentence possible, he would have been eligible for
16 parole in ten years. He must now serve 17 years under his
17 guidelines sentence and an additional 5 years for his old
18 law sentence for a total of 22 years. I can't see this any
19 differently than the imposition of a 10-year sentence on
20 convictions, an additional 12 years he must serve for
21 acquittals.

22 I am not a lawyer, and I don't pretend to

1 understand all of the intricacies of the guidelines
2 sentencing system, but I have always held the belief that
3 our system of justice was based on a democratic system of
4 government for the people, by the people. I own my own
5 business, and I come into contact with many people from all
6 walks of life. Without exception, these people are shocked
7 and disbelieving that our federal criminal justice system
8 permits a court to sentence on acquitted conduct.

9 My husband does not serve this sentence alone. My
10 two daughters and I suffer this injustice along with him.
11 Other family members and friends also suffer the pain of
12 this separation, and we all want to believe in our system of
13 law and a fair system of justice. I ask you to please
14 recommend to Congress in May of this year that proposed
15 Amendment No. 18 be passed. I also ask that this amendment
16 be made retroactive to alleviate the injustice that a few
17 federal defendants received when sentencing courts sentenced
18 them using acquitted conduct.

19 Thank you for your time and consideration. Many
20 need to speak at this hearing.

21 CHAIRMAN WILKINS: Thank you. Mr. Timilty?

22 MR. TIMILTY: Thank you, Mr. Chairman. My name is

1 Timilty, Joseph F. For the record, my number is 19400038.
2 For those that have any involvement in the system know that
3 that is my prison number. I am presently a resident of a
4 halfway house in Boston, Massachusetts on Huntington Avenue.
5 I, first, got notice of this public hearing, Mr. Chairman,
6 as a resident of a penal colony in upper Pennsylvania and
7 asked, through a letter to Mr. Courlander an opportunity to
8 testify. He was kind enough to respond in the affirmative.

9 In the conversation with him, I indicated to him
10 it was not my intention to talk about my specific case, nor
11 was it a case of being a liberal bleeding heart, but a
12 chance to maybe talk to the Commission for just a brief
13 period of time about what happens once somebody leaves your
14 courts and is sentenced under the present guidelines.

15 As indicated, I became a member of a penal colony
16 in the upper part of Pennsylvania and, although having
17 extensive experience in government, having seen both local
18 facilities and state facilities in the Commonwealth of
19 Massachusetts, I was not prepared for what I saw in
20 Pennsylvania.

21 My first introduction to the colony was, as I was
22 lost like everybody else is going to that former strip mine,

1 stopping and asking directions, I was told in order to find
2 the camp versus the minimum security facility to look for
3 the area with the picnic tables and the fancy-colored
4 awnings. That is how I would find the administration
5 building. I say that not as a means of being a comedy,
6 because there is nothing that has been said here that is of
7 any comical nature. It is a case in point to this
8 Commission, the Sentencing Commission, about the warehousing
9 of 99,000 prisoners in those camps and the need for
10 alternative sentences.

11 I heard the articulate testimony this morning
12 which suggests the aged and infirm that presently reside,
13 and my understanding is that somebody who is coming on after
14 me will articulate that point much better than I could, but
15 I saw it firsthand, and there is no way that the Bureau of
16 Prisons has either the patience or the ability to care for
17 those individuals. For anybody that is infirm in those
18 facilities, you are considered a malingerer, and that is
19 where you start from. So somebody who is infirm within
20 those facilities, good luck. The first rule I heard or I
21 should say the second rule -- forget the first rule -- the
22 second rule that I heard when I went into those facilities

1 is don't get sick. Stay well.

2 Well, my case in point and the point that I wanted
3 to bring to the attention -- not to the attention, but maybe
4 to reiterate to members of the Commission -- was that the
5 warehousing of those facilities that we have at present now,
6 and I think I heard Ms. Stewart, Julie Stewart, that said
7 the punishment ought to fit the crime. I am not making a
8 case for those that are in a position of having been
9 convicted to not pay some kind of penalty. My suggestion is
10 that those that are paying the penalty now, when you talk
11 about a 19-year-old individual spending 19 years in a
12 federal penitentiary, whether it be a camp or a minimum
13 security facility, you take my figure of \$20,000. You take
14 the Reverend Jackson's figure of \$40,000 per year per inmate
15 it doesn't make any sense. There are those people in those
16 facilities now that are teachers, that are doctors, that are
17 professionals, they are lawyers, they are whatever. They
18 could be doing alternative sentencing.

19 Now, if you take it from a conservative side,
20 which Congress should understand, is if you have somebody
21 that is on a bracelet, is on home confinement, is doing
22 alternative sentencing, it is \$95 a month of which either he

1 or she pays versus \$40,000 a year out of taxpayer's money.

2 If we are going to remove the career criminal, the
3 violent criminal from the streets, then you have to free up
4 those spaces. I understand, as well as every other member
5 of this Commission understands, that Congress is not going
6 to be able to build the new prisons they are talking about
7 because they are looking for the local states to man them.
8 States don't have the money nor the willingness to do that.
9 If we are going to get the real criminals off the streets,
10 the way to do that is to take a look at the people we now
11 have warehoused in those facilities. All across the country
12 there are 99,000 of those individuals first time, nonviolent
13 offenders that are being warehoused, and I heard both the
14 testimony on this panel and on other testimony today that it
15 is not just the individual that is in those facilities that
16 is paying that price.

17 I heard, myself, firsthand, in a very recent
18 period of time, conversations on the phone by individuals
19 talking to loved ones, whether it be a parent, a
20 grandparent, a wife or a young one at home, which is they
21 are being affected. It ruins homes. It ruins households.
22 It ruins marriages. It ruins relationships and, in some

1 cases, we can get more of a benefit out of that than we are.

2 So I heard the Chairman say, and rightfully so, I
3 understand a little bit about the process; that it is not
4 this Commission that can edict those changes, but maybe it
5 is this Commission, through its wisdom, through its
6 experience and through its credibility, can enhance the
7 members of Congress that are debating the laws now.

8 The last point I want to make, Mr. Chairman, and I
9 want to thank the Commission for the opportunity is that the
10 process goes through a lot of due diligence to make sure
11 that the members of the bench are qualified people, yet we
12 come up with laws to prevent those people from carrying out
13 those responsibilities. I have heard and read, case in
14 point, I heard it here this morning where somebody would
15 suggest that there is nothing we can do. I don't want to
16 give this sentence. There is nothing I can do. There is no
17 sense in having that person, either he or she, on the bench
18 if they can't use the discretion that their years of
19 experience had leant them.

20 Thank you, Mr. Chairman.

21 CHAIRMAN WILKINS: Thank you very much. Ms.

22 Careen Williams, did you want to address the Commission?

1 MS. CAREEN WINTERS: I know that you have a lot of
2 people. I could just leave my remarks in writing behind.
3 If she has already testified, that is okay.

4 MR. TIMILTY: I was told to talk until you
5 arrived.

6 [Laughter.]

7 MS. CAREEN WINTERS: It is up to you, Mom.

8 MS. MAUREEN WINTERS: I think I represented our
9 views. Thank you very much.

10 CHAIRMAN WILKINS: I didn't mean to overlook you,
11 Mr. Rosenthal. We will be glad to hear from you at this
12 time.

13 MR. ROSENTHAL: Thank you for having me here. I
14 wanted to discuss three different issues. The first is the
15 issue of recently eliminating marijuana cultivation has been
16 affected by the government. The government has had an
17 effect on the amount of marijuana that is being cultivated.
18 We might look at that as sort of a good effect, but there
19 has also been another effect. We haven't stopped supply.
20 Instead of having domestic cultivation, we now have, as a
21 result of this, a new group of importers bringing in
22 marijuana from Mexico. So what we really are developing by

1 enforcing the marijuana laws against cultivation is an
2 organized international crime ring. Our experience with
3 these crime rings has been, since the mafia and others, that
4 they don't go away once their initial product. So this is
5 an effect of these laws that we don't often see. This
6 doesn't directly affect sentencing, but I think that we
7 should have that perspective on it that things don't happen
8 in a vacuum.

9 The second thing that I wanted to discuss is the
10 one kilogram/100 gram minimum. I am opposed to any minimum
11 and let me explain why. There is no set minimum or maximum
12 that a plant will yield. Dr. ElSohly did a very flawed
13 study with the DEA of cannabis yields. Now they might cite
14 this study to you, but this study has no relevance in terms
15 of what people who actually grow marijuana illicitly do, and
16 there are several reasons for that that I want to go into.

17 To set a set amount for a marijuana plant is a
18 gross exaggeration of what actually happens in farming. Any
19 kind of farming is speculative. I have a friend who has a
20 farm in Wisconsin and in the last five years he has had the
21 worst drought and the worst floods in a century. He planted
22 \$20,000 worth of different seeds, and they were washed away.

1 The same things that happen to regular farmers happen to
2 marijuana farmers. They are affected by nature. Some of
3 the things are the weather, the rain, climatic conditions
4 and so on. But then each farmer has a different technique.
5 Most of you have probably had a garden in your life, and you
6 look over at your neighbor's garden, and he might have had
7 the same plants, but they have different yields of tomatoes.
8 The next gardener might take care of them differently; such
9 things as fertilizer, water, light, and so on.

10 Now this study was done under ideal conditions in
11 Mississippi, which has a long growing season. It was done
12 in an area where they got plenty of water, plenty of light,
13 plenty of fertilizer and so on, so these plants were grown
14 under optimal conditions. But illicit marijuana farmers,
15 for instance, might grow in the shade so that the plants
16 aren't getting as much light, and they will have a different
17 yield, of course, than a plant that does get light. So what
18 we really have to do is get past this 100-gram- or 1,000-
19 gram-minimum and actually look at what the actual yield of
20 the marijuana plant is.

21 You can have the same marijuana seed. You can
22 plant it outdoors, give it nine months of light in an open

1 area, plenty of water, plenty of fertilizer and it might
2 grow a half-pound. But the reality is that most people grow
3 indoors, and most indoor plants do not yield more than an
4 ounce. In fact, most of them yield under a half-ounce. I
5 brought some photos that I took that were published in a
6 magazine, High Times magazine, for you to look at. These
7 photos show both commercial growers as well as growers who
8 grow for their own use. The average yield from an indoor
9 marijuana plant is something like 10 grams.

