UNITED STATES SENTENCING COMMISSION

PUBLIC HEARING ON

PROPOSED GUIDELINE AMENDMENTS

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MEMBERS PRESENT:

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MICHAEL S. GELACAK, Commissioner

MICHAEL GOLDSMITH, Commissioner

A. DAVID MAZZONE, Commissioner

DEANELL R. TACHA, Commissioner

JO ANN HARRIS, Ex-Officio Member

EDWARD F. REILLY, JR., Ex-Officio Member

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P R O C E E D I N G S

COMMISSIONER MAZZONE: Why don't we get started. We are waiting for one Commissioner, who will be with us momentarily. I will, for the moment, stand in for Judge Conaboy, who is appearing before the Judicial Conference this morning but will join us as soon as he is able to do so.

Thank you all for coming. As you know, we have received your written comments, as well as those of others who will not appear to testify. Under our rules, we have allotted time for each topic, and within that topic, we hope that you have allotted the time, should there be more than one speaker, amongst yourselves.

We urge you sincerely to keep your remarks within the allotted time. I will make some allowances for having started late, but please keep your remarks within the allotted time, not only out of respect for your fellow panelists, but also for those who would follow. We have 38 speakers today, and in order to give everybody a fair chance to be

heard, we are going to try to keep you to the time that we have set.

The first speakers, if they would come forward, please, are Dr. Curry, Francis Meade, Renee Patterson, and Dr. Lantz. As with all others, I ask that you speak directly into the microphone. You will have to share it because our reporter will have an easier time to pick up your remarks.

Dr. Curry, good morning, sir.

DR. CURRY: Good morning. First of all, I would like to thank the Commission for this opportunity to address you at this time. Last year, I also addressed you, but would like to continue to impress upon you the predicament with regard to my particular fund.

I think it is extremely significant that you understand, first, why I am not here. It is not my intent to point fingers or criticize judges or prosecutors, nor to mark the judiciary system of our country. My sole purpose today is to present my fund's case to you as an example of why we must

rethink the 1986 Anti-Drug Abuse Act, in general, and specifically, the disparity between crack and powder cocaine sentencing.

In passing this Act, we have forced prosecutors to demonstrate their toughness on drugs and drug offenders by the number of convictions they get. This has meant, in many cases, referring cases normally heard in State courts to Federal courts, changing trials to a more favorable location for convictions, and using minor participants in an undercover capacity relative to trapping other criminals and enhancing other criminal investigations.

I must admit to you, however, that I am frustrated and sometimes angered by a democratic system that I defended and promoted, as a soldier in Vietnam, as an educator, as a parent, as a black male in America. I was raised to believe that this system works and it works for everyone, regardless of race, gender, age, or religion. Now, for the first time in my life, when I need that system to work for me, I find it almost impossible, from time

to time, to even get an audience with elected representatives.

My son, Derrick Curry, was arrested December 5, 1990, at the age of 19 and charged with one count of possession with intent to distribute crack cocaine, one count of distribution of crack cocaine, and one count of conspiracy to distribute crack cocaine. He is the youngest of three children, my only son. His oldest sister is an accountant. His younger sister is a graduate of Carnegie-Mellon.

A complete background check was done by the FBI and no evidence was found to support any contention that he was a major drug dealer. He owned no automobiles. He drove an old Chevy Citation that belonged to his mother. He had no money, and, like most college students, spent most of his time borrowing gas money from his mother and his father. He had no jewelry. He had no prior arrest record, no involvement with the law prior to this particular incident.

On the one hand, despite having an IQ of

80, he was a second-year student at Prince George's County Community College, working toward, of all things, a degree in criminal justice. The FBI conducted an investigation involving 28 individuals over a five-year period. By the prosecution's own record, my son was determined to be a model participant who was involved only in the last six months of the investigation.

During the ensuing months, he was offered a plea agreement which called for him to plead guilty to one count of conspiracy and to agree to work undercover in a capacity relative to other criminal investigations. In exchange, it would be recommended to the court that his sentence be 15 years. My son turned down the plea agreement for two reasons. First, he did not feel at that time that he was guilty, and secondly, he did not want to work in an undercover capacity.

Because of the large number of individuals involved in this particular case, my son was tried separately. He was the only one of the 28 defendants that was found guilty of the conspiracy.

One has to ask, whom did he conspire with?

My son was sentenced on October 1, 1993, to 19 years, seven months in a Federal prison. However, he would have received ten years, at best, if the sentencing for powder and cocaine had been one to one.

Federal Prosecutor Jay Appleson, in a commentary of "What Prosecutors Know: Mandatory Minimums Work", Washington Post newspaper, February 27, 1994, best described the subjective practices that exist when comparing Angela Lewis's case with my son Derrick. Lewis was sentenced to ten years for her involvement in drug trafficking when she failed to cooperate with the prosecutors. After deciding to cooperate, she served only 18 months.

In this particular commentary, there was the comparison between the case. I don't see the comparison, in that my son, in order to receive the plea bargain, was given 15 years. It just does not make sense, and one has to then wonder, does fairness and justice and equality of law depend solely on the prosecutor that one receives in a

particular case? I would probably submit to you that if given the same kind of a situation, that most likely, my son would have agreed to a plea arrangement rather than the 15 years, if he was offered.

I must admit to you, however, that as I sat and watched President Bush address the nation on the drug problem, without the facts, I, too, believed that crack was the worst evil to confront our nation, but something had to be done. Now, we have the facts, and something still must be done. With the facts, how can the penalty for crack cocaine be 100 times greater than that of powder cocaine? Without powder cocaine, there will be on crack cocaine.

In an effort to convince you to eliminate the disparity between powdered and crack cocaine, I wish to offer the following. Is the penalty greater for killing someone with a handgun or a shotgun? Is the penalty greater for killing someone with a knife or a gun? Is the penalty for bombing a building dependent upon the type of bomb

that is used? Is the penalty greater for vehicular manslaughter when one is intoxicated on beer or liquor?

I am hopeful that the Commission will continue to press forward in its efforts to demonstrate to the Congress that this discrepancy between the two must be eliminated.

I want to read to you some excerpts from the transcript for the sentencing of my son that was conducted by Judge Nicholson in Baltimore. He said, "I think I am as sympathetic, if not more sympathetic, than most judges when it comes to departure in a particular case, and in a case, in particular, like this one, where, as I have already indicated, the guidelines appear to me personally to be so extremely harsh. Notwithstanding my complete agreement with you that Mr. Curry was a gofer and a minor player and there was a lot of peer pressure from a particular individual in seducing him into this particular activity, if I were sentencing in a situation other than the guideline situation, I would not impose the

sentence that I am going to impose upon you." As a result of that, my son was sentenced to 19 years and seven months.

I think the Commission has taken the first major step, if one is to believe what is written in the Washington Post. I am eternally grateful to you for taking that particular step. My family is particularly grateful to you for taking that particular step. This is my only son--my only son. He made a mistake, but should he spend the rest of his life paying for that particular mistake?

I think that there are two other steps that must be taken. One is that we must look at what States have done. Forty-two of our States sentence powder and crack cocaine on a one-to-one basis. I suggest we need to follow that.

Secondly, if a mistake was made, and I believe that, in making mistakes, it was not an intentional mistake, then I think that it should be made retroactive.

I thank you for the opportunity to appear before you.

COMMISSIONER MAZZONE: Thank you, Dr. Curry.

Ms. Meade?

MS. MEADE: Good morning. First of all, I would like to thank you for giving me the opportunity to present my grandson's case. My grandson's case is of such a nature that it is hard not to become emotional, but I plan not to in presenting his case to you.

My grandson was only 19 years old, a first-time offender. What I am concerned about, Amendment 38 dealing with the disparity of sentencing between crack cocaine and powder cocaine. I feel that the 100-to-one ratio had an adverse effect on the sentencing of my grandson, Ronald G. "Jay" Kinzer, Jr., who was sentenced 151 months for crack cocaine distribution within 100 feet of a school.

Ronald was charged with two counts of distribution, which, the Government said, totaled 50 grams. This figure was arrived at from Ronald's co-defendant's testimony. He said that he sold

drugs for Ronald at approximately $200 a day. The Government said that they felt or believed it to be $800 per day. The co-defendant plead guilty and received a sentence of one year. Ronald repeatedly requested that he be allowed to take a plea for five years, but his lawyer said that she would not do so because it was a matter of principle.

At this time, I knew next to nothing about the law. However, since then, I have learned much about sentencing through working with FAMM. Had that drug that Ronald was dealing with have been powder cocaine instead of crack cocaine, his sentence would have been 21 to 27 months. There is no enough difference between the two drugs to merit a ten-year difference in sentencing. For this reason alone, the disparity should be eliminated and crack and powder should be sentenced the same.

Too many lives have been adversely by the 100-to-one sentencing disparity. I am asking you to please reconsider what ha been allowed to happen here and to make appropriate changes soon and to make them retroactive. Ronald is a first-time non-

violent offender who is not a leader, an organizer, or a manager. He did not get any points off for acceptance of responsibility, and we don't really know why. But Ronald was only 19 years of age when he was sentenced, much too young to have to serve such a long time.

I also want to add that, had Ronald had five grams of powder cocaine, equal to this, perhaps he would not have gotten any time. However, if he had five grams of crack cocaine in the same packet, he would have done five years mandatory minimum without the possibility of parole.

I also would like to add, when you put a 19-year-old in prison for 12 years and seven months, what do you expect society is going to have to deal with when he gets out? He will be untrained. He will have learned the ways of prison life, and then we are going to have a worse problem.

I really feel that there are other alternatives for someone in his position. He had

just begun college. He had great potential. He was a first-time offender by the very fluke of thinking it was a joke. As he wrote me later, "Grandma, I thought it was a joke. Grandma, I found out, it's not a joke, and it's so hard." He said, "Grandma, I never knew I'd have to go through the atrocities that I am going through."

So I just want you all to please reconsider when you are thinking about the disparity between the crack cocaine and the powder cocaine and the difference that there is. It's not that much of a difference, and it doesn't have that much of a difference of impact.

I just want to thank you for listening to my passionate plea on behalf of my beloved grandson. I also speak for the hundreds of other victims, primarily young black men in America, of the harsh crack cocaine sentencing laws.

If you would permit me to do so, I would like for you all to see the picture of my grandson. There is a face to the sentencing. I thank you for your time.

COMMISSIONER MAZZONE: Thank you, Mrs. Meade.

PARTICIPANT: If you don't mind, would you let Dr. Lantz go next?

COMMISSIONER MAZZONE: I will follow whatever order you want. Do you mind? You are next in order, but do you mind, Ms. Patterson, if we go to Dr. Lantz first?

MS. PATTERSON: No.

COMMISSIONER MAZZONE: Dr. Lantz?

DR. LANTZ: Thank you very much for allowing me to speak to the Commission again this year. As is indicated in the letter, in my CV, I hold a doctorate in analytical chemistry and am a pharmacologist. I have testified in a great many trials in Federal, State, and military courts concerning drugs and their effects.

I noticed in the latest version of the cocaine and sentencing guideline policy that a great many problems had been cleared up, and I am very glad for that, but there are a couple things where there are questions that are still open, so I

wanted to particularly talk about those things today, and, particularly, the misinformation and the lack of clear definitions.

Since the majority of you, I believe, are jurists, and I as a scientist, we are all concerned with the fact that words have meanings. If the definitions are not clear, then we can easily go astray, whether we are talking about so-called crack cocaine or versus powder cocaine or assault rifle or in any term that we are using that doesn't have a clear definition.

One of the things that we were talking about in particular in this Commission guideline publication was why there was the hysteria over so-called crack cocaine in the early 1980s, and that was because the so-called crack cocaine, at least, as far as I can tell, the reason was that there was a substance which was available on the street, at least, certainly in the East and the Southeast, which was crackly and was very glassy and it was different from what we now see in the streets as so-called crack cocaine--the same word, different

substance.

They both contain cocaine, but the material that was available in the early 1980s was actually very heavily contaminated with other alkaloids, that is, other substances from the cocoa leaves which, some people believe, were a great deal more toxic than cocaine. They were not particularly euphoragenic, but they were particularly toxic, at least, according to some toxicologists, and that may well have been why so many people were dying from this original crack cocaine, that is material which has almost nothing to do with what we see on the streets now and have for the last ten years seen on the streets.

It was a manufacturing artifact, rather like if I were to go Los Angeles and attempt to buy so-called China white. There are at least three or four different compounds, quite chemically disparate, which I could obtain, although, probably, I might not be easily able to buy so-called China white, but the term is applied to many different compounds or many different substances.

In the case of crack cocaine, the old substance with the old word doesn't exist anymore. So basically, there are a number of falsehoods that I wanted to cover today, and crack cocaine or cocaine hydrochloride, which is how chemists refer to it, is different from the cocaine base or so-called crack. The second thing is that they are difficult to interconvert. The third is that the base itself, in and of itself, is more addictive than the salt. The cocaine base causes users to be more violent than does the cocaine salt. Then the last is that the cocaine base is less expensive than is the cocaine salt or cocaine hydrochloride. Therefore, it is more dangerous to society.

I have been told all of these things in court by people who should have known better, and all of these assumptions are false.

Cocaine, as a chemist would represent it, looks just like this. This is the cocaine base molecule, where each of these little balls represents an atom and the gray bars between them represent chemical bonds. A chemist would

recognize this as cocaine.

This is hydrochloric acid. This is muriatic acid you use to clean your sidewalk, to get the paint off. This is crack. This is cocaine powder, just a little hydrochloric acid sitting next to it. It is not even truly covalently chemically bonded to this, or as one of your experts pointed out in your sentencing policy guideline book, cocaine is cocaine is cocaine. So simply on that basis, there doesn't seem to be any reason whatsoever, chemically speaking, for a difference in sentencing between possession of this molecule and possessing this molecule with a little contamination from hydrochloric acid.

The other point here is that the analytical chemist really can't tell when he or she is going to come into court and testify that, yes, this defendant possessed cocaine or powder, which it was that they were possessing, because, as far as on the street, all of the powder cocaine contains cocaine base, that is, it contains crack, and all of the so-called crack contains powder

cocaine, that is, the cocaine salt. So it really is a rather arbitrary distinction, depending upon what the chemist or the prosecutor may decide the person was possessing.

The chemist really can't tell, because both substances are present no matter what, unless that so-called powder cocaine has been stolen from a pharmacy and, therefore, is very pure, and powder cocaine is a legitimate pharmaceutical. It is a Schedule II drug, but it is manufactured by legitimate pharmaceutical firms because it is used in common medical practice. Other than that, all cocaine, all cocaine and all cocaine powder, contains the other substance. So from an analytical chemist's point of view, you can't tell. Therefore, that is another good reason why there should not be a difference in the penalties because you can't tell which the person possesses.

COMMISSIONER GELACAK: But that is not really true, Doctor. The person who is being charged knows what he or she possessed.

DR. LANTZ: They may think that, for

example, and that is an excellent point, but, for example, there was a case in Minnesota a number of years ago where the judge did rule that because a person felt that this was LSD that it must have been LSD. This was a heavily-experienced drug abuser. Just because somebody thinks it is crack doesn't mean that he has it. The example of the China white, the people think that they are buying very highly purified heroin. They are actually buying Fentanyl, which is a different and vastly more dangerous drug.

So they think they are possessing crack, and that may go to the concept of conspiracy to possess crack, but they may not really be possessing crack, or in any case, they may be in possession of something that looks like it, but no matter what, I, as a chemist, can't tell you, yes, this is cocaine base and nothing but. They may think that they have cocaine base and nothing but, but they don't. They are not good analytical chemists.

Yes, sir?

COMMISSIONER GOLDSMITH: Doctor, in light of that, how is it that the government is able to meet its burden of proof at trial? In the trial, they need to establish that, in fact, it is crack as opposed to powder. They need to be able to do that somehow at trial.

DR. LANTZ: It depends, to a great extent, on whether or not the defendant is able to afford an expert to point this out. I realize that is a little self-serving, because I make my living as a scientific expert, but I work for both the prosecution and the defense. It is a matter of whether or not someone is able to afford the expert to come in and point out that the DEA laboratory person just can't tell. This is sad, but true.

COMMISSIONER GOLDSMITH: Would you go back to your first point? You said that the old substance associated with the term "crack" doesn't exist anymore. Could you elaborate upon that?

DR. LANTZ: The original reason for, as far as I have been able to tell, the original reason for naming the substance "crack" was that

the cocoa alkaloids, which included cocaine, tropia cocaine, and a number of different isomers, were simply extracted from the cocoa leaves and turned into a cocaine paste, and this was extracted again, using gasoline, fuel, kerosine, whatever, and allowed to dry in sheets that turned very glassy.

I think we have all seen where in India, the locals will take sea water, allow it to dry out, and repeat this until they can get enough salt to sell in the shallow sea beds right by the ocean. The same thing is done with the extract of the cocaine leaves or cocoa plant leaves. This turns very hard and glassy so that they break it up with a hammer.

Supposedly, this is one of the reasons why it was called crack. There are other stories for where the name came to be. What I have found is that in the East and the Southeast, this is where the term originated, where in the West, it was because the material which contains the sodium bicarbonate actually crackles as it is smoked. There are two different origins for the name

"crack".

COMMISSIONER GOLDSMITH: And why is it that that substance doesn't exist anymore?

DR. LANTZ: Because it is much easier to transport the cocaine hydrochloride. That is, it doesn't get sticky, it doesn't stick to everything like the cocaine base does. The other thing is that that cocaine crack, that is, the crackling material, the glass-like material, did contain a great many toxic substances which are removed by more modern techniques and the older techniques for making cocaine.

Cocaine is not the only alkaloid, that is, it is not the only basic substance which comes out of cocaine leaves. A number of other substances come out. Indeed, the way that the majority, but not all, cocaine processors work is that they start off with this mixture of alkaloids, all of which have the same what is called tropane center to the molecule, and all of these are then broken down and have the little parts that make it cocaine or make it tropia cocaine or make it some other substance.

All those little parts are broken off and then it's resynthesized. That is, the part of the molecule that is hard to synthesize is left intact and all of the extraneous materials are cleaved off, that is, cut off chemically, and it's put back together again. So if you want to make cocaine from cocoa leaves, you have to go through several chemical steps in order to convert your contaminants into cocaine.

This was, at one point, where they, for whatever technical reasons--I have read it was because of interdiction--the people were not going through this step of turning all of the other alkaloids into the tropane, or, that is, what is called ecgonine, e-c-g-o-n-i-n-e, center the molecule, and then rebuild back to the real cocaine. The other compounds apparently are not particularly active psychologically.

I don't know if I have overdone the answer or not.

COMMISSIONER GOLDSMITH: That certainly explains to me why I have not taken chemistry.

[Laughter.]

COMMISSIONER GOLDSMITH: I appreciate your answer.

DR. LANTZ: I am a lot of fun at cocktail parties.

So, in any case, getting back to this, and I want to make sure that I leave enough time for the lady, that another common misconception is that there is a major difference in effect in addictive potential. I am glad he addressed this in the book. There really isn't--in the substance itself, it is a matter of how it is administered.

One thing that I have noticed, and you probably have noticed, too, as jurists, is that there is no difference in the penalty for heroin base versus heroin salt, and the analogy is the same. People smoke heroin. If you recall, the opium wars were a result of that. I will speed on a bit.

COMMISSIONER CARNES: Let me ask you, Doctor, a question. If essentially your position is the drugs are the same, doesn't the market tell

us the drugs are a little different? By that, I mean you have individuals out there who are not unintelligent people who would take a chance, knowing they could easily sell the powder and have a much lesser penalty, but they sell crack in the form they sell it in and they subject themselves to these extremely high penalties.

Doing so suggests to me that, as intelligent business people, they recognize the market would not support the powder. They couldn't find the same customers. They have a market there for crack, and the fact that they risk these kind of penalties, doesn't it suggest there is something about their clientele or customers that finds something inherently more appealing in crack than powder? Otherwise, if it was just the same, wouldn't the drug dealers say, I am just going to sell powder and I will get a split sentence if I am caught doing that.

DR. LANTZ: There are a couple of things there. That certainly is true, that people who prefer the crack, that is, prefer to smoke it, do

tend to buy it in that form, but it is so easy to convert, at least among the people that I know. None of my actual friends are drug users; they wouldn't stay my friends long, or they wouldn't want me as a friend because I am so adamantly opposed to drug use, but it is easy to convert, so that if I were buying it, I would do this.

The second thing is, and speaking of penalties, from talking with so many of the defendants that I know, they have no idea what the penalties are, utterly no idea of what the penalty is. They are just utterly shocked, and so there is no deterrent value to having that great threat there when they have no idea --

COMMISSIONER CARNES: Word hasn't gotten out in some communities, whether they know it is 100-to-one or not, that it is worse if you get caught with crack than powder? People don't know that?

DR. LANTZ: Apparently not, at least from talking--now, I could be being caught, but apparently they don't know that there is this huge

difference.

COMMISSIONER CARNES: It is hard not to know. You can't pick up a newspaper --

DR. LANTZ: You assume that people read newspapers.

COMMISSIONER CARNES: Are intelligent, right.

DR. LANTZ: I read newspapers, you read newspapers, and we operate in probably the same social circles, which is not the same as what the crack users do.

COMMISSIONER CARNES: Thank you. I know we need to move on.

MS. MEADE: Could I address that as well? First of all, the people who are using crack, it is an economic thing. People who use crack cocaine went to crack cocaine because it is easier to mix the baking soda or whatever with the powder cocaine, cook it, make it into little chunks which they can sell more readily to people that can maybe perhaps buy it. People with money deal with the powder cocaine. People without money and don't

have much money are the little dealers out on the street.

Nine times out of ten, the people that are at the top of the level with the crack cocaine, with the powder cocaine, are people that you never have to worry about going to jail because they don't go. It is the little dealer on the street that we are talking about. It is an economic situation. It is people in these little communities that the big people come and they give them these little rocks.

COMMISSIONER CARNES: If they were selling the powder, you are saying they wouldn't do as well?

MS. MEADE: They would privy to have access to the powder, not the people who are going to jail. They wouldn't have access to the powder as well as they do to crack.

DR. LANTZ: I think much of the reason is that people who want to smoke the cocaine don't want to go to the trouble of even that minute or two or three that it takes. I have demonstrated in

court just how quickly the interconversion can be done. I did not use cocaine, I used a very similar compound which chemically is interconverted between the base and the salt very easily, and so I was able to demonstrate to the court --

COMMISSIONER CARNES: I didn't want to delay it, because I know we have another witness. We really need to get to them.

DR. LANTZ: So I will summarize in about 30 seconds. Basically, as a scientist, I see no reason to have that differential between the two.

The last thing is that what concerns me very much is that judges are not being allowed to be judges. I would much prefer to allow a judge to make his or her evaluation of a particular case. That is what judges are paid for. That is what they are trained for. Let them be judges.

COMMISSIONER MAZZONE: Thank you, Dr. Lantz.

MS. PATTERSON: Good morning. My name is Renee Patterson and I am here this morning to talk about my brother, who is Donald Strothers, who was

convicted at age 19 of distribution and conspiracy to distribute crack cocaine. He was sentenced to life without parole plus 40 years for being a low-level member of the Newton Street Crew, as the Justice Department called it. It is still hard for me to believe that at age 19, with no prior and no association with violence, my brother was sentenced to life without parole, a very harsh punishment.

The largest quantity of crack cocaine that he allegedly sold was approximately one-half ounce. An execution of a search warrant of his house revealed the presence of approximately one ounce of crack. The upper-level defendants in the Newton Street conspiracy were alleged to be involved of murders and all sorts of things, but Donnie Strothers was not connected with any of these.

I feel that the penalty for crack cocaine is unjust and uncivilized. Justice must still be the goal of the Justice Department without respect for an individual's race. Under the current crack cocaine laws of 100-to-one, Donnie received no justice. He was guilty of breaking the law and

deserved to be punished, but life plus 40 years is cruel and unusual punishment. Too many young black men like Donnie are getting sentences like he is. The mandatory minimum sentence, if Donnie were sentenced under the mandatory minimum laws, he would get ten years, and that should be more than enough punishment.

I know that Donnie got life because the guidelines are intended to be directed toward drug kingpins and violent drug dealers, not low-level, non-violent street dealers. In fact, your new report on crack cocaine shows that nearly 60 percent of the people who get sentenced for crack cocaine are street dealers. When are we going to hear about the arrest and prosecution of the person at the top who controls the overall kingpin operations? These young men, black men, do not have planes, boats, or any transportation to transport the drugs into the country.

The only plea bargain Donnie was offered was on condition of his testimony against other co-defendants. Should Donnie receive life without

parole because he refused to testify against other co-defendants about something he had no knowledge of? Where is the justice? Was Donnie supposed to lie against the other co-defendants under oath just so he could be set free? Is that the way the American justice system works?

Donnie Strothers may only be a Federal ID number to the penal system, but he is a son, he is my brother and the brother of my sisters and brothers, an uncle, and he is also a father to his family. He is just one of hundreds, probably thousands, of black males serving the sentence. I urge you to correct this injustice by making crack and powder cocaine sentences equal. We can send people to the moon, we can discover new technologies, but when it comes to sentencing our young black men, we are still in the stone ages.

When there is a wrong, you right it. The Commission has the power to correct this glaring wrong. Please do, so this amendment cycle, and make your changes retroactive so my brother can have the chance to live again.

COMMISSIONER MAZZONE: I can only say to you, before I ask my colleagues if they want to have any further questions, that, as you know, the Commission issued its report on cocaine punishment policy and we concluded that the 100-to-one ratio cannot be justified. Where we go from there is something we are trying to do now as quickly as we can do it.

Commissioner Gelacak is leading our effort to put together some kind of recommendation for Congress to act upon so that we can bring what we think we have found here to be a disproportionate penalty, so we are trying to do that. I hope we can get it done, for the benefit of you and your loved ones, pretty soon.

Are there any questions on my right?

COMMISSIONER GOLDSMITH: I have one quick question of Dr. Lantz.

DR. LANTZ: Yes, sir?

COMMISSIONER GOLDSMITH: You stated earlier that an analytical chemist would not be able to tell the difference between crack and

powder cocaine. Then I asked you a question about the government's burden of proof, and I think you said that one of the problems here is that defendants ordinarily wouldn't have the capacity to hire an expert to present this type of testimony.

I am wondering whether you have had occasion ever to present that type of testimony in court and also whether any court has accepted that testimony and applied it in any case.

DR. LANTZ: It is often difficult to tell whether it really has been applied. Sadly--now in State courts, certainly, that is true. In Federal courts, I do less work in Federal court because, obviously, there are fewer trials. In State court, that certainly has been true, where I have been able to point out that you can't tell. But in most State courts, it doesn't make a lot of difference because, as Dr. Curry pointed out, the sentences are the same, so that there is no real question about it.

COMMISSIONER GOLDSMITH: So you have presented that testimony in some courts,

predominately State courts?

DR. LANTZ: Yes, sir, and at sentencing, I have pointed that out, but unfortunately, the judges tend to be or are constrained in their ability to act in accord with what they, as intelligent, educated attorneys, know is the right thing. As Judge Forrester pointed out, he hasn't the foggiest idea--I think that is not exactly his words, but basically, he hasn't the foggiest idea what Congress meant by crack.

COMMISSIONER GOLDSMITH: Thank you.

COMMISSIONER MAZZONE: On my left, please? In a moment, ma'am. Commissioner Reilly?

COMMISSIONER REILLY: I want to pursue a moment, Doctor, you made a comment that people are somewhat shocked by the penalties when they find out what they really are. I am curious, I suppose--in my short time here in Washington, I have, from time to time, had the opportunity to ride in cabs and I have asked cab drivers, because I feel they are a wonderful pulse of what happens in a community and they can usually tell you everything

that is going on, in their experience, if they knew what the penalties happened to be for drug abuse, whether it was selling, distributing, whether it was manufacturing, whatever, and I am surprised to learn that very few of them, those who are immigrants to this country as well as those who have been around a long time and are driving these cabs, really know what the drug penalties are.

So I guess my question is, have we failed in terms of the media letting people know and the courts letting people know and the Congress letting people know what the penalties are with regard to Federal versus State crimes, and if so, had you known that or had your children known that, what would have been the impact? Could you have guided them, had you known it? Did you know it? Did you know what the penalties were?

DR. CURRY: May I speak to that? Since my son has been involved in this particular incident, I have been principal of two different high schools, the smallest being 1,800. I personally conducted a survey at the two high schools. I did

not find one individual, male or female, that had any idea what the penalties were and what the range is, crack versus powder cocaine.

COMMISSIONER REILLY: And had they known --

DR. CURRY: I really can't tell you. They might have thought --

COMMISSIONER REILLY: It is like driving and drinking.

DR. CURRY: Yes.

DR. LANTZ: That is the analogy that I was about to bring up. I am glad we are thinking along the same lines. In my laboratory, we are licensed--as a matter of fact, we are the private lab in Colorado to be licensed to do drugs in blood and we do work for both prosecution and for the defense and so I end up talking with a great many drunk drivers.

The publicity about the severe penalties for drunk driving in Colorado and some other States, those seem to be correlated with the decrease in drunk driving. There are severe

penalties, but until the publicity came about so that people knew that you would go to jail--if you are caught drunk driving a second time, you will go to jail, no ifs, ands, buts, no plea bargaining, nothing. If you are charged and you are found guilty, you will go to jail. Prosecutors are not allowed to deal away drunk driving offenses, ever, in Colorado.

The drunk driving incidence has gone down because people now know that there are severe penalties. If they didn't know, it wouldn't affect them, and I think that is an excellent statistical tool that you have there, asking the cabbies. I hadn't thought of that, but I think it is a good idea.

COMMISSIONER REILLY: I found out a lot of things I didn't really want to know. [Laughter.]

COMMISSIONER MAZZONE: Thank you very much, on behalf of the Commission. Thank you very much for your appearance here, your written testimony and your very eloquent statements. I am sure we are going to have all of those in mind as

we work on this project. Thank you.

The next panel is Juanita Hodges, Fred Richardson, Nicole Isom, and Patrick Brown, please. I am going to suggest, in the interest of time and efficiency, that perhaps my colleagues should hold their questions until the end, and I will try to reserve some time for questions at the end.

Good morning. I am going to take the panel in the order that I have been given. Juanita Hodges?

MS. HODGES: I am Juanita Hodges. I am Director of an organization out of Atlanta, Georgia, called Seekers of Justice, Equality, and Truth, Inc. I would first like to thank this Commission for realizing that the current 100-to-one ratio between crack and powder cocaine is unjust, unwarranted, and for you strongly recommending against it.

However, I, along with thousands of family members of those currently serving unjust long sentences behind this country's prison walls, including the inmates themselves, am very, very

disappointed, to say the least, that this Commission failed to make any significant recommendations that could have expeditiously brought an end to this madness. If young white males were being incarcerated at the same rate as young black males, I contend that the statutes would have been amended long ago.

Further, in spite of the November 9, 1993, hearing by this Commission which produced comprehensive data and testimony that there were no pharmacological differences between cocaine base, which is called crack, and powder cocaine, this Commission asserts in its report that cocaine base, crack, may be more harmful than powder cocaine and cocaine base presents somewhat of a greater harm to society. To this end, this Commission in its report listed 11 enhancements which it intends to consider adding to the already overburdened sentencing guidelines.

Most of the enhancements, however, are already covered in the current guidelines, and the remaining, if incorporated in the sentencing

guidelines, can and should be used as determining factors, not only in the sentencing of cocaine base offenses but all drug-related offenses, as all drugs pose the same threat to society, including the legal drugs, such as alcohol and tobacco products.

I contend that further enhancements made only in reference to cocaine base offenses will only serve to cause similar disparities in sentencing which resulted from the 100-to-one quantity ratio between powder cocaine and cocaine base. There should be no further enhancements adopted for cocaine base offenses. This Commission should recommend and adopt the only ratio based on facts, and that is the one-to-one at the current level set for powder cocaine.

As you know, in the hearing that you held, that Dr. Charles R. Shuster, Director of the National Institute on Drug Abuse, pointed out that cocaine is cocaine is cocaine. He did recommend in his report that cocaine base, or free-basing cocaine, has more euphoric effects than powder

cocaine, but it should be noted that the powder cocaine can be smoked, injected intravenously, and snuffocated.

In reference to the crack babies, studies have shown that the crack baby scare has been overblown and that many of these infants suffer as a result of other social factors. If there are going to be enhancements for selling cocaine base to pregnant women, which supposedly result in the birth of crack-addicted infants, on the basis that, all things being equal, this Commission should consider the need to address issues of fetal alcohol syndrome, in which the danger to unborn infants is just as great or even greater.

Dr. Warren James Woodford has a doctorate in chemistry and has undertaken post-doctoral studies in medical chemistry. Dr. Clinton Kilts is presently on the faculties of the Department of Psychology and the Department of Pathology at Emory University School of Medicine. Mr. Joey Douglas Clark has a master's degree in chemistry and works as a forensic chemist. And Dr. John Marshall

Holbrook holds a degree in pharmacy and a doctoral degree in pharmacology with an interest in controlled substances.

All four of these qualified experts testified at an evidentiary hearing that in the scientific community, the term cocaine base is synonymous with cocaine, powder cocaine, and that in the scientific community, cocaine base has no other meaning. They also unanimously agreed that the term crack, as it relates to cocaine substance, does not have a fixed meaning in the scientific community and that the term has its origins with illicit drug abusers. In other words, crack is the street name given to the solidified form of cocaine base because of the crackling sound it makes when it is smoked.

In his State of the Union Address to this nation earlier this year, President Clinton stated that recommendations and decisions should be left to the experts, those who know best, who have firsthand experience in dealing with the problem or problems. In my opinion, the experts in chemistry

and pharmacology would be persons such as the individuals quoted above. In the criminal proceedings, the experts would constitute judges, criminologists, criminal researchers, prison wardens, and other correctional professionals, criminal justice practitioners, and the criminals themselves.

In a February 4, 1994, report conducted by the United States Department of Justice for the Office of the Attorney General, it was reported that the amount of time inmates served in prison does not increase or decrease the likelihood of recidivating, either when time served is examined alone in relationship to recidivism or when controls are introduced for demographic variables, including age, education, work experience, prior arrest, convictions and incarcerations, drug and alcohol dependency, and post-release living arrangements. In fact, it was reported that because both marital stability and post-release income are strongly related to reduced likelihood of recidivism, anything, including a long prison

term, that erodes marital stability or reduces employability will likely increase recidivism.

Senator Paul Simon, in commenting on his survey of prison wardens and inmates, said that, "We have just passed the dubious milestone of having one million people in prison. But for all the new prisons we have built and filled over the last two decades, we feel less safe today than we did before. Loading our prisons with non-violent drug criminals means that, today, we are committing more non-violent offenders to hard time than we are violent criminals, and there is little room left for violent offenders who should be put away to make our streets safer."

In Senator Simon's survey, 58 percent of the wardens who responded did not support mandatory minimum penalties for drug offenders. They overwhelmingly chose prevention programs, especially those addressing basic human needs, when asked to identify the most effective way of fighting crime. Seventy-one percent said improving the educational quality of public schools would

make a difference in fighting crime. Sixty-six percent favored increasing the number of job opportunities in the community, and 62 percent endorsed developing programs to help parents become better mothers and fathers.

In contrast, only 54 percent said longer sentences for violent criminals would have a major impact on crime, and only eight percent supported longer sentences for drug users. Ninety-three percent of the wardens surveyed recommended a significant expansion of literacy and other educational programs in prisons. Even they can see that it was senseless for Congress to eliminate all funding for Pell Grants for prisoners.

One of the comments made by one of the individuals in the survey of Paul Simon is from Professor Philip B. Heymann, Director of the Center for Criminal Justice, Harvard Law School, Massachusetts. "We do not have to help States emulate the Federal Government, which, at Congress' command, has been filling thousands upon thousands of its cells with drug offenders who have no prior

convictions, no record of violence, and no important role in any significant drug organization, and who are serving Congressionally-specified sentences much longer than most violent criminals, far longer than the tough-minded Federal Sentencing Commission would set, and longer than some of our most distinguished judges have been prepared to impose, despite the clarity of the mandatory minimum statutes.

"The common-sense view that this is folly is also the view of our nation's prison wardens. The Congress should be holding hearings on what works and what doesn't work before plunging ahead again with what feels good and sells well. This country is entitled to more safety, not more posturing."

Should we give one thought of consideration to the possibility that the experts in the field of chemistry and pharmacology are speaking sensibly when they assert that the only difference between powder cocaine and cocaine base is the means of ingestion? Or should the experts

in the field of criminology, who assert that imposing draconian mandatory sentences on drug offenders is illogical, ineffective, and unjust? Or are they all wet and just radicals that survived our educational system without getting an education?

Should we not utilize their knowledge and expertise to make meaningful and rational decisions in matters who ultimately affect so many lives? Or should we, as in you, Mr. and Mrs. Fair-and-Just American, continuously rely on the media and politicians to make our decisions for us?

I contend to this Commission that the time has come to put an end to injustice within the criminal justice system, to stop filling our prisons with non-violent drug offenders and to use less-costly community-based alternatives. These measures will enable families to stay together, help to keep our communities intact, as well as hold offenders accountable for their actions. Also, it will substantially lower the enormous cost to taxpayers of approximately $25,000 a year per

inmate.

Furthermore, it would seem to be economically sensible to devote scarce government resources to reducing the large ingress and wholesale distribution of powder cocaine by major traffickers, which would consequently reduce the existence of base cocaine, crack, as a derivative product. For without powder cocaine, there could be no base cocaine, crack.

However, national and local statistical data do not show that prosecutions are targeting the upper echelons in the drug trade. Few kingpins are prosecuted. Powder cocaine is usually imported into this country by boats, trucks, and planes, and in huge quantities, none of which, more often than not, are owned by street-level dealers who are filling this nation's prisons and jails. Subsequently, however, most street-level dealers are given managerial roles. Thus, sentence enhancements under the conspiracy laws, which lands them into the prison system anywhere from 30 years to life and beyond. This also includes first-time

offenders, many with no prior convictions.

Sadly, the focus on the prosecution of numerous low-level base cocaine dealers appears to be a national policy, perhaps designed to give the impression of great victory in the war on drugs. But such a misguided approach to the elimination of drug trafficking has resulted in the necessity of expensive prisons. It has also genocidally decimated a generation of African Americans, by destroying the lives of thousands of young African American men during the most productive times in their lives, at the flowering of their manhood, many with no prior criminal record. And, most importantly, the war on drugs has not reduced the quantity of drugs saturating our nation.

Thus, it would appear that the only ones profiting from the overwhelmingly high prison population of this country are the demagogues, such as politicians in furtherance of their political careers, and the businessmen, such as those who stood up and cheered when Senator Edward Kennedy announced that Fort Devens would be converted to a

Federal prison.

The fact that African Americans are punished more severely for violating the same laws as white Americans is not a new phenomenon. A dual system of criminal justice based on racial discrimination can be traced back to the time of slavery. Prior to the civil rights era, Congress repeatedly imposed severe criminal sanctions on addictive substances, once they became popular with minorities. Historically, as well as currently, a consortium of reactionary media and subsequently-inflamed constituency have combined to influence Congress to impose more severe criminal sanctions for use of narcotics once they become popular with minorities.

Although moderate strides have been taken, we cannot continue to fool ourselves into believing that our decisions are free from the influences of this country's legacy of racial subordination and discrimination. If so, we will remain imprisoned by the past.

So why not punish the possession and

distribution of powder cocaine with equal severity as cocaine base? After all, cocaine is cocaine. Neither should be punished less than or more than the other. They are equal in their harm to society and destruction of individual lives and the punishment should be the same for both. To impose a more severe penalty on a derivative source of an illegal narcotic while the principal source of the drug is tolerated is illogical. In all actuality, if any enhancements would be justified, it would be to penalize powder cocaine more severely, for without powder cocaine, the derivative base cocaine would cease to exist.

You cannot stop a runaway freight train by grabbing hold of the caboose; it is the engine you must contend with. And in this war on drugs, cocaine base, crack, is the caboose, and powder cocaine is the engine. Eradicate powder cocaine and you stop base cocaine, crack, dead in its tracks.

In conclusion, we contend that this Commission has at hand the golden opportunity to

correct a grievous wrong. We realize that your job is one that will take courage, a righteous conscience, and a God-fearing heart. We beseech that this Commission would please bear in mind that there are thousands of family members of those serving unjustly long sentences, impatiently waiting for this racially discriminatory policy to be rectified.

Further, we implore this Commission to do the only humane and just thing to do. Recommend that Congress adopt a one-to-one ratio, thus equalizing the penalties between base cocaine and powder cocaine, and that this become retroactive so that those now in this country's prisons sentenced under the cocaine base statutes would be given a second chance to join society and live productive and meaningful lives.

To quote the late Dr. Martin Luther King, Jr., "Cowardice asks the question, is it safe? Expediency asks the question, is it polite? Vanity asks the question, is it popular? But conscience asks the question, is it right? And there comes a

time when one must take a position that it is neither safe, nor polite, nor popular, but one must take it because it is right."

On behalf of the members of Seekers of Justice, Equality, and Truth, Inc., as its founding director, and the thousands of inmates who are in this country's prisons, sentenced under the crack cocaine statutes, I would like to thank this Commission for giving me this opportunity to testify before you concerning this important issue. Thank you.

COMMISSIONER MAZZONE: Thank you, Ms. Hodges.

I have the uncomfortable responsibility of reminding the speakers and those who will speak that under our rules and the protocol that we set, the remarks were to be limited to a certain period of time. We also have your written comments, and I have read your comments, and some I will want to read again. You should point out to us those portions of your already-submitted statements that you want us to focus on or, perhaps, add to it.

I know it is not easy to testify before any panel. I hope this is a less-intimidating panel than you might sometimes find yourselves before, but I really urge you--it is not fair to the speakers on the panel and it is not fair to those other people who have scheduled their time in order to come here. We are already, you see, almost an hour behind time and we have only gone through the first panel.

I am doing a terrible job of keeping you in line, but please help us by restricting your remarks to the time allotted. That will also leave us time for questions between the panel and you, and I think that is where we get the most benefit, because we have read your statements and we will read them again.

I am sorry, Mr. Richardson. Please proceed.

MR. RICHARDSON: Distinguished members of the Sentencing Commission, I would like to address the issue of drug conspiracy. My name is Fredrick Richardson and I came here today from Mobile,

Alabama, where I live and where drug conspiracy convictions are among the highest in the nation.

Thank you for allowing me this opportunity to speak on behalf of Society for Equal Justice and the millions of family members whose loved ones and friends are Federal inmates serving life for drug conspiracy without having a gram or even a grain of crack cocaine in their possession. They were often lied on by inmates who, in exchange for promised reduced sentences, as indicated in sworn, notarized affidavits that I provided to you.

In my ten-page testimony that I sent to you, which I have reduced to five minutes, of the 131 convictions in Mobile on drug conspiracy--we had 131 people convicted in Mobile for drug conspiracy charges from 1989 to 1990. Federal cases during this period involving possession were less than five. The system was actively removing people, not drugs, from our streets. We need help to change this, and we seek your help.

Blacks are targeted in these drug conspiracy offenses simply because in drug

conspiracy, testimony only is enough to gain a drug conviction. In such a record, we find that evidence of police surveillance was almost moot. We found relentless effort by agents to produce witnesses, all who had been charged themselves with drug offenses. We found little or no effort by police to confiscate drugs, since one can be merely given the label "drug kingpin" without ever having been charged or being caught with drugs, and they can charge them with drug conspiracy on he said, she said, they said evidence.

In 1992, in Mobile, Alabama, a city of 200,000, the Federal Government prosecuted as many drug offenders as Baltimore and Philadelphia, cities with over a million people each. Why? Because local authorities sought and gained permission from Federal prosecutors to evoke their own personal prejudices in the war on drugs. Local police unjustly single out African Americans above all others for persecution and prosecution, using drug conspiracy as a pretext to shield and cover their motives, which are all too often unrelated to

drug offenses.

Had a majority of victims in this drug war been white, and had the drug users been 65 percent black, not the 26 percent that we know, the drug conspiracy law would have long been removed from the books and the drug war would have been redirected at the real target, those supplying and manufacturing drugs, a cartel who is neither poor nor black.

I am the voice of one who is crying in the wilderness for millions of people in pain today, begging this Commission to recommend a repeal of the unjust drug conspiracy law. You know the facts, and we are asking you to act on those facts. If you recommend that we continue to do what we already did, we will always get what we already got.

We are asking you to make a recommendation to change this. If not, we can expect more of the same. This vicious cycle must stop, and we don't know of anybody that can recommend that it be stopped any better than you. Drug conspiracy is a

law whose time has come and gone. We know it and so do you, so we ask you this question. If not now, when? If not you, who? Thank you for giving me this opportunity.

COMMISSIONER MAZZONE: Thank you, Mr. Richardson. I want to thank you for your written statement you submitted, together with the facts and figures that you submitted. That is very valuable to us, sir. Thank you very much.

MR. RICHARDSON: Thank you.

COMMISSIONER MAZZONE: Ms, Isom, please?

MS. ISOM: Good morning. My name is Nicole Isom and I shall be brief. I just wanted to say that the heightened penalty provision for cocaine base should be ignored, according to Robert Byck, M.D., Professor of Psychiatry and Pharmacology at Yale University School of Medicine. Lab analysis revealed that both forms of cocaine are scientifically synonymous. Further, tests, conducted by government chemist Joey Douglas Clark of the Drug Enforcement Administration yielded the same results.

Therefore, the 100-to-one ratio should be abolished and revised to a ratio of one-to-one. This revision will accurately reflect the meaningless distinction of the heightened penalty provision for cocaine base.

Thank you again for your time and consideration in this matter.

COMMISSIONER MAZZONE: Thank you, Ms. Isom.

Mr. Brown, please?

MR. BROWN: Thank you. My name is Patrick Brown. I am a defense lawyer from Union, Kentucky, and I am not here as a member of any organization. I am here as a practicing attorney who--I just feel the need and the urge to be here, probably in furtherance of representing my clients, those former clients of mine and those clients I will represent in the future.

As I was reviewing the proposed amendments in the Federal Register of January 9 of this year, I noticed there were 40 pages written on those amendments with various commentaries. I also

noticed that the crack cocaine ratio merited just about one paragraph in those 40 pages. I think that they anticipated what this hearing would ultimately involve, and there would be a lot of stories and impassioned pleas relative to that.

To a comment previously made by Commissioner Goldsmith relative to noting whether it is crack or powder, and Dr. Lantz indicated maybe he didn't know from a scientific basis, I know. I know when I walk in and I am representing a client that it is crack or powder.

I liken it to the first time I represented an LSD defendant. I remember that I threw up when he came into my office. And I called him the next day and I said, I can't represent you, and I did the same thing on the first crack case. The reason I did it, I could not stand next to a man and watch him be sentenced like that. We had addressed it with LSD. We have not with crack.

We are focusing on crack to powder, and what we need to focus on, maybe, is crack to LSD. LSD is a young white man's crack, in many respects.

In 1993, you fixed that problem. I didn't have anything to do with it. But you fixed that problem, in large part, and I have had the pleasure of handling many cases under the new amendments and applying them retroactively, and I have yet to represent a young male black on an LSD case. I have also yet to represent a young white male on a crack case.

Commissioner Carnes indicated there is knowledge about the penalties and the selling of crack versus powder with knowledge of those penalties. It is my experience, in my practice, I don't find that to be the case.

What I find is that, in handling both Federal and State cases, that in the State of Ohio, where I practice a lot in State court, is if an individual is holding a weapon, he knows he is going to jail for three years. The individual knows that. They will tell me that, and they will tell me the circumstances under which it falls in the law. They know. They know if they are carrying a bag of marijuana, it is a $100 fine.

They know.

I don't think it is because of publicity, and I don't think it is because of the media. I think it is because of being around other people, who, unfortunately, have seen the same circumstance. It is so simple and clear. If you have a gun, it is three years. Crack cocaine, it could get multiplied by 100 and then you take these ratios. Were you an organizer? Were you a manager? It is very difficult on the street level to understand that.

I also don't think it has to do with the market that it out there relative from crack to powder. It is my experience, in representing these individuals, that typically, the individuals I represent for crack cocaine cases are young street-level, unfortunately, entrepreneurs in this drug trade, and we don't need them, obviously, but as they graduate, and I think that you find that the individuals who are selling powder have graduated, and are graduating from small-level powder sales to crack sales.

It is easy to get into the crack business. You can get into it with as little as $50. You can't get into powder with $50. You have to make money, and that is why powder is not seen on the street level.

I don't want to focus my comments exclusively on crack to powder because there are some other great amendments out there that are pending that have not been mentioned.

I would encourage this Commission, regarding Amendment 34, which is relevant to the mitigating role and establishing a set base offense level, I think that is a great amendment and it would be welcomed from a defense perspective and, I think, from a fairness perspective. But I would also say that we may have a Chapman problem in doing that. If we weigh the drugs and we've got a mandatory minimum of ten years but we end up with guidelines that don't fit underneath that, I still see we are in the same box we are in, even if we make that amendment.

Maybe we can address that through relative

conduct, that we say we don't go to the drug table first. I mean, the first thing we do is we figure out the drug table and then go back to relevant conduct, and those are the amounts that are relevant for relevant conduct. They will kick in, maybe, mandatory minimums, if we can argue in reverse regarding the mitigating role.

And on the purity level, the purity level, I think, dovetails quite effectively with Amendment 38, the crack to powder ratio, and that is taking a look at really what is there. It only makes the most sense to look at what was actually sold. If it is 50 percent purity, it ought to be sentenced accordingly, because a kilo of 100 percent pure versus a kilo of 50 percent pure, the one kilo of 100 percent pure is doubly dangerous because it can be split twice, or if it is cooked down into crack.

In reading both the commentary and that amendment, I didn't see that the cocaine was necessarily to be included within that, but it does make sense and that the crack to powder amendment, and I think also the marijuana, the 50. I

struggled with my own self to try to understand why 50 plants is magically a kilogram instead of 100 grams. I have struggled with that, and I would lie to you if I said I went back and read all the commentaries back from when that was originally imposed so that I would understand where it came from, but I don't understand it from a working perspective.

I would urge this Commission to follow their own instincts, which is demonstrated in a quite lengthy report which I have not had the opportunity to read in full but have had a chance to review and review some commentaries. In doing away with this crack-to-powder problem, I sense that there is some apprehension of totally walking away from it and going all the way, one-to-one. Do you go one-to-two, one-to-five, one-to-20? Maybe that is not the best basis. Maybe it is a sliding scale of increased points, zero, one, and two, based on weights, zero, one, two, or three keys, a zero-point enhancement, maybe three-to-ten, a one-point enhancement maybe up to a two-point

enhancement, like we do for role in the offense, between a minor role and a major role.

But there needs to be some enhancement relative to crack cocaine. I don't think it is exclusively on a weight issue, because you are just hammering the little guy who then can't help himself anyway under mandatory minimum. He knows so little, he doesn't have worthwhile testimony. So he is really caught in a horrible, horrible situation.

We are investing a lot of money in housing these people for 20 years. Twenty years costs about a half-a-million dollars. If I wasn't a criminal defense lawyer and if I had never been in a courtroom in my life except to maybe pay a parking ticket, I would be upset about investing a half-a-million dollars in warehousing somebody, especially on some smaller amounts that can get you there.

I thank the Commission for their time and appreciate the opportunity to be here to provide my comments.

COMMISSIONER MAZZONE: Thank you, especially for taking your time to come here from your busy practice. As someone who works with the guidelines day in and day out and within the system day in and day out, your comments, as everybody's comments, are especially helpful.

On my right, please, any questions?

COMMISSIONER GELACAK: I don't have a question, and I don't want to debate the report that we put out, but I would like to say, however, two things, and speak just for myself and not for the Commission.

One, I think that report, in my opinion, is just the right document at just the right time and it will do a lot to help us down the road.

The other is to point out to you, to Mr. Richardson and others, please, don't feel like you are a voice in the wilderness because you are not alone on this problem and there are people on the Commission and in Congress and other places who are genuinely concerned about this problem and are attempting to do everything they can to correct it.

COMMISSIONER MAZZONE: On my left, please, any questions?

[No response.]

COMMISSIONER MAZZONE: Thank you again, very much.

Our 10:00 panel, Judges Kessler, Wald, and Murray, please.

MS. SIMS: On the comment you made about your intention, I want to ask a question. You said you were going to present something to Congress, or ask them for suggestions on how you could rule on this. Was that what you were saying?

COMMISSIONER MAZZONE: I don't think so, but there will come a time at the end of our scheduled meeting when we will ask for comments from anybody else who cares to be heard.

MS. SIMS: We have to get back to Georgia, and we were hoping that --

COMMISSIONER MAZZONE: Are you a speaker, ma'am?

MS. SIMS: No, sir, because I came with the president to--I didn't have time to furnish you

my information, so I was hoping you could answer the question.

COMMISSIONER MAZZONE: Give me the question again, please, and if you --

MS. SIMS: The question is, why is it that this Commission is going to seek advice and direction and suggestions from the Congress of how to resolve and correct our problems.

We truly appreciate you are recognizing that the rules and the laws have been inadequately dispensed in the past, but why are you going to expect them to give you a recommendation on how we can change and come back and do our focal point on reallocating sentencing, instead of this Commission, perhaps, coming up with suggestions on how they can best supply the information to Congress on how they should vote on it. Somehow, I think Congress needs more direction and we need to be able to let them know what's going on in the real world, the hardship and pain.

COMMISSIONER MAZZONE: I think, quickly, the answer I can give you is that we have written

the report, which is our report of what's going on. That report says we cannot justify and do not justify the 100-to-one ratio. It also says that we are working on recommendations to give to Congress for them to change their sentencing policy. You see, sentencing is up to Congress. We are going to give them --

MS. SIMS: But you are going to send something to them?

COMMISSIONER MAZZONE: We are in the process of doing that as we speak.

MS. SIMS: Praise the Lord. Thank you.

COMMISSIONER MAZZONE: Now wait, before you thank us -- [Laughter.]

Congress ultimately sets the penalties and Congress passes mandatory minimum laws. The only thing I ask you to take away from this hearing is just one statement. Mandatory minimums trump the guidelines. That is as simple as I can say it. Mandatory minimums control what we do. So we can have all the best intentions in the world, and I think you will find no more conscientious and

devoted people than are sitting here at this table, but until Congress is convinced that mandatory minimums don't work, until they are, we are always going to be constrained by what Congress says. I am sorry I can't --

MS. SIMS: No, that is all right.

COMMISSIONER MAZZONE: But I hope that helps you. I think any lawyer in the group here will tell you that, and I think anybody who has looked at the problem will tell you that. Thank you very much, ma'am.

MS. SIMS: Thank you, sir. We look forward to a better year. [Laughter.]

COMMISSIONER MAZZONE: I will take you in the order in which you are presented to me. Judge Kessler?

JUDGE MURRAY: Would it be all right if I started?

COMMISSIONER MAZZONE: Of course. You are first on our list. I am not sure how you managed to achieve that elevation, above a Circuit Judge, you see.

JUDGE WALD: It is merit.

COMMISSIONER MAZZONE: It is temporary here, too.

JUDGE MURRAY: Good morning. My name is Brenda Murray and I am a Federal Administrative Law Judge and I am here this morning as Chair of the Women Offenders Task Force of the National Association of Women Judges. With me representing the Association and its educational affiliate, the Women Judges Fund for Justice, are Judge Patricia Wald of the United States Court of Appeals and Judge Gladys Kessler from the United States District Court.

The National Association of Women Judges was created in 1979 to improve the administration of justice with particular emphasis on eliminating bias, specifically gender bias. We have now approximately 1,200 members, female and male, who occupy positions at all levels of the American judiciary.

In 1991, the Association created a project called "Out of Sight, Out of Mind", which was to

focus on what judges could do about the status and the conditions of incarcerated women. Because the number of incarcerated women has been small compared to the number of incarcerated men, and for other reasons, as well, their particular situation has received scant attention in studies of the overall incarcerated population.

It is our position that women are no longer an insignificant number of incarcerated people. In February 1995, women were 7.4 percent of the Federal prison population. As of last month, 5,939 women were incarcerated in Federal institutions. Estimates are that approximately 70 to 80 percent of these women are mothers, most of them are single parents, almost half have minor children, and most were the primary custodial parent before they were incarcerated.

A number of studies have documented the negative impacts on children caused by separation because of a parent's incarceration. Women serve their sentences an average distance of 567 miles from their last residence, so their contact with

their children, which is the primary concern of most incarcerated women, is difficult to impossible.

We are here because these women have no organizations to represent them. In our statement, we respectfully suggest five subjects for your consideration: Preserving family ties, pregnant offenders, incarcerating first offenders for non-violent offenses, substantial assistant departures, and domestic violence.

Before we respond to any questions, I would ask Judge Wald or Judge Kessler if they have any comments.

JUDGE WALD: I would like to address myself very, very briefly to just one aspect that was covered in our statement and in Judge Murray's synopsis of that statement. That is the Commission's present policy statement 5H1.6, which says that family ties and obligations are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range.

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JUDGE WALD: I would like to address myself very, very briefly to just one aspect that was covered in our statement and in Judge Murray's synopsis of that statement. That is the Commission's present policy statement 5H1.6, which says that family ties and obligations are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range.

I have worked with the sentencing guidelines since they were instituted and I do have a sense that the dynamics of the effect of that guideline go as follows. It takes a very courageous district judge to decide that this is not the ordinary case, it is an extraordinary case. There have been a few circuit precedents, and I am aware of them, where family situations have been deemed to be extraordinary enough so that they authorized a downward departure, but they are very few and far between, and I have been to many sentencing institutes.

I am sure Commissioner Gelacak remembers, I have debated former members of your Sentencing Commission about the effect of that policy statement. One of the former Commissioners said, well, we expected the courts to develop a common law around that, to this business of the exceptions which were ultimately vindicated by a circuit court, but it is not quite that easy.

Even in the District of Columbia, where we don't see nearly the amount of criminal cases that

other circuits do, we see enough so I know that while that guideline is there, not only is it, in its present form, unalleviated by any exceptions, not only is it a deterrent to the district judge who wants to do something, but, quite frankly, most of our drug defendants and women defendants are represented by CJA lawyers, by criminal justice attorney lawyers. They are not going to raise it. They are not even going to raise that, unless they are very sure of their footing, and as you know, the sentencing guideline jurisprudence is that when a district judge decides not to depart, there is no review of that.

So if the thing is never even raised to begin with, it never goes to the district judge, the district judge decides not to depart, it never comes up to us. So the momentum is to stay where it is.