10 Last year when I was here I mentioned that I was
11 an expert in a case under the 1987 guidelines in which a
12 grower had a number of plants that were seized at harvest,
13 and they yielded 10 grams each, but he was sentenced to 100
14 grams each under the old guidelines. If it had been under
15 the new guidelines, he would have been sentenced for 1,000
16 grams each, which would have been literally 100 times what
17 he was producing.

18 So what I think is that some people have said they
19 will settle for 100 grams or something like that. That is
20 not justice. We are talking about the Department of
21 Justice. Let's get some justice here. A person should not
22 be sentenced for something -- he or she should not be

1 sentenced for something that they are not producing, and the
2 average marijuana grower, for instance, in a 4 by 4 closet
3 they might grow 64 plants. They would be sentenced to 36
4 months or something like that, and those 64 plants might
5 yield 8 ounces of marijuana. So the sentencing is really
6 disproportionate.

7 Now I want to take this a step further. If you
8 want to get rid of marijuana from the United States, if you
9 want to make the United States drug free, as far as
10 marijuana is concerned, there is only one way to do it, and
11 that is one strike and you are out, and let me explain why.
12 With every other drug that a person might use; alcohol,
13 tobacco, heroin, cocaine, any of those drugs, when you say
14 to that person, "Well, would you want your grown child to
15 use this? Would you want your brother to use it, your best
16 friend to use it?" Everybody will say no. They will say
17 this thing has done terrible things to my life. I hate it.
18 I wish I could get off it. I am not strong enough or
19 something like that. But when you come to marijuana, most
20 people who use it would say, and if you say, "Would you turn
21 your brother on to this?" They would say, "Yes, I think it
22 is pretty good for me. I think that marijuana hasn't harmed

1 me. I don't see the harm in it."

2 So you can't really educate marijuana smokers not
3 to use it except by fear. There is no downside to it except
4 legal. So, unlike other drugs, which you can have a drug
5 prevention program or a drug education, you cannot educate a
6 marijuana user either that they are doing anything wrong or
7 that it is harmful. The only harm from marijuana, which
8 many people have said, in terms of gross harm, is the law.
9 It is impossible to educate that person.

10 So, if you want to get rid of marijuana, you have
11 to have a one strike and you are out for life. That means
12 that what you would have to do is build 400,000 prison cells
13 a year for the next ten years. Are you willing to
14 incarcerate 5 million people? Well, if you are not, then
15 let's get some civil regulatory and eliminate the marijuana
16 laws, not just modify or change them, but eliminate them.
17 No law should do more harm to society than what it is trying
18 to prevent, and the marijuana laws have been doing a vast
19 injustice. They have been harming this society. They have
20 been destroying this society. They have been causing
21 corruption among police. Let's get rid of these laws.

22 The reason why I bring this to you is that you go

1 to Congress. Part of it is educating Congress that
2 marijuana is not like the other drugs. You cannot teach a
3 person that marijuana is really harming them. Most people
4 who use marijuana, if you did a survey, would say that they
5 appreciate this God-given herb.

6 Thank you very much. By the way, I brought
7 magazines for you to look at. You can actually see actual
8 marijuana gardens and what marijuana plants look like.
9 There is one picture specifically here this is a picture of
10 a typical indoor marijuana garden, a 16-square-foot garden.
11 These plants would yield approximately a quarter ounce each,
12 64 plants yielding a quarter ounce each.

13 I have another picture. This is a commercial
14 marijuana garden. This person is growing several thousand
15 plants here, and this garden would yield about 10 grams per
16 plant. You would be sentencing him -- I am not saying what
17 he is doing is right according to the law, but I think it is
18 wrong to sentence somebody for 100 times what they do.

19 Thank you very much.

20 CHAIRMAN WILKINS: That article is aptly entitled,
21 "A Tale of Two Gardens."

22 MR. ROSENTHAL: That is right. It was a seven-

1 part series that I did following two gardens over a year
2 period.

3 CHAIRMAN WILKINS: We will make those magazines as
4 part of our record.

5 MR. ROSENTHAL: Thank you. Do you have a copy of
6 Dr. ElSohly's yield report?

7 CHAIRMAN WILKINS: I don't recall offhand, but if
8 you would make it available to us, we would appreciate it.

9 MR. ROSENTHAL: I would like to say that this
10 report is flawed. He was not growing marijuana the way
11 marijuana growers grow. He was growing it according to some
12 theoretical method. Although what he got from it is true,
13 it is not representative, and it doesn't have a relationship
14 to marijuana gardens as marijuana growers grow them.

15 CHAIRMAN WILKINS: Thank you very much.

16 MR. ROSENTHAL: Thank you.

17 CHAIRMAN WILKINS: Mr. Courlander, if you would
18 pick these magazines up and this other article when we
19 finish. Let's see if anyone to my right has any questions
20 or comments to the panelists.

21 COMMISSIONER GELACAK: Mr Timilty, to be fair, I
22 think we should acknowledge the fact that many people who

1 are incarcerated as first-time offenders are not, in fact,
2 first-time offenders. It is the first time they got caught
3 and convicted. There is an argument that is made with
4 regard to the cost of incarceration that goes something like
5 this; that acknowledging that it may cost \$10- or \$20- or
6 \$40,000 a year to incarcerate an individual and there is an
7 incidental cost to the commission of crimes that he or she
8 might commit if they are on the street, and that incidental
9 cost would be costs visited upon victims. The number of
10 crimes committed by that individual has an economic impact
11 on the community, so that it is hard for us to gauge whether
12 or not it is cheaper to have him on the street or to have
13 him in jail. I would just like to have your comments on
14 that.

15 MR. TIMILTY: I don't know whether I understood
16 the first portion of your question, whether you are
17 suggesting that first-time offenders might be classified
18 first-time offenders because that is the first time they got
19 caught?

20 COMMISSIONER GELACAK: I think there are a lot of
21 people who are, in fact, the first time they have been
22 convicted. It is not the first time they have committed a

1 crime. I think everybody acknowledges that, and I would
2 assume that you would as well.

3 MR. TIMILTY: I would rather lean towards the
4 system where there is a presumption of innocence until
5 proven guilty. If a person has not been charged and not
6 been found guilty, then, as far as I am concerned, either he
7 or she is still a first-time offender.

8 COMMISSIONER GELACAK: I am not quibbling over the
9 term. I am suggesting that that first-time offender may
10 well have committed a number of offenses and never been
11 caught in the past. Those people are out there.

12 MR. TIMILTY: That goes to the --

13 COMMISSIONER GELACAK: I'm sorry. I thought that
14 was a given.

15 MR. TIMILTY: Then that goes to the second portion
16 of my testimony, which suggests that a jurist with the
17 discretion and the training you trust either he or she to
18 pick that up and whether that he or she was to sentence that
19 person to a federal camp or come up with some kind of
20 probation or some kind of parole or some kind of alternative
21 sentence. I trust a jurist to that.

22 The theory of my attempted communication here was

1 to try to put the sentencing capacity of discretion back in
2 the hands of the jurist who has been trained to do that and
3 then to use alternative sentences as a means of alleviating
4 the overcrowding in the facilities and make room for the
5 career criminals.

6 CHAIRMAN WILKINS: Any questions from my left?

7 COMMISSIONER MAZZONE: Mr. Timilty, you have
8 acknowledged, I think, that this Commission's work is
9 controlled and restricted in many respects by what Congress
10 has told us to do and what is now on the books as the law
11 and what we can do under the law. You have sat here all
12 day, I noticed, and you listened to all of the statements
13 made by people, very impressive, very sincere people who
14 need help and, in many respects, I think everybody on this
15 Commission wants to give them some relief. Everybody on
16 this Commission has been in front of Congress in one form or
17 another; testimony, private meetings, submitted reports,
18 submit data, respond to questions by Congress, and we do it
19 every day. Staff does it. Commissioners do it. We work
20 very, very hard trying to get a message.

21 Now, without further elaboration, because, of
22 course, I know who you are, and I know you held high

1 responsible office in Massachusetts, and you were called
2 upon to vote on issues like punishment. We have had no
3 success or limited success. Maybe we can hold the line, but
4 we aren't having any success in getting Congress to listen
5 to us, for example, on mandatory minimums. Tell us what
6 argument we are not making. You have got an answer for us
7 now, but what argument are we not making to people like you
8 15 years ago or 10 years ago that you would have listened
9 to? Tell us what I can tell the next time I go to Congress,
10 any one of us, that will persuade them that we have
11 something to say, and we can do it better if they would let
12 us do it.

13 MR. TIMILTY: I can answer that in one word, Your
14 Honor. It might be an insufficient answer, but it will be a
15 one-word answer. It is economics. The system is coming
16 apart at the seams, whether it be in Massachusetts or
17 whether it be in Washington, and you just don't have the
18 room in those federal facilities to house the kind of people
19 that need to be housed there.

20 COMMISSIONER MAZZONE: But they are building more
21 prisons in this new Crime Bill. That doesn't seem to have
22 much persuasive effect.

1 MR. TIMILTY: And I tried to allude to that. They
2 can build as many prisons as they want. It is a matter of
3 economics at a local level when they say to those states,
4 "We will build them." The hardware is easy. The real cost
5 of those facilities is the guards, and there is the food,
6 and there is the hospital service. There is the everyday
7 expense, the each-year expense that that legislature in the
8 local states have to come up with. They are not going to do
9 it. They don't have the money. They can articulate
10 demagoguery on the system of justice on throwing everybody
11 away -- one, two, three strikes and you are out. The facts
12 are it is economics. They don't have the money to spend
13 \$40,000 a year on her husband or that son or whatever, that
14 first-time offender. It doesn't make any sense for \$95 a
15 month, Judge, with the same sentence, \$95 a month that that
16 person, either he or she, could be paying.

17 The reason I come before this Commission, and I
18 understand how hard it is, and I understand how difficult it
19 is for somebody in politics to be perceived as easy on
20 crime. The facts are the way that it can be attacked, the
21 way it has to be attacked is on economics. From a
22 taxpayer's point of view, there is a better way for us to do

1 it; not that you are easier on crime. It won't work. Not
2 that you are a bleeding-heart liberal. It won't work. But
3 that economically you found a way to do it differently; the
4 same type of punishment, as Julie Stewart said this morning;
5 a punishment that fits the crime. I am not saying no
6 punishment for people who have been convicted. I am saying
7 alternative sentence. If there is a doctor or a teacher,
8 get that doctor out.

9 It was interesting. There is a t.v. room up in
10 the camp that I was at, and there were 60 or 70 young men,
11 really well put together, watching women put together those,
12 in St. Louis, Missouri during the floods, the women were
13 manning the lines putting all of the sand piles up there
14 just to keep the water out. To see the 60 or 70 men just
15 sitting there watching this on television, it didn't make
16 any sense. I am not saying that that is what they should
17 have done, but there are other ways that you can make them
18 pay, and it has got to be economics. That is the only thing
19 Congress understands.

20 CHAIRMAN WILKINS: Thank you and thank all of you.

21 MR. ROSENTHAL: I would like to say one more
22 thing. In 1937, when the marijuana laws were passed, there

1 were 50,000 marijuana users. Now there are estimated to be
2 50 million. That is an increase of 10,000 percent. Don't
3 you think that we should do something else? I mean
4 shouldn't there be a change if that hasn't been working?
5 Obviously it hasn't been very effective.

6 CHAIRMAN WILKINS: Thank you very much, Mr.
7 Rosenthal. Nice to see you again.

8 Ruth Dodd, and Margaret Williams, and Donna
9 Messenger. Ms. Dodd, we will be glad to hear from you.

10 MS. DODD: I am here today to speak to you about
11 my husband. My name is Ruth Dodd. My husband, Jim, is a
12 federal prisoner at Fort Worth, Texas. He is 67 years old
13 and a retired airline pilot. In May of 1993, Jim was
14 sentenced to prison for almost 25 years plus 5 years of
15 supervised release, making a total of 30 years. Leading
16 cardiologists have said that due to major heart surgery
17 Jim's life expectancy is nine to ten years under ideal
18 conditions and much less than that in prison, maybe two or
19 three years.

20 My husband has a rather complex medical history.
21 In 1960, he had a laminectomy with three discs removed. He
22 more recently was diagnosed as having rheumatoid arthritis.

1 Jim has a very serious condition known as basilar
2 distribution ischemia manifested by recurrent bouts of
3 transient visual loss and continues to experience same.

4 Jim loses his vision and had an incident in the
5 past ten days where he fell and cut his head on the
6 sidewalk. The cut required several stitches and now appears
7 to be infected. This condition has existed since he had
8 major heart surgery.

9 Jim had an aortic valve implanted in his heart
10 and, since that time, he has had a condition known as
11 brachial nerve palsy injury that causes excruciating pain
12 that can only be controlled by narcotics. Doctors say this
13 injury was caused by the prolonged supine position on the
14 operating table during open-heart surgery. He was
15 undergoing physical therapy three times a week for this
16 condition at the time of his incarceration. Obviously, he
17 has not been allowed to continue these treatments.

18 Jim's medical status is unstable and fragile at
19 best. His many medical problems I could go on listing them
20 but the most critical one is the artificial aortic valve.
21 It is manmade and requires much thinner blood than normal to
22 prevent a blood clot which could be fatal. Jim has to take

1 a daily dose of Coumadin, a blood thinner, to keep his blood
2 at a certain viscosity. If he takes too little, he is at
3 risk of a blood clot. If he takes too much, he is at risk
4 of internal bleeding, which also could be fatal. He walks a
5 razor's edge, a very fine line in this respect. He must be
6 monitored at least monthly. He is very limited in taking
7 any medication for normal illnesses because of the
8 interaction of the Coumadin.

9 Jim is in FIC Fort Worth, which houses
10 approximately 1,200 prisoners. Some of them are transferred
11 there from other prisons and some come in from the street.
12 They bring with them almost every disease known to man,
13 including AIDS. Tuberculosis and hepatitis are rampant in
14 prisons, according to government sources. He shares
15 showers, bathrooms, sleeping quarters, dining room and other
16 facilities with these inmates. He is certainly more at risk
17 there than he would be in another environment.

18 One of his greatest concerns is that he will have
19 a heart problem while at Fort Worth or any other BOP
20 facility after normal work hours, which are 8 a.m. to 4 p.m.
21 During the night and the weekends there is no medical doctor
22 on the premises, usually only a physician's assistant. He

1 would have to be transported outside the prison to a local
2 hospital, which almost takes an act of Congress. In heart
3 problems, time is the most critical factor in survival of
4 the heart patient. If he was at home, he would only be 5
5 minutes from a hospital, if he had home confinement. We
6 live approximately 15 blocks from a major hospital in Miami.
7 This could make the difference between life and death in his
8 case.

9 I cannot emphasize strongly enough the risk
10 involved for Jim due to the exposure of infections from
11 other prisoners. Any infection would render the heart valve
12 inoperative and necessitate replacement. There is
13 absolutely no need to place him at this great risk.

14 Jim has never been arrested before, never had any
15 kind of problem. We firmly agree with Attorney General
16 Janet Reno and Congress that repeat violent offenders should
17 be put away forever. I recognize that defendants need to be
18 prosecuted on the basis of their offense. However, the law
19 cannot be blind to the unusual suffering which prison
20 sentences impose on older and infirm defendants.

21 I urge consideration of some alternate to the
22 strict incarceration of individuals sentenced on guideline

1 sentences. Please consider more flexibility in handling
2 these unusual cases.

3 The judge, after sentencing, was concerned about
4 the level of medical care that Jim would receive in prison
5 and ordered that a report be submitted to him in
6 approximately 30 days. That was 10 months ago and still no
7 report.

8 He approved of my appearance here today. He said
9 that it may not help him, but could possibly help someone
10 else. We would hope that we could get the alternate for Jim
11 would be home confinement. There he could have the medical
12 care he needs, and we could give it to him promptly.

13 Thank you for hearing me.

14 CHAIRMAN WILKINS: Thank you for coming and
15 testifying, Ms. Dodd. Any questions or comments from my
16 right?

17 [No response.]

18 CHAIRMAN WILKINS: Left?

19 [No response.]

20 CHAIRMAN WILKINS: Hearing none, thank you very
21 much.

22 MS. DODD: Thank you.

1 CHAIRMAN WILKINS: We have one more scheduled
2 witness who is to arrive shortly, Professor Jonathan Turley.
3 He will be here at 3 o'clock I am told. In the meantime,
4 some individuals may wish to testify who have not previously
5 notified our office, and we always welcome everyone and give
6 everyone an opportunity to participate in this hearing. I
7 see one taker already. Come forward, sir, and give us your
8 name and anyone else who would like to testify we will be
9 glad to hear from you.

10 MR. MILLER: Your Honor?

11 CHAIRMAN WILKINS: Good afternoon.

12 MR. MILLER: I would like to do as Mr. Timilty
13 did. My name is Christopher Boone Miller. My federal
14 number was 17761083. I was released December 21, 1993 from
15 Morgantown after 23 1/2 months for 21 USC 846 violation,
16 conspiracy to possess with the intent to distribute LSD.

17 Last year's amendment reduced my sentence from 72
18 months to 27. It was a 45-month reduction, which was
19 essentially about 40 months that I would have had to have
20 served extra.

21 I am here basically for three things that I wanted
22 to point out to you guys. One is to bring a real face to

1 the issues that are at hand because I am sure you guys a lot
2 of times probably get a little bit separated from what is
3 actually going on, and it is kind of an interesting time
4 when gentlemen like Mr. Timilty, myself or this nice woman
5 right here gets a chance to really put a face on what is
6 going on or Dr. Curry. It really, I think, helps you guys
7 to understand that what you are doing is not an impersonal
8 thing. It really is a very serious job that affects people
9 in very great ways.

10 A little bit about myself. Now, since I have been
11 out, I have two jobs now. I work a lot of hours a week.
12 One job I work in a restaurant as a host. I have been there
13 for about two months, and they have me training people now.
14 My other job I work for Julie Stewart at FAMM doing case
15 research, trying to help convince you guys to do certain
16 things.

17 Recently, I just got reaccepted back into the
18 university I was attending, which was Radford University. I
19 was home for the summer when I got arrested originally. I
20 am going to be going back again in about eight weeks to
21 start again.

22 Another point, my second of the three, is I would

1 like to say that I feel exactly the same as Dr. Curry does
2 in a lot of ways. When I read his article that was in the
3 paper a few weeks ago about his son, he said when he saw the
4 videotapes of his son that he didn't recognize him. It was
5 a different person the way he was acting. It was like
6 someone that he had never seen before, and I can say that I
7 really, really can see exactly where he is coming from.

8 I was such a different person when I was dealing
9 drugs and when I got arrested for dealing drugs, that my
10 life is so much different now. In fact, I was telling my
11 mother about this this morning on the way over here. Last
12 night I was out -- a friend of mine is back from spring
13 break -- and we went over to a friend of his house, and we
14 were hanging out, and on the way home he wanted to stop at
15 7-11. So we pulled into 7-11 and, on the way home from
16 where we were, it happened to be exactly the same 7-11 that
17 I was originally arrested at by the Fairfax County Police
18 Department. He said to me when we got out of the car he
19 said this has got to be just the greatest deja vu for you.
20 It was the first time I had been to this 7-11 in 2 1/2 years
21 now. I told him, no, it was completely different because my
22 perceptions at that point in time when I was arrested were

1 so different because of the type of person and the state of
2 mind that I was in that I didn't even recognize the spot any
3 more now 2 1/2 almost 3 years later, just because my own
4 perceptions are so different now.

5 The point that I am trying to make is that people
6 can and they do change. Just because someone has been
7 caught once for distributing drugs doesn't mean that they
8 are going to distribute drugs for the rest of their life.
9 Speaking of that, Mr. Gelacak, you made a point that first-
10 time offenders are very rarely really first-time offenders,
11 and I will agree with you.

12 COMMISSIONER GELACAK: No, no, I don't mean that
13 they -- I just think that there are a number of first-time
14 offenders who have committed other crimes and haven't been
15 caught.

16 MR. MILLER: Absolutely, and I will tell you, in
17 my case, that is absolutely the truth. The one time that I
18 got caught dealing drugs was definitely not the first time I
19 had dealt drugs. I had been doing it for about a year.
20 However, the point that I wanted to make is that any of
21 those other crimes that I might have committed don't exist
22 because I was never convicted of them, so any kind of a

1 claim that there are other crimes that have been committed
2 that are unadjudicated criminal offenses really, until you
3 are convicted of them by the government, they really don't
4 matter. We should always be willing to take and convict a
5 person for every single crime they commit and then sentence
6 them for it, instead of saying that we have a bunch of
7 crimes that we can assume that somebody might have committed
8 and go ahead and sentence them for those and relevant
9 conduct and acquitted conduct do exactly that.

10 But, to go on just a little further, I would hate
11 to portray everybody in prison as being angels, and I am
12 sure you guys are quite aware that they aren't. I would
13 say, in my experience, 99 percent of the guys in prison I
14 couldn't stand. I thought they were complete losers. But
15 there is that 1 percent that is not. The 1 percent that is
16 willing to do something to change their life, to change
17 where they are headed, the course that they were taking when
18 they got arrested is not the same one that they always want
19 to have.