What I suggest from all the statistics that Judge Murray gave you is that women are suffering disproportionately from that. From that, I do not suggest a gender-oriented solution. That

would be the worst thing in the world. In fact, your statute gives you a mandate on that. But I think it is clearly true that when 80 percent of the women who are incarcerated, roughly 80 percent are mothers, are single mothers, nearly that percent are first offenders, nearly that percent are low-level participants in either the drug or the other form of crimes, it suggests to me consideration of one solution, and this is a very broad--I mean, I have not worked minutely on the wording, but let me throw the suggestion out and hope that you will at least think about it.

That would be that in place of this presumption, or in addition to the presumption about ordinarily not relevant in determining, that the Commission might consider specifically proposing an explicit downward departure authorization for those non-violent drug and other offenders without any serious criminal record--define that as you will--who are low-level participants--define that, if you will, whether it is minimal or whether it is minor or whether you

actually define a take that they are involved in in the criminal enterprise--who can demonstrate a history of effective parenting so that their sentences may, under the new amendment, be served in a community-based program.

I think that would be consistent with the amendment which went into effect in November 1994, which lets you opt out from under the mandatory minimum. Most women who are in prison are serving the five-year mandatory minimum. It would be gender-neutral. Obviously, if a father could qualify, he should be able to obtain it. It would be based on a court's finding that there was active, effective parenting, and I think it would be narrow enough to garner some support.

I have talked--I don't have a survey--I have talked with U.S. Attorneys, I have talked with district judges, I have talked with people who are in the prison system, and most of them are quite uncomfortable with these kinds of cases and wish there was something that could be done. I think a simple signal from the Commission, over and above

this not ordinarily relevant, would be of great assistance not only to the district judges but actually out into the legal community to the CJA lawyers to raise it. Thank you.

COMMISSIONER MAZZONE: Judge Kessler?

JUDGE KESSLER: I am Judge Kessler, everyone. Thank you very much for your time this morning.

I have only been on the Federal bench for about nine months, but before that, I was a State court judge for 17 years, and so I would like to offer just a slightly different perspective in terms of the actual effects felt from these sentencing decisions.

I spent a lot of time in the family division, and actually presided over it for four years, and I want to reiterate the point that the loss experienced by the children when their parents are incarcerated is simply incalculable. Once a parent is incarcerated, and as you well know, many, many parents are sent very far from the place where their children actually live, because they are sent

to prisons throughout the country, but once that parent is incarcerated, the ties to those children, most of whom are very young when the parent is first sent away, are almost impossible to maintain.

First of all, the parent is far away. Second of all, it is extremely difficult to make phone calls from prisons.

Third of all, it is often expensive and very difficult for remaining family members to visit that parent in prison, even if it is a prison where visitation by children is allowed, and in a couple of the Federal institutions, that is allowed and encouraged. It is, oftentimes, for very practical reasons, very difficult to get the family and the child there.

There is a much more significant problem, and that is that in many, many instances, there are no remaining family members who can keep those young children within the family unit. So at that point, when that mother or father is sentenced to a period of incarceration, that child is placed in foster care.

At that point, the deck is almost stacked against the natural parent. I have to tell you that, honestly. There are court hearings where the natural parent doesn't appear, because that parent is incarcerated. Most States now are very anxious to make permanent decisions for children. That is a philosophy I totally endorse, but the bottom line of that policy is that, oftentimes, all relationships are severed between the natural parent and the child, who is in foster care and who is then put up for adoption. We have termination of parental rights in all States.

The hardship and the loss and the loss of bonding experienced by the children who remain creates enormous, serious problems for the family unit, for the children, of course, for the parent. But I would urge you, as you consider this issue, to focus on the children and what happens to them when they are left in the community, they have lost their primary custodial parent, and they are either with distant relatives or forced into a foster care system that, in almost every State in this union,

is extremely unresponsive to the needs of children.

For that additional reason, I would ask you to very seriously consider the position that we have put forth today and that Judge Wald has articulated with great specificity. Thank you very much.

COMMISSIONER MAZZONE: Before we ask questions, Judge Wald, I just wanted to refer you, in your spare time, to look at United States v. Rivera out of the First Circuit. You may find some solace. It might not be enough for you, but --

JUDGE WALD: No, I do find solace in the circuit courts, and there have been a few of them. My problem is that, I think, still, there haven't been any like that in our circuit and I still think that most district judges will look for a signal from the Commission that it is okay to do something like that.

COMMISSIONER MAZZONE: Perhaps you are right. Again, when you remember the guidelines, whether it was right or wrong, I took no part in crafting that particular phrase, but it would seem

to me that in light of what Congress told the original Commission to do, namely, consider the general appropriateness or inappropriateness of family ties and military service and employment history and community, as well as completely race- and gender-neutral guidelines, that it was not-- that's not a badly-phrased statement, not ordinarily relevant.

That seems to give the district judge enough leeway to factually, carefully set out enough to convince the circuit judge that it is not ordinarily relevant. I am not sure how we can improve on that. I would love to.

JUDGE WALD: Let me just say a few words, if I may. I certainly think, conceptually, you have a point there. I think the way the guidelines have evolved and the way the jurisprudence around them has evolved, as you know, in a few cases, not this one particularly, although I am not sure whether this one or not, as soon as a district judge or a circuit judge kind of forged out there into uncharted territory, then would come down

another guideline saying this is not ordinarily relevant. So there began to be a kind of law that if it says "not ordinarily relevant" out there, it really means you had better really have your ducks lined up.

As you know, you are a judge and I don't need to tell you, judges are very busy people. They have a lot of stress. If they are going to go outside of the framework, they have to think long and hard and they have to do a lot of work on it, and some of them may honestly believe that this is not an extraordinary--or extraordinary enough. Nobody knows what it is.

Commissioner Nagel and I used to debate publicly, as well as conduct some informal conversations, on whether or not, even if the Commission didn't do what I suggest in terms of authorizing a departure downward, that at least it ought to give flesh and blood to the ordinarily, instead of saying there should not ordinarily and saying, well, what does that mean, that they ought to at least have some explanation of what is

ordinary and what is not ordinary, drawing, perhaps, on Rivera and some of the few cases that we have, so that somebody going in there cold, a CJA lawyer or somebody like that, has some sense that there is another body of law there.

COMMISSIONER MAZZONE: Are there any questions on my right?

COMMISSIONER GELACAK: Judge, I have seen you debate this issue. Just to let you know that my mother didn't raise any fools, or at least she thinks she didn't, I am not about to get into a debate with you on that. [Laughter.]

COMMISSIONER TACHA: I would ask, Judge Wald, I assume the probation officer, under your scenario, the probation officer would make the recommendation on effective parenting relationship?

JUDGE WALD: It would be, certainly, that the PS, or whatever the acronym is, would certainly be the place where that information would initially come in, and if there were a sort of specific handling there, then, I think, CJA lawyers and those would begin to put in the information that

was necessary to go on about it.

I think the form in which I suggest, I have read the articles, I have read the Nagle and Johnson article [ph.]. I know you don't want to be gender preferential. I know you don't want to say to two like offenders, you go to prison because you are single but you get to stay out in the community because you happen to have children. I understand those.

But I think, still, within the profile that affects so many women, which is a first offender, a very low-level participant in a non-violent crime, that the parenting, at that point, if it is, in fact, active, effective parenting, should be an additional factor that could be considered in putting somebody into a community corrections program. I am not talking about somebody with a record this long who carried guns or anything like that around there, but so many of the women fit this very low-level profile.

That, in turn, I would hope, would result in the creation--I know you don't run the

corrections system--but would result in the adding to the resources now. For instance, in the District of Columbia, we had a gender task force and they looked into this problem, too, and their findings mirrored pretty accurately the national findings. But there are six community corrections outfits with whom the Bureau of Prisons has contracts, but, of course, only two of them are for women, and I don't think either one of those--I am sure they don't--will take women with children.

So if you had more women coming into that side of the equation, I would hope that the Bureau of Prisons would react by creating more facilities--it will be cheaper, I think, in the community corrections field--that would be able to accommodate the family concerns. It's down at the bottom there. None of us are suggesting you put violent offenders on the street because they happen to have kids.

COMMISSIONER CARNES: Is there an argument in the other direction, however, that looking only at the children, not the mothers' parental rights,

that a mother who has let a man into her home who is a drug dealer, who may have drug paraphernalia in her home, who is associating with those kind of people is, perhaps, by definition, not been a terribly wonderful role model up to that point, and that perhaps the children might be better off in another setting than with that mother?

JUDGE WALD: I am going to let Judge Kessler take that one, with her 17 years of experience.

JUDGE KESSLER: Those are often very tough issues, and they are factual issues.

COMMISSIONER CARNES: I will tell you, I get the other side of it. When I sentence young offenders, I get, every time, the young offender, the defense will turn and say, Your Honor, he was with his mother that his whole life hung out with drug dealers, her boyfriends were drug dealers, she used drugs, and some court a long time ago should have taken these young men away from this mother. So I see it from that side frequently, because I sentence a lot more young male offenders than I

sentence--I haven't sentenced a mother yet.

JUDGE KESSLER: There is no question that some of those cases exist. Obviously, the kind of suggestion we have made would take into account whether it was effective and adequate parenting. But it is certainly my experience that in many, many, many cases, women who are using drugs and who are addicted to drugs are not necessarily bad parents, that you really do have to look at the issues very carefully.

I know that is a painful thing to talk about, because everybody likes to think in terms of fairly easy boxes. If you use drugs, you have to be a bad person or a bad parent. But I think that when you really look at the actual situation, that it is much more complicated than that.

You will often get a situation where a parent is an occasional user. She does get caught in a serious compromising situation--and I am just using the word "she" for the moment for ease of discussion. That doesn't mean that on a day-to-day basis, she is not getting her children off to

school, she is not getting her children fed, she is not the nurturing, caring person who is taking care of those kids every evening.

I do not deny for a second that there are instances where kids are living in very bad households and where the child neglect system should be operating more effectively, but I do think there are many, many situations in which a parent is still doing their major functions with that child, and most importantly, that child is bonded to that parent and will suffer greatly if that parent is suddenly sent away and that child is put into the foster care system.

So I do think it is very much a case-by-case issue and that you have to look very realistically. Probation would be providing facts. It may well be that defense lawyers and prosecutors would be providing additional information to the court. I don't think it is a straight black and white situation.

JUDGE WALD: If I could add something to that, in the variety of factual situations which I

have seen in the appellate court, it isn't always the mother who invited the boyfriend in or even went in to live with the boyfriend. You very often have a kind of a loose family network. You have a grandmother, you have some sons, you have the sister with her children by somebody else, and they are all living in different rooms. It is clear that the single mother is there. They have a roof over her head.

She ends up being convicted of constructive possession or knowing that the drugs were going on, not being active in the dealing but knowing that they were there. She is not always involved in a love affair/relationship with the other men in the household where drugs are going on. Sometimes you say to yourself, what is the alternative? She should have gone to the local women's shelter when she knew that her brothers were dealing drugs? Maybe ideally, but that is not such a realistic situation.

The infinite variety of fact situations that you see, I think, at least, militates, in my

view, to leaving the options open, letting the conscientious district court judge know that if he really looks at it and appraises it accurately, that he can legally do something in those cases that he really feels it is better not to send the woman away for five years.

COMMISSIONER MAZZONE: Thank you very much.

JUDGE WALD: Good luck to you, by the way.

COMMISSIONER MAZZONE: Ambassador Quainton, please? Ambassador Quainton is the Assistant Secretary of State, for those of you who may not know, for Diplomatic Security in the Department of State.

AMBASSADOR QUAINTON: Thank you, Mr. Chairman. I am very pleased to have this opportunity to appear before you today. As Assistant Secretary of State for Diplomatic Security, I am here to emphasize the need to amend the sentencing guidelines concerning statutes pertaining to passport and visa offenses so as to provide meaningful deterrence to those who would

violate these laws.

As you know, Secretary Christopher has personally written to the Chairman about the importance of raising these guidelines, and so, too, have key members of the House and Senate Judiciary Committees and the House International Relations Committee.

The full text of my statement has been made available to the Commission, so I would just like to highlight a few points and then leave time to respond to any questions that you may have.

Passports, recognized as proof of citizenship, and visas, are essential documents for those who want to travel to and from the United States. It is becoming more and more apparent to the diplomatic and law enforcement communities that passport and visa violations are predicate offenses to a host of other criminal activities. Use of false identification on visas, in the case of Russian organized crime, is increasingly common.

In the area of international terrorism, fraudulent documents are also used. Two of the

terrorists who conspired to carry out the World Trade Center bombing used false passports to travel to the United States. One of the two used a passport in another identity to flee from the country on the day of the bombings, and as you know, he was captured and returned to the United States for trial just last month. The false passports and visas are important evidence of that terrorist conspiracy. In fact, nine out of the 41 counts or charges in the World Trade Center case relate to passport and visa fraud.

The current sentencing guidelines, as they apply to both passport and visa offenses, are not effective deterrents, given the fact that most convicted defendants receive sentences of less than six months in jail. In fact, most passport and visa cases are not even brought to prosecution, and the majority of those that are result in no incarceration beyond any time that may have been served during post-arrest custody.

Because of this situation, the Department of State strongly supported action by Congress to

increase the penalties for the passport and visa statutes which the Department is responsible for enforcing, 18 U.S.C. Sections 1541 through 1546, and we are very pleased that such provisions were enacted in the 1994 crime bill.

The crime bill raised the maximum fines and generally increased the maximum periods of imprisonment to ten years. Current sentencing guidelines assign higher base offense levels to many other offenses with statutory maximum incarceration periods of ten years.

We are pleased that the Department of Justice proposal before you, Amendment 23, addresses both the heartland cases by setting higher base offense levels and enhancing penalties in cases in which fraudulent passports and visas are used to facilitate other criminal activity. The increased penalties proposed by the Department of Justice are, in our view, essential deterrents to misuse of these important documents and are fully within the spirit of the crime bill.

Thank you again for this opportunity to

appear before you today and for your consideration of our position. We stand ready to work with you and the Justice Department to help finalize fair and effective sentencing guidelines concerning these statutes for which we in the Department of State have enforcement responsibilities. I will be happy to answer any questions.

COMMISSIONER TACHA: This is just procedural. I assume the U.S. Attorney is prosecuting these cases?

AMBASSADOR QUAINTON: That is correct.

COMMISSIONER TACHA: Does the Department of State take any active role in requesting prosecution?

AMBASSADOR QUAINTON: Yes, it does. The Department of State, through its field offices in the Bureau of Diplomatic Security, which are in 18 cities around the United States, approach the appropriate U.S. Attorney when sufficient evidence has been obtained under one of the statutes for which we have authority. The U.S. Attorney makes the appropriate determination as to whether to

proceed with prosecution or not.

But I think it is fair to say that in many jurisdictions, because of the very low likelihood of any very serious deterrent action being taken, it has not always been easy to get U.S. Attorneys to accept these cases, even though they may relate to other important criminal activity.

COMMISSIONER MAZZONE: This amendment has marshaled a lot of comment, as you probably know. We heard from the Secretary of State, Warren Christopher, as well as members on both sides of the aisle on the House Judiciary Committee and district judges. This amendment has generated a lot of support.

AMBASSADOR QUAINTON: I think the reason for that, Commissioner, if I might just comment, is that there is great awareness of the impact on our society of criminal activity with a transnational context. That could be narcotics trafficking, it can be international terrorism, it can be racketeering, it can be Russian or Chinese organized crime, and in a high percentage of these

crimes, either false visas or false passports are being used to facilitate the commission of much more serious offenses.

So we believe that part of the deterrent obligation which we have in the Department to protect the documents which the Secretary of State issues falls very much within this area and should be strengthened by enhanced penalties.

COMMISSIONER GELACAK: Ambassador, I think I agree with you, but are penalties going to make any difference here?

AMBASSADOR QUAINTON: I think the current penalties, if you take last year, there were something on the order of 500 arrests and 260-odd convictions. In the 1542 offenses, which are the ones most commonly prosecuted, the average sentence was just over three months and the median sentence was zero. That is no deterrent at all. I think our position is that some reasonable increase will create a climate in which it will act as a deterrent. Nobody would tell you that these offenses will go away by raising the sentencing

guidelines, but we think it will enhance the chances of doing that.

COMMISSIONER GELACAK: I would hope you are right, but by the same token, I would think that if someone were to need those documents in order to facilitate the commission of a particularly economically good criminal opportunity, that someone would be willing to provide those documents, given the exchange of currency or whatever that takes place, regardless of the penalties, unless, of course, we get into the far extremes. So I would hope you are right. I just wonder whether or not all we are doing is, in fact, kicking up penalties and we are going to have no impact on activity.

AMBASSADOR QUAINTON: I hope that is not the case, and, of course, the more severe penalties are those which are associated with both narcotics trafficking and terrorism, where the penalties are really quite severe, and those are the crimes, clearly, that we have a national interest in dealing with on a priority basis.

COMMISSIONER MAZZONE: Are there any questions on my right?

[No response.]

COMMISSIONER MAZZONE: Ambassador Quainton, thank you very much for your testimony.

AMBASSADOR QUAINTON: Thank you. I appreciate it.

COMMISSIONER MAZZONE: Abe Clott, for those of you on the panel who may not know, used to work with us here at the Commission, so, you see, he is going to be very sympathetic to us and the job we have to do, are you not, Mr. Clott?

MR. CLOTT: I hope so.

COMMISSIONER MAZZONE: Thank you very much at the outset for your very thorough submission on behalf of the Federal Public and Community Defenders. This is always one of the more helpful documents we receive.

MR. CLOTT: Thank you. I will try to focus my remarks this morning on some selected portions. Obviously, the submission stands for itself.

I am an attorney with the Legal Aid Society in New York City, the largest poor people's law firm, if you will, in the United States. I am assigned to our office in the Federal Courthouse in Brooklyn for the Eastern District of New York, and I am speaking today for the Federal Defenders nationally. We represent nationally the majority of defendants in Federal criminal cases.

COMMISSIONER MAZZONE: Approximately how many defendants in the Eastern District do you represent?

MR. CLOTT: Me, personally?

COMMISSIONER MAZZONE: No, your society.

MR. CLOTT: Thousands. I don't know the number off the top of my head.

COMMISSIONER MAZZONE: It is one out of two, I think, in Boston. That always strikes me as an astonishing figure.

MR. CLOTT: If anything, it is higher. I, personally, have an open case load now of about 60 cases, and that is continually rolling.

COMMISSIONER MAZZONE: I am sorry I

interrupted you. It just struck me that I wanted to ask you that question.

MR. CLOTT: It is an important question, because it is a huge number of people, and I think the Commission should know that the collective experience of the defenders nationally that is reflected in the submission is experience based on an absolutely huge, huge number of cases.

As an assistant in the Eastern District of New York, in particular, my case load is largely narcotics defendants, almost half, sometimes slightly more than half, low- and mid-level defendants, usually. The reason that I asked for the opportunity to come back to the Commission this year is because I think the Commission is in a very special position this year to address narcotics issues. I plan to use my time this morning to address alternative one in the narcotics amendments, that we largely support.

We have had the experience several years now of working with the guidelines, with the structure of the guidelines, and we have seen, to a

large extent, that the guidelines work rationally to assign punishments relative to real culpability in narcotics defenses, but there has emerged, I think, a fairly remarkable consensus that, especially with low-level dealers, low-level defendants, the quantity-driven nature of the guidelines can overstate the seriousness of the offense.

What alternative one does, in a fairly conservative way, is tinker with the present structure of the guidelines in a way that will make their operations more fair, more consistent with the structure of the guidelines. I say it is a fairly conservative approach because it does not reject the basic philosophy underlying 2D1.1 and the Commission's approach to narcotics to date.

Amendment 33 addresses the relationship between the drug quantity table and the mandatory minimum sentencing laws. Perhaps this is the most important amendment, because the quantity table has been key to the mandatory minimum laws. The Commission may have no choice but, to some extent,

key the drug quantity table to the mandatory minimum laws, if it is not to simply fly in the face of Congress.

Option A simply addresses the fact that there is no reason for the offense level to be set so that the mandatory minimum is the bottom of the resulting sentencing range rather than the top of the resulting sentencing range. Option A is, if you will, the smallest change that could be adopted, and it is entirely consistent with everything the Commission has done before. It is simply acknowledging that the mandatory minimum could be the bottom rather than the top.

Option B recognizes the double-counting problem that has resulted from the failure to give effect to the Congressional intent reflected in the legislative history, that the mandatory minimum quantities were assumed to represent at least mid-level if not high-level dealing, so that if the guideline is set to the mandatory minimum quantity without a role adjustment and the descending sentence is then enhanced by further role

adjustments, this sentence has, in fact, been doubly enhanced.

Option C, which we support in the written materials, recognizes the virtue of both of these proposals and combines them.

It is always difficult in a public policy discussion to advocate lowering sentences. It is difficult when one is not in the position of the family members who were here today, who can speak emotionally about personal experiences, to argue as a policy matter about why sentences should be lower.

What I would like to suggest with respect to Amendment 33 is that adopting proposal B or proposal C would make the guidelines more in tune with the mandatory minimum sentencing law, and I would like to point out one, I think, very important practical consequence that should be considered with respect to the safety valve legislation. This is in support of Option B, which would reduce the offense level associated with the five-year mandatory minimum from offense level 26

to offense level 24.

A very common situation in our district, I think, in many districts across the country, is a young defendant, a first-time defendant in a narcotics case who is eligible for the safety valve. His guideline base offense level is now 26. If we reduce it to 24, if he speedily accepts responsibility and is a minor actor, as is often the case with safety valve defendants, his final offense level under Option B will be 19 rather than 21. With an offense level of 19, a first offender's sentencing range is 30 to 37 months.

The judge in this situation, if he or she chooses, can sentence that defendant to 30 months with a recommendation for placement in the shock incarceration program. That program's experience has been, by far, the single most effective approach to low-level, first-time offenders, inner-city defendants, people who have had a lack of organization in their lives, a lack of direction in their lives, who are put in the six months' intensive program, intensive discipline for the

first time in their lives, or at least for the first time in many years, and are then put in a community treatment center for a more extended period of time than would otherwise be the case for reintegration into the community.

So all of these numbers, which can appear fairly abstract when we bounce them around--level 26, level 24--here, we see that Option B is directly keyed in in its proposal to go from level 26 to 24 to the safety valve legislation to the possibility for a recommendation to the shock program. These options all make sense, when looked at together and in light of their repercussions.

Amendment 34 is, perhaps, equally important. It establishes a base offense level of no higher than 28 for a defendant entitled to a mitigating role adjustment. I think it is important to make clear from the start that this is not a cap. One of the reasons why this proposal, I think, is a good idea is that it is not a cap.

A cap would be unduly mechanistic with a base offense level of 28 if, unfortunately, a

defendant's sentence were required to be enhanced for obstruction of justice or under the grouping rules or if, God forbid, he were a career offender. Those enhancements would work as they now do. But the starting point, the base offense level, would be limited to 28, which, in the case of a defendant whose role is minor or minimal, is certainly appropriate.

A large number of my cases, personally, are the people we call mules, the people arrested at the airport with various quantities of narcotics. Inherent in the role of a mule in a minimal or minor participant is not having any control whatsoever of the quantity one is importing. I have never represented a defendant who received a minor or minimal role adjustment who had any meaningful say in the quantity that he reported.

We usually think that quantity is associated with culpability. In a truly perverse sense, with mules and couriers, quantity can be inversely associated with culpability, in the sense

that the defendants I have represented who have transported the largest quantities have always been the most simple-minded, the most easily manipulated. The defendants with any sense at all carry small quantities that can be easily hidden.

It is the real simpletons who walk through Customs with huge quantities strapped around their waist, their clothing bulging, who march right up and are arrested. Their sentences can be 70 months, 90 months, and this does not, in any real sense, reflect culpability. If anything, it reflects even greater problems, even greater mitigating circumstances, and that is why limiting the base offense level for cases like that really does make a tremendous amount of sense.

We have made our positions clear on the proposed role adjustments, Amendments 35 and 36. I would refer you to the report for that.

I just would like to say that I read the submission from the Judicial Conference on role adjustments and we are not in favor of that proposal. First of all, a change of that

magnitude, without prior publication, I think, would be highly questionable.

Second, a guideline that, in effect, established an eight-point spread, subject to the judge's discretion, is, I think, certainly inconsistent with the spirit of guideline sentencing. I think it probably runs afoul of the 25 percent rule. This Commission is, of course, obligated by statute to promulgate guidelines under which the maximum doesn't exceed the minimum by more than 25 percent. I don't see how an eight-level spread can comply with that. If the courts determine that it does, it will only be after years of extensive litigation. So I understand the judges' frustration, but I don't think that is a sound proposal.

We support Amendment 37, to rationalize the sentencing of marijuana defendants. That is not a problem in the Eastern District of New York, generally, but it is a huge problem in some other districts.

Amendment 38, the crack cocaine ratio, I

first want to say that I was terribly pleased to read the report. It is an outstanding piece of work. I think since the initial promulgation of the guidelines, this report and the mandatory minimum sentencing report certainly reflects the Commission at its best. I like to think that it, perhaps, vindicates those of us in the defender community who have chosen to continue to engage in a dialogue with the Commission. The Commission is certainly very much on the right track.

You have heard a lot today, and I am sure you will hear more, on why many of us feel the ratio should be one-to-one. All I can say is, just like the defense lawyer who spoke previously, we have never represented a defendant in a crack case who wasn't black. The racial disparities here are enormous and, apparently, unconscionable.

What I would say is that, given those racial disparities, I would be very sure of the basis for departing from a one-to-one ratio before I did, and so far, I don't see any evidence to support a departure from a one-to-one ratio. There

may be some senses in which crack cases appear more serious than cocaine cases. The violence associated with crack is already taken into account explicitly in the guidelines by enhancements. When it is not taken explicitly into account through offense characteristics, judges know they can depart.

Although there are other, more nebulous ways in which crack cases appear more important, I would suggest that, as a whole, Federal crack offenders are often less serious offenders than Federal cocaine offenders. In our experience, cocaine offenders are mid-level, high-level distributors. The mandatory minimums to which the guidelines are, by necessity, keyed were structured with distributors in mind. So anyone being sentenced for a cocaine offense at all is being sentenced under a scheme, but to some extent, is addressing the problem of distribution and people higher up in the chain.

Crack cases, as the report sets out, by their nature involve low-level defendants. In my

experience and the experience of my office, crack cases are more likely than any other to involve defendants with unbelievable packages of pathologies. The defendants, often women, and as the report knows, women are disproportionately involved with these offenses, often people with corroborative histories of sexual abuse as a child, physical abuse as a teenager and young adult, long histories of drug addiction that have never been addressed with anything more than a week or two of detox, which is entirely inadequate to crack or heroin addiction.

We have often been in the situation with these defendants where their exposure in Federal court, believe it or not, presents the first opportunity through the services of our pretrial services office, through the services of our probation department, and through a Federal defender, an Assistant U.S. Attorney, and a Federal judge with case loads low enough to focus on the needs of a particular defendant, this is often the first time that anyone has looked into the social

history of the defendant, has gone out and put together the possibility of programming, of long-term extended treatment.

Crack cases, above all others, are the kind of cases in which these problems arise. These are the kind of cases in which, to the extent alternatives are available, alternatives are the most important. And as the ratio moves away from one-to-one, the extent of departure necessary to do anything meaningful makes the option almost unavailable, especially outside the Eastern District of New York, where everyone knows we have developed departure jurisprudence to unusual heights. [Laughter.]

MR. CLOTT: But I want to emphasize, as a defense lawyer, when we are facing guideline ranges of 70 to 87 months, it is not realistic, in most districts, to talk about residential treatment or what happened to someone when they were a child. It doesn't matter, because if a judge is looking at a guideline range of 70 to 87 months, for example, all the judge can say is, counselor, you are asking

me to disagree with the guidelines. There is no way to justify a departure of the degree you are asking for without saying that I think these guidelines are too high for this offense, and you know, counselor, that I can't do that.

There is no answer to that question, because, of course, the judge is right. So I would encourage the Commission to keep this aspect in mind when considering the ratio and, hopefully, not going above one-to-one.

The final amendment I would like to speak about in depth is 39, the snapshot approach. This is another amendment we strongly supported over the years. I think the most difficult question that arises, why should drug cases be treated differently from all others in the aggregate quantity? If a defendant commits a fraud involving a certain number of dollars, we don't cut off the level based on some time-period analysis. If he doesn't pay his taxes, we don't cut it off. Why should we treat drugs differently?

The answer is that narcotics cases are

prosecuted differently from fraud cases or tax cases, the other kinds of cases in which we use quantity tables. It is very, very frequent in a narcotics investigation. I don't know if I have had a narcotics case, other than an airport arrest, where the investigation has not been ongoing and where law enforcement agents, for perfectly legitimate law enforcement reasons, allow an operation to continue to develop a case, to build a case.

I have never heard of a fraud case or a tax case where agents simply sit back and watch the fraud continue or the tax evasion continue, perhaps send in an undercover. When the fraud comes to light, people are arrested. People are indicted. The same with tax.

We have supported the 30-day snapshot. That is the same period of time, I understand, which is used by the DEA to evaluate the seriousness of narcotics operations. We think that adopting the snapshot approach would dramatically reduce a very great area of disparity in sentencing

narcotics defendants, disparity that arises from nothing more than the particular nature of a particular investigation or, perhaps, from different investigative practices in different districts.

It would also address one of the most frequent problems in drug sentencing, which is extrapolation, what we call emphatico hearings in the Second Circuit, where estimates are made about the quantity of narcotics involved in a defense. In ongoing cases, we have someone saying, well, I think they were really there for 12 months. When we went three times, one day there was 200 grams, one day there was 400 grams, one day there was 300, so let us see, 300 grams a day, and we will multiply it by 12 months, but we are not really sure, so maybe we will divide it in half.

This is another world. By the end of the hearing, there is no correlation with reality. Nobody involved with the process thinks there is any correlation with reality. There is something wrong with a system that encourages this kind of

process, this kind of result. The snapshot, I think, is the best answer to that.

Amendment 40 on purity, we strongly support. It would, again, erase a very great source of disparity. A defendant who sells five-percent-pure heroin is obviously very different from one who is distributing 98-percent-pure heroin. He is far lower on the chain. There is no reason for these defendants to be treated the same.

Very briefly, away from the narcotics issues, we have set forth in our submission a matter I remember I discussed with Commissioners frequently during my tenure here that increases in statutory maximums do not necessarily require increases in base offense levels, that it is often the case that an increase in the statutory maximum is a recognition that there are serious instances of the offense that are not sufficiently punished. This leaves room for upward departures, perhaps for specific offense characteristics in particular crimes, but, I think, as a general matter, does not require an increase in the base offense level.

Finally, Amendment 46, 5G1.3 --

COMMISSIONER MAZZONE: We've heard about that one.

MR. CLOTT: Some may remember that this guideline was my special favorite. I know it is complicated. [Laughter.]

COMMISSIONER CARNES: We are trying to remember who was responsible. It was you?

MR. CLOTT: I admit it. Yes, it is complicated on its face. What is important to keep in mind is that, first of all, Subsection C does not apply at all if the information necessary to its application is unavailable. If the probation department, if the lawyers are unable to provide the court with enough information about the past sentences to apply Subsection C, the court doesn't apply the rule. So a lot of the criticism based on the difficulty of application is simply a red herring, because if it is too difficult to apply, it doesn't apply and it needn't apply.

The text is somewhat lengthy. Option 1 suggests some sensible clarifications. Our

experience has been that once a given probation officer or a given judge has worked through the issues once, in one sentencing, they have no problem with it again.

COMMISSIONER MAZZONE: On your way out, you stop and see Tommy Whiteside. [Laughter.]

MR. CLOTT: My experience with it has been that although--and it is a matter on which I am often brought in because people know that I am familiar with the guidelines. People, even in the defense bar, are afraid to get into it. I have found nearly universally that judges, prosecutors, let alone defense lawyers, have been very satisfied with the results once we have worked through it. It yields a result which has been almost universally recognized as fair in an area which is very difficult and very prone to unfairness if we simply have no rule at all.

COMMISSIONER MAZZONE: Thank you very, very much.

Are there any questions from my right?

COMMISSIONER GOLDSMITH: I have a quick

question, Judge. You mentioned your opposition to the proposed modification to the aggravating and mitigating role provision. That surprised me somewhat as I saw that provision potentially giving judges substantially more discretion to pose lower penalties. Could you elaborate more on the basis for your opposition?

MR. CLOTT: Sure. I think that discretion is already there. I do like--I am sure defenders like--much of the language in the proposal describing what is mitigating and what is aggravating. I think it is very well drafted. I think the Commission appreciates that when the defenders come here, we are wearing a somewhat different hat than when we are in court. We are not here simply to advocate what is better for criminal defendants, period, what we think might result in the lowest sentences. It is often difficult to make that kind of prediction.

When we look at a proposal like this that says, the judge is supposed to choose an offense level anywhere within an eight-point spread, we

can't honestly say that we think that that's consistent with a system of guideline sentencing. We can't honestly say that we are confident that that is going to give rise to a lot of litigation about the legitimacy of the guidelines and really legitimacy of the fact-finding.

The virtue of the guidelines, to the extent there are virtues, is that they focus the judge's attention on the important issues. They say, if you find X, we assume that Y is the appropriate result in most cases. I mean, if you think that something different from Y is the appropriate result, you have to explain how and why in reference to objective criteria.

I think a system that just allows for an eight-point spread in relation to 12 factors doesn't allow for that kind of focus.

COMMISSIONER GOLDSMITH: I understand your answer. However, my understanding, frankly, was that most defense attorneys were opposed to the guideline system, in many respects, and it seems to me that by providing for additional discretion, you

are returning an element to the process that defense counsel ordinarily favor.

MR. CLOTT: I don't think it would be useful to come here and testify that we think there shouldn't be guidelines.

COMMISSIONER GOLDSMITH: But that would be the first choice?

MR. CLOTT: I honestly don't know. I think --

COMMISSIONER GOLDSMITH: You are saying, in other words, assuming that we have the guideline system in place, you are opposed to that particular amendment, because it is contrary to the purposes of the guideline system?

MR. CLOTT: Right. I think it is too inconsistent with the rest of it.

COMMISSIONER GOLDSMITH: Thank you.

COMMISSIONER GELACAK: I would take issue with one thing you started out by saying, which was that you thought it was difficult, at times, or perhaps at all times, to discuss lowering penalties in a policy-making situation. I don't find that

difficult at all. I talk about those kinds of issues all the time. They have never caused me any physical pain. But what is difficult is getting anything done.

The reason I comment on it is because it allows me to vent some of my frustration. I only do it because I would like you and others, and I know you do recognize this, but others in the room to recognize that talking about these issues is one thing and accomplishing anything on them is something else again. We all have to recognize political reality and the realities of the day as we go forward in this process. Sometimes, that's a little bit more difficult a task.

COMMISSIONER MAZZONE: Anything else?

[No response.]

COMMISSIONER MAZZONE: Thank you very much.

Mr. McCloskey? Let me acknowledge that the Chairman of the Commission, Chairman Conaboy, has joined us, back from the Judicial Conference meeting, and will preside over the meeting.

How are you today?

MR. McCLOSKEY: Good. Good morning. I appreciate the opportunity to appear before you today to discuss the amendments to the sentencing guidelines. I will focus on three major issues of concern to the Department of Justice at today's hearing: One, the proposed controlled substance and role in the offense guidelines; two, the proposed money laundering guidelines; and three, the manner in which the Commission should implement Congressional directives.

Before addressing these three areas, I would like to point out an overriding concern of the Department, one which we share with others involved in the Federal criminal justice system. Prosecutors across the country have voiced concern that the complexity of the guidelines, the number of issues requiring factual hearings, the proliferation of guideline amendments, and appellate litigation over guideline issues have made their work particularly difficult.

In this cycle, we ask the Commission to

strike a balance between the need to provide clear guidance to the users of the guidelines and the need to avoid unnecessary amendments and further complexity. The Department looks forward to working with the Commission and others in future attempts to ensure that guidelines do not become overly burdensome and complex in their application.

I might note that I heard the other day an interesting comment which hadn't occurred to me but which is one that causes great concern, as a Federal prosecutor and somebody who has been an Assistant United States Attorney, prosecuting many cases for about 14 years before I became U.S. Attorney, and that is a comparison of the guideline amendments as they now stand to the I.R.S. code. I don't think it is quite that bad yet, but certainly, as a line prosecutor, I hope it never gets that way. That clearly is a concern, I think, that the Commission is going to address, it appears, in the next year, and the Department looks forward to working with the Commission and others in this process.

Amendments 33 through 43 propose a number of amendments to the guidelines concerning controlled substances and role in the offense, which would result in a major--a major--restructuring of the guidelines. We strongly oppose adoption of any of these amendments.

The guidelines system cannot readily absorb the breadth of change that the drug and role amendments would produce, particularly in a year when numerous other guideline amendments are required by new statutes. Again, I think this reflects back on a concern of prosecutors throughout the country about the complexity of the guidelines and them changing every day.

The wholesale revision of the drug and role guidelines will affect a large number of Federal offenders. The new guidelines would also produce litigation regarding many substantive issues at a time when numerous issues under the current guidelines have been resolved.

Again, one of the concerns of the Department, and certainly of line prosecutors, is

that issues are resolved by litigation, either in a particular circuit generally, and the next thing we get is a change that might, in a vacuum, be better, but, nonetheless, results in a tremendous amount of new litigation. It is causing a tremendous problem in prosecutors' offices across the country.

We also object to the present effort to revise the drug and role guidelines because the Commission has not had time to adequately assess the effect of significant recent changes in both the guidelines and relevant statutes which were enacted to moderate the effect of drug quantity on sentencing.

For example, in 1992, the Commission revised the relevant conduct guideline to provide that a defendant's relevant conduct, based on jointly undertaken activity, is not necessarily as broad as the scope of the entire conspiracy. The amendment was intended to have a limiting effect on relevant conduct.

Similarly, in the last amendment cycle, the Commission reduced to level 38 the maximum base

offense level tied to drug quantity so as to moderate the impact of quantity on drug sentencing.

Finally, the safety valve exemption from the mandatory minimum sentences enacted as part of the Crime Control Act of 1994 and embodied in the guidelines can be expected to have an effect on both guideline and mandatory minimum sentences. The Commission should study the effect of the current safety valve guideline before seeking further amendments to the guidelines.

Additionally, if the Commission is concerned that use of quantity inappropriately ensnares low-level drug offenders, the Commission should consider expanded use of the safety valve to minimize the effect of quantity for those select defendants rather than just seeking to amend the guidelines for all drug defendants.

It is the position of the Department, and, I believe, the line prosecutors throughout the country, as someone who has spent a lot of time on the Attorney General's Advisory Committee talking to other U.S. Attorneys and to line prosecutors,

that the Commission analyze the need for Amendments 33 to 43 in light of the recent changes before it further disrupts the guidelines in this area.

The purpose of the proposed drug amendments is to reduce further the impact of drug quantity on the sentence as a measure of the seriousness of drug trafficking crime, in the case of Amendment 43, Option 1, to eliminate the effect of quantity completely. As I indicated, many steps have already been taken to reduce the effect of quantity on the ultimate sentence in appropriate cases, and we should see how that works.

We continue to believe, I might add, that in most cases, the quantity of a controlled substance involved in trafficking offense is an important measure of the dangers provided by that offense. Assuming no other aggravating factor in a particular case, the distribution of a larger quantity of a controlled substance results in greater potential for greater harm than the distribution of a smaller quantity of the same substance. Reliance on such aggravating factors as

firearms use and injury undervalues the dangers presented by the unlawful sale of large quantities of drugs in the absence of these other factors.

Finally, minimizing the use of quantity as a proxy for dangerousness and harms caused to society will likely result in a much more complex and time-consuming sentencing process. Relying on specific offense and offender characteristics to try to fill the void left by eliminating quantity will complicate sentencings at every stage in the process.

Again, I think, as someone who has been litigating cases in Federal court for 15 years, prosecutors have seen sentencing hearings getting longer and longer and more complicated every day. Eliminating the factor of quantity and going to more specific offender characteristics to determine a sentence will very likely increase this problem.

COMMISSIONER GELACAK: Mr. McCloskey, I want to apologize to you, but I have to stop you for one minute.

MR. McCLOSKEY: Sure.

COMMISSIONER GELACAK: I think I just heard you say that it made more sense to prosecute larger quantities than smaller quantities. That may not be your exact words.

MR. McCLOSKEY: I think what I said was that the harm is greater from a larger quantity than a smaller quantity.

COMMISSIONER GELACAK: And, consequently, it would make more sense to prosecute those cases, right, that involved larger quantities?

MR. McCLOSKEY: Obviously, we want to prosecute cases involving large quantities, and if you have a choice between prosecuting a kilo of cocaine versus a gram of cocaine, certainly, in the Federal system, you would choose the larger quantity.

COMMISSIONER GELACAK: And I don't disagree with that. Then why on earth, other than a statute that tells us we should, are we prosecuting five grams of crack cocaine?

MR. McCLOSKEY: That is an interesting question, because I have been intimately involved

in looking at that issue. I am the U.S. Attorney in Maine and had been a prosecutor and an Assistant U.S. Attorney for 14 years in Maine, and in the last couple of years, we have seen a tremendous explosion of crack and heroin cases in rural Maine, something that we never expected to see.

The quantities are relatively low at any particular time, but yet, we are seeing an explosion of crack cases that, I think, is going to present a tremendous danger to rural America that has never been seen before and we are going to be facing some of the same problems that the cities have seen over the last ten years.

If we don't stop that problem in Maine, in my judgment, and in Maine, the Federal system is the only one that is capable and has the resources to make any dent in that problem, we are going to be inundated with the same sort of societal problems that you see in New York City or Chicago or California. I think that prosecuting small crack cases, at least in rural America, makes some sense.

COMMISSIONER GELACAK: Let me take that one piece at a time. We don't prosecute them in New York City, to a great extent. Most of those small crack cases are handled at the State level or the local level.

MR. McCLOSKEY: Obviously, the reason being that there are so many of them that it has inundated the system, and the Federal system, obviously, doesn't have the resources to prosecute that number of cases. So, therefore, we have deferred those cases to the State system. It is not because, I don't think, the Federal system doesn't think that the small crack case is important or that it ought not to be prosecuted. It is simply the quantities and numbers of people don't allow for Federal prosecution.

Certainly, in rural America, it hasn't reached that epidemic proportion, and what is going to happen in places like Maine, New Hampshire, and Vermont, and I have talked to those U.S. Attorneys on a number of occasions, we are going to be in the same situation that New York is, where we are going

to be inundated if, in fact, there isn't some effort to deter crack coming into rural America. I am concerned about it, and I think, at least now, the Federal Government and the Federal prosecutorial system in Maine can make a real impact on the crack cases.

COMMISSIONER GELACAK: I am concerned about it, too, and I don't mean to get into a debate on prosecutorial policies here, but it just strikes me as kind of a convoluted way of solving a problem. I always thought that the Federal system and the Federal courts were intended to deal with national "big picture" items, but it seems to me that we get more and more involved in dealing with street-level narcotics, in dealing with local problems, and in focusing on issues that were intended and that most people, I think, still believe ought to be handled at the local level. They are local problems.

We are creating a system, and I know you didn't do it and I know you are doing your job when you prosecute these people because you enforce the

laws, and God bless you for doing that, but it seems to me that the focus of the Federal effort in the narcotics area has gotten out of focus. It ought to be on the big picture. We ought to be trying to prevent exactly what you are talking about from occurring, and that focus ought to be preventing the cocaine from getting there in the first instance, not dealing with the street-level dealers.

MR. McCLOSKEY: I would disagree with you, to some extent. Clearly, to the extent that the Federal Government can bring resources to bear to prevent cocaine or other illegal substances coming into the country, we ought to do that, and we have done that over the years, and --

COMMISSIONER GELACAK: And that ought to be our focus.

MR. McCLOSKEY: And clearly, in certain cases, that ought to be the focus. But take Maine, for example. The major problem in Maine, the major problem threatening Main in terms of the drug area today is crack and heroin, cocaine coming in mostly

from Massachusetts. That is the problem that is going to cause the greatest trouble--it is true--the greatest trouble for Maine, New Hampshire, and Vermont. Crack dealers have specifically targeted Maine, New Hampshire, and Vermont for crack distribution.

If we leave those small cases, relatively small amounts of cases, to the State system in New England, they are not going to be able to handle it. They do not have the resources to prosecute them, to follow them outside the State. They don't have the penalties to get defendants to cooperate. If you prosecute a criminal case in State court in Maine, you are not going to get to trial for a year. The defendants just wait you out.

The Federal Government is able to prosecute that smaller crack case, follow its route to Massachusetts, frequently, prosecute higher-level dealers, and, hopefully, cause some detriment to crack distributors in Maine.

For example, we were successful in driving out of Lewiston, Maine, a whole cartel, almost, of

individuals distributing crack cocaine out of the State of Maine, Dominican nationals, never to come back--never to come back--to have a tremendous impact in that particular area. We are at a point where, in the rural areas of the country, we can have an impact so it is not simply prosecute one person one day and the next day you have another person filling that void. Once we take out an organization, it stays out for a long period of time.

So I don't think that we should just simply give up on prosecuting small cases and say, that is a State function. I don't think we ought to do that.

COMMISSIONER TACHA: Mr. McCloskey, could I ask you, to what extent in your investigation and enforcement of, as you said, small crack defendants, does it lead you to the powder baker, if you will, or the person who distributed and made it from the powder into the crack?

MR. McCLOSKEY: Very seldom does that occur. In the Maine --

COMMISSIONER TACHA: When you go to Massachusetts and get the source in Massachusetts, it is still a crack source?

MR. McCLOSKEY: It is still crack, although a much larger dealer. Oftentimes, that same dealer is dealing fairly significant amounts of heroin. We may follow it from there, but it relatively infrequently, I would say, is followed back to the point where you are getting the person who brought the cocaine into the country that was --

COMMISSIONER TACHA: Why is that?

MR. McCLOSKEY: Usually, what you do, the investigation with regard to that cocaine dealer would come from another angle. So you would be investigating and targeting that cocaine importer in another investigation.

COMMISSIONER TACHA: But, presumably, one of the purposes of prosecuting the crack defendant is to try to, as, I think, your own description describes, move up the line, to use the vernacular. Why wouldn't the sort of logical extension of that

be to try to get all the way to the powder defendant?

MR. McCLOSKEY: You certainly would, and, to some extent, in some cases, we can do that. But I would say, at least from my limited experience, that, normally speaking, we don't get quite that far up the chain in terms of getting the individual who brought the powder cocaine in that was converted to crack. You might do that, but I would say you are just as likely to get to that organization, targeting it from a different angle.

COMMISSIONER TACHA: So you are saying that the market here, the distribution market, is pretty much an interstate crack distribution market to the point of very few locuses of the powder distribution?

MR. McCLOSKEY: I would say, at least from my experience, that is correct. I don't know about in other areas of the country, but certainly in New England, that is true.

COMMISSIONER TACHA: So there is a Federal interest in the crack prosecution?

MR. McCLOSKEY: No question. I think that--certainly, again, I speak from a relatively limited point of view, I suppose --

COMMISSIONER TACHA: That's all right, I'm from Kansas.

MR. McCLOSKEY: Actually, I have spoken to the U.S. Attorney, Randy Rathburn, in Kansas, who has the exact same attitude and position that I do, that we are at a point where we are going to be inundated with crack and the problems that come from crack that you see in the larger cities are going to be affecting rural America unless we do something about it. Simply lowering the penalties for crack cocaine isn't the answer, really. It is a function of the Federal Government to try to bring whatever resources it can to bear to stop this problem from spreading.

I think, at least in New England, we are having some success. We have literally driven crack organizations out of Maine. That doesn't mean that others aren't coming in, but we have really been successful --

COMMISSIONER TACHA: They have gone back to Massachusetts.

MR. McCLOSKEY: Exactly, and we are working on getting them out of Massachusetts, now, with Don Stearns's help.

MR. RICHARDSON: May I ask a question?

COMMISSIONER MAZZONE: Mr. Richardson, please bear with me. Remember, again, it is my uncomfortable duty to remind you that we set this up in order to learn from you, and we asked you to come here and you were good enough to come here and provide us with information in order to learn here. I know that you will have some objections to what has been said. I have been watching the reactions of Dr. Curry and Ms. Meade and you, and I have been hearing things, too. This is not a debate, however. You have to understand, it can't be a debate between the parties. This is for our benefit, sir.

At the end of the afternoon, we usually ask if there is anybody who has something further to say, but we would kind of like to keep our

schedule, if you don't mind, sir.

Mr. McCloskey, would you wrap it up? We are pretty far behind.

MR. McCLOSKEY: Let me just finally say that, again, the Commission has the Department's position on crack versus powder cocaine. Clearly, in connection with the Commission's recent special report to Congress, "Cocaine and Federal Sentencing Policy", the Department has expressed its views on crack and powder cocaine and we reiterate those views.

We believe that crack cocaine traffickers should be sentenced more heavily than cocaine powder traffickers, and although we recognize, as a policy matter, that an adjustment in the current penalty structure may be appropriate, any such adjustment must reflect the greater dangers associated with crack as opposed to cocaine powder.

I might just add, on that one point, do not underestimate the ability of those high crack sentences to have a deterrent effect. Ultimately, the message will get out that dealing with crack is

extremely dangerous. If the issue is the defendants or potential defendants don't know that crack carries such a penalty, then let's conduct an information campaign to tell them. The answer is not to lower the crack penalty but to conduct an informational campaign to bring that awareness to everybody who might deal with drugs.

Finally, let me speak about the money laundering guideline, because I think it is also one that is very important. The Commission has proposed a sweeping amendment of the money laundering guidelines. The amendments would substantially lower the penalties for many serious money laundering offenses, even though Congress determined money laundering to be a significant offense and established ten- or 20-year penalties.

The Department opposes the amendment as proposed. To the extent that revision of the money laundering guidelines is prompted by a perceived disparity between these guidelines and the fraud guidelines, we suggest the Commission renew the fraud guidelines, which we believe to be generally

inadequate, and I might tell you that that is the unanimous opinion of every prosecutor across the country, I believe, that the fraud guidelines are too low.

Before weakening the money guidelines, some effort should be given to raising the fraud guidelines. We urge the Commission to consider this entire area of the law comprehensively. However, if the Commission is intent upon proceeding with a revision of the money laundering guidelines in isolation, we strongly suggest certain revisions to the proposed amendment, and we have provided those suggestions to the Commission.

Thank you very much.

COMMISSIONER MAZZONE: Thank you, Mr. McCloskey.

Are there any questions on my right?

COMMISSIONER GOLDSMITH: Mr. McCloskey, a brief question. Does the Department have a position with respect to an appropriate ratio in the case of crack and powder cocaine?

MR. McCLOSKEY: The Department does not

have a precise position on that. Again, I think we have indicated that the ratio, whatever it might be, should reflect the much greater danger of crack cocaine, but the Department has not taken a position on what that exact proportion ought to be.

COMMISSIONER GOLDSMITH: Do you have a position on that?

MR. McCLOSKEY: No, quite frankly, I don't. I will tell you what my position is, is that I, as a prosecutor, a line prosecutor, would look at the bottom line, and the bottom line is what is the penalty going to be and what is that sentence going to be in crack versus powder cocaine. I will tell you, I strongly favor a ratio which would result in crack being punished much more severely than powder cocaine --

MR. DANIEL: That is racist.

MR. McCLOSKEY: --whether that is 20-to-one, or even larger. From my particular position, I think it ought to be punished much more severely.

I might add, in terms of the racial issue, that I went back and looked at the number of cases

that we, in Maine, are prosecuting in crack cocaine over the last two years and it literally jumped off the map. I mean, these are Federal prosecutions. We have defendants running four or five pages long, which is a lot of cases for a small State and a small office. I don't think one of them is black.

So I think that issue of black versus white may be true in the cities now, but as crack cocaine comes into Maine, comes into Vermont, comes into New Hampshire, I don't think you are going to see the racial distinction that you may have seen in other areas. So I would dispute that crack, in fact, carries that effect, at least in some areas.

COMMISSIONER GELACAK: I only want to follow that up for one reason. You cited a Dominican crack ring.

MR. McCLOSKEY: They clearly are the suppliers of our problem in Maine, but the users and the people who are distributing for them on the streets are your basic Mainers. [Laughter.]

MR. McCLOSKEY: In Massachusetts, we call them "Mainiacs". [Laughter.]

COMMISSIONER MAZZONE: Thank you, Mr. McCloskey.

Our next speakers are Angela Jordan Davis and Nkechi Taifa. The order in which I have you has Ms. Davis from the National Rainbow Coalition first.

MS. DAVIS: Thank you. Good afternoon. On behalf of the National Rainbow Coalition, I appreciate this opportunity to address the United States Sentencing Commission on its report on "Cocaine and Federal Sentencing Policy" issued on February 28, 1995. I will be limiting my comments to that report today.

I would like to just start out by saying, I don't know what the demographics of Maine are, but I would dare say, probably the reason why there are not many African Americans arrested for and convicted for crack possession or distribution in Maine is probably because there are very few African Americans in Maine.

The National Rainbow Coalition is a multi-racial, multi-issue national membership

organization founded by Reverend Jesse L. Jackson. Its mission is to move the nation and the world towards social, economic, and racial justice through methods which include research, education, litigation, legislation, and independent political action.

The criminal justice system in this country is a case study of racial injustice and discrimination. From arrest through sentencing, the criminal process is rife with evidence of the inappropriate consideration of race. One need only examine the targeting of law enforcement and arrests in inner cities and prosecutorial decisions about who receives special sentencing considerations for cooperating with law enforcement agents to see clear evidence of the disparate treatment of people of color.

This evidence does not only exist at the law enforcement stage. The under-representation of people of color in legal and other decision-making positions in most prosecutor and defender offices, as well as the judiciary, results in the

inappropriate, although often unconscious, consideration of race at various stages of the criminal process. Of course, we are all now fully aware of the disproportionate number of African American and Latino men in prison, on probation, or on parole in this country.

But perhaps the most glaring and outrageous example of racial discrimination and injustice in the criminal justice system and, indeed, in the nation is the disparity in penalties for crack and powder cocaine in Federal sentencing policy. Although the Commission's report recognizes and fully documents this disparity, it sadly falls short of making the recommendations necessary to remedy this injustice.

The Commission recognizes that the 100-to-one differential between crack and powder cocaine is irrational and should be amended, but it does not recommend a one-to-one ratio, nor does it recommend the repeal of the mandatory minimum statutes which created this disparity. We strongly urge this Commission to make these recommendations

so that this stark example of racial discrimination and injustice in the Federal criminal justice system can be remedied.

In 1986, Congress passed a law enacting mandatory minimum penalties for Federal cocaine offenses. In establishing these penalties, the law distinguished between powder and crack cocaine. first-time offenders who sold 500 grams of powder cocaine were subjected to a mandatory minimum sentence of five years in prison, but first-time offenders who sold only five grams of crack cocaine were subjected to the very same penalty.

In 1988, this disparity was extended to the possession of crack cocaine. A five-year mandatory minimum sentence was established for the mere possession of crack cocaine. The penalty for possession of every other drug, including powder cocaine, is a maximum of one year in prison.

This disparate treatment of crack cocaine in the Federal sentencing scheme has resulted in one of the most striking examples of racial discrimination in our country today. This

Commission found that although almost two-thirds of crack cocaine users are white, almost 90 percent of crack defendants are African Americans, while only four percent are white. On the other hand, about 45 percent of powder cocaine defendants are white, 30 percent are African American, and 23 percent are Hispanic. Consequently, African Americans and Latinos convicted on cocaine charges receive much longer prison sentences than whites because of the form of cocaine used.

This Commission recognized that there is no rational justification for the 100-to-one ratio, but suggested there may be justification for some differential between the two forms of cocaine. The Commission based this finding on its conclusion that crack has a greater potential to create dependency, is more readily available to young and poor people, and is more associated with systemic violence.

Despite the Commission's findings regarding the potential of crack cocaine for dependency, the report found that cocaine produces

the same physiological and psychotropic effects in any form. The report noted that both powder and crack cocaine produce aberrant behavior and psychoses and have the risk of addiction.

With regard of the appeal of crack cocaine to young and poor people, there is no rational basis for establishing a greater penalty for these reasons, if they are, in fact, true.

Finally, there is no discernible difference in the level of violence associated with crack and powder cocaine. Indeed, Dr. Paul Goldstein, Associate Professor of Epidemiology at the University of Illinois, an expert who has previously testified before the Commission, has found no difference in the level of violence between the powder cocaine and crack cocaine markets.

Given these facts, there is no rational basis for any distinction in the penalties for possession or distribution of crack and powder cocaine.

Whether or not one accepts the

Commission's broad conclusion that crack cocaine causes greater harm to society than powder cocaine, there is one indisputable fact which compels the elimination of any disparity in sentencing for crack and powder cocaine offenses. The fact that powder cocaine can be quickly and easily converted to crack cocaine negates any rationale for distinguishing between these two forms of the very same drug.

The easy convertibility of powder to crack cocaine, no doubt, has resulted in scenarios in which purchasers of powder cocaine, which is more readily available to white, more affluent users, may be arrested before they have the opportunity to convert the powder to crack. Whether a cocaine user is sentenced to probation or five mandatory years in prison should not depend upon the fortuity of the timing of an arrest.

In addition, this easy convertibility of powder to crack cocaine has resulted in extremely egregious conduct by some police officers. Here in the District of Columbia, undercover police

officers admitted to selling powder cocaine to young African American men and encouraging them to convert the powder to crack cocaine before arresting them. It is behavior like this which has led some to believe that this disparate treatment of African Americans and Latinos is racist in its intent as well as its effect.

Finally, policy decisions about where arrests are made and who is arrested have added to the discriminatory impact of the 100-to-one differential. The presence of law enforcement, drug sweeps, and undercover operations in inner-city areas inhabited by African Americans and Latinos and their virtual nonexistence in suburban areas where cocaine is, no doubt, just as available has resulted in the over-representation of people of color in prisons and jails across the country.

Despite all the evidence of the discriminatory effect of the Federal cocaine laws, the Commission declined to recommend that Congress repeal the mandatory minimum penalties which have caused this disparity in sentencing. The

Commission also declined to recommend that the penalties for crack cocaine distribution and possession be amended to be the same as the penalties for powder cocaine distribution and possession.

Instead, the Commission chose to recommend that the 100-to-one quantity ratio be "reexamined and revised", and indicated its intent to develop a model for Congress to consider in determining whether to revise the current sentencing scheme. Further, it expressed its intent to identify the harms it perceives as substantially associated with crack offenses and to determine the extent to which these harms can be addressed in the guideline system.