20 A long time ago, this is a conversation that I
21 remember between my father and I. He loves to talk
22 politics, laymen's politics, and he was describing to me the

1 differences between some countries and the United States;
2 how we treat people, and he was using as an example a
3 dictator in the Soviet Union from years ago used to say that
4 if there was a village of 2,000 people and there was one
5 person in that village who had committed a crime against the
6 state, then wipe out the entire village and you make sure
7 you get the guy. He is gone.

8 Whereas, the framers of our country had intended
9 that you let all 2,000 go because you can't determine who it
10 is and you have to let everybody go if you don't know who it
11 is. If we have 100 percent of the people in prison and you
12 take that sample and say 1 percent of them are willing to
13 change, are willing to do the right thing in their life, we
14 can't say that we have to punish all 100 percent exactly the
15 same. We have to give this other 1 percent a chance some
16 way that they can improve themselves, some way that they can
17 go and give back something to society that they never had
18 given before. I guess it is a role reversal from the
19 current political trend or course that we are pursuing, but
20 that was just something that I wanted to bring up.

21 My third and my last thing that I really wanted to
22 cover is something that I already mentioned that I just want

1 you guys to really understand that what you are doing is so
2 serious, and I am sure you do. I am sure none of you takes
3 it lightly, but you affect people in such adverse ways that
4 everything you do is so important that I just hope and I
5 urge you that you never ever, ever consider anything in a
6 political context; that you always consider it, be like the
7 island in the criminal justice system that motivates itself
8 due to rational thought and not political thought because I
9 haven't seen anything in the political justice system that
10 isn't motivated by political rationale.

11 That is basically about all I had to say. I
12 really just wanted to let you guys know, to thank you for
13 what you did last year because it really did make a big
14 difference in my life. There are some other people that I
15 know that it made a big difference in their lives as well.
16 I think you guys really, really did the right thing.

17 CHAIRMAN WILKINS: Well, thank you for coming and
18 testifying, and good luck to you as you pursue your college.

19 [Round of applause.]

20 CHAIRMAN WILKINS: Is there anyone else that would
21 like to take the stand? Come around, sir.

22 I have one witness that I would like to call up,

1 if you don't mind. He is a scheduled witness, and then we
2 will have plenty of time for you and others.

3 Dr. Jonathan Turley is here. Professor Turley
4 teaches at George Washington University and is here on
5 behalf of the Project for Older Prisoners, something that he
6 has done a great deal of studying over the past few years.
7 Professor Turley, we are delighted to see you again.

8 DR. TURLEY: Thank you, Mr. Chairman. Let me, on
9 behalf of the Project for Older Prisoners, I thank you and
10 thank the Commission for allowing us to address you today on
11 this subject. The Sentencing Commission has always given a
12 great deal of attention to developing penalogical data and
13 has specifically looked at older prisoners on previous
14 occasions. On behalf of the Project for Older Prisoners and
15 many people working in this field, I want to begin by
16 thanking the Commission for its continued interest.

17 While, as the previous speaker noted, we are in
18 something of whirlwind of political interest in crime. The
19 most important aspect of the U.S. Sentencing Commission for
20 me as an academic and also as the Director of the POPs
21 project is the importance of the Commission in setting a
22 tone or direction for the state systems. The U.S.

1 Sentencing Commission still remains a preeminent body when
2 it comes to sentencing policies and recidivist studies.

3 It is for that reason that I come before you
4 today, and I suggest further efforts on behalf of older
5 prisoners. For purposes of introduction for the two
6 Commissioners that I have not addressed on previous
7 occasions, I should note that the Project for Older
8 Prisoners is a project committed entirely to legislation and
9 research on older prisoners. The project was formed in New
10 Orleans, and we have an office in New Orleans and an office
11 here in Washington, D.C. We have offices opening in New
12 York and Chicago. It is a pro bono project funded by the
13 students and pro bono attorneys.

14 We have worked on legislation in over a dozen
15 states, and we have enacted legislation on the state level
16 in states ranging from Illinois to Louisiana to here in D.C.

17 The first project of its kind in the country, the
18 Project for Older Prisoners, is attempting to deal with what
19 has become something of a national crisis. To put it quite
20 simply, the population of prisoners in our nation is
21 graying, and it is graying at a very fast rate. In the
22 states that we have worked with, we have found that older

1 prisoners is the fastest growing segment of the population
2 in states like Michigan, New York, Illinois. By the Year
3 2000 there is an estimate that there will be 125,000 older
4 prisoners in this country.

5 The impact of such a population on states is
6 already being felt. In New York at this time we are working
7 on a review of the New York prison system, which we have
8 completed. That work follows a similar evaluation of the
9 Illinois system. What we have confirmed in those systems
10 are some of the figures I am about to give you that, if
11 anything, are more serious in the federal system, and I
12 would like to explain why. This will help put into context
13 the amendments that I originally sent to the Commission on
14 November 22, 1993 suggesting amendments of the guidelines.

15 As you know, the federal system, through Congress
16 and the new administration, has directed its attention to
17 older prisoners. Recently Congress, the House Judiciary
18 Committee, with Chairman Chuck Schumer, amended the federal
19 bill to allow for an exception for older prisoners. That
20 amendment was made in recognition of the different
21 recidivism and costs associated with older prisoners.

22 Similarly, Attorney General Janet Reno noted that,

1 at the end of this process, "You don't want to be running a
2 geriatric ward for people who are no longer dangerous." On
3 November 22nd, POP submitted to you, Mr. Chairman, and the
4 other Commissioners suggested changes for the federal
5 system. In our view, the problem of older prisoners is more
6 severe in the federal system, and I would like to explain
7 why, if I may. By the way, as many of you know, as a law
8 professor, I am used to being interrupted, and I certainly
9 would be delighted to be interrupted by any of the
10 Commissioners. I am lucky if my students don't walk out let
11 alone interrupt me, so that doesn't bother me in the
12 slightest.

13 In 1986, the federal system housed 33,132
14 prisoners in the report at that time. By 1990, the system
15 had grown to 59,123. The next year, in 1990, the
16 projections were for an exponential growth, but current
17 estimates for the Year 2000 is that the federal system will
18 reach 127,000 inmates, and that is a conservative rate of
19 growth.

20 What this shows is that the federal system is
21 growing, but it is also growing at an accelerated pace.
22 This is leading to some pressures that the federal system is

1 finding difficult to deal with. I recently spoke at a forum
2 with the federal system on the impact of long-term
3 incarcerated prisoners. The impact on the system is being
4 felt on the individual prison level as well as in the
5 budget.

6 In 1986, prisoners over 50 represented roughly 11
7 percent of the federal prison population. By the Year 2010,
8 the federal system has estimated that as much as 33 percent
9 of the federal system may be over 50.

10 Now, when you keep in mind that percentage, you
11 also have to realize that the number of prisoners who are
12 chronologically 50 and older is different from the number of
13 prisoners who are physiologically 50 and older, and that is
14 the result of a study done in the federal system, which has
15 found that all of us have, of course, different
16 physiological ages from chronological ages. Some people, as
17 you know, the saying is you are blessed with the body of a
18 19-year-old. Some of us are cursed with the body of a 60-
19 year-old, but most people do have a different physiological
20 from chronological age.

21 The studies have shown that prisoners are
22 generally seven years older physiologically than they are

1 chronologically, which means that the federal system is
2 encountering a percentage of physiologically older prisoners
3 far in excess of what the chronological numbers show.

4 This is significant for the amendments that we are
5 going to be giving you today because our amendments would
6 allow for courts to review the medical condition,
7 essentially, of federal prisoners to consider their medical
8 status after sentencing and long into their incarceration.
9 The reason that is important is because aging is accelerated
10 within the federal system as within all prison systems, and
11 so there is a need at some point for the federal system to
12 have a valve or a check which would allow federal judges to
13 make the type of determination which I will be suggesting
14 here.

15 Each year the federal system has outpaced the
16 states in growth. Last year the federal system expanded by
17 12 percent. On the state level, the expansion is, on
18 average, 6 percent. That has forced almost all of the
19 federal facilities into chronic overcrowding. Of the six
20 federal penitentiaries, five of the six are overcrowded.
21 Most of the penitentiaries are between 40 and 100 percent
22 overcrowded. The only penitentiary not overcrowded is

1 Marion, which houses only 440 prisoners and, as the
2 Commission knows, is a lock-down prison.

3 Of the 36 federal correctional institutions, all
4 36 are over capacity. Some of these are 150 percent over
5 capacity. I want to note that when I say over capacity I am
6 referring to not design capacity, but rated capacity. As
7 you already know, there are three levels of overcrowding,
8 the first being design capacity. The federal system passed
9 through design capacity sometime back. It is now in the
10 second stage of overcrowding, which is rated capacity, and
11 it is fast approaching ceiling capacity. As you know,
12 ceiling capacity can trigger mandatory court releases.

13 COMMISSIONER GELACAK: Let me take you up on your
14 offer, Professor Turley. Just for the record, my
15 recollection is that this is not the first time that we have
16 had this problem in the federal system, and I was looking
17 for Mike Quinlan because he was here earlier, but we have
18 topped out the federal penal system in the past, I think, as
19 far as capacity levels, and then it was brought down. It
20 was brought down because we got rid of mandatory minimum.
21 Am I wrong about that?

22 DR. TURLEY: No, that is correct that the number

1 was brought down. The problem is still going to be the rate
2 of growth because just last year we had a 12 percent
3 increase, and we have never had a rate of federal
4 construction to meet a 12 percent increase annual growth
5 rate. So, even with the reduction, our construction isn't
6 meeting incoming prisoners, let alone reducing overcrowding.

7 COMMISSIONER NAGEL: Doctor, I was going to take
8 you up, too. I hate to interrupt you. I assume that you
9 are familiar with the pending bill in the House that has an
10 age cap attached to the three-strike provision should it
11 pass. Have you given any thought to how a POPs-like program
12 could be applied in the federal system consistent with that
13 age cap or could they work in parallel or have you sort of
14 thought about a proposal that would take those two in
15 tandem?

16 DR. TURLEY: Yes. Commissioner Nagel, I think
17 that we can work within that system. The present cap is
18 fairly high. I believe it is 70 years and after long-term
19 incarceration, and it is not clear how many prisoners would
20 fit into that category. I know Chairman Wilkins testified
21 in the House Subcommittee that came out with that
22 recommendation.