The Commission's report was a thorough and convincing treatise on the discriminatory effects of Federal cocaine laws. Unfortunately, its recommendations to remedy the wrongs it found did not come close to meeting the force of its findings.

Those of us who have studied this issue

and lobbied for years for the elimination of this blatant example of racial discrimination expected the Commission to recommend that the mandatory minimum sentences for possession and distribution of crack cocaine be eliminated. We are disappointed, but we are hopeful that the Commission will act quickly and do what is necessary to correct this blight on the Federal criminal justice system, not only for those who are arrested and charge in the future, but for those who are currently incarcerated under this discriminatory law.

The Sentencing Commission cannot control the unfair an inequitable concentration of arrests in inner cities. It cannot control the prosecutorial decisions which often result in lighter sentences for white defendants. It cannot correct the social and economic problems in our society which lead to drug addiction and violence. But it can do something about the discriminatory crack cocaine laws, and that small step could do so much to correct the racial discrimination that

exists in our criminal justice system. We strongly urge this Commission to take that step. Thank you.

COMMISSIONER MAZZONE: Thank you very much, Ms. Davis.

Ms. Taifa?

MS. TAIFA: Good afternoon, Commissioner Conaboy, other members of the Commission, and interested persons in this room. On behalf of the American Civil Liberties Union and the Committee Against the Discriminatory Crack Law, I welcome this opportunity to comment as to whether the United States sentencing guidelines should be amended with respect to the 100-to-one quantity ratio between crack and powder cocaine.

We feel that the 100-to-one disparity in sentencing is irrational and unwarranted and strongly urge this Commission to amend its guidelines to institute a one-to-one correspondence at the current level set for powder cocaine and to recommend that Congress repeal retroactively the mandatory minimum penalties for crack cocaine possession and distribution, allowing those

convicted to be sentenced pursuant to the newly-amended guidelines instead.

The ACLU is a founding member of the Committee Against the Discriminatory Crack Law, which is a non-partisan coalition of over 20 criminal justice, civil and human rights, and religious organizations who are joined together to educate the public and Congress about the unwarranted disparity in cocaine law sentencing.

The organizations represented in the Committee include the NAACP, the Southern Christian Leadership Conference, the National Conference of Black Lawyers, the Criminal Justice Policy Foundation, the Drug Policy Foundation, Americans for Democratic Action, the General Board of Church and Society of the United Methodist Church, the National Association of Criminal Defense Lawyers, the National Black Caucus of State Legislators, the National Black Police Association, the National Rainbow Coalition, the National Urban League, the Sentencing Project, Families Against Mandatory Minimums, Families Against the Discriminatory Crack

Law, National Legal Aid and Defenders Association, National Committee Against Repressive Legislation, Seekers of Justice, Equality, and Truth, and the National Islamic Political Foundation.

I wanted to state that to let you know that I am not standing here testifying alone. I am testifying on behalf of all of those organizations, some of which have already been before you.

On February 28, this Commission released a very thorough and meticulously-prepared report on the disparity in sentencing of crack cocaine defendants and powder cocaine defendants. The report stated that Federal sentencing data leads to the inescapable conclusion that blacks comprise the largest percentage of those affected by the penalties associated with crack cocaine. The report disclosed that in 1983, 88 percent of those convicted of Federal crack cocaine distribution offenses were African Americans, while only 4.1 percent of the defendants were Caucasian, despite a finding that a majority of the nation's reported crack users are white.

We agree with this Commission's statement in its report that Congress should not rely solely on a statutory distinction between the two forms of the same drug and, instead, that the guidelines system should be revised to further the purposes of sentencing. We feel that the guidelines should be revised to reflect a one-to-one correspondence between crack and powder cocaine possession and distribution, with the penalties set at the current level for powder cocaine.

However, we feel that already existing guideline enhancements sufficiently account for any additional harm that may be associated with crack or with powder or any other drug by that means. Thus, it is unnecessary to promulgate additional guideline enhancements for crack cocaine penalties.

For example, it is our understanding that the Federal sentencing guidelines already take into account involvement of firearms or other dangerous weapons, serious bodily injury or death, use or employment of juveniles, leadership role in the offense, prior criminal history, among other

aggravating factors. Therefore, we are particularly troubled by the addition of systemic crime, crime relating to the drug's marketing, distribution, and control, and social harm, harms associated with increased addictiveness, parental neglect, child and domestic abuse, high-risk sexual behavior, as factors to be considered for guideline enhancement.

Three persons testified before this Commission on the issue of violence and gangs at its November 1993 hearing. None of the three supported the proposition of increased penalties for crack cocaine defendants based on the assertion that there is more violence associated with the use of crack than with the use of powder cocaine.

This Commission also reported that it would seek to factor any "social harm" as an enhancement to the sentencing guidelines relevant to cocaine offenses. This approach is also problematic and should be abandoned. We submit that the factors mentioned in the report show that there is no rational basis for stiffer penalties

for crack because of increased addictiveness or dangerousness.

As stated in the report, cocaine in any form produces the same physiological and psychotropic effects, and although the onset, intensity, and duration of effects differ according to how the drug is administered the report reveals significant dangers from the consumption of both crack and powder cocaine. The report stressed that both powder and crack cocaine have risk of addiction. Both show aberrant behavior and psychoses. The duration of effect is the same for inhalation, smoking crack, as it is for injecting powder cocaine. Indeed, some medical experts believe the intravenously injected cocaine, not smoking it, is the leading cocaine-related threat to both the user and society.

Moreover, the report states correctly that there is no reliable information regarding crack versus powder addicted babies. There are virtually no studies addressing concerns related specifically to crack cocaine use and maternal neglect, teenage

pregnancy, boarder babies, and the like.

But perhaps the most paradoxical situation, which defies the logic of any disparity and penalty, is the undisputed fact that all one needs to transform powder cocaine into crack is a frying pan and some baking soda.

We believe that the 100-to-one disparity in sentencing between powder and crack cocaine is irrational and unwarranted and that, by and large, the legislatures and the courts have drawn the distinction where science and medicine have concluded none exist.

In its report, this Commission contemplated that its guideline refinement process could be accomplished within the current and next amendment cycles, resulting in the submission to Congress by May 1, 1996, of a comprehensive revision of cocaine offense guidelines. It is our understanding that this date will be attempted to be moved up a year.

However, this approach, no matter how meritorious, will not remedy the situation. Reform

of the sentencing guidelines fails to confront the barrier of mandatory minimum statutes. Without a repeal of the relevant mandatory minimum statutes, any appropriate adjustments in punishment within the guideline structure will be impossible, for the statute will always trump the guidelines.

Thus, it remains incumbent that this Commission recommend that Congress expeditiously repeal the mandatory minimum statutes as they relate to cocaine offenses, or in the alternative, advocate for a one-to-one sentencing ratio at the current level set for powder cocaine and that these recommendations be retroactive.

Both the American Civil Liberties Union and the Committee Against the Discriminatory Crack Law stand ready to work with this Commission to achieve this goal.

I would like to append to my testimony a series of petitions that came to our office, as many things come to our office from prisoners, and I know you get a lot of prison mail as well, but they wanted to make sure that they had a voice, and

I just would like to submit this for the record as well. Thank you very much.

COMMISSIONER MAZZONE: We will take that, if you will hand it up. Is this just one copy?

MS. TAIFA: There are three copies.

COMMISSIONER MAZZONE: All right. We will duplicate it and distribute it. Thank you, ma'am.

Any questions from my right? Ms. Harris?

COMMISSIONER HARRIS: If I may, or perhaps you can hear me, have your organizations or any of the organizations that you have indicated that you represent here, have you studied the impact of crack trafficking on poor neighborhoods?

MS. TAIFA: I am very familiar with the impact of crack on poor neighborhoods. I am very familiar with the impact in the community in which I live. In fact, prior to a year ago, there was a crack house two doors down from my residence. Being aware of that harm and that societal devastation which, I will state, is devastating, there still is no rationale whatsoever for the tremendous differential in penalty between these

two forms of the same drug.

COMMISSIONER HARRIS: I really am interested in your descriptions, if you have studied it or if you have anecdotal information. We are really, truly concerned about information relating to the impact of crack trafficking in, as I say, poor neighborhoods. So I would urge you, if you have any information with respect to that, that you give it to the Commission, or here, if you have a personal opinion or if your organizations have an opinion as to that.

MS. TAIFA: I would like to make one more statement with respect to that, and then Angela can go on. Many persons within organizations that I am speaking on behalf of belong to community groups, belong to church groups, reside in some of these same types of neighborhoods that we are speaking of, and to speak on some of these issues are very difficult, sometimes, for some of them.

Many times, many in the black community tend to have a knee-jerk response to the issues of crime and punishment, lock them up and throw away

the key, death penalty, and the like, specifically because of the devastation which it is causing without really stopping to think about the impact of many of these criminal justice policies on the community.

Despite that fact, however, members within these organizations are extremely disturbed with the unfairness of the situation. They are not saying that these individuals should not be punished. What they are saying is that they should not be punished 100 times greater than their counterparts of other races who are engaging in the exact same type of behavior.

MS. DAVIS: I just want to comment on that, as well. I have not studied it, but I have no doubt, from my former experience as a public defender and the public defender here for the District of Columbia, I am very familiar with through my being in neighborhoods devastated, by representing clients, families who have been both victims of and have been defendants in crack cases, that it is extremely devastating.

I think any kind of drug addiction or the presence of drugs in any form is devastating. Powder cocaine addiction in white suburban neighborhoods is devastating. The question is how it is dealt with. I can tell you that I live in a suburban neighborhood that is racially mixed. I have never, in my life, seen a police officer standing on my corner, and I have been living there for eight years. Before that, I lived in another area of Silver Spring, Maryland.

I have never, in Silver Spring, Maryland, seen police officers, even one, standing on a corner, waiting to arrest someone, ever. I have never heard of a drug sweep through any neighborhood in Silver Spring, Maryland, or any suburban area. I have not heard of drug sweeps in high schools or any other area in suburban--in any suburban area.

I think you can see what my point is. And I have no doubt that drug use is rampant in any suburban areas you go to, in Silver Spring, wherever. I am sure that powder cocaine and crack

cocaine is being used behind closed doors.

So the question is, how do we deal with the devastation of drug use and drug addiction and how do we deal with how it is being used and why it is being trafficked in certain ways. Unfortunately, that is not an issue that this Commission can resolve, but that, in my opinion, is relevant to the point of the discrimination that exists in the penalties between the two. I don't even think that there is a relation between those two points.

COMMISSIONER MAZZONE: Anybody else?

COMMISSIONER GELACAK: I just want to point out, for the record, that everybody understands that mandatory minimum still impact and still trump guideline sentences in this area, but if the Commission, for example, were to elect a one-to-one ratio and recommend it and put it into place in the guidelines, it would, in fact, impact those sentences dramatically that now fall above the mandatory minimum.

MS. TAIFA: Is that because the mandatory

is both floor --

COMMISSIONER GELACAK: Yes. It would bring down those 15, 20, life sentences, down --

COMMISSIONER CARNES: It would mean the highest sentence would be ten years.

COMMISSIONER GELACAK: Yes.

MS. TAIFA: I appreciate your pointing that out.

COMMISSIONER BUDD: I would just like to add something, as well. We should all understand that the issue of the recommendations is a very open one and the report was a first step. I would like to underscore what Ms. Harris has said in terms of we are seeking out and searching ways to balance the harms that are caused in the communities against unfair penalties, and we are with you all the way in terms of 100-to-one. We have stated that as clearly as we can. We want to now come up with recommendations that would fairly reflect the harms and put on balance with the criminal activity against harms in the community.

There is some precedent, as I understand

it, in terms of different ratios for drugs. For example, heroin is at a ratio of five-to-one. Methamphetamine, as I understand it, is at a ratio of five-to-one. In my own mind, I am not clear if it should be a one-to-one ratio, as some have advocated, or something higher.

So, again, we welcome the information. It is something we are working on right now. To those of you who have testified and others of you who are here, if you have information that can help us along the way, that is why we are here today, to gain that kind of information to help us in the course of our deliberations.

MS. DAVIS: If I can respond to that, I appreciate very much this Commission wanting to balance these harms, but with all due respect, the only way that the harms the drug trafficking is doing in those communities can be resolved is by keeping the drugs from being imported into those communities, into this country and into those communities. I mean, by the very nature of how it is sold in inner cities as opposed to how it is

sold in other areas, the drug trafficking is going to be different and everything that surrounds the drug trafficking is going to be different.

So punishing small-time drug dealers who are themselves oftentimes users and addicted themselves--sometimes they are not--is not going to solve this problem of the violence and all of the problems associated with drug trafficking in those communities. Making these penalties different is not going to resolve the problem. It is keeping the drugs out of those communities in the first place.

With all due respect to a previous person who testified, doing public service announcements about the penalties of crack cocaine is not going to stop a person who is using crack cocaine from using it, or a small-time dealer from dealing. I mean, if one understands the very nature of addiction and the very nature even of the trafficking, advertising what the penalty is is not going to deter.

I was a defender for 12 years. I can tell

you about recidivism. I have personally schooled clients in great detail on penalties and what will happen to them if they get arrested again. It is not a deterrent. We have to get to the prevention side of this. The punishment side of it is not going to stop the problem that you all are so concerned about and that we are all so concerned about. It has to be dealt with in a very different way.

COMMISSIONER MAZZONE: Mr. Goldsmith?

COMMISSIONER GOLDSMITH: Just very briefly, both of you made reference to the Commission's report failing to take a position on the question of mandatory minimums. I wanted to ask you each whether you were familiar with the Commission's plenary report dealing with mandatory minimum, which has already opposed mandatory minimums.

MS. TAIFA: Absolutely.

MS. DAVIS: Yes.

MS. TAIFA: A magnificent report, magnificent. And that is --

COMMISSIONER GOLDSMITH: Given the magnificence of that report and the fact that the Commission is already on record, why would it have been necessary for the Commission to have gotten into this issue again with respect to the recent report --

MS. DAVIS: Actually, that is just the point, because that report did not specifically address the issue of crack. In fact, my understanding is that is the reason why, even before Congress directed the Commission to do this report, it decided to look at this issue, because that report only tangentially dealt with the issue of crack as it was a mandatory minimum sentence.

But that is why I am still a little perplexed, or why I am greatly perplexed, as to why the Commission felt it was so difficult to make a recommendation to Congress, taking into account all of the evidence that it already had from its 1991 report, to simply say to repeal the statute.

With all due respect, Commissioner Gelacak was speaking to Mr. Clott, I think it was, and was

saying that he has no problem politically with reducing sentences, et cetera, et cetera, et cetera. I really think it is a political problem and a political situation --

COMMISSIONER GELACAK: No, no, I didn't say I didn't have a problem. I said I did have a problem politically.

MS. TAIFA: Okay. Then that goes in concert with what I am saying.

But I just want to go back to a quote from over 100 years ago. I just must do this. Frederick Douglass said that power concedes nothing without a demand. Congress is up there holding the power, and unless we, not Nkechi Taifa from the ACLU, but unless a body such as the Commission goes out there and demands that these equities be reversed, there will be no change in the current system.

I really feel that it was a missed opportunity. I respect the struggle that the Commission had to come up with what it did come up with. Again, as I said, it was an excellent

report, but we feel that it did fall short with respect to that. We are very much looking to what comes out of this guideline revision and we really hope that that serves as the step towards the elimination of the statute, or at least that Congress does the one-to-one with respect to the statute, as well.

MS. DAVIS: I agree with everything that Nkechi said, but I would like to add one thing. It is particularly frustrating--this law has been on the books for almost ten years--for almost ten years. As a person who last summer spent hours walking from Congressman's and Congresswoman's door to door to door, pleading and begging and lobbying on this point, having them nod and say what a shame it is and promise that they are going to fight for it, only to find that when the time came to vote on the crime bill that it was all brushed under the rug, and then to have them come out, with all the knowledge and information that many of them had, to say, well, let's study it some more. Let's refer it to the Sentencing Commission and let them study

it, that was frustrating.

I hope you can imagine the frustration that I now feel and many others feel to have it be studied and so beautifully laid out in this report, only to find out, once again, that, especially given the previous positions of this Commission on mandatory minimums, that, once again, no action that really will make a difference for people who are already in prison and those who will continue to be while nothing happens takes place. I really just hope that the Commission seriously considers the urgency of this problem and does something about it.

COMMISSIONER CARNES: Let me ask you a question. You said you were a defender for 12 years, so I am sure you have a pretty strong intuitive feel from your experience about what sentences make sense. If you have a fellow who is selling or distributing, say, 50 grams of crack, which right now would put him at a ten-year penalty, what is your sense, from your 12 years of experience, of what would be--you say that he

should get some punishment. You don't like him in the inner city. It is a devastating drug and you want some punishment. What do you think is an appropriate punishment for that crime?

MS. DAVIS: In answering that question, I can answer a question you asked a previous defender here about guidelines in general. I don't believe that you sentence crimes; I believe you sentence people. You sentence individual people. You cannot --

COMMISSIONER CARNES: Let me tell you, most of the people that we are going to get, all you will pretty much know about him is that he sold 50 grams. You can speculate he didn't come from a very good home. He probably did not have a father; he had a mother who was struggling to raise him. He is not a terribly well-educated person, maybe a high school education. That is about all the judge knows about these offenders.

Now, with that information, what would you say is an appropriate sentence?

MS. DAVIS: That is a difficult question

for me to answer, but given all those facts very quickly and trying to digest them right now --

COMMISSIONER CARNES: That is a typical person. They are pretty much all the same. The defendants are pretty much the same in terms of --

MS. DAVIS: I don't think they are--I guess that is the point. I think that they are all very, very different.

COMMISSIONER CARNES: In terms of those kind of biographical criteria, offenders are the same, and that's about all the judge usually will know.

MS. DAVIS: I strongly take issue with your premise that those basic facts, in any way, makes defendants very much the same. I think they are all very, very individual people and all have very individual lives, and it would depend very much on whether that person had a drug problem him or herself, whether or not that person was addicted, whether or not that person lived in a certain environment, and what the alternatives to me, as a judge, might be.

If I had an alternative, for example, if that person had a drug problem, to put that person under some kind of very structured residential drug program to resolve the drug problem, I would do that. If I had an alternative that would balance some period of punishment with some other--a split sentence of some sort which would involve some kind of punishment as well as community service with education, with employment, which dealt with all the real problems which have people in the criminal justice system in the first place, I would do that kind of a balancing act.

I think the guidelines are a horrible mistake because they do sentence--I know what the intention was, but I think you have heard from enough people, including Federal judges, some of whom have even left the bench because of their despair over what these guidelines have done, that they are a mistake.

COMMISSIONER CARNES: Let me bring you back to my question. If it was a person who did not have a drug problem, then your feeling would

be, let's just say a person, that's how he makes his living, your feeling would be that a fair sentence would be some sort of split sentence, six months in jail and then sort of a halfway house, or --

MS. DAVIS: Depending on whether or not the person had a previous record, yes, and depending on--with a very strict probation and then giving the person an opportunity, and if that person blew that opportunity, then punish the person with a sentence, but I believe we have to do this. I mean, we have to take into reality our prison system and we have to take into reality certain social factors if we are ever going to resolve this problem. That is just my strong belief.

COMMISSIONER CARNES: Thank you.

COMMISSIONER MAZZONE: Are there any further questions?

[No response.]

COMMISSIONER MAZZONE: Thank you very much, Ms. Davis and Ms. Taifa.

I am going to exercise my authority here by finishing up the morning session now, even though we are behind the time that we should be at. So, Ms. Soller, Lyle Yurko, Jack Tigue, and James Wyatt, can you all come forward? We would like to have you finish, really, in the time that we have allotted to you, and then we are going to take a brief lunch recess. So for those of you who are coming back at 1:00, it was supposed to be 1:00--Barry Taylor, Jeffie Massey, Barbara Goodson, and so forth, if you wanted to get something to eat now, you could. Otherwise, we will be back here, if you can finish in the time we had allotted to you, we probably would resume here at about 1:30.

I will take you in the order we have listed. Mary Lou Soller? You are not going to read that to me, are you, Mary?

MS. SOLLER: If I were to read this to you, my stomach, and I am sure yours, would be grumbling.

COMMISSIONER MAZZONE: We do read it, you see, and it gives us an idea of what you are going

to say, and then we like to have you really highlight it and punch away at those areas that you really want to concentrate on.

MS. SOLLER: I will make my comments brief, in view of Your Honor's comment.

I also would note that my comments are based on extensive discussions with other members of the ABA who have a wide range of views. The ABA is one organization that does not come from a sole view, does not come from sole experiences. I am not saying that others have, but this is one that I can speak for that does not.

I also would note that our comments are based on the ABA's standards, so there are many proposed amendments and issues for comment that individual members of the ABA might like to have commented on or that I might like to speak about out in the hallway, but there are certain issues that we were not able to address because of the limitations of the standards.

I know that may be frustrating for the Commissioners who are trying to get definite ideas,

yes or no, on how certain groups feel about the guidelines, but it is something that--and that is the reason that I bring it to your attention.

I will bring up a point that has not been touched on by the other people who have spoken, and it is a point that we have raised in the past and that we will continue to raise here. I think it is particularly appropriate this year.

The Commission is a unique agency in many ways, and it did not, from its inception, have the sort of uniform procedures that other agencies have. We have made the suggestion in the past, many of the Commissioners are new, and to not belabor the point for those Commissioners who have been here before but to make the point to those who have not, we, again, urge the Commission to adopt routinized procedures that are followed by other agencies.

The reason that we feel it is particularly appropriate this year is, I think, evidenced by some of the issues for comment that were issued, particularly in response to the crime bill and

either Congress's directive suggestions or mandates. Many of those are in a narrative form. They are issues for comment. We urge the Commission to not hear an issue for comment, devise a proposed amendment, and then enact it without having had true comment periods and full debate on the specific proposal that is ultimately adopted.

I also note that with the new proposals that have come out within the last week, this, again, highlights our position. As I understand it, those proposals came out after a telephone conference, which was not a public event, which is not tape recorded for any member of the public to be able to participate in, and in which many segments of the population did not have any availability for input.

I know that much of those come out of the crack report, which means that they were not available at the time of the initial proposal in January, but one of them was a Department of Justice proposal that was added at the eleventh hour, in some ways, and our concern is that members

of the community who are not members of the Commission or not ex-officio representatives have a --

COMMISSIONER CARNES: What are you talking about, the Department of Justice proposal?

MS. SOLLER: The price proposal.

COMMISSIONER CARNES: That was the judicial proposal.

MS. SOLLER: I apologize.

COMMISSIONER TACHA: And the record should be clarified that those teleconference calls were recorded and are available.

MS. SOLLER: I stand corrected, then. I think this, then --

COMMISSIONER MAZZONE: There just isn't time, Mary Lou. We just didn't have the time to get together and do it, except by phone.

MS. SOLLER: And I am not --

COMMISSIONER MAZZONE: As a matter of fact, I wasn't there.

COMMISSIONER TACHA: You can get the tape, too.

MS. SOLLER: I apologize, then, but this, then, shows that those of us who are involved in the system were not aware that that was available. How so the many members of the community out there who did not know that such a thing occurred, that it is available, or that there is any resource to get it?

I stand corrected. I would like to hear that --

COMMISSIONER TACHA: I want to be sure I am correct on that, but --

CHAIRMAN CONABOY: Yes, they are correct. They are available.

MS. SOLLER: I think it would be helpful, in the future, if such things were routinized so that people in Kansas and in Seattle who have not yet had an opportunity to come before the Commission directly and who have not yet had the Commission go to them, and I know the Commission is considering and we urge you to do field hearings. We think that that will be helpful. But I think that it demonstrates the difficulty in getting the

message out to other members of the community.

The three points that we focused on are generically and in more general terms, with an attachment at the specifics, the proposals that are --

CHAIRMAN CONABOY: I don't mean to interrupt you, but there was an interesting article, and I think it goes to a little bit of what we are saying here. It is kind of a favorite topic of mine, to be honest with you.

On the first front page of this morning's Washington Post, I believe it is, there is a picture of the Governor of Florida holding up 50 pounds of regulations about meetings and procedures, and they are now considering in the State of Florida abolishing all regulations. It has tremendous support because we are inundated with regulations and rules, so much so that trying to devise them and trying to write them consumes a great deal of time of most agencies.

The concept on which this procedure in Florida is proceeding is that we need a return to

common sense in this country a little bit and forget about being constrained with so many rules and so many regulations that they have become a cottage industry and have taken on a life of themselves.

We do have a lot of rules that we are governed by and we do have a lot of books and regulations piled on top of each other, around here, like in every other agency. But I want to tell you, it is more important for us to concentrate, in my judgement, on getting some good things done throughout the whole sentencing process here than it is on more rules and more regulations.

I don't think I am arguing with you completely about the necessity, perhaps, of adopting some rules, and, by the way, that is one of the things that I am going to look at as Chairman. One of the programs I have set for my term as Chairman, anyhow, is to look at the internal operation of our agency.

But I do want to be very candid with you and anyone else. I hope that we are not going to

get so caught up with looking at our internal operation that we forget what we are supposed to be doing, and that is what is happening in Florida.

MS. SOLLER: We are not proposing that, but this is a national agency that does affect the lives of thousands of people each year.

CHAIRMAN CONABOY: And we are very aware of that, but what we do sometimes is more important than what we print and what we say and what the rules and regulations about our procedures. What we do--and we have to keep our eye on that focus, I think. What we do is more important than publishing regulations on how we go about doing it.

MS. SOLLER: I would agree.

CHAIRMAN CONABOY: And we have to keep that focus. We are not in focus in the United States on that.

MS. SOLLER: No, I would agree --

CHAIRMAN CONABOY: It is very hard to understand how any agency operates anymore. Some of the people who are here this morning evidence that frustration. When you go to Congress and you

go to agencies year after year after year and the only answer they give to you is that we've got to follow our procedures, it drives you crazy.

So I want to tell you that, in my judgement, as a person who has been in this a long, long time and has suffered through that frustration, I am in favor of the fewest possible rules that we can possibly get and the use of good judgment and common sense and a feeling of respect for each other that we are trying to do the best we can. I think if we can reinstate that into the procedures that we use in American government, it will be a big, big help.

I am sorry. I struggle not to interrupt anyone here, but please don't ask us--I hope nobody is going to ask us to make up too many more rules.

MS. SOLLER: I think we would be the last to say that the rules should drive anything that the Commission does, but the difficulty is, in the past, there has been a history of some things appearing at the eleventh hour with no opportunity for public comment, no attempt or no ability for

the public to be able to provide information to the Commission. On a common sense theme, it makes sense to hear from those who have that information as to whether or not it is workable.

CHAIRMAN CONABOY: So you can get the balance, let me give you an example of what just happened here. You have four new Commissioners here, the first time the Commission has been really operating at full steam in four years. This crack report has been languishing around for a long time, the concept, the 100-to-one. You have heard all that. We get here and everybody wants action, and what are we constrained by? Rules.

We have to publish, we have to have so much time, we can't turn anything over to Congress unless it is during a session of Congress, so we have a May 1 deadline. We have more rules coming out our ears, literally, and I am not meaning to argue with you, but that is the truth. We were constrained by all these rules and procedures.

Then we had a common sense judgment to make. Is there some way, within all of that

constraint of rules and regulations, that, perhaps, we can try to do something this year instead of waiting until next year? That is why we put together a couple of phone conferences. Now maybe there wasn't a written rule to do that, but do you know what? I don't care. I think we try to do the right thing, and I hope we will do that again if the necessity calls for it.

So we have to look at what was done rather than to say, was there a rule that you followed in doing it, to see which is more important, and that, I would like to take issue with anyone who would say that what we did didn't make sense. I think it did make sense, because if we didn't do what we did on these couple of phone conversations, for instance, phone meetings--these people are all over the country. We don't all live here in Washington. We all have other jobs.

That was the best way we could do it, and it was the only way we could do this and get it done under the rules, May 1. That is a big, big rule that is in there that we have to follow. If

that May 1 rule wasn't there, we probably could have done it a little bit differently.

We try to use good judgment and common sense, and sometimes that's a lot better than the rules, even though it maybe wasn't a rule that everybody could read to see why we did it.

MS. SOLLER: Turning to what the Commission can do, on that point, we have provided comments, basically --

CHAIRMAN CONABOY: I'm not as angry about this as I seem to be. I just have a bad cold.

[Laughter.]

MS. SOLLER: I didn't take it personally, Your Honor. I am not taking it personally --

CHAIRMAN CONABOY: I mean that.

MS. SOLLER: But I see the need to vent here.

There are three main areas that we provided comments on, and taking them not in the order that we presented in our written proposal, but those were drugs, money laundering, and on the crime bill proposals.

Following up on what you have just said, Chairman Conaboy, what we would urge the Commission to do is to focus this year on those areas in which there has been comment year after year, and we believe that many of the drug proposals and the money laundering proposals which have been evaluated by the community, by the Commission for the last three or four years, in some cases --

CHAIRMAN CONABOY: You are going to beat me with my own words, now.

MS. SOLLER: I apologize.

CHAIRMAN CONABOY: I don't blame you, if you do.

MS. SOLLER: But we would urge the Commission to focus on that. Many of the proposals made by Congress, and we have set this out much more fully in my comments, and I am not going to spend time today, we think are premature. We think that they are appropriate for receiving information from the public, but not appropriate this year for passing amendments, that many of these proposals or the inquiries that Congress made should be

considered by the Commission but should not necessarily result in an amendment guideline when Congress says, look, we hope the Commission does not interpret that as junk.

We think that many of the issues for comment are phrased in very thoughtful ways, that it indicates the Commission's thinking, but it should not result, after hearing issues for comment, in the development under the short time frame between now and May 1, in the development and issuance of a proposal that is created by the rush of the business.

We would urge the Commission this year to follow what we have put forward in more detail in our proposals, and that is to focus on the two areas that we think are needed, have shown disparity for a variety of reasons in the past, and have been most thoroughly briefed over the last several years.

I appreciate that the Commission has many new Commissioners this year who have a very full plate, that is overflowing, but we think that it

would be most helpful, because of that, to start with the areas that are not brand new and new out of the box and have not been, as the Department of Justice said, have not been thoroughly studied. They believe that certain other proposals have not been thoroughly studied.

That is not our assessment, but we will use the words of the prior speaker, that the areas that are brand new, that have not been assessed, in which there are brand new offenses, and with the simplification study and urging that is going on, we particularly urge the Commission to not develop individual guidelines that are solely developed for a specific new offense that has been created by Congress if, in fact, applying an existing guideline will do the job just as well.

CHAIRMAN CONABOY: Thank you, Mary Lou.

COMMISSIONER TACHA: May I ask just one question? Are any of these amendments addressed by any action of the House of Delegates?

MS. SOLLER: No. Quite honestly, with the process that you have, our procedure is much more -

COMMISSIONER TACHA: Believe me, I started to point that out.

MS. SOLLER: I will note that we are not just picking on the Commission, however, on the point about procedures and rules, that the House of Delegates within the last year made a similar urging having to do with environmental regulations and guidelines, because that was another area in which it was seen that there was an urging and a perceived need to do something quickly and that the expense of not following what has been established and has been developed by other agencies was seen as a tremendous disadvantage.

CHAIRMAN CONABOY: Lawyers love rules, and we are all lawyers.

MS. SOLLER: Your Honor, there is nobody who dislikes rules more than I, but I do believe that they are appropriate here.

COMMISSIONER MAZZONE: Let us follow our procedure. Lyle?

MR. YURKO: James is going to speak next.

COMMISSIONER MAZZONE: Then why are you there?

MR. YURKO: I will be next.

MS. SOLLER: We are going down the row, apparently.

COMMISSIONER MAZZONE: I am sorry. Mr. Wyatt?

MR. WYATT: Members of the Commission, my name is James Wyatt and I practice law in Charlotte, North Carolina, with the law firm of Wyatt and Cunningham. After graduating from law school in 1982, I clerked for a Federal District Court judge, and for the last 11 years have engaged in a Federal litigation practice, with emphasis on Federal criminal cases. I am here to speak on one point only; that is, proposed Amendment 44, the money laundering amendment.

I am also the Chairman of the North Carolina Academy of Trial Lawyers Criminal Law Section, and my comments represent, to some extent, the views of the members of that section.

When the money laundering laws were first

passed, there was a cartoon that appeared in the New Yorker. It had a couple in a boat cruising in the Caribbean and they looked toward an island and there was a large washer and a large dryer and there were bills floating around in the washer. The husband said to the wife, "Honey, I think we need to report this to the Feds." [Laughter.]

MR. WYATT: The reason I bring that up is because when the money laundering laws were passed, there was a certain conception as to their application. In my practice in the last 11 years, I have seen money laundering cases applied to numerous types of specified unlawful activity. I have personally been involved in cases with the following specified unlawful activity: Drug activity, of course; mail fraud activity; Federal gambling activity; State gambling activity, not rising to the level of Federal gambling activity; prostitution, an offense constituting a misdemeanor under North Carolina law; and recently, I have been involved in a case where a card game of poker has been used as a specified unlawful activity in a

money laundering case.

There are reported cases where racketeering has been used as a specified unlawful activity, where the smuggling of salmon has been used as specified unlawful activity, and where bankruptcy fraud has been used as unlawful activity. The point of that is that the money laundering laws are tremendously broad, and having a single offense level at this point is inequitable, given the type of prosecutions that have come forward.

The money laundering laws are also extremely broad for two other reasons. First of all, because the willful blindness doctrine applies to money laundering offenses, the prosecution need not even show that a defendant knew, in fact, the nature of the underlying lawful activity but was, rather, willfully blind to it.

Secondly, Section 1956 has no minimum dollar requirement, although Section 1957 does.

In order for the money laundering sentencing guidelines to reflect real offense

conduct, and in order for them to prevent sentence disparity among jurisdictions, and in order for them to promote basic fairness in sentencing, we respectfully submit that Section 2S1.1(a)(1) should be applied to every money laundering offense, even if the other subsections can be determined, because that is the section that reflects the real offense conduct.

We also suggest that the practitioners' proposal of levels ten and six for Section 2S1.1(a)(2) and (a)(3) apply, and also that the money laundering table, as opposed to the fraud table, be incorporated.

I would like to just go through two examples of showing why these proposal should be adopted. First of all, in most serious drug offenses, all of the proposals will ensure very harsh penalties for those engaged in the underlying activity, but the cases at the fringe, where you have gambling activity, prostitution activity, card games, are cases where there should be some differentiation made based upon the nature of the

underlying offense.

For example, if you have a gambling offense involving $50,000 and the person engaged in that offense purchases an asset in a nominee name, the gambling offense level is six. Under the practitioners' proposal, the offense level under the money laundering statutes would be eight. Under the current proposal, it would be 15. Under the Department of Justice proposal, it would be 21. Under the current sentencing guidelines, it would be 20, so only the practitioners' proposal reflects a desired goal of achieving penalties for underlying real offense conduct.

In many money laundering cases, too, I have seen cases that were ordinarily State cases being brought into Federal court for several reasons. One is the enhanced penalties, and secondly, the financial glamor of bringing that kind of activity for forfeitures.

With regard to a second example, in mail fraud, assuming there was an underlying mail fraud activity involving $100,000, under the mail fraud

guideline, the current offense level would be 12. For the money laundering offense relating to that, under the current guidelines, the offense level would be 20. Under the practitioners' proposal, it would be 14. Under the Commission's current proposal, it would be 16. Under the Department of Justice proposal, it would be 20.

Often, mail fraud offenses can be charged either as money laundering offenses or as mail fraud offenses, and it is certainly constitutionally permissible for a prosecutor to try to up the ante by charging mail fraud conduct as money laundering conduct in order to enhance the penalty. However, from the Commission's perspective, if a prosecutor in Maine charges the activity as mail fraud, the prosecutor in California charges it as money laundering, there is a great disparity of sentence just based upon the personal practices of that prosecutor.

If the practitioners' proposal is adopted, then that disparity will be eliminated because the sentence will be based on the real offense or

underlying conduct.

With regard to the fraud versus money laundering table, we suggest that the money laundering table should be adopted for several reasons. First of all, the fraud table essentially involves activity where there is a loss to a victim, whereas in money laundering offenses, that is very rarely the case.

Secondly, because the fraud table starts out at such low monetary levels, it skews the real offense conduct at the lower levels of sentencing.

Third, if the fraud table is used as opposed to the money laundering table, you actually run into a situation at a low offense level where a person who engages in just the money laundering activity and not the underlying criminal activity gets a stiffer sentence than the one who engaged in the underlying criminal activity.

I have prepared written remarks, which I will submit to the Commission.

In conclusion, we would just ask the Commission to consider adopting the practitioners'

proposal because it achieves the goal of real offense conduct, eliminates disparity in sentences based on charging decisions in different jurisdictions, and promotes the most fair and equitable type of sentencing in money laundering cases, which run the gamut from smuggling of salmon and card games up to the most involved drug activity. Thank you.

COMMISSIONER MAZZONE: Thank you, Mr. Wyatt.

Mr. Tigue?

MR. YURKO: I am going to go next.

COMMISSIONER MAZZONE: Oh, I thought you were --

MR. YURKO: I was deferring to James because he had a topic other than crack cocaine to speak of, and that is what I am going to talk about. I have prepared remarks where I say good morning. It is now afternoon.

I am Lyle Yurko. I practice criminal law in Western North Carolina, including Charlotte. For purposes of this afternoon, I am the immediate

past Chair of the Criminal Law Section of the North Carolina Academy of Trial Lawyers and I am also a member of the North Carolina Sentencing Commission and I chair a joint committee on sentencing guidelines of the Academy and the North Carolina Bar Association.

You were supposed to hear in this time slot from one of our most distinguished members, Joe Chesher [ph.] of Raleigh, but family illness makes it impossible for him to attend, so I will briefly try to tell you Joe's message.

Our sentencing committee met in an all-day meeting about two weeks ago where we reviewed your proposed amendments and we endorsed the changes proposed by both your practitioners' advisory group and the probation officers advisory group, and have said so in writing.

But Joe especially wanted to talk about crack. I consider Joe one of the premiere criminal lawyers in Eastern North Carolina. He has a varied Federal practice, but much of it is white collar. He was waiting for a hearing in Wilmington in

February and he saw 16 young black men all lined up for a crack sentencing and none of them received less than seven years. Most got more than ten. There was no evidence of violence; they were street-level dealers. Joe asked the rhetorical question, when will this madness end, and what on earth are we going to do when these young men, by the thousands, are released in five, ten, and 15 years?

Chairman Conaboy and Commissioners, neither Joe nor I can speak as eloquently on the evils of the 100-to-one crack ratio as does your own well-written and superbly-documented crack report. We commend you for this fine work but recognize the job is only half complete.

The report demonstrates that 88 percent of all crack defendants are black; 72 percent of the powder defendants are not black. The 100-to-one ratio results in black defendants receiving vastly different sentences from those who are not black. The creation of this differential may not have been intentionally biased, but the effect surely is

biased.

Our organization favors a one-to-one ratio. Violence, firearms, use of children, and distributions to pregnant women can all be accounted for by specific offense characteristics for all drugs. But this discriminatory 100-to-one ratio must end now.

I have a client who I currently represent. He is black, 23, served in the military, has a legitimate job. His young three-year-old daughter comes to my office with her daddy. She loves her daddy. Two years ago, she needed an operation to save her life and he didn't have the extra $5,000 to supplement his insurance. His career-offender uncle showed him how to get it. His range now begins at 262 months. Every time he comes to my office, he looks at his daughter and cries. He has earned a reduction by cooperating, but a one-to-one ratio will bring him home before his daughter grows into a teenager with the danger of this cycle continuing.

He is doing all he can do. I ask you to

help now, help him and the 3,000 others who are sentenced like him each year. Change must occur now. The mandate of your report is clear. Thank you.

COMMISSIONER GELACAK: Lyle, what is the ratio in North Carolina, the State ratio, of crack to powder?

MR. YURKO: It is one-to-one.

COMMISSIONER MAZZONE: Mr. Tigue, please?

MR. TIGUE: Thank you. Good afternoon, gentlemen and ladies. I am the representative of the New York Council of Defense Lawyers. We have about 150 lawyers who do almost all their work in the Federal courts of New York City, in the Eastern and Southern District, with 1,000 indictments a year in the Southern and about the same number in the Eastern. I think our organization members represent a very high percentage of the people charged with Federal crimes in New York City and we are very much involved in the guidelines.

The procedure that we used when the proposals came out, they were distributed to our

committee members immediately. We proposed written comments on them and discussed them with the members of the committee, and ultimately, when we finalized those remarks, they were approved by the board of directors, so this is not just my point of view this morning.

We tried to be selective in what we comment on. The written report that we submitted to the Commission last week contains our remarks on--it's about a 35-page report. I thought maybe I would start this morning by reading it all, but I guess I am as hungry as everybody else is, so if I could just comment on five of the proposed amendments.

The first two are somewhat related, using a minor to commit a crime and an adjustment for the elderly. We think that the crime bill requires, I guess, the Commission to either come up with a generally-applicable departure policy statement or a mandatory upward adjustment if an adult involves a child or someone under 18 in a crime. We think it is preferable to do the generally-applicable

policy statement and not what the Department of Justice recommends for the mandatory upward adjustment.

We think that this particular crime--I think it depends on the facts of each case. The discretion should still remain with the judge because you will have a situation, perhaps in a gang, where one gang member is 21 years old. He commits a crime with a 17-year-old who may outrank him, may be a hardened criminal, may be more culpable in the commission of the crime. So we think that if Congress makes you change this, if you have to change it, we would prefer a general statement.

Proposed Amendment 27-A, with respect to the elderly, we think it's not broken and please don't fix it. Under Section 3A1, it seems to me that the two-level upward adjustment that is available already provides for a vulnerable victim because of age. Very often, older victims are not particularly vulnerable. We all hope to be less vulnerable senior citizens. I think, again, it

depends on the very facts of the situation, and there could be an upward adjustment or even a departure, depending on the other authorities that were cited in the proposed amendment.

COMMISSIONER MAZZONE: Have you read the report, Mr. Tigue--maybe it's not really distributed. We submitted it to Congress yesterday.

MR. TIGUE: No, sir, I apologize. I have not.

COMMISSIONER MAZZONE: On the elderly, that is.

CHAIRMAN CONABOY: It is available, if you would like a copy.

MR. TIGUE: Yes, I certainly would.

Two other sort of related proposed amendments are 35-A and 35-B. One is the aggravating role; the other is the role in the offense. With respect to proposed Amendment 35-A on the aggravating role, we support the elimination of the "otherwise extensive" language, but we are upset with the use of the word "unusual". We don't

think that is sufficiently precise. It ought to be deleted from note one. Also, there is a proposal to hold a supervisor who indirectly supervises another. We think that is yet another loose language.

So if you are talking out "otherwise extensive", please don't put in "unusual" and "indirectly". We think that that is just going to generate some more litigation and create a little more of that regulation, that lack of clarity in the law which we all seek to avoid.

We oppose the application note number one, where the participant, when you count who is supervising who, the participant can be one who is not criminally responsible. We think that there is a greater culpability for criminals who involve fellow criminals and take responsibility for their conduct. We think the existing guidelines provide adequately for people who involve innocents in those unusual circumstances where that would apply.

On note three of the same proposal, we endorse the clarification about the supervisor

enhancement, that if you are a minor participant, you consider that first. If you have such a limited supervisory role that you get a downward departure, you then don't go for the upward aggravating factor.

Proposed Amendment 35-B, again, this is role in the offense. We are concerned about the proposal to eliminate the compromise language permitting a three-level decrease in the conduct which falls between minor and minimal participant. We would just as soon you leave that in.

We are happy with notes one and three, where you are inserting the "substantially less culpable". We think that will help make things clearer.

On note five, with respect to the mules, we went on at some length about that in our report, and that has already been commented about by people who testified earlier today. It seems to me, what they said, my organization supports it, as we do in detail. This proposal comes up every year and we are opposed to taking away the possible minimal

role adjustments for people who transport narcotics.

Lastly, proposed Amendment No. 44, relating to the money laundering guidelines, I guess if you can get passionate about this, in the organization, almost everybody is passionate about the proposal, that the guidelines finally come down to some realistic level. We are happy that the proposal will relate the conduct and the guidelines more to the underlying activity than mere rubric of money laundering.

Of course, we don't agree with everything that is in there. For instance, there is a two-level upward adjustment for a defendant who tries to conceal the money laundering or promotes further criminal conduct. It seems that those are the essential elements of the existing crime of 1956 already, so that will wind up being universally applied in every single money laundering conviction.

There is another problem with--it seems to us that people convicted of 1957 will receive the

same sentence as those convicted under 1956. Under the old guidelines, the range was 17 for a violation of 1957 and it was 23 for a violation of 1956. We think, under the way the proposal reads, is that everybody, in the name of simplification, those convicted of either section will wind up being sentenced the same. We are opposed to that.

As a matter of fact, in 1993, there was a similar simplification and consolidation which was sought and supported by everyone in the tax area. People who failed to file tax returns, which was a misdemeanor, lost their one-point reduction. We think that this is an even greater situation where everybody is now going to be "pancaked" into the same sentence for, basically, two different violations which have different essential elements that are going to have to be proven at the trial.

We strongly disagree with the United States Attorney who testified earlier today that we shouldn't get down to level eight or maybe even level six, down where the fraud guidelines start, because, basically, we view money laundering as a

financial crime, and it very often involves drugs and organized crime, and in those cases, there are many grounds in the guidelines for much heavier sentencing.

But when the fraud guidelines were set at six, that included, presumably, more than minimal planning in each case, but that was included in level six. Now you are proposing level eight because it is a financial crime plus more than minimal planning, so I think you're winding up at two levels higher than you would otherwise.

I have raced through that, but I know that everybody wants to go home. I thank you very much for the opportunity, and if you have any questions or if we can submit anything further, please let us know.

COMMISSIONER MAZZONE: Thank you.

Any questions? Let's start on my left this time.

COMMISSIONER TACHA: I noted with interest that you, on the crack question, that your people suggested two-to-one or a five-to-one ratio, is

that correct?

MR. YURKO: Yes. I was sorry you brought that up, because there was such passion here this morning, and it was hotly debated among ourselves. We thought 100-to-one was outrageous and ridiculous and irrational, and then we had a big debate among all the committee members and the board and this was the camel that was supposed to be a horse made by a committee, so we come down to either two-to-one or to five-to-one.

COMMISSIONER TACHA: Could you tell me, on either of those ratios, what was the rationale, preferably on both.

MR. YURKO: In our organization, we have a lot of former U.S. Attorneys. We have ten ex-chiefs of the criminal division. So it's not your typical defense organization which may, very often, always come on this side. There is an attempt at balance.

I think the general perception that prevailed as a result of these meetings is that crack cocaine does pose a more powerful threat to

society and it ought to be punished somewhat more seriously. We didn't ignore all these racial considerations because they're there, they're real, they have to be dealt with by you, of course. But we do think that crack is somewhat more of a threat to society and creates more damage and that something higher should be. We came out with two-to-one or five-to-one.

COMMISSIONER TACHA: It's not an exact science, in other words?

COMMISSIONER GELACAK: Did the present ex-officio member of the Commission, was she still on your board at the time?

MR. YURKO: No, I don't think so.

MS. HARRIS: I resigned.

MR. YURKO: We are sorry to see her go.

COMMISSIONER GELACAK: I was hoping.

COMMISSIONER MAZZONE: Are there any other questions?

[No response.]

COMMISSIONER MAZZONE: Thank you very much. I appreciate your understanding in being

here so long. Thank you very much.

MR. YURKO: I'll have a greater lunch than I would have had, had I had to rush back.

COMMISSIONER MAZZONE: I think we all need some time. I said 1:30 earlier, but we shouldn't do that. We should take a little more time. What about 1:45? Can we try to get back here at 1:45, Mr. Taylor and others who are next on our agenda? Or is 2:00 better?

COMMISSIONER TACHA: No, let's move it up as much as we can.

COMMISSIONER MAZZONE: Let's try 1:45. Please be back here at 1:45.

[Whereupon, a luncheon recess was taken to reconvene at 1:45 p.m., this same day.]

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

COMMISSIONER MAZZONE: As for this panel, I understand that you want to arrange your own order of presentation. That is fine. I have it starting off with Barry Taylor, but you tell me how you want to proceed. I am, again, going to remind you, I know you have been here and we still have some 20 people behind you to come. We have lost our place, but we would like very much to not lose any further time, if you don't mind. Thank you.

Mr. Taylor first?

MR. TAYLOR: Good afternoon. My name is Barry Taylor. I am an AIDS project attorney with Lambda Legal Defense and Education Fund. Catherine Hanssens had submitted written materials to you. She is the AIDS project director. She wasn't able to be here personally. I am speaking on her behalf.

Lambda Legal Defense and Education Fund submits the following comments in response to the Commission's recent announcement of proposed guideline amendments focused on HIV-infected

defendants and the expanded definition of certain crime elements to include HIV-infected bodily fluids. As the nation's oldest and largest national legal organization dedicated to the civil rights of lesbians, gay men, and people with HIV and AIDS, we are grateful for the opportunity to address this important issue currently before the Commission.

The three HIV-related amendments currently under consideration include specific offenses involving an HIV-positive individual's intentional exposure of another to HIV through sexual activity; expansion of the definition of a dangerous weapon to include infectious bodily fluid of a person; and extension of the definitions of "serious bodily injury" and "permanent or life-threatening bodily injury" to include HIV infection through exposure to body fluids. In addition to these amendments, the Commission has invited comment on whether enhanced penalties for willful sexual exposure to HIV will affect HIV testing behavior.

For the following reasons, we believe that

these proposed amendments invariably are vague, over-inclusive, and unnecessary and create enforcement nightmares while undermining important individual rights and proven mainstream public health policies. The singling out of a particular disability for enhanced penalties also runs counter to the important principles of fair and equal treatment at the heart of anti-discrimination laws, such as the Rehabilitation Act of 1973 and the Americans with Disabilities Act.

We address, in turn, each of the proposed amendments and the related legal and policy implications of these proposals.

The first HIV-related issue on which the Commission invited comments concerns whether there should be guideline amendments relating to offenses in which an HIV-infected individual engages in sexual activity with knowledge of his or her infection status and with the intent through such sexual activity to expose another to HIV.

Even without the difficulties of enforcement and the public health dilemmas which

such a proposal would engender, the amendment is ill-advised in that it is difficult to even identify known incidents in which the conduct addressed by the amendment has occurred. Without any evidence that the type of conduct described is more than an exceedingly rare event, there is no issue of public safety appropriately addressed through the criminal code to support the adoption of such an amendment.

It is important to emphasize what numerous experts in the field of law and public health have repeatedly pointed out, that criminal statutes are never appropriate or effective means of combatting HIV infection. In the eight years since the General Accounting Office reported similar consensus, there have been no significant changes in the type or frequency of behavior posing risks of HIV transmission to warrant rejection of this conclusion at this stage of the HIV/AIDS pandemic.

Efforts to curb significant routes of transmission of HIV should rely on public health law and measures for effective solutions to

activity that poses a real risk to the health of our citizens. At the same time, if an identified type of conduct, in fact, occurs so rarely that it cannot be reasonably be characterized as a genuine threat to public safety, then the criminal law functions of deterrence and retribution are not applicable.

Even the most narrowly-drafted HIV criminal statute will likely prove counterproductive in the critically important fight against the spread of HIV infection. A statute that requires defendants to know their HIV status at the time of the criminal act will discourage persons from determining their HIV status and entering HIV-related education and treatment programs.

As one commentator has aptly noted, "The social and economic cost of this strategy outweighs any benefit likely to result from prosecuting the few individuals who use the intentional transmission of HIV as a means of causing serious injury or death to another person."

Finally, the goal of improved public safety simply is not served through sentencing guideline amendments which increase the term of incarceration for a defendant with a terminal illness. For many, if not all, HIV-infected defendants sentenced under the current guidelines, any sentence will prove to be a life sentence.

Moving on to the proposed amendments, the characterization of private medical information as a deadly weapon would pose new dangers for people known or believed to have HIV. This is particularly true in the context of the current proposal, which provides no guidance as to the circumstances under which such a definition would apply to someone with HIV. In theory, once the definition of a deadly weapon is amended to include even HIV-infected body fluids, such as saliva, which have never been implicated in the transmission of the virus, conduct such as spitting could be treated as a criminal act.

I would personally just like to support this last statement, in that I had a case this past

year in State court which had a similar provision under State law, and what had happened was the individual, when he was being arrested by the police office, was sprayed in the mouth with mace. He had sores in his mouth and involuntarily spat because the mace stung his mouth severely. His saliva hit the police officer's leg. But, because on the Ohio statutes mandatory sentencing provisions, his saliva was treated as a deadly weapon and he was sentenced to three to 15 years in prison.

We got involved at that point and were involved in his parole proceedings, were able to educate the judge and the prosecutor on the methods of HIV transmission. The officer, obviously, was negative, and he was able to have parole after six months of serving.

But, again, the amendment we are talking about today is comparable to the statute we were handling in Ohio, as well. So this particular conduct, such as spitting, is a reality for someone with HIV, of being criminalized.

COMMISSIONER CARNES: If he had bit the officer, purposely bit him, would your reaction be different or would you still feel that that conduct would not justify an enhancement of his sentence?

MR. TAYLOR: There has been no medical evidence at all that HIV is transmitted through saliva. Again, we were involved in the Weeks case, which is in Texas which involved biting. Obviously, that conduct is more severe. You are talking more of an intent issue. It gets a little more tough, but we would also provide that that also is not subject to a life sentence. That man has been sentenced to life now, and there is no evidence of any transmission of the virus.

COMMISSIONER CARNES: Is it your position in that situation you could see where a judge might want to depart up, or your position would be you really don't even think that's the basis for any sort of upgrade?

MR. TAYLOR: I think there's no basis, as long as there is no showing that there is any transmission risk. Even if there is an intent to

do something here, there is no transmission risk, and, therefore, no provision for enhanced sentencing, as well as the fact that what we are seeking to do is to have people be able to get out early, compassionate release programs because of the terminal illness aspect of things. We feel the amendments are actually taking us in the opposite direction.

COMMISSIONER CARNES: I am sorry. I interrupted you.

MR. TAYLOR: That is okay. The amendment of the sentencing guidelines in this manner is additionally problematic because of the potential for abuse posed by the fact that most defendants are likely to be disfavored minorities, such as gay or bisexual men, intravenous drug users, and racial minorities, who almost exclusively have been the defendants in previous attempts to criminalize conduct in cases involving AIDS and HIV.

The negative effects of prosecutions and convictions produced by the characterization of body fluids of an HIV-infected individual as a

dangerous weapon have been widely noted, particularly as they concern conduct posing virtually no demonstrated risk of transmission. One commentator ha suggested that convictions of this type "surely fuel the misinformation, hysteria, and discrimination surrounding the HIV epidemic, and hurt the criminal law's social objective of educating the public."

Even victims of violent crimes and their families could face an additional threat of a personally-invasive inquiry concerning private aspects of their health and lives for the purpose of justifying the violence they experienced.

Indeed, precisely this scenario recently occurred in a Mississippi State court prosecution of a man who confessed to the execution-style slaying of two gay men. In that case, the defendant's attorney persuaded the trial judge to allow the post-mortem testing of the dead victims' bodies on the argument that if either proved to be HIV-infected, it would have been tantamount to carrying a loaded weapon, allowing the defendant to

raise a justifiable homicide defense.

Although the jury ultimately rejected the defense, the judge's allowance of the discovery and introduction of the dead men's HIV status on the belief that this information was relevant to the defendant's culpability produced the widespread publication of the men's private medical and personal information and caused considerable anguish to their families and friends. It also stoked the fears of those who already experience discrimination on the basis of their sexual orientation or perceived HIV status, that this judicial approval of the concept of HIV as a deadly weapon could provoke more serious violence against them.

There is an alarming amount of discrimination and violence directed against those with HIV disease. The HIV-Related Violence Project, funded by the New York State Department of Health, has collected data on HIV-related violence since 1990. The project's data demonstrates that HIV-related violence is increasing at an alarming

rate.

Moreover, the effects of this violence are far-reaching. The fear of encountering violence prevents many with HIV from obtaining medical care, counseling, referral to support groups, and other supportive services. The Commission should reject amendments which could prove the unintended effect of exacerbating an already serious problem confronting those with HIV.

Moving on to the last issue you asked us to comment on, as far as how it would affect possible treating and testing behavior, there is little question that criminal sentence enhancements that focus on a defendant's knowledge of his or her HIV status will undermine the continuing efforts of public health officials to encourage individuals voluntarily to be tested for HIV infection. Such measures place a premium on an individual's ignorance of his or her HIV status and create a disincentive to be tested.

Clearly, prosecution for an AIDS-related sex offense becomes far more difficult when the

prosecutor is unable to prove the defendant's prior knowledge of his HIV infection. Regardless of the actual application, the clear message that the proposed amendment sends is that a record of HIV antibody testing alone can be the basis for criminal penalties.

Further, amending the guidelines' definition of "deadly weapon", "serious bodily injury", and "permanent or life-threatening bodily injury" to include the body fluids of an HIV-infected person or the transmission of HIV will discourage testing in a more far-reaching way by raising the specter of punishment, even for otherwise legal and frequently harmless conduct when engaged in by a person known to be HIV-infected. The adoption of these amendments would only lend credence to the fear and ignorance that breed discrimination and the violence which increasingly accompanies it.

In conclusion, criminal enhancement penalties focused on the presence of a virus recognized as a protected disability under Federal

anti-discrimination laws run counter to the salutary purposes of these hard-won protections while serving neither legitimate law enforcement nor public health goals. Criminal law measures have been widely recognized as ineffective in responding to public health crises, and, in fact, serve the opposite effect of driving affected individuals underground, away from the treatment and prevention services which remain the best hope of stemming the tide of HIV infection.

Thank you very much.

COMMISSIONER MAZZONE: Thank you, Mr. Taylor.

Mr. Webber, did you want to follow?

MR. WEBBER: Yes. We are going to go somewhat out of the original order, since I am also here to address this HIV proposal. I represent the National Association of People with AIDS. I am a consultant to that organization and I have written extensively about AIDS legal issues over the years and have been involved in representing clients in HIV-related matters for roughly the last ten years.

Mr. Taylor's presentation, I think, was thorough and complete, and, honestly, I do not have very much to add to it. I would recommend to you also, though, the written statement submitted by William Freeman that is in your materials from the National Association of People with AIDS, which also, I think, clearly discusses these issues.

But I thought how I might best use your time here today is to address a little further Commissioner Carnes's question, because it is a very interesting one, about the situation where you may have someone biting someone, and again, this is an extraordinarily rare situation, where we have someone engaging in this kind of behavior where it actually poses a risk of HIV transmission. Of course, I think that is the strongest argument for not doing anything here, in terms of any change. If it's not broken, don't try to fix it. We just don't see these cases in the Federal courts. We see them very rarely in the State courts.