1 We have explored the possibility of working within
2 the federal system if we are allowed essentially the ability
3 to do so. There is currently, within the federal system,
4 with the exception of those prisoners who were sentenced
5 before the guidelines took effect, our ability to work with
6 prisoners for parole is obviously quite limited. We would
7 love to see the federal system simply allow us to submit
8 low-risk offenders for review and this bill, as you
9 mentioned, Commissioner Nagel, is a very, I think, good
10 start and, in some ways, as Commissioner Gelacak noted
11 earlier, that type of legislative action could reduce
12 overcrowding significantly, and we would jump at the
13 opportunity to participate in that.

14 COMMISSIONER NAGEL: What about the possibility,
15 too, of an experimental program in the same way in which we
16 had previously had experimental programs in the federal
17 system so that you might, for example, agree to start at,
18 let's say, age 60, or whatever it is, or 55, after some
19 period of incarceration to satisfy those who think a
20 substantial period of incarceration should have been served
21 and then, using the same POPs-kind of analysis that we do
22 now, where you interview and then make a prediction on the

1 basis of a set of characteristics, and then actually collect
2 data to determine how successful that is and then, if
3 successful, then that would perhaps encourage Congress to
4 expand the criteria, et cetera. Have you talked to Congress
5 about that possibility?

6 DR. TURLEY: I have talked on similar subjects. I
7 didn't present it as cogently as you just did. I would love
8 the opportunity to have a pilot program in the federal
9 system. In any other area, you could suggest a pilot
10 program that would depend upon your success. I am more than
11 willing to take that challenge. We have released over 60
12 prisoners today and not a single one has committed a new
13 offense, and I have no reason to believe we couldn't have
14 the same record in the federal system.

15 The one thing about the project that I hope we
16 have shown is that, when you sweat the specifics, in terms
17 of recidivism and the background material, some of which we
18 use from the Commission -- much of the material that you
19 have produced is vital to our assessment -- and we are
20 confident that if we were given an opportunity in the
21 federal system we could have an equally successful program
22 here. If we failed, if a single one of our prisoners

1 recidivated, then I would be the first to come here and
2 submit my project to be removed from the federal system. I
3 am willing to take that challenge because I believe that the
4 system that we have developed is very, very good.

5 To give you a comparison of the risk differences
6 between POP's prisoners and regular prisoners, currently
7 under court order a younger prisoner around age 20 will have
8 a likelihood of recidivism of around 70 percent. An average
9 in some states it is somewhere between 40 and 50 percent for
10 all parolees or prisoners released under court order. A
11 POP's prisoner will have, on average, a less than 10 percent
12 likelihood of a new offense and usually be around a 4
13 percent likelihood.

14 In addition to that, before we make any
15 determination for release, we locate the prisoner in an
16 environment where the prisoner can live and be supported.
17 The combination of those two things; the risk assessment and
18 the post-release plan, has led to a zero recidivism rate.
19 We speak with prisoners in the federal system all of the
20 time, and we have a number of prisoners in the federal
21 system who are bedridden. Most of our federal prisoners are
22 in hospitals. I am afraid the most I can do for them is to

1 tell them that, until there are changes in the federal
2 system, we are not able to bring their cases forward. I
3 probably have a couple dozen prisoners that I could bring
4 tomorrow where I would stake my reputation they wouldn't
5 recidivate. Half of them can't even move out of bed, and so
6 it is not a particularly difficult bet for me to take.

7 The savings for the system is not simply the
8 savings of the cost of the prisoners, and the cost is quite
9 high. The average cost for an older prisoner is two to
10 three times that of a younger prisoner. That is largely due
11 to medical and maintenance costs.

12 The money that could be saved could be used in a
13 number of ways, but the one thing gained is a cell. In the
14 federal system, cells cost between \$100,000 and, in some
15 cases, \$200,000 a cell. This would make a dramatic savings
16 for the system without any increase in risk to society.

17 Now the Commission already has stated in its
18 policy statements that age is relevant in some cases for
19 sentencing. The changes that we have suggested for 5H1.1
20 and 1.4 would simply allow courts to look at a prisoner
21 after the prisoner has been incarcerated. It is very
22 narrowly tailored and, if I may, I would like to read you

1 two of the sentences that would go into this amendment.

2 We suggest that the U.S. Sentencing Commission
3 stipulate that a sentence may be reconsidered on motion by
4 the offender for downward departure from guidelines or the
5 relocation to home confinement. It goes on to say that an
6 offender may show that this age infirmity or physical
7 impairment has reduced his likelihood of recidivism to the
8 point where alternative confinement would have been ordered
9 had he been sentenced as of the date of the motion for
10 reconsideration.

11 So, effectively, what this would allow is for my
12 project to be able to bring evidence forward that a prisoner
13 is not just simply infirm, but also low risk. I will give
14 you two examples; one which would make this definition and
15 one that would not.

16 I have a prisoner currently in Wisconsin who is a
17 federal prisoner. He has served about five years on a
18 conspiracy charge. He is on full dialysis as well as
19 serious other medical problems. He is a first offender.
20 His recidivism rate is roughly about 5 percent for that
21 category of crime. We can locate him in a way in which we
22 can guarantee further that he will not recidivate.

1 I also have a child molester that I have looked at
2 today. The child molester is a recidivist. He is also in
3 serious medical shape. I expect that he has less than a
4 year to live. He would still not make this definition
5 because I could not guarantee that he was a low recidivist.
6 So, under the definition I put forward, I must show both
7 chronic illness and low recidivism in order to even be able
8 to use this provision.

9 I know that you are quite busy today, and I don't
10 want to take up any more of your time, but I would like to
11 simply note this; that I believe that older prisoners
12 represent something of a child for the federal system, which
13 has led the rest of the country, I think, in redesigning its
14 sentencing, and I approve of the effort, as many do, to
15 bring proportionality into sentencing. I am certainly not
16 arguing that we bring back parole in some raging torrent for
17 older prisoners. My whole project is based on the premise
18 that simply because you are older does not mean that you are
19 low risk; that older prisoners have to be dealt with in a
20 system comprehensively to control their costs and to deal
21 with them on a selective basis, but we must continue to
22 divide our attention between low-risk, mid-risk, and high-

1 risk prisoners and treat them differently.

2 CHAIRMAN WILKINS: What you suggest would require
3 legislation.

4 DR. TURLEY: Chairman Wilkins, I believe we could
5 do some of this with changes in the guidelines, which would
6 ultimately have a legislative component, and some of the
7 suggestions I think would have to go to the Judiciary
8 Committee. I believe there is room for the Commission to
9 act on these types of departures, but in terms of some of
10 this, I think we would have to go to Congress.

11 COMMISSIONER NAGEL: Would it be possible for you
12 to submit to us subsequent to this hearing a proposal which
13 would allow us to work jointly with you to try to both
14 outline and then perhaps endorse an experimental program? I
15 think there is precedent in the federal system for
16 experimental programs at the end of which you could present
17 the data, which might then be persuasive to expand the
18 program?

19 DR. TURLEY: I would be delighted to present to
20 the Commission that type of pilot program.

21 COMMISSIONER NAGEL: Can we ask you to submit
22 something and then we can take a look and see if we could --

1 DR. TURLEY: We will get to work on it today.

2 CHAIRMAN WILKINS: We will pursue the statutory
3 requirements and what the Sentencing Commission can do later
4 on, but I think it is probably a question that has to find
5 its answer from the Congress as well as the Commission to do
6 all that you would suggest could be done, I believe. I am
7 not sure how much authority we have after the sentence has
8 been imposed to authorize the court to go back and consider
9 departures. Is that what you were talking about?

10 DR. TURLEY: That goes into the two suggestions I
11 made formally in November, and I would be more than willing
12 to explore the statutory basis and also to approach
13 committees about possible changes.

14 CHAIRMAN WILKINS: Good. Yes, explore our
15 statutory authority to do something without having to wait
16 on new legislation is what I am primarily concerned about.
17 Because something we might do something about, because we
18 act as a body here and, of course, the Congress sometimes it
19 is a more lengthy process to get new legislation.

20 DR. TURLEY: I will submit a memo on the statutory
21 question as well as an outline of an experimental program if
22 that would please the Commission.

1 CHAIRMAN WILKINS: I am sure it would. We would
2 be happy to receive it. Thank you.

3 DR. TURLEY: If there are no further questions, I
4 would like to simply thank the Commission for giving us some
5 of your limited time today and to say that we have, in our
6 project, currently over 1,000 prisoners that are either
7 under review or going forward with parole. Of the prisoners
8 that we are moving forward are less than 10 percent of the
9 original prisoners that we reviewed. What we are suggesting
10 is a very selective system that we believe will work with
11 our system.

12 Commissioner Gelacak?

13 COMMISSIONER GELACAK: There was one question I
14 wanted to ask you and that is whether or not you could, with
15 any reasonable degree of accuracy, quantify what kind of
16 effect it would have in the federal system.

17 DR. TURLEY: In terms of how significant an impact
18 a pilot program would be, I think there would be two
19 effects; one is, if the pilot program succeeded, if we had
20 an experimental program, it would essentially create a valve
21 that we could then utilize later. If we do continue, as the
22 trend would suggest towards ceiling capacity, if that is the

1 trend, at some point the question is not going to be whether
2 someone is released, but who. A pilot program would afford
3 the federal system a basis for making low-risk releases at
4 times of chronic overcrowding to essentially safeguard
5 public safety.

6 In terms of real numbers, a pilot program in the
7 next few years would probably only amount to 40 or 50
8 prisoners within two years, if we had a pilot program. The
9 implications of such a program would affect many more. If
10 the federal system is correct, and we are looking at one-
11 third of the federal system above age 55, such a program
12 could have potentially quite significant impacts.

13 We suggest simply that a group be selected within
14 the federal system in a relatively narrow band. I would be
15 willing, for example, to have a percentage of older
16 prisoners selected at random for my project, and we can test
17 whether our recidivist data succeeds; that is, I will take
18 any hundred older prisoners and produce from it low-risk,
19 mid-risk, and high-risk prisoners, and I can move forward
20 suggestions for release, and my project will stand behind
21 it. The first prisoner to recidivate, I will ask to address
22 the Commission and inform you of that and allow you to pull

1 the program.

2 Commissioner Mazzone?

3 COMMISSIONER MAZZONE: Alan Chaset has found the
4 section that was roaming around in my mind here and brought
5 it to me that there is an exception to this now in 3582,
6 which allows the Bureau of Prisons, on its motion, to
7 petition the court to move the court to reduce a sentence
8 for compelling and extraordinary circumstances. Have you
9 explored that?

10 DR. TURLEY: Yes. About four years ago I
11 addressed the U.S. Parole Commission and, as part of that
12 address, I had a discussion with the Bureau of Prisons at
13 that time about the use of that provision. The provision
14 apparently has not been used as far as I know.

15 COMMISSIONER MAZZONE: Ever?

16 DR. TURLEY: I don't know of any case. There may
17 have been such a case, but certainly --

18 MR. BOMSON: If I may interrupt.

19 DR. TURLEY: Yes.

20 MR. BOMSON: My name is Scott Bomson with the
21 Bureau of Prisons. It has been used approximately two dozen
22 times in the last year, I believe.

1 DR. TURLEY: So it has been used. I am not aware
2 that there is any system for evaluation with that section.

3 CHAIRMAN WILKINS: Is that two dozen times in a
4 year or ever?

5 MR. BOMSON: In the year, and we have regulations
6 on the subject.

7 CHAIRMAN WILKINS: About two dozen cases per year.

8 MR. BOMSON: Approximately.

9 COMMISSIONER MAZZONE: Can I ask are they medical?

10 MR. BOMSON: By and large, yes. Almost
11 exclusively, yes.

12 DR. TURLEY: When we discussed the issue at the
13 Federal Bureau of Prisons a few years ago, we were told that
14 this was not viewed as a particularly good option for a
15 program within the federal system when the U.S. Parole
16 Commission asked whether this provision could be utilized.

17 What we are suggesting would allow essentially a
18 separate avenue for review other than that provision. I
19 would be more than willing to work within the Bureau of
20 Prisons, if they are serious about developing that section
21 further.

22 CHAIRMAN WILKINS: It sounds like that you in the

1 Bureau could move forward without anything further from this
2 Commission, the Congress or anybody else, if you could agree
3 upon a cooperative arrangement. You identify the
4 individuals and you use your screening and the other
5 techniques that you do, and then let the Bureau be the
6 moving party.

7 DR. TURLEY: Yes. That would be fine, Chairman
8 Wilkins, although I do want to note I would be amiss if I
9 didn't note that I have some question about whether this
10 section could be a truly significant avenue for the federal
11 system. I am relying entirely on the impressions that were
12 left in my earlier meeting, but the criteria under that
13 section are different from the criteria that we use, which
14 is primarily a mix of recidivism as well as health. But I
15 can assure you I would be more than willing to use any
16 avenue. I prefer as big an avenue as possible, but I will
17 take anything I can get.

18 CHAIRMAN WILKINS: Thank you very much, Professor
19 Turley.

20 DR. TURLEY: Thank you very much. Who is the
21 gentleman that wanted to address us? Come around and state
22 your name for the record, please, sir.

1 MR. MORLEY: Judge Wilkins, Commissioners, my name
2 is Chuck Morley. I am in private practice as a financial
3 investigator, and I am a recognized expert on the subject of
4 money laundering. I had the pleasure of addressing you last
5 year and, some of you may recall, I was a member of the
6 working group on the money laundering guideline revisions
7 last year.

8 I would like to just take a moment of your time
9 this year to reiterate and add some things to my testimony
10 last year. Last year I submitted a number of written
11 documents to both the staff and the Commission. I have
12 copies of those here for you, if you would like to have
13 them, if you don't have them in your possession at this
14 point for your consideration.

15 I have been dealing with the subject of money
16 laundering since at least 1979 in my capacity as a special
17 agent with the Internal Revenue Service and in 1980 I became
18 Chief Investigator of the Senate Permanent Subcommittee on
19 Investigations. We conducted a four-year investigation of
20 money laundering, which culminated in some very sensational
21 hearings before the subcommittee and some fairly dramatic
22 action on the part of the federal government on this issue.

1 I would like to urge you, initially, to approve
2 the guidelines. This is the second time we have addressed
3 this, and I commend the Commission for raising the subject
4 again, and I particularly commend you for passing the
5 changes to the structuring guidelines last year. I feel
6 they were badly needed, and it was very exciting to me that
7 that occurred, and I urge you again to look at the money
8 laundering guidelines this year and pass them as they are
9 recommended.

10 As the staff noted in their very extensive study
11 last year, the revised guidelines reflect a greater
12 sensitivity to such factors as sophistication of money
13 laundering conduct. In the monograph that I wrote for the
14 staff and ultimately for the Commission, I pointed out a
15 number of differences between conduct that would be
16 sentenced under the guidelines and the type of conduct that,
17 in my experience and the experience of people that I have
18 worked with, both as a government investigator and in
19 private practice for the defense bar, the type of conduct
20 that I feel more appropriately fits under the rubric of
21 money laundering, and that is to say the overt act type of
22 activity, the concealment of trying to disguise money, which

1 is typical money laundering operations as we know.

2 The staff, in its report of last year, stated the
3 Commission expected that guideline 2S1.1 would be applied in
4 cases where financial transactions encouraged or facilitated
5 the commission of further crimes and to offenses that were
6 intended to conceal the nature of the proceeds or to avoid a
7 transaction reporting. The report continued that it
8 appeared that the base offense level may reflect a view that
9 18 USC 1956 would generally be applied primarily to
10 traditional and perhaps large-scale professional money
11 launderers. I think we can all agree at this point that
12 that has not happened; that these guidelines have been
13 applied to a very broad spectrum of people who have been
14 caught up in money laundering investigations, even if it is
15 simply because they deposited money into their bank account,
16 something that we all know is a transactional-type offense.

17 The staff found in their study that the
18 prosecution and prosecutor's investigators have broadly
19 stretched the money laundering offense and that it has
20 dramatically affected the charging basis of criminal
21 activity which, I believe, is a purpose that it was not
22 designed for.

1 Let me give you an example, for instance. Let us
2 say that blank and white, two individuals, bribe officials.
3 Black takes funds from a company, wires it to his own bank,
4 his own personal bank account and he then uses that money to
5 bribe an official. White, on the other hand, runs the
6 bribes through a whole series of shell corporations. He
7 runs it offshore, brings it back through a convoluted web
8 that would be impossible to figure out. Both of those would
9 fit under the same category under the existing guidelines.
10 Both of them could get the same sentence, and I think that
11 is totally disproportionate to what we are trying to do
12 here.

13 When we talk about money laundering, we are
14 talking about the latter type of activity, where there is
15 more attempts to conceal. That type of activity should
16 receive an enhanced sentence.

17 I think there is a tension between the guidelines
18 and the basic definition of money laundering. Again,
19 concealment is a key element of money laundering, but it
20 does not seem to be a key element of the existing
21 guidelines, and I believe it should be.

22 In the 1983 staff study, they showed that 40

1 percent of the cases had no concealment whatsoever. Only 20
2 percent involved the type of sophisticated concealment that
3 law enforcement and everybody else considers traditional
4 money laundering. So you have got 80 percent of cases do
5 not fit the category originally envisioned by the
6 Commission, and that is why I think these guidelines need to
7 be severely addressed and looked at.

8 I think it is time to take the guidelines out of
9 the driver's seat and the charging decision of prosecutors,
10 and I think it is time to match the punishment with the
11 severity of the activity and the nature of the activity that
12 we know as money laundering.

13 I would like to mention one other thing. Much of
14 this I said last year, and I don't want to repeat what I
15 said last year particularly.

16 I would like to address the issue of co-mingled
17 funds because I was called by the staff this last week on
18 that issue, and I think it is a very important issue. As
19 you may be aware, if funds are co-mingled in a bank account,
20 part of the sentencing guidelines are reflected by the
21 amount of money involved in the laundering operation. So
22 the question is how much money was involved, not how much

1 money was charged in the indictment, and not how much money
2 was involved in the conviction, but how much money was
3 involved in the laundering activity, and I realize that some
4 government officials believe that, when you have a co-
5 mingling of funds, for instance, if money comes through a
6 bank account and is co-mingled with clean funds, and then is
7 disbursed and then subsequently used, it is difficult to
8 separate the clean money from the dirty money. It is,
9 therefore, perhaps difficult, it is said, to determine how
10 much money is involved in the laundering operation.

11 Some government officials have said that it is
12 impossible to tell the difference and that, therefore, when
13 money is co-mingled, that for purposes of sentencing, the
14 entire corpus should be used to determine the sentence, and
15 I say that that is udder nonsense. I have been training law
16 enforcement agents for 15 or 20 years on how to follow
17 money, how to trace money flows, how to follow cash, how to
18 recreate transactions, whether they are currency
19 transactions or any other kind of transactions, and it is my
20 experience that you can trace money, that you can separate
21 dirty money from good money, and that you do not have to
22 throw up your hands and say we can't trace this. Therefore,

1 we are going to use the entire corpus in deciding the
2 sentence guideline.

3 I think that a person who is convicted of money
4 laundering should not have to suffer because the government
5 does not feel it should take the effort or can take the
6 effort to separate clean money from dirty money. I believe
7 that if the prosecutor is going to convict someone of money
8 laundering, if they are going to try to establish sentences
9 for money laundering, it is incumbent upon them to determine
10 how much of the money is dirty and how much is clean and not
11 just to throw it all in the pot, go their own way, and let
12 the defendant then serve three months, ten months, two
13 months, 20 years more simply because the government did not
14 take the time and the effort to separate this out. I think
15 it is a training problem and, if the agents are not
16 adequately trained to make the separation of clean money
17 from dirty money, they should be trained. We should not put
18 that burden on the defendant to suffer because they are not
19 trained.

20 I think to continue under the current money
21 laundering guidelines is to ignore the realities of money
22 laundering. It is to continue to mete out disproportionate

1 and unfair sentences because we are ignoring realities to
2 both drug and nondrug offenders. This is not a white-collar
3 crime issue. This is an issue that permeates all types of
4 offenses. I believe that adopting these proposed amendments
5 will achieve the Commission's original goal with respect to
6 the sentencing guidelines, and that goal is to severely
7 punish sophisticated laundering activities and to match the
8 penalties with the severity of the laundering activities.

9 That is basically my statement, and I appreciate
10 the opportunity to appear before you. If I can be of any
11 further help or answer any questions, I will be happy to.

12 CHAIRMAN WILKINS: We want to thank you for the
13 assistance that you have been, before today, to this
14 Commission in making yourself available when we need to call
15 on you.

16 Any questions or comments anyone?

17 [No response.]