But, in any event, if you should have such a situation, I think the only way you would really

have a risk of HIV transmission through that kind of behavior is if there is actually blood there present from the person who is HIV-infected, and if, then, the bite is severe enough to cause that blood to enter into the victim's bloodstream. So without that, you really are not going to have any risk of HIV transmission.

I think the question, then, is, how are you going to define a standard that makes any sense at all when we really have to look to such specificity of behavior to make any sense out of what behavior may or may not pose a risk of transmission.

In addition, I should suggest that if you did have such a case in front of a Federal judge, of course, there is provision under the current guidelines to allow for an enhanced sentence if there were a showing that the defendant knew about the HIV status and acted with the intention to transmit HIV. So I am not sure that this is a problem that can't be addressed in those really unusual and rare cases where there may be this type

of behavior alleged.

I would be happy to answer any questions.

COMMISSIONER MAZZONE: Before we get on to the other two, we did issue a report yesterday, at Congress's direction, on precisely this point that may be of interest to you when it gets further disseminated.

Thank you. We will have some questions, I am sure, later, but we want to take the panel as a whole.

Jeffie Massey, please?

MS. MASSEY: Yes, sir. Good afternoon. My name is Jeffie Massey. I am a private practitioner in Dallas, Texas. Just by way of information for the Commission, so you will know where I am coming from, I have been an attorney for a little over 17 years. I really haven't done much Federal work up until about June of 1992, and since that time, my Federal practice has been exclusively white-collar fraud cases and forfeiture cases, generally associated with the white-collar fraud.

I guess I have kind of a different

perspective on things, because I live and practice in the area of the country that has been the prosecutor's dreamland as far as white-collar fraud cases go, mainly as an outburst of the S&L crisis, which, I don't have to tell you, Texas probably leads the nation in. We've seen some very creative prosecuting being done in Texas, which, I think, is coming to an end now.

There have been particular Department of Justice people making up what we call the bank fraud task force. Not only did they see fit to prosecute bank officers and directors and people that you read about mostly in the paper, but as an outgrowth of that, a lot of people that were customers of banks, were high-profile customers, also came under scrutiny. From those investigations, there have been a multitude of indictments in the Northern and Eastern District of Texas being the ones I am mostly familiar with.

The majority--I can't say for sure 100 percent of them, but certainly the vast majority of those cases, when there has been any one of a

number of white-collar fraud offenses being charged, has included money laundering accounts. That is, if you will recall from my written comments, the only issue that I want to speak to you about today.

I feel like I have a good perspective on recommending seriously to the Commission that you retroactively amend the money laundering guidelines. I have first-hand witnessed what some of the other earlier speakers have alluded to with what we don't hesitate to call in Texas the account manipulation that has taken place by the local U.S. Attorneys offices, as well as the Department of Justice people that have come down on the task forces.

Obviously, it goes without saying, and I can see by the background of the members of the Commission that all of you, or most of you, have a Department of Justice or similarly-related enforcement background and you understand the advantage of having a big stick to wave at a defendant and his attorney as far as what that

person is going to be indicted for. It just enhances, from the prosecutor's viewpoint, plea bargaining. I have never been a Federal prosecutor, I have been a State prosecutor, and even to that extent, I can understand that.

But I think that the problem arises when you look at what the money laundering statute was intended to do, and I address this in my written comments and you allude to it even in the proposed amendments in the comments that came out in the published notice.

It is very clear, the Congressional intent was very clear when the money laundering statutes were passed. They were aimed at a very specific part of the crime that was going on in America at that time.

Then, in the 1980s, the specified unlawful conduct was greatly expanded to cover a multitude of what I call white-collar criminal fraud offenses, and I think, again, part of that was the outshoot of the S&L debacle and the frustration that prosecutors were seeing and feeling over the

types of people that had stolen millions of dollars from banks or citizens and were successfully getting away with it. So you see this humongous expansion as far as the statute is concerned about what a prosecutor could do with a money laundering charge. At least in Texas, that was very effective, too.

The problem with the guidelines, as they exist, you have recognized in your published notice, and that is that they don't have any relation to the reality of the conduct that was engaged in. The great thing about the proposed amendments that are before you all at this time is that they seek to tie the "money laundering offense" to what the real offense conduct was. I applaud that. I think that that is an essential element, or should be an essential element of any program of amendments to the money laundering guidelines.

The criticisms that I have are very slight, and I have detailed them for you in the written comments. I just want to visit a couple of

them.

First off, I don't think that your amendments should assume anything. The easiest example is where one of the suggested base offense levels assumes more than minimal planning. I don't think you should assume anything about money laundering transactions.

I am familiar with three separate cases that I personally worked on where the defendant did nothing more than negotiate the funds. One of them deposited them into a bank account that was in his own name. Another one, it went into a company account. And another one simply turned a check into a cashier's check. Those three transactions were each, in different indictments, different cases, the foundations for money laundering accounts in an indictment.

I think it is very important to look at what actually happened. In other words, if you want to assume that a person commits bankruptcy fraud and if he is convicted of accomplishing money laundering by taking some funds he supposedly

concealed from the bankrupt estate, the trustee, and deposited them into his bank account, the prosecutor may very well or will very well, in Texas, get an indictment out of that for bankruptcy fraud and money laundering. A jury, most likely, if they are going to convict a person on a bankruptcy fraud, will convict a person of the money laundering, also.

But when it comes time for sentencing, what was that case really about? It was about bankruptcy fraud. So why sentence someone for the elevated level of money laundering when, really, that person's game was bankruptcy fraud?

So the closer you can tie it to the underlying conduct, I think, the more realistic and the fairer the sentencing is going to be to that particular defendant. I don't see any reason, having given this considerable thought, that you can't deal with the different levels of money laundering, the different levels of complexity to the specific offender characteristics.

I think that a person who simply takes a

check and deposits it into his account should not be punished the same as someone who uses offshore accounts, who uses dummy corporations, who uses fictitious names. Obviously, there is a different level of culpability there, at least from a defense perspective, and I can justify punishing those persons differently. I think the guidelines can, too.

The other problem that comes up in the proposed amendments, when talking about punishing the real offense conduct--and I know a previous speaker mentioned this, also--is in the proposed amendments, there is a two-point adjustment if, and I am looking on page 2464, which you all probably don't have in front of you, but if there was proof that the funds were used to promote further criminal conduct or that the transactions were designed, in whole or in part, to conceal or disguise the proceeds of criminal conduct.

Out of the different types of discrete violations that a person can be convicted of under 18 U.S.C. 1956, there are four different discrete

violations. Those two things are two of those discrete violations. In other words, you can have a person convicted of conducting the transaction with the specified unlawful proceeds with the intent to promote further criminal conduct, and that last little sentence is part of the substantive offense. So when you punish him again, you are punishing him for something he has probably already been found guilty of.

And again, because there are four different ways, actually, I think there are 12 in total, but there are four discrete violations that are listed in the statute, and I am referring to the A-1 discrete violation, I think the guidelines need to back up a little bit and take into consideration that a particular defendant may already have been punished for that simply by being found guilty of the money laundering offense under 1956.

The only last issue that I want to make an impression on with you, hopefully, is the issue of whether or not the amendments that you pass should

be retroactive. I would say, clearly and hopefully, that they would be. I am familiar with defendants who have exhausted all of their appellate remedies and have been sentenced under the former guidelines for conduct that really is not a fair representation of what they did. I believe it would be a gross injustice to not make the amendments retroactive so that the people who have been incarcerated as a result of count manipulation by the local prosecutors can get some relief.

Something that I was a little confused on in your proposed amendments, you mentioned something in there about when you can't determine what the specified unlawful conduct is. I have been trying to imagine a situation where the government would not know what the specified unlawful activity was and I simply cannot imagine one. Perhaps you all have come up with some examples or had some given to you in some other written comments, but that is how you get money laundering, is if you have identified this other

conduct and that is how you get the unlawful proceeds.

So certainly, the government is going to have a theory or an idea, and at least in Texas, I think they are going to put it in their charging instrument, or it has been their practice to put it in their charging instruments, and identify whether it is drug trafficking or bankruptcy fraud, or wire fraud/mail fraud in one case I worked on, a bank official taking a bribe. In other words, they alleged that as part of their indictment.

I think that once a person is punished for that conduct, just bringing this in line with the other offense is certainly the equitable and reasonable thing to do.

With just one final comment, going back, again, to what Congress intended when they passed the money laundering statute, I think the Congressional intent, in and of itself, defeats the comment that was made by the United States Attorney for Maine that the solution to this problem is, let's just raise the fraud guidelines.

If Congress wants to make fraud offenses more serious and bring them in line, then I think that is their job. I think your job, at least as stated in what you have put in your publications, is to try and do something that is related to reality. I don't see that as your job, is to up the fraud guidelines to make what is otherwise an unreasonable sentence for money laundering seem reasonable.

Thank you very much for the opportunity to appear this afternoon.

COMMISSIONER MAZZONE: Thank you, Ms. Massey.

Barbara Goodson, please?

MS. GOODSON: Good afternoon, Commissioners. I would like to share with the Commission members a picture of my family. I had sent in a copy of my testimony and a picture of my family members.

I would like to share with the Commission members my concern as a mother and a voter about the Federal sentencing guidelines. My views are

shared by other parents, wives, and children that have loved ones in prison. I never thought I would be in front of this Commission today pleading for my son, Nathaniel Goodson, who is 24 years old, and the lives of other parents' children.

Like so many other people, I did not feel the Anti-Drug Abuse Act would affect my family members, so when this law was passed, I took the attitude that it doesn't affect my children or me, like so many other parents, until the day when my son was incarcerated. I was totally unaware of the Federal system or the laws that impose long-term sentences.

My experience in a Federal courtroom on August 5, 1994, was the worst nightmare, when my son, Nathaniel Goodson, was led from the county level to the State level, and finally to the Federal level for the violation of the crack cocaine law. This is what happens to so many minority offenders, since the guidelines for crack cocaine and the mandatory sentence was enacted, which I call a double jeopardy.

My son is a good example of the injustice of the Anti-Drug Act. I feel like Nathaniel had died and part of my body was cut off when the judge imposed a 12-and-a-half-year sentence on my son. He was a first-time offender. Nathaniel's wife and daughter, Daeja, and she is three years old, and other family members are serving this sentence with him. We are suffering because of the incarceration of Nate. Daeja will be 15 years old when her father returns home, since there is no parole in the Federal system.

If the Federal guidelines for crack cocaine is lowered and made retroactive, Nate can have the opportunity to come home and support his family.

I do not condone selling or using drugs, because I want a safe environment, too. However, I do believe the Federal sentencing guidelines for crack cocaine are unjust as well as a double jeopardy sentence for my son and other inmates, especially for first-time and non-violent offenders found guilty for crack cocaine.

Our children's lives are important to us, and this Commission has the power to change this unjust law and give them a chance to correct their mistakes and discover their destiny. I pray that God will give the Commission wisdom, compassion, and strength to lower the calculation from 100-to-one and change it to one-to-one for the crack cocaine under the guidelines and to make the changes retroactive, in order that the injustice to inmates all over the country is corrected.

Our country and this Commission have no reason to fear to change this Federal guideline law and make the changes to benefit inmates serving long-term sentences for crack cocaine. The fear that I have and other African American families have is that our children and other children are growing up without hope or a future invested in this country, and I think this is very unjust.

The African American community is constantly faced with the vicious circle of drug selling, drug addicts, people without jobs, imprisonment of our children, and I feel this must

stop. The government needs to provide educational programs, jobs, rehabilitation programs, and not more prisons. When the government offers programs like midnight basketball, they do the African Americans a serious injustice. This is a joke and a slap in our face, when you offer our children these types of programs.

This country is also guilty of leading our children to believe that money is the answer and solution to all problems. We have created a generation that has lost hope and turned to drugs for answers to find equality in society. This has led to incarceration of so many minorities. Each member of this Commission here today can change the outcome by changing the Federal guidelines to be equal for all, as the United States Constitution was written by our forefathers.

There is no realistic answer to why crack cocaine is 100 times greater than powder cocaine. The reason cited, as I have found, they feel that crack cocaine is more prevalent in the African American community and there is also cited that

there is more violence associated with it. When you look at any drugs, they are all accessible in our society and it creates no more crime or violence in a society. The crime rate has not dropped in the African American community since this Act was passed in 1987. More prisons are not the answer to the problem, and this is evident.

We, as a nation, should try to understand what is creating crime in our society and take full responsibility for what we have created and find a solution for the crisis. The country's leaders should work for creating hope and a future for all citizens, especially minorities. A mind is a terrible thing to waste, and if we do not give the inmates a chance to change their lives and to correct their mistakes, this is a waste, too.

Do we, as a nation, want the inmates rehabilitated when they return to society, or do we want them to remain in prison as a means of elimination, believing that incarceration will eliminate crime? The Federal court system is a good example of injustice and elimination of

minorities.

These are my experiences in the Federal court system, and only a few. Minorities are led from the State to the Federal level to impose long sentence terms. Innocent until proven guilty--not true. Today, you are guilty and you proceed with trial. Lawyers are to defend you and your rights in a court of law. This is not true. Most individuals cannot afford a competent lawyer and most proceed with a public offender, who doesn't even care.

Rights are violated and there is nothing you can do about it. Most people do not know the law or their rights. The appeal process is not set up for defendants to understand or have the knowledge how to apply for appeal.

I just want to close and just ask that this Commission truly, truly listen to all the testimony that was given here today and search your hearts and--I don't know if this would be appropriate to say--but pray about your decision before you actually put it in writing.

I also included with my testimony to each one of you a packet of different cases and findings as far as the comparison between crack cocaine and cocaine, which they really found no difference, and that was given to me by the inmates from Bradford, Pennsylvania. They felt that you needed to be aware of it, and also myself, because when I first found out about this whole guideline and mandatory, I was at a loss when they talked about book one and book two, and that's why I call it a double jeopardy, because I feel that my son was sentenced twice when he received his sentence.

I guess the only other thing that hurts real deep inside of me is my granddaughter, when she says, "Grandma, my dad is not coming home. Why?" What answer can you give her? I admit, he has done something wrong, but for a boy--well, he is my boy, my only boy--going in at 23 and coming out at 30-something years old and miss all the main part of his daughter's life, and she will be 15 years old, I think it is a tragedy. I really do.

That is all I have to say.

COMMISSIONER MAZZONE: Thank you.

Mr. Jaroslawicz?

MR. JAROSLAWICZ: Good afternoon. My name is Isaac Jaroslawicz, and until a few months ago, I was a practicing attorney doing commercial litigation for Wall, Gottschall, and Menges, and then I looked at my seven-month-old daughter and decided two things. One, I wanted to see her before she graduated from college, and secondly, I wanted to do something socially useful as a lawyer. I got involved in the criminal justice system in trying to address some of the issues that face our society and some of the issues that this panel is considering.

I am the Executive Director of and Director of Legal Affairs for the Aleph Institute. Some of you Commissioners are familiar with the Aleph Institute. It was an organization founded about 15 years ago at the direction of Lubavitcher Rebbi, basically to provide services to inmates in terms of inculcating moral values and attempting to work on an essential element in our criminal

justice system, which is rehabilitation.

We are not a liberal organization. The type of work and the precepts that we follow are sometimes viewed as draconian in terms of looking at Old Testament values and modes of punishment, even. What is interesting is, if you go through the Bible, the one form of punishment you don't find--I mean, you find fines, you find lashes, you find the death penalty--the one form of punishment you don't find is incarceration, and there is an essential reason for that, in that incarceration in and of itself is not rehabilitative.

To the contrary, the removal of a person from society and locking them in a room and removing them from family, from community, and basically isolating them for a long period of time, does absolutely nothing to rehabilitate a person, but to the contrary. I think the statistics prove it tends to produce a bitter person with a completely changed outlook on life, and certainly nothing that will remove that person and change that person's value system to avoid going back in

in a variety of other situations.

Certainly, we believe in and appeal to a supreme judge of the world. Sometimes people's eyes roll when you say that nowadays and say, well, you are bringing in religion. A supreme judge of the world--I am reading from our Declaration of Independence, when the people that founded this country appealed to that same supreme judge of the world before declaring our country a free nation. While we are certainly not propounding any type of mix of church and state, certainly, the one thing that is lacking and the one thing that does not exist in our Constitution and does not exist in the books of regulations, which Chairman Conaboy had referred to, is any types of moral teachings. The one thing that is missing is any sense of values and moral basis of what is right and what is wrong.

I know that Representative Gingrich today was in the papers mentioning we should go back to Victorian times and the sense of shame and community. We look a little further back than even Victorian times in terms of the basis for these

moral teachings and the need to inculcate those values into people of whatever religious persuasion.

When you get down to it, whatever the religious background, the essential moral elements, the concept that underlies where every observing Jew wears a cap, and that is there is only one reason why Jews wear yarmulkes, and that is to remind you that there is a power over you, that there is something, a higher authority, as it were, and that we are not necessarily the masters of our own fate and can choose whatever we choose to do, that there are rules to be followed, basic rules between ourselves and our creator, and also basic rules between ourselves in terms of having a just and humane society.

What I'm basically getting at in terms of the broad general aspect of it is that while we do view punishment as an essential element in a just society, that punishment must be individualized to the person. Other speakers have spoken here about the problem being that crimes are being punished

rather than people. Certainly, with respect, and as opposed to mandatory minimums, which relieve a sentencing judge of any discretion whatsoever, the sentencing guidelines are, with no disrespect, a lesser evil, in that you do provide, at least where the sentencing court can take individual characteristics of the defendants and build those into the sentence itself.

What is still missing, unfortunately, is for a court to consider post-conduct situations. Except for providing substantial assistance to the government, there is absolutely nothing where a criminal, having had an error, having had a lapse in judgment, having done whatever, certainly in the case of a first-time offender, can do anything to ameliorate the sentence based on remorse, based on repentance, based on accepting certain ethical guidelines, commitments, programs to lead a better life, and is really narrowly constrained by a certain amount of good behavior in the prison system.

Now last year alone, we have counseled

over 8,000 individuals in the Federal and State system. We have an ongoing relationship with the Bureau of Prisons. We are the only Jewish organization that provides furloughs, where the Bureau of Prisons actually gives inmates to our organization for a period of weeks for study programs that we conduct around the country.

I can tell you, from just the few months that I have been there, good behavior is sometimes a very difficult thing to show in a prison environment when circumstances beyond your control are at work. When you are assaulted by another inmate and then put into the hold for your own protection and the record is there, that counts against you.

It is very, very difficult, and perhaps this Commission on a longer-term basis should consider types of programs, or at least for a court to be able to review it. I know we have eliminated parole as such, but certainly, this is also a cost-effective measure. We are not talking about where the government itself has to institute the

programs. There is a wealth of opportunity out there, committed, dedicated people, community-based organizations that would be very happy to step in and work and create programs to work with offenders, counseling programs, ethical teaching programs, study programs, educations that can provide these offenders with an opportunity to ameliorate a sentence.

The very fact that this Commission is considering whether or not to make certain amendments retroactive in terms of reducing time that is necessary to be served under the guidelines, only tends to underscore the fact that decisions that are made at the sentencing level can have a very real impact for years and years down the road.

Somebody that is sentenced to ten or 15 years with no possibility of reducing that sentence whatsoever is in a position where that person is still sitting there after all of you have served your terms on the Commission, after I have gone on to other things in my life, and that person still

has absolutely no hope whatsoever.

In terms of specific recommendations, Amendment 6, I found it surprising that there was an issue as to whether or not the guidelines should be based on a standard of proof beyond a reasonable doubt or preponderance of the evidence, where death results as a result of a certain crime. It appeared that way to me.

Let me just note that in today's paper, it says that the Federal Government has set the date for the first execution in the Federal system since 1963. Certainly, if there is an issue or a situation where death resulting as a result of certain crimes could lead to that type of punishment, I think there is no question that the issue has to be resolved and clarified to be based on that death resulting beyond a reasonable doubt as a result of that offense, rather than a lesser standard of the preponderance of the evidence. Perhaps I misread the guideline, but that was the impression that I have gotten in terms of your proposed comments.

With respect to Amendments 11 and 44, dealing with heightened sentences for protected locations and with respect to money laundering, with respect to the value of funds, I think there can be little argument that the importance is to look at individual culpability, again, and to have a sentence heightened because of the act of a government agent suggesting a particular location for a transaction to happen or for a certain amount of funds to be involved in a transaction really removes and takes away the essence of the individual culpability of what the individual may have been disposed or predisposed to do and now creates a situation where a government agent is involved in undermining that person's ethical foundation and then creating a heightened sentence as a result of the person yielding to that.

With respect to Amendments 27-A and C, we believe the current guidelines provide sufficiently stringent punishment with respect to crimes against the elderly and the fact that the guidelines themselves do provide a sufficient basis to look at

individualized conduct. We find it interesting that the Commission is looking to do a presumption that would appear at a certain age and yet is unable to find what age that presumption should occur.

On the one hand, this Commission has noted that 55 is an age used with respect to one statute, 65 is used with respect to another statute, and is looking for comments as to what age to select for this presumption.

The ethics of our fathers teach us that at 60 is old age, at 70 is ripe old age. Interestingly enough, the presumption there is the opposite, is that at 60, a person is wiser and that perhaps the very fact that we are looking to find a presumption of weakness at a certain age says something about our society in that we are looking to presume that somebody that is older is more vulnerable. I think, again, one has to look at the individual circumstances of the case rather than even presenting this presumption.

Finally, we commend this Commission with

respect to a little note, note six in Amendment 31-A, which would specifically direct the courts to consider the availability of programs for an offender before looking at the new offense. It is one of the few situations, and perhaps a crack in the wall, where this Commission can, and perhaps, Congress, too--that is for another day--look at situations and conduct that is post-offense, looking at what an offender has done or is doing in terms of rehabilitation, in terms of evaluating the punishment that our society deems is merited for that individual.

Thank you for your time.

COMMISSIONER MAZZONE: Thank you, Mr. Jaroslawicz.

Are there any questions?

MS. HARRIS: I have asked the staff if they have a package that you just talked about, Mrs. Goodson, and they say that they have not received it, so could you just make sure that they do receive it? We would each like a copy of your submission.

MS. GOODSON: Okay.

COMMISSIONER MAZZONE: Mr. Jaroslawicz, Congress seems to think that 55 is an age, because that is the age that they gave us to report to them on what we've got as punishments for the elderly. They used 55 as at least a point we should begin, so Congress has --

MR. JAROSLAWICZ: They need a lot of educating.

COMMISSIONER MAZZONE: I didn't say that; you said that. Thank you very much.

There are some familiar faces approaching the table here, David, Mary Shilton, Julie, a very familiar face, always welcome. We always enjoy hearing from you.

MS. STEWART: It is a pleasure to be here, and I am really overjoyed to see a full compliment of Commissioners. It has been too long in the coming, and we welcome you.

I know this is a long day for you, too, and it is hard to sit here and listen to every person come forward, one face after another, urging

you to do the right thing on their amendment or amendments, but I also am struck every time I have sat before this Commission, and this is my fourth year that I have done this, what a unique opportunity this is for the public to, one day out of the year, get to directly address the Commissioners about their sentencing concerns. I really am impressed and applaud the sort of the role of the Commission, in that this was established as part of your process, because it's unique. It's very American and it's very democratic and I like it, so I appreciate being here.

Really, what I am going to speak about today is the role of the Commission. I have submitted written testimony to you about specific amendments, and I hope you will look at it, if you haven't, because I put a lot of time into it and because I represent 28,000 people. Actually, some of those people are introduced to you in my written testimony, so I hope you will have a chance to look at it.

But what I would rather do today is talk about the vision that Congress had when it established a Sentencing Commission and how this body can best carry out Congress's vision.

The Federal guidelines system that was enacted in 1984 was conceived as a kind of a middle ground between mandatory minimum sentences and indeterminate sentencing. The Senate report that was published that year on the Sentencing Reform Act emphasized the need to curtail judicial discretion, but it also stressed that the guidelines are not intended to be imposed "in a mechanistic fashion".

The report stated that the purpose is to provide a structure for evaluating the fairness and appropriateness of a sentence for an individual offender but not to remove all of the judge's sentencing discretion. So it was clear that Congress was wanting to create a flexible system, and as early as 1975, Senator Tooney said, while introducing a precursor bill to the Sentencing Reform Act, that an inflexible scheme is hardly an

improvement over an arbitrary one.

Of course, all this rational sentencing thinking was immediately undermined that same year, in 1984, by the passage of mandatory minimum prison sentences for gun offenses, and as we know, every two years since then, there have been new mandatory minimums added for guns.

But I still think that the unique historical role of the Sentencing Commission allows it to operate independently of the Congress. There is a separateness built into mandatory minimums in the guidelines, and it is a separateness that frustrates many of us who work in the system, but I also see it as a saving grace because it allows this Commission to make decisions about sentencing reform that are independent of whatever members of Congress are doing in front of C-SPAN on the floor of the House and the Senate.

This Commission has illustrated brilliantly that it can act independently of Congress and do so without any repercussion when it changed the LSD sentencing weight ratio back in

1993. It was in 1993 that I first saw this Commission really lead the Congress, in other words, lead, not follow, the Congress, and I think that that leadership role captures the vision of the Sentencing Reform Act of 1984, that the Commission is to provide certainty and fairness in sentencing by avoiding unwarranted disparity.

The Commission is now positioned to continue that leadership role by adopting new guidelines for, for instance, for crack cocaine and for marijuana sentencing and by revising the drug sentencing tables. It is really within your charter, and, in fact, I believe it is your mission to make independent, well-researched decisions on sentencing and then to incorporate those decisions into the sentencing guidelines.

I urge you to do that now. The members of this Commission know that we don't need mandatory minimum sentences. Your report from 1991 proved that brilliantly. I believe Judge Mazzone was in charge of that. You know that they do not provide the kind of calibrated sentencing possible under

the guidelines. You know that members of Congress gave little thought, and I am giving them the benefit of the doubt when I say little thought, to the length of sentences that they created when they passed mandatory minimum sentences in the 1980s.

So I urge you not to compound Congress's errors but, instead, to seek an independent course, and I believe that that is what you have started with this crack cocaine report, which was really excellent. We may not feel that it drew any conclusions that we can hang our hats on, but the report was very well done and I applaud the effort.

So I am urging you to please make crack cocaine and powder cocaine sentences equal. Your study was exhaustive and certainly proved, as Judge Mazzone said earlier today, that this Commission realizes 100-to-one is an outrageously unrealistic sentencing ratio and very inappropriate.

I urge you to make marijuana sentences no longer 1,000 grams per plant but 100 grams per plant, as it was prior to 1988 under the sentencing guidelines. At that time, this Commission did

recognize that, indeed, there is no such thing as a marijuana plant that can yield one kilo of usable product.

So please use the discretion given to this body by the members of Congress. It is a tall order, and I know that it is not a popular order, but I also know that this Commission is very dedicated to sentencing fairness and rationality, and I believe that you want to do the right thing and that you will do the right thing.

My final request is that that right thing also include retroactivity, just a small request, because sentencing fairness really falls short of its goals if it fails the plight of those who have already been sentenced.

Thank you very much.

COMMISSIONER MAZZONE: Thank you, Ms. Stewart.

Professor Yellen?

MR. YELLEN: Thank you, Judge. Thank you for the opportunity to be here today. It's been a while since I have testified, for the new

Commission members, so I haven't had a chance to meet you before. I am a law school professor now. Previously, I worked on the Hill, at the time, for the House Judiciary Committee, when the guidelines were promulgated. I have worked in various capacities with the staff of the Commission and spoken at forums with members and staff on many occasions.

I would like to talk about three related topics, and really, for the most part, what I have to say follows, I hope, nicely from what Julie just said. I want to talk a little bit about the crack report, the relevant conduct guideline, and the Commission's role in the future.

First, on the crack report, which I was able to read fully before the hearing because your staff, especially Phyllis Newton, was nice enough to get it up to me real quickly when I asked, I read it with great interest and I found it, for the most part, extremely thorough and very compelling.

Unfortunately, I think, the broad data was maybe more compelling and more convincing to me

than it was to the Commission itself because of the tentativeness of many of the conclusions. I think some of the most important points about the report were left unsaid, and let me note what I think those are.

First of all, that the mandatory minimums ought to be repealed. The Commission's wonderful report back in 1991 exhaustively catalogued the, I think, lopsidedly one-sided arguments in favor of being opposed to mandatory minimums, although in the end, even that report was somewhat tentative in the sense that it urged Congress not to pass any new mandatory minimums but didn't really make a strong case for repealing them.

Similarly, with the crack report, the Commission again makes the strong case about why mandatory sentencing statutes are crude and imprecise and why a sensible drug sentencing policy would take into account a quantity, as appropriate, but other factors, at least as importantly, and the report does a wonderful job of cataloguing what those other factors are and laying it out in a

coherent way.

But then, at the end, the report suggests that Congress revisit the 100-to-one ratio without a clear statement that mandatories do more harm than good and that Congress should trust this body with a wealth of experience, now, to set sound sentencing policy.

I think it is ironic--I work in New York, and new Governor Pataki, one of his proudest early accomplishments is succeeding in reinstating capital punishment in New York, so he obviously is not someone who could be labeled soft on crime by anyone on the Hill. At the same time that he was doing that, he has urged the repeal of the Rockefeller drug laws, the antecedent of the current disastrous Federal mandatory minimum sentences. So if it is good enough for Governor Pataki, I think it is good enough for this Commission to take a strong stand on the same grounds.