18 CHAIRMAN WILKINS: Thank you, again. Does anyone
19 else wish to address the Commission? Please come forward.

20 MS. ROBINSON: My name is Kelly Robinson from Ohio.
21 I was just curious. Every time I hear about the war on
22 drugs and sentencing and so on and so forth I always hear

1 about the drug dealer and how we start with the mandatory
2 sentences and so forth. I wanted to know if you could tell
3 me what steps that the government is taking to prevent the
4 drug from getting over here in the first place, and then I
5 was kind of curious on your views on mandatory sentencing.

6 CHAIRMAN WILKINS: I will answer the latter first.
7 The Commission has gone on the record several year ago as
8 opposed to mandatory minimum sentences imposed through the
9 statutory scheme in favor of the guideline system that we
10 have. We have been unwavering in our position on that
11 issue.

12 As far as the other is concerned, I don't feel
13 qualified to address that. We need to turn to the
14 Department of Justice, the FBI, and DEA, and Customs and
15 other law enforcement agencies. That is somewhat beyond the
16 scope of our ability here to address it, and it is certainly
17 beyond the scope of this hearing. So I don't know the
18 answer to your first question. If anyone else wishes to
19 join in, but it is more of a law enforcement issue than
20 sentencing.

21 COMMISSIONER MAZZONE: What the Chairman says is
22 exactly right. The only thing I can add to it is that there

1 is a section in our enabling legislation which allows us to
2 examine causes of criminal conduct. To that end, the
3 Commission did organize a conference last June in which we
4 called together people who talked about drugs, and violence,
5 and causes and preventions, so we talked about it. The idea
6 was to get a message of some kind to Congress, whatever that
7 conference produced. We had Congress people there and we
8 had educators. We had judges, and so we are doing something
9 like that in terms of trying to educate a lot of people,
10 including Congress, on what can be done because I think we
11 all agree that law enforcement alone is not the answer.

12 CHAIRMAN WILKINS: Thank you. The person on the
13 end do you have a comment that you would like to make?

14 MS. TEAL: My name is Erika Teal. I have a very
15 great concern about people that spend 10/15 years in prison
16 feeling that they don't really deserve such a very long
17 sentence, come out and are almost unemployable. What is
18 going to happen to them? They are bitter. They are
19 unemployable. If they have started education before they
20 went, they are very unlikely to finish it at that point. I
21 think this is something that we really have to think about
22 before we put people in prison for such a long time.

1 I have a son in prison. He is a first-time, and
2 this is a real first time, offender. He was talked into the
3 crime by a DEA agent. He had never done it before, didn't
4 do it afterwards. A year later he was arrested. He is
5 spending 70 months in prison. He is in his 20s, and I don't
6 know how he is going to feel when he comes out. His life is
7 changed. He wants to get an education. I don't know
8 whether anybody will employ him when he comes out.

9 Several years ago, I think about three years ago,
10 I talked in front of this Commission, not as a speaker, but
11 as a citizen like right now, and I urged the Commission to
12 look into alternative sentencing. I don't think we have
13 made much progress, and I know it is really difficult to
14 convince Congress that this is maybe the way to go. At
15 least it is the first step. I don't think it is the real
16 answer because I think the real answer lies in completely
17 changing our outlook about prevention of crimes and
18 punishment of crimes. But, unfortunately, the real
19 solutions are so long-term that they take a generation at
20 least, and they do not win votes in the next election.

21 I want to thank the Commission for being willing
22 to listen to the voices of change here, and all we have

1 heard today are voices of change. I did not hear a single
2 testimony that was in favor of mandatory minimums, that was
3 in favor of longer sentences. I think this is something
4 that is very heartening to me, and I think you should be
5 heartened by that, and I think the only solution is to keep
6 on working at it. If we live long enough, maybe we will see
7 Congress make changes in those laws.

8 Thank you.

9 CHAIRMAN WILKINS: Thank you very much.

10 MS. WHITAKER: My name is Dionne Whitaker. I just
11 had a question to ask. I am not really familiar with all of
12 the laws and how the amendments get on the docket and all of
13 that kind of stuff, but it seems that today everything has
14 been focused towards crack cocaine instead of powder
15 cocaine. So I am wondering when is it going to get on the
16 amendment or is there a way that people have to ask for it
17 to be on the amendment or do you guys decide or how does
18 that go about?

19 CHAIRMAN WILKINS: Well, we do decide in the final
20 analysis, but we receive input from a variety of sources,
21 individuals, committees, judges, lawyers, citizens sending
22 us requests for consideration of various amendments, and we

1 would be happy to review any that is received from you or
2 anyone else. I might add in this amendment cycle there are
3 amendments dealing with powder cocaine in the overall drug
4 table and things of that nature as well. We would be happy
5 to make the amendment package available to you so you can
6 see exactly what is under consideration. If you would like,
7 Mr. Courlander is here and Kent Larson in the back. You see
8 him after this hearing and he will be glad to get you a
9 copy. He will have everything in there that is for
10 potential consideration.

11 MS. HODGES: May I have a copy, also?

12 CHAIRMAN WILKINS: Yes. You might want to get a
13 dozen copies or so, if you can, and get two dozen if that is
14 how many it takes. Everybody gets a copy. Did you have a
15 comment?

16 MS. HODGES: I have a couple of questions and a
17 comment. One of the questions I would like to know is what
18 are the guidelines the federal court system is using as far
19 as plea bargaining and why is criminals being allowed to
20 testify against others in order to get shorter sentences? I
21 read in your mandatory maximum sentencing guideline manual
22 that the reason plea bargain is acceptable is because

1 individuals may have information that are of use to the
2 court system. I think, from what I am hearing of a lot of
3 people involved in the federal prison system is that the way
4 they got there was through someone plea bargaining their
5 time down and those people, in turn, are doing time for
6 conspiracy.

7 Conspiracy is the next thing I have a problem
8 with. I looked conspiracy up in the Webster Dictionary, and
9 it is defined as plotting or planning to commit. It is not
10 saying you actually have committed, and if that is being the
11 case why are individuals being sentenced or held accountable
12 for something that they have not yet carried out? And the
13 time that they are getting is the same as they carried out
14 the act or sometimes exceeding it. I find that hard to
15 comprehend. I really don't understand that, and it would be
16 nice if someone can shed some light on that for me.

17 Also, I am a victim three times over of crimes.
18 In 1976, my sister was murdered. The person that did it
19 went unpunished because there was only the two of them
20 there. In 1991, my daughters were raped. They were 4 at
21 the time. Because of their age and their inconsistency in
22 their stories, the person went unpunished. In 1992, my ex-

1 boyfriend attempted to kill me. He came into my home. I
2 was asleep in my bed. He put a gun to my head. Luckily it
3 didn't do as much damage as he intended, obviously, because
4 I am here. He was sentenced to seven years. Because of the
5 gun charge he does a maximum of he has to do three years.
6 After three years I have to worry that this guy is going to
7 come after me and finish what he promised to.

8 What I guess I am asking is why is there so much
9 emphasis placed on nonviolent drug offenders who, to me, the
10 majority of them in their misconception of reaching the
11 status "economic and freedom" have accepted this as a way
12 out of poverty, and in their lack of knowledge and
13 understanding go into this field and they are being punished
14 severely for it when someone who come into my home and try
15 and take my life he gets three years, which, to me, is a
16 slap on the wrist, and I have to run from this man for the
17 rest of my life. I have moved my family already. We have
18 relocated already, which was a financial burden for us.
19 When he gets out, I know we are going to have to relocate
20 again. What protection the federal government needs to
21 give. What are they doing to protect people such as myself,
22 victims of real crimes, crimes against people that, to me,

1 should have more weight against the crimes like drug crimes?
2 People make a choice to use drugs. Alcohol is a drug.
3 Alcohol is one of the greatest addictions there is, and
4 there are masses of rehabilitation centers to prove that
5 that is a problem. Yet I don't see people who are using
6 alcohol because it has become socially acceptable through
7 its legalization I don't see these people doing time in
8 federal prison, state prison or otherwise unless, of course,
9 they have a DUI where they killed someone and still the
10 sentences that they receive for taking another person's life
11 doesn't come nowhere near what is given to individuals up
12 under the sentencing guidelines as far as drugs is
13 concerned.

14 My other question is why not legalize drugs? If
15 drugs are legalized, it is controlled just as the drug
16 alcohol is legalized and controlled.

17 Another comment I would like to make, as far as
18 LSD is concerned, it is also a psychoactive drug. You have
19 changed the guidelines and sentences on that drug and why
20 not do the same for all drugs? Why not give everyone the
21 same chance that you have given them? Thank you.

22 [Round of applause.]

1 CHAIRMAN WILKINS: You have raised some very
2 important issues. One of the things I think that you did
3 emphasize in your statement is that perhaps we are
4 overlooking the plight of victims of crime. We need to
5 place more emphasis on violent offenses and less emphasis on
6 nonviolent offenses, including your run-of-the-mill drug
7 offense.

8 MS. HODGES: Right.

9 CHAIRMAN WILKINS: The other issues we can be
10 talking about at length for some time. I think, if you
11 don't mind, we might reserve discussion of those for a more
12 informal setting. You have got two nationally-known lawyers
13 sitting right behind you there. They would be glad to talk
14 to you about it. I will, too, and everybody else will, but
15 those issues will take a long time to debate, and a lot of
16 those are outside our jurisdiction.

17 So let's go ahead and move on. You did make a
18 powerful statement, though, on some issues, and we
19 appreciate that very much.

20 Yes, ma'am?

21 MS. CLARK: My name is Beverly Clark. I would
22 like to ask not only a couple of questions, but also make a

1 statement.

2 My first question is I do write to several of the
3 inmates that are incarcerated under the mandatory minimum
4 sentence laws, and I find that, in writing to them, no one
5 has been sentenced in any type of consistency. I would like
6 to know why are they so far apart. Two young men from the
7 same state, same county, same first-time offense, one 19,
8 one is, I believe 22 or 23, for conspiracy not for the
9 actual possession of the drug. One was given 18 years and
10 then the other one was given 15 years with no possibility of
11 parole, very little time off for good behavior. If the
12 correctional institution is a correctional institution,
13 where is the hope? You leave young people with no hope. In
14 writing to these young people, I find that so many of them
15 have no hope with 25 years, 35 years. Even I can't even
16 conceive of doing that type of time.

17 I also find another complaint among the young
18 people that are incarcerated, when they are given the
19 opportunity to make an improvement on their lives, they go
20 to school, no sooner they are in a classroom and are
21 studying and doing well, the system moves them.