The second thing that is left, surprisingly, I think, unsaid in the report is that

crack sentences are, too often, too high. You say the ratio is wrong, it's too high, and it needs to be fixed, but I hope you have realized that somebody could stand up on the floor of the House or the Senate, as has happened in the past, and say that I agree that the ratio is too high so let's fix it by raising all of the powder cocaine sentences.

I think it is entirely implicit in the report that what you are saying is not that, but rather that crack is too high. If all the mandatories were set at extremely low levels, it wouldn't inhibit the development of sound guidelines policy. It is only because the mandatories are too high that it ties your hands, in effect.

So I would have hoped for, now or in the future, a stronger message to Congress that the mandatories ought to be gone, or at least what the problem is, is that the crack mandatories are too high.

My third point has to do with relevant

conduct, and I think another strong implication of this report is that the relevant conduct principle needs to be radically revised. I have made my big pitch on that in a law review article that I submitted to the Commission and I don't want to completely bore you by talking in that language that we law professors write in, but I think the relevant conduct guideline has many of the flaws of the mandatory minimum sentencing laws, and I make that case in my article.

I wanted to highlight one point about it here today, and that is that the relevant conduct guideline has the effect of dramatically extending the reach of the mandatory minimum sentencing statutes far beyond what was required by those statutes.

Everyone is familiar, who has read the report, with the notion that what the Commission did in writing the drug guidelines was peg everything to the mandatory minimum statutes. That, despite what some people have said, is not something that the Commission was required to do.

The Commission could have said, we are going to write the best guidelines we know how without even looking at the mandatory minimums, and then when and if the mandatories trump the guidelines, then the mandatory sentence, obviously, controls.

But you were not required to say that someone who sells a little less than the mandatory amount gets a sentence just a little less than the mandatory sentence. You could have done--I don't mean you, I mean the previous Commission--could have done whatever they thought was right, but they chose not to do that. I think that was the wrong decision and I think it's extremely exciting that another implication of this report is that in the next amendment cycle, you are going to be looking at writing the best guidelines you can without regard to the mandatories.

The second part of this is that the relevant conduct guideline goes even further and says that, say someone is convicted of selling a small amount of powder cocaine, so there is no mandatory minimum even in the picture at all. If

the judge believes that that offender, in the same course of conduct, sold a larger amount, when aggregated together it brings that person to the mandatory minimum threshold, that offender gets the same sentence that they would get as if they had been convicted of selling that mandatory trigger. And again, there is no reason that the Commission was required to do that.

I think, when added on to the other flaws that I have detailed in the relevant conduct principle, it is something that ought to be seriously reconsidered in the next amendment cycle. At a minimum, I think you ought to think seriously about what Judge Newman originally suggested, and I tried to develop a little more in my article, and that is that if you are going to count other alleged offenses that the defendant wasn't convicted of, those other alleged offenses should not count as much in the guidelines calculation as something that the defendant actually was convicted of.

Right now, the amounts count the same and

there is precedent in the guidelines for treating things differently, like criminal history. Again, if you would like to follow up on that, I will be happy to talk more about it or you can read what I have submitted.

Finally, my broader point is that, again, I think it is a great report, and if you follow the conclusions, and, more importantly, the implied conclusions, I think the report will have been a tremendous success without regard to what Congress does. I do understand, having worked on the Hill, the need to be politic and the need to tread lightly on this volatile political situation.

But as others have said, the reason this Commission was established was to provide a principled voice of reason in the sentencing debate, to take things out of the political realm, to a great extent. Unfortunately, in my view, the Commission in the past has been too timid in not following through on what, on some occasions, a majority of the Commission believed.

I hope and trust that when you do come to

concrete conclusions, when you disagree with something that Congress has done, you will be more forthright about it and you will tell Congress, this is why we are doing it. If Congress feels strongly enough that you are wrong, they can go ahead and change it, but you are all thick-skinned enough to be able to deal with a little controversy.

And, more importantly, a big part of your role is to educate everyone involved in the Federal sentencing system, most especially Congress. I think virtually everyone outside of the Hill and the most strident prosecutors knows that, somewhere down the road, these mandatories are going to be gone and will be properly relegated to the dinosaur heap, but it is not going to happen unless Congress is led there and is educated. There is no person or body in the country better suited to that task than this Commission. I just hope that, in your efforts to make the guidelines simpler, more flexible, and fairer in the future, you follow that path. Thank you.

COMMISSIONER MAZZONE: Thank you, David.

Mary Shilton, please?

MS. SHILTON: Good afternoon. I am also pleased to be here, and I will follow suit with my contemporaries at the table here, congratulating the Commission for having this hearing today and opportunity for those of us who care about the evolution of the sentencing guidelines to, once again, comment.

I represent the International Association of Residential and Community Alternatives. They are the halfway house transitional service providers. Some of them are private, some of them are probation contractors at the State, local, and Federal level. We are a membership organization, and whenever I meet--I am the district representative for them--whenever I meet with them, they urge me to come before you and say, when is the next time you can testify before the U.S. Sentencing Commission, so I am here today at their bidding and glad to be here.

What I want to talk about today is really

a follow-on with what Julie and David have just been talking to you about. It is our concern that we really haven't adequately developed an intermediate sanctions range within the guidelines, in the view of IARCA, and to urge you to begin to look at ways that, if you cannot abolish or eliminate the mandatory sentences and the impact of them, or if you cannot establish a guideline which puts the mandatories on one side and the rest of the sentences on another, if you can't do either of those things, then to begin to look at what you can do and all the options for developing a third tier of punishment or community corrections sanctions within the guidelines, taking into account the existing situation. I am very much a pragmatist.

One of the things that we would like to see are more community-based correction centers, educational and vocational services, drug testing and treatment, tutoring services, day treatment, crisis intervention, family or individual counseling, victims' services, community service supervision, bail supervision, home detention and

electronic monitoring, neighborhood outreach, and after-care.

Why do we want that? We think it works. We think that fewer prisoners will be returning to you after their release if they are adequately transitioned and they have a chance for programs, and we also think that there are a whole lot of non-violent drug-addicted Federal offenders who probably belong in those programs in the primary instance and should not go to prison based on your profiles that you all release in your reports every year.

We are pleased that the Commission has published this range of issues for public comment and many proposed to eliminate the inequities in drug treatment, particularly, and which certain drug offenses have attained under the guidelines. Others deal with the persistent problems resulting from passage of mandatory minimum sentences.

A few address the pressing issue which is on the mind of the politicians that we have, a potentially dangerous prison population which is

placing increased demands on our prison system, and that we simply cannot afford the cost of being purely punitive in our sentencing practices. We must look to other principles of equity, public safety, restorative justice, and habilitation to guide our punishment practices.

Today, I will focus on the proposals as they relate to the use and development of alternative punishments, particularly drug-involved offenders, to get to the point the proposed guidelines, in their search for balance within a guideline system, fail to do what they should and what many States are now doing, developing intermediate punishment sentencing ranges with a range that recognizes that there are low-level offenders who should not be sentenced to prison or who should receive short split-sentences with intensive community corrections treatment. The Commission should act now to recognize and provide for incentives and sanctions to do this for this group.

I am going to skip some of this. I am

going to go on and say, to get to the point, I would like to just say that we support the incarceration of high-volume career drug dealers, particularly those who have been involved in weapons or life-threatening offenses, but that we do not believe in characterizing most drug users as assaultive or as violent. We think that the guidelines need to take steps to differentiate between non-assaultive offenders and violent offenders, and that the statutes really need to delineate who should be in that pool.

In 1992-93, one in six drug defendants had a weapons involvement. Sixty-two percent of the drug offenders were a category one criminal history. There is a substantial pool of folks who need to be looked at as being potentially non-violent, treatable offenders.

What am I suggesting? I am going to jump right into it and say that there are a whole bunch of options out there, but one of the ones I would really like to look at is drug courts. In the Federal context, I watched drug courts grow up in

the last six years. We now have over 30 drug courts at the State and local level around the country.

At the Federal level, I would urge the Commission to work with the U.S. Attorneys, the Justice Department, pretrial services, and public defenders to develop, really, a court-based drug diversion program for folks who would be up for low-level drug crimes but who are treatable and who are potentially non-violent and to give them the full treatment, the shot at treatment, and to use a drug court-like procedure in lieu of a full sentence option and conditioned on compliance and so forth, using the drug court model.

I think it is worth trying. I think we will see some districts, if it were permissible to do it. I don't know how you would put the mandate in place or you urge folks to do it. I think it would require some real collaboration, but that is what it is about. It is about using judicial supervision to encourage treatment and to make sure that the person stays in treatment and is compliant

for a long period of time.

Beyond that, I would urge reserving Federal prosecution for major cases or cases where States are not able to prosecute, particularly in the area of drug offenses, and putting some emphasis on that. We simply cannot afford to build the prisons that we are going to need to house these people if they keep coming through the Federal gates.

The guidelines should be revised to present a more balanced approach towards prison and to fully implement restitution and rehabilitation purposes of sentencing. We are still not satisfied that we have gotten there. I realize that there are many other forms of restorative justice, again, that have been tried by States and localities that are not involved in Federal sentencing programs. I urge you to look at them.

They are cost effective. It costs about one-seventh of the cost of putting a prisoner in community corrections with supervision as it does in a prison, so you could conceivably put seven

folks into a good community corrections program with similar results as to one in prison. With the numbers we are looking at, I think that is a real good thing to do.

Community-based programs should be the placement of choice for over half of the drug-involved guideline offenders because they are safe and effective. I think the Sentencing Commission needs to look at that.

I thank the Commission for this opportunity to discuss expansion and use of alternative sentencing within the guidelines. I recommend the Commission look at it again with great detail as to the front end of the process with respect to working with prosecutors and judges so that they knew that there is some discretion that they can use prior to the mandatory sentence kicking in for sentencing, and that maybe some folks can be diverted into treatment. I thank you.

COMMISSIONER MAZZONE: Thank you, Ms. Shilton.

Are there any questions?

COMMISSIONER GOLDSMITH: I have a practical question for the panel, and I ask that you not infer anything about my possible view on these issues or about the Commission's conclusion about these issues from the question itself. The question concerns the issue of retroactivity, and specifically, of course, this Commission is not in the position to be making changes to the law retroactively. That ultimately would be a Congressional issue.

But my question concerns more of the matter of implementing a decision of retroactivity. If, for example, we were to modify the law to change the ratio from 100-to-one to one-to-one, five-to-one, ten-to-one, whatever it is, it may ultimately be a significant change. The Commission's report out now talks about reconsidering the issue in the context of the guidelines themselves. That is relatively easy to implement prospectively, but retroactively, when you are talking about the cases of people who are in prison, that may result in a situation where a

wide variety of cases wind up having to be relitigated in a situation where the facts have grown stale, witnesses have disappeared, et cetera, et cetera.

How do you go about implementing that kind of a policy decision retroactively? Keep in mind that the Commission's report does not necessarily, standing alone, do that, of course, because the Commission did not find that the 100-to-one ratio was completely without rational basis or that it deprived anyone of due process. We essentially made a finding that the ratio, as it presently stands, is inappropriate for a variety of reasons.

So my question, in essence, is, as a practical matter, how do you go about implementing a decision that change ought to be effective retroactively?

MR. YELLEN: I may be the lawyer, but that is a very hard question. Issues about retroactivity, whether you are talking about the Commission or the U.S. Supreme Court, those are really hard questions. I am concerned --

COMMISSIONER GOLDSMITH: That is why they pay you the big bucks.

[Laughter.]

MR. YELLEN: I guess when we are dealing here with an issue where what the Commission would, in effect, be saying is that this 100-to-one ratio is today, at least, unfair. To the extent you are saying it has always been somewhat unfair, that, obviously, argues for retroactivity.

On the other side, obviously, I wouldn't want to see a set of policies that made the Commission so hesitant to change the rules in the future because you would know that every change you would make would have this dramatic effect, the same reason the Supreme Court didn't make some of the important early 1960s criminal procedure cases retroactive.

COMMISSIONER GOLDSMITH: That is right.

MR. YELLEN: That is a legitimate systemic concern. On the other hand, we are dealing with human beings and individual justice. You don't want to err too much on either side. So I am

afraid I am going to have to be very political and wishy-washy here and say I have somewhat of a bias towards retroactivity on something as important as this, but I really do understand the competing concerns.

COMMISSIONER GOLDSMITH: I think the Commission is aware of the competing concerns and of the human factors, as well. Nevertheless, there will still be an important question to resolve, which is assuming that the Commission makes recommendations for change, how should those changes be implemented retroactively? Are we going to wind up relitigating all of these old cases on these various crucial issues?

MS. STEWART: I think that you can look at the LSD retroactivity. That would be a very good example. How have those cases been relitigated, or have they been? I think they have basically just gone back for resentencing under the new guideline change. I mean, you have done this once, in 1993.

COMMISSIONER GOLDSMITH: I am not familiar with those changes in detail, but my understanding

is that all that was recommended there was a change in the ratio. When all you have done is effected a change in the ratio, it is easy to go back retroactively. On the other hand, if what you are doing is suggesting that different types of factors ought to be considered with respect to each crime, it is not nearly as easy to go back retroactively.

MS. STEWART: I don't think it is going to be easy at all, and this came up last year in Congress with the safety valve. I remember, I believe it was the Justice Department that was sort of complaining about the paperwork that would be involved if the safety valve were made retroactive.

COMMISSIONER GOLDSMITH: It is much more than the paperwork.

MS. STEWART: I know, and that is right, but where do you balance it? Do you want to try to make it fair and just for everyone and endure a bit of a headache? We do.

COMMISSIONER GOLDSMITH: Let me just suggest something. We have limited time today, but to the extent that you might have suggestions that

would go towards the practical aspects of implementing a decision of this kind, recognizing the enormous cost that it imposes upon the entire system, that would be something that everyone would appreciate.

MR. YELLEN: If I could just say, in 30 --

COMMISSIONER GOLDSMITH: Also, footnote a great law review article. Everyone would read it.

MR. YELLEN: Thank you. I do have one suggestion that occurs to me, which is that if you decide the ratio ought to be dramatically changed, other factors ought to count more, and that something ought to be done retroactively, you could adopt a special guideline for retroactivity. In other words, say that for all these old cases, they will not be completely resentenced under this very complicated new guideline, but rather, here is a table.

Take the amount that was involved before and it translates, roughly speaking, to a reduction of this amount. It wouldn't work perfect justice, but it might work the appropriate balancing between

doing justice to individuals and not overburdening the system with relitigation.

MS. STEWART: Believe me, it would satisfy a lot of the complaints you are going to hear if you don't make it retroactive, I mean, if you do something that is not made retroactive. We have thousands of cases in our office of people who would benefit if something was done retroactively. If nothing is done, I really hate to think what is going to happen. I am not trying to scare people, but the prisons are overcrowded. There is a lot of tension, there is a lot of anger there already. If some carrot were offered, as you have just suggested, it would alleviate a lot of that tension.

COMMISSIONER GOLDSMITH: I don't think we are looking for a carrot, we are looking for a principled solution here, as well.

MS. STEWART: I understand, but that may be as close as we can get.

COMMISSIONER GELACAK: Just an observation, not so much for the people on the

panel, because I know you know this, but it doesn't make any difference what we say or what we do. Someone, and I can give you a group of names right now, someone will stand up in Congress and say, we ought to equalize it, sure, but we ought to bring it in line by bringing powder down to crack instead of crack up to powder. I mean, there is no question that will happen.

The other observation I would make is, regardless of that fact, I, personally, and I speak only for myself, I, personally, believe that this probably is the best opportunity we are going to have to take this issue on for a long, long time and we ought to do it.

MS. STEWART: I second that.

COMMISSIONER REILLY: I was just going to follow up Commissioner Gelacak and how realistic is it for us to think, and you have been on the Hill and you, yourselves, have indicated you have lobbied members of Congress, but how realistic is it for us to think that we would have any chance whatsoever of getting retroactivity applied, maybe,

just maybe, on the crack cocaine, if Congress was warm to that idea, but on all of these other issues that we have heard discussed here today and the mention of retroactivity?

In the climate that we are in in America today, with Congress being so concerned about crime and with constituents of theirs really crying out for something to be done, and, of course, the something has obviously been tougher penalties and more prisons. But how realistic is it to think that Congress would do anything in terms of a broad retroactivity on all of these crimes?

MS. STEWART: I think it is an uphill battle. Definitely, it is not going to be easy. But I guess I would also say that in 1993, when LSD was changed under the guidelines and made retroactive, you didn't hear a squeak out of Congress. I don't know if this new Congress is going to be going through your changes with a fine-tooth comb that they didn't two years ago, but I urge you to try it. You have nothing to lose.

COMMISSIONER REILLY: I am not opposing

it, I am just asking the question.

MS. STEWART: To be honest with you, under these sentencing guidelines, I think the chances for retroactivity are very good. Under statutes, we have to change the statute first prospectively and then look at the retroactivity of it. But I think the guidelines, that is what you are here to do, is recommend the appropriate sentences. I do think that the Congress gives this body some credit, not enough, but they do give you some.

COMMISSIONER MAZZONE: Thank you for that.

MS. HARRIS: Judge, may I ask just one question?

COMMISSIONER MAZZONE: Of course.

MS. HARRIS: Ms. Shilton, forgive me if I just missed this in your materials, but have you submitted some very specific recommendations in terms of amendments with respect to alternative sanctions?

MS. SHILTON: I would be happy to do that. I just submitted some testimony today, and it has been a while since I have testified before you, so

I will be happy to write something up for you.

MS. HARRIS: If you have done that in the past, I would just be interested in your ideas.

MS. SHILTON: My main concern is that I think that even within the context of the mandatories, that there should be more room for using alternative sentences as mandatories, as part of that mandatory, if we must have them, which I don't support, but if we must, that there can be various kinds of supervisory release and community corrections sentences.

I also think that you can look more at earned time and good time and a second look at tough time that prisoners do as another way of getting to an earlier release for those who really don't belong in prison.

COMMISSIONER MAZZONE: Thank you very much.

Our next panel is Dr. Nancy Lord, Lennice Werth, Ed Rosenthal, Marvin Miller, and Robert Kampia. Thank you for coming. Dr. Nancy Lord is first on the list.

DR. LORD: I am going to switch places with Mr. Miller, who has something else scheduled.

COMMISSIONER MAZZONE: That is fine.

MR. MILLER: I am a trial lawyer and I have a Federal case where I am supposed to meet with a bunch of prosecutors, and they are chomping at the bit and I don't want to have to get a lawyer to represent me if I am too late. The other members have graciously agreed to let me take a few minutes.

On retroactivity, the answer is real simple. It is in the Federal Rules of Evidence. The evidence rules don't apply. They can use the transcripts, the agents' reports, the PSI from before and recalculate the numbers. The courts won't have a problem dealing with that, which is why they didn't have a problem and why Congress didn't oppose the change in retroactivity on the LSD issue. You can do it. If you want to do it, you do it. The lawyers and Congress will know how to do it, and when they don't, their staffs will.

I am from the National Organization for

the Reform of Marijuana Laws legal committee. I have been practicing law for about 25 years, have been involved in drug offense for about 30 years.

You are a Commission to take the heat off the politicians. You can make recommendations to them that they can't make themselves and they can say, these people did all the study and we are going to go along with it. The same thing happened with base closings. Why did they have a commission for base closings? To take the heat off themselves, to give themselves an out. You are the out.

I appreciate, as we all do who have been here today and who are going to come with me and after me, your willingness to listen to us and get some feedback from a broad spectrum to give a whole breadth of ideas to what you are about to do.

The whole situation that you are trying to accomplish is truth in sentencing. That is why you have these hearings. That is why LSD was changed. There needs to be change in other drugs, as well.

Look at weight. Weight, as a prime

criteria for factoring sentencing, is not honest and it is not realistic, it is not practical. Joe, take this truck with a camper on the back--you don't have the trunk key--and drive it from Miami to Washington. Now, the police will tell you that if they don't have the key to the trunk or they don't have the key to the back of the truck and it's a sealed kind of indication that that's an indicia that the person is a courier.

Why? The courier doesn't know what's in the trunk. He doesn't know what the weight is. He doesn't know how much it is. He may have been hired by somebody in a bar for a few hundred bucks to drive up and get a plane ticket back. He parks it someplace, leaves the key and departs, and someone else picks it up. He just calls a number on a pager, leaves a code, and goes. He can't turn anybody in. He is not a minimal participant. He is not a minor participant when he gets arrested. Why? Because there are no conspiracies; there is nobody else to judge it against.

So what is he going to do? He is going to

get the weight. I can't tell you the number of times I have heard Federal judges talk on the bench, and, more often, off the record, and even prosecutors and drug enforcement officers about situations where some poor slug who is a courier is going to get more time than the big guy.

When you have a conspiracy and the big guy gets busted, he can always buy his way out because it is always for sale. He turns in all the other people, he turns in assets, and he charge bargains down on some offense and then gets a Rule 35. If he has turned in a whole lot of people, he is going to get a benefit.

Under relevant conduct, some other guy hasn't got anybody to turn in, can't cooperate to do anything of any meaningful benefit to the government because he's in a little bit too late, and so what is he going to get--the higher sentence. I have heard that in court repeatedly.

I had an occasion about a year ago to interview a number of Federal judges in the State of Virginia from the Eastern and Western District

off the record, in chambers. Okay, guys, I have known you for 20 years. Tell me what you think about these things. They create unfair results because they are not designed to deal with the realities of what they face in the courtroom, and you have an opportunity and a recommendation to make it more realistic.

Quantity alone doesn't count. Look at what you do for growing plants. I forget the gentleman's name who runs the agricultural station for the Federal Government in Mississippi --

MR. ROSENTHAL: Mahmoud ElSohly.

MR. MILLER: Mahmoud ElSohly. He says that in perfect conditions, in an ideal lab, you can't get a kilogram a plant. That's a fantasy, or as somebody once said, it's a pipe dream.

You look at a person who grows a little over 50 plants. They grow 60 plants. This is based on a series of cases I did that were growing cases where people were growing for personal use in rural parts of Virginia and West Virginia. I got government experts to agree to the following. You

are going to lose approximately, at maximum, maybe a third of your plants, period, I don't care what you are growing, because they aren't going to make it. So if you have 60, that leaves you with 40.

You only can use the female plants, because the male plants have no functional use. So you knock out the male plants, and they can be half or more. Let's keep it small, let's keep it at half. So you're down to 20 plants.

So you have 20 plants, now. You grow the plants to maturity and you harvest them. A lot of connoisseurs, and you find this more in the California areas and certain of the mountain areas of Virginia than you do in some other areas, only use the buds of the plant. The rest of the plant gets tossed away.

I have a case where my guy was apprehended, because in his barn, he had all this stuff he had bundled up for throwing away and burning. He hadn't gotten to it yet, and they didn't know where it was grown. They caught the load, which was the buds, and he was a commercial

manufacturer. They caught the buds and they found out where they had been grown by seeing this stuff that was going to be thrown away.

But look at the small grower. He grows 60 plants and he is going to end up with a little bit over a pound for himself for a year. If he gets arrested after he has harvested it, packaged it, put some of it in the freezer, he is going to be sentenced on a pound-and-a-half. If they come in when they are seedlings in the basement, before he has even put them in the ground, well, he has over 50 plants. It is a kilo a plant--not realistic.

Your recommendations talk about this issue and you need to bring them in line with reality. Congress is going to want to go along. You've got one million people incarcerated. Sixty-two percent of them in the Federal system are for drug offenses. They are looking to deal with balancing the budget, and you can take the heat off of them by cutting back on what they spend in incarceration.

Drugs are a problem in our society, but we

have to look at sort of settling them out. Not all drugs are the same. Almost all the States recognize a difference between one drug and the next. There are some, and I was surprised to hear this from some drug enforcement agents federally, who agreed with me, in an evening, that treating marijuana and cocaine the same in the way they were dealt with in sentencings lead to the crack problem, to the extent that if I am a professional, hard-nosed, nasty drug dealer and I am going to make money and my penalty, my risk of doing business, is the same for marijuana as it is for crack, well, I will tell you, I would rather deal with something where it is easier to conceal and I can get more for a smaller amount than something larger that is less harmful.

This agent wouldn't want to lose his supervisor's job and he would never come out and testify about that, but there is a practical reality. I am sure that you hear this as you go around the country, talking with people. It is not something that people are making up out of thin

air.

What needs to happen is practical truth. There is a case called Fatica out of the Second Circuit. It talks about truth in sentencing. That is why you are here listening to everyone today. Some of it interests you, some of it bores you, but you are trying to take from it what you can and to synthesize it into a practical reality where you can do something good for the country. And the reason you are taking time from your life to come here and do this is to do something good for the country, and the country needs you to do it, and we appreciate your willingness to do it.

If you look at the overall situations in 2D1.1, just basing it on weight, putting that incredible weight of a kilo per plant on over 50 plants of marijuana, it just doesn't work. What I urge you to do as a practical matter is look at this from the context of you break up a ring, you put people in jail for a while, they usually don't come back. Your recidivist rate in State courts is low.

By using weight, you get a State narc, and no offense to them, I have been fighting with them and some of them are friends of mine now after 25 years of this for some of the same people, they get promoted and they get benefits based on their case numbers, which are based on sentences they get. So a guy goes out and he gets arrested. The narc says to him, I'll tell you what. You give me three collars and you go free, small arrests, possession, maybe a small felony. Give me three and you go free, and I have seen that happen repeatedly. It happens all the time.

I have seen situations where an individual comes in and goes, okay, get me a case at this level and you will go from this level in State court to that level in State court and then they've got a case they can bring in the Federal court, they are in a task force, State and Federal agents in task forces. They get a great deal of kudos for that. They go into Federal court. Now they can take cars and do forfeitures much easier than they could in State court. The numbers go up; their

career goes up.

This is a broad and complicated problem. It does not lend itself to simplistic, easy solutions. Retroactivity is something that needs to be done. It can be done. The Federal Rules of Evidence and the procedures for courts and sentencing would allow it to happen. I hope you bite the bullet and do the right thing.

If you will excuse me--yes, sir, I'm sorry?

COMMISSIONER MAZZONE: Good luck.

MR. MILLER: Yes. I hope I get some today. I could use it. I appreciate it.

COMMISSIONER MAZZONE: Thank you for your comments.

Dr. Lord?

DR. LORD: Mr. Chairman, I appreciate the opportunity to testify before this Commission and I hope that my observations as a practicing attorney can help to correct the perilous course of today's law.

Good law derives its authority from its

adherence to natural law, and by common sense, the preponderance of men obey good laws. For those tempted to violate them, the fear of shame and rejection usually compels obedience, because such laws enjoy the overwhelming support of the people, and when real crimes are committed, we impose sanctions which have long been tested and approved in the laboratory of human experience.

It is important to understand that fear of shame enforces laws that coercion cannot. This insight probably explains why large cities have high crime rates. The big city provides an opportunity for anonymity and thereby permits shameful activities without fear of shame.

Every government in history has manufactured certain laws and punishments to coerce obedience from an unwilling population. These laws, in their mature forms, always display one common characteristic, unconscionably harsh penalties for the infractions committed. The reason for that is that they possess no intrinsic moral authority and the sole agent of enforcement

is the police power of the state. Individual citizens have no stake in and no commitment to such laws.

Do you recall reading about the vim and vigor with which the U.S. Government prosecuted the crime of manufacturing alcohol during prohibition? Those laws stand as a monument to the transitory nature of artificial and oppressive legislation. Writing in the 1992 issue of The Freeman, the Rev. Edmund Opitz said, "The Eighteenth Amendment was repealed by the passage of the Twenty-First Amendment in 1933. Shortly thereafter, another prohibition law passed, this one a prohibition against owning gold. Under the earlier dispensation, you could walk down the street with a pocketful of gold without breaking the law, but if you were caught carrying a bottle of whiskey, you might be arrested. Then the legal switcheroo occurred and you could carry all the whiskey you wanted, but if you had any gold in your pocket, you could be thrown in jail."

Today, Congress keeps the sentencing

function out of the hands of the jury, because jurors would very seldom apply the law's harsh punishments to a flesh-and-blood defendant. But removing the jurors from the sentencing phase of trial is not enough. It is also necessary to conceal from them the draconian penalties to be imposed on the convicted defendant. If they knew the consequences of a guilty verdict, the jurors would frequently acquit, despite the law and the evidence.

The hideous magnitude of the punishments for some crimes has been too much, even for veteran judges, to stomach. The penalties for drug law violations have become so severe and the requirements for conviction so lax that scores of senior district judges are now exercising their prerogative not to hear cases involving violations of the drug laws.

In order to ensure that its laws and penalties would be imposed, Congress found it necessary to deprive even the judges of their discretion in sentencing. Now we have the Federal

sentencing guidelines and justice by recipe. We just open the felony cookbook and search for a credible offense. We add a little time for this, deduct a little time for that. We extrapolate here and interpolate there. And, with the impartial guidance of a calculator, we arrive at a just sentence. Who would ever have imagined that justice could be so easy? Who, indeed.

In the campaign for the passage of the Federal sentencing guidelines, much was made of the great variability in Federal sentencing. One of the causes of this evil, we were told, was the broad discretionary authority of the district judges. Now that the guidelines are in effect, we find that the evil of variability has survived. Much of the trial judge's discretion now resides with the prosecutor.

Today, it is primarily the prosecutor who controls