22 My son that is incarcerated presently has been

1 incarcerated for five years. He has been moved seven
2 different times, have been to seven different federal
3 institutions. Each time he has voluntarily "hissself" into
4 school, he has been moved. He has just been moved on our
5 way here to Washington.

6 My son is in maximum security in Marion, Illinois.
7 I mean this gives him, a young man of no hope, one hour of
8 any time of activity in a 24-hour day. He has not committed
9 a violent crime against no one in his whole entire life.

10 Another complaint that the young men have been
11 given is the work. They don't mind doing the work, but then
12 the pay is not enough to sustain their own personal needs,
13 as toothpaste, personal hygiene. I feel that we should be
14 able to make some type of commitment to them so that they
15 can sustain themselves while they are incarcerated.

16 They have one other complaint that I have
17 received, and I would like to know why they are not given an
18 opportunity for parole after doing their good time, getting
19 some kind of concession. If a person, any individual
20 anywhere is without hope, there is no life. You have to
21 have hope. If we are going to have a correctional
22 institution, we call it a correctional institution. We are

1 trying to correct people. Then we must give them hope.

2 Thank you.

3 [Round of applause.]

4 CHAIRMAN WILKINS: Thank you very much. Yes, sir?

5 MR. STERLING: Chairman Wilkins, I am Eric

6 Sterling, President of the Criminal Justice Policy

7 Foundation. I apologize for not submitting a written

8 statement, and I appreciate the opportunity to speak to you

9 for a moment this afternoon.

10 As the Commissioners know and as the public
11 observes, there is a sense that our nation's criminal
12 justice system appears to be out of control; that fear is at
13 very, very high levels. While greater numbers are now
14 incarcerated than ever before in our history, there is the
15 perception that crime is at greater levels than have ever
16 been in our history.

17 The response appears to be increasingly for longer
18 sentences in general, three strikes and you are out,
19 mandatory minimums, which is, in effect, an attempt to put
20 the criminal justice system on automatic pilot. When the
21 system is out of control, putting it on automatic pilot is
22 the wrong response.

1 What we see with sentencing is really the output
2 of the entire criminal justice system, starting with
3 reporting of offense. The police, the investigation, the
4 prosecution all is directed with the sentence in mind as the
5 output, as the measurable product and yet it is only
6 measured then either in terms of how long the sentence is,
7 and which you have heard many people complain today about
8 sentences being too long, and then the deterrents that we
9 assume that the long sentences are providing, but something
10 which we are really very limited in our ability to measure.
11 We just don't know how much our sentences are preventing
12 crime from taking place.

13 So, when Judge Mazzone asks the question he asked
14 of Mr. Timilty earlier, "What do I say to legislators?" Mr
15 Timilty points to economics and, yet, the only answer that a
16 legislator will respond to is promise me better protection.
17 Promise us more protection through what you are offering
18 because that is what I have to sell to the public. I have
19 to be able to claim that this response, this change leaves
20 the society safer in some measure than it was beforehand.
21 That challenge then goes to the whole question of what are
22 not only the sentences that the criminal justice system

1 produces as an output, but it has to go to educating the
2 legislators that only a tiny part of what we call crime
3 prevention comes from your product, comes from the criminal
4 justice system. Members must understand that when they
5 debate, as they are debating right now the education goals
6 for the Year 2000, that is as much an anti-crime measure as
7 the Omnibus Crime Bill that they are debating right now.
8 That the health reform proposal or the housing legislation
9 that that is anti-crime legislation. It is a challenge then
10 for people in your position, who have been involved in this
11 and seen the limits of the criminal justice system, to
12 explain to them that they cannot put on the back of the
13 criminal justice system the entire burden of public safety.

14 I simply want to conclude then by praising your
15 work. This Commission has done as much as I know of anybody
16 in Washington to educate the public and members of Congress
17 about what the real consequences are in the criminal justice
18 system -- your work in 1991 on mandatory minimum sentencing,
19 the hearings that you have had, the one that you had last
20 fall on crack, the one you had last summer on violence and
21 crime, the analysis you prepared of the Crime Bill in
22 writing for Congressman Hughes and Congressman Edwards

1 earlier this year and the openness of your hearings. When
2 you allow the public to come forward and speak as you do,
3 hearing after hearing, this is a way in which the system is
4 accessible by the public that is not accessed any other way.

5 Since I started working for the House Judiciary in
6 1979, I have never seen any other public body allow the
7 public, without petitioning it in advance, to come forward
8 and express their views. I commend this Commission and
9 particularly the leadership of Chairman Wilkins for
10 outstanding work over the years. This hearing shouldn't end
11 without that being on the record.

12 Thank you very much.

13 CHAIRMAN WILKINS: I am delighted it did end on
14 that high note.

15 [Laughter.]

16 CHAIRMAN WILKINS: Does anyone else here wish to
17 say anything before we adjourn?

18 DR. BERESFORD: May I, please?

19 CHAIRMAN WILKINS: Yes, sir.

20 DR. BERESFORD: I didn't realize that it was
21 appropriate for a witness to ask questions, but I do have a
22 question on behalf of a number of LSD prisoners, who are the

1 community I basically represent, and it has to do with the
2 applications for sentence modifications, in view of the
3 recent guideline on that subject.

4 There are two theories which are proposed in
5 court; one being that there is a conflict between the
6 guideline and the statute and this is the position taken by
7 the government, who approached these requests for sentence
8 modifications by looking at the crime and seeing if, first
9 of all, a mandatory minimum sentence can be extracted from
10 it and, if so, then that sentence stays firm and, if there
11 is an adjustment made possible by a guideline sentence, then
12 that number of months is taken off. That is one theory.

13 The other theory being that the sentence is
14 recalculated from the beginning and that the 0.4 milligrams
15 are added up and if a mandatory minimum is triggered on that
16 basis, so be it.

17 My question has to do with the intention that the
18 Commission had when it passed this amendment, and this is a
19 question which is of very great importance to a number of
20 prisoners who have had their applications for sentence
21 modification refused by judges. There are appeals in at
22 least five circuits now pressed by defendants against a

1 judgment which has not taken their sentence down below the
2 statutory mandatory minimum.

3 There are other appeals going on by the government
4 against judgments which have taken the sentence down below a
5 mandatory minimum, and I could cite cases of that sort.

6 So my question to you, Chairman Wilkins and
7 members of the Commission, is was it your intention or would
8 you prefer not to answer the question, but the question is
9 was it your intention that the theory which begins with
10 adding up the .4 milligrams until the mandatory minimum
11 level is struck was that your intention in the first place
12 or were you operating on the double measurement standard?

13 CHAIRMAN WILKINS: It is a very difficult issue, a
14 very important issue, and one that I would not hazard to
15 attempt to try to answer here in this public forum,
16 particularly without consulting with my fellow
17 commissioners. I have no objection to you writing me a
18 letter and asking me that question, and then we can properly
19 consider in it a forum that will not result in snap answers
20 being produced. I know it is important, but I just don't
21 want to say, and I am not sure we can say. We may follow a
22 legislative process, and the courts have to read what we did

1 and interpret from the four corners of what we have written
2 and that is how it has to go, but it may corrective language
3 can come through the Commission. We can amend some
4 commentary to try to clarify, if there is a problem. There
5 are a lot of things we might could do, but we need to
6 consider it in a very deliberative process.

7 DR. BERESFORD: That might be possible this year?

8 CHAIRMAN WILKINS: I don't know that it would --

9 DR. BERESFORD: Too late for this year.

10 CHAIRMAN WILKINS: I doubt if it would be possible
11 this year. We have only a few weeks left, about four weeks,
12 but I don't suggest that it impossible. You certainly take
13 every chance you have got, and send me a letter. Outline
14 the issues as plainly as you have here, and we will take a
15 look at it.

16 DR. BERESFORD: I have been advised by lawyers
17 this could be an issue in which different circuits rule
18 differently, and it could go to the Supreme Court. It would
19 be useful to have the Commission's own views on record in
20 due course.

21 CHAIRMAN WILKINS: Yes. We resolve circuit
22 splits, too. That is one of the things we do.

1 DR. BERESFORD: Thank you.

2 CHAIRMAN WILKINS: Mr. Clark, you had something
3 else you wanted to tell us?

4 MR. CLARK: Yes. I want to make a comment about a
5 report that I read on a hearing back in November, I believe
6 it was, and you had several expert witnesses and none of the
7 witnesses felt that the mandatory sentence was correct; that
8 it should be made different. The only one that spoke in one
9 of the hearings that you had against not having the
10 mandatory sentencing lowered was a law enforcement officer.
11 He said that they needed it in order to make arrests and get
12 convictions.

13 I am tying that in with another report that I read
14 -- it is not a report -- it is part of the Crime Bill that
15 they held where they want to have money set aside for police
16 officers or people who are interested in law enforcement to
17 go to school and learn how to deal with the public and learn
18 how to be.

19 Now they have incorporated in this particular bill
20 an awful lot of good things, I believe. There is always
21 going to be crime. There is always going to have to be
22 punishment, but if it can be done in a more equitable way I

1 think people will understand that this is a part of what
2 life is all about.

3 But when it goes so far to one extreme over here,
4 the person over here that is getting slapped on the wrist
5 saying, "Okay, I am getting away with it," and he is
6 laughing about the person over here that is getting 100
7 times more, and this person over here is mad about it and
8 justifiably so.

9 So, if they can't come together with something
10 that you can say we have done our best on this. We have
11 discussed it as far as we can. Now it is time to take
12 action while they are debating the bill in Congress and
13 giving them some type of guidance or some type of input on
14 how you feel about it.

15 CHAIRMAN WILKINS: All right, sir.

16 MR. CLARK: I appreciate it.

17 CHAIRMAN WILKINS: Thank you very much.

18 I want to express my appreciation to all of those
19 who have participated in this hearing. It has been very
20 informative, a very productive day, and I want to express
21 our appreciation to all of those who have been here in
22 attendance.

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1 Hearing nothing further, we will stand adjourned.

2 [Whereupon, at 3:55 p.m., the proceedings were

3 adjourned.]

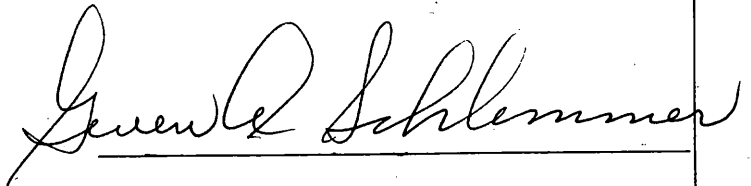
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1
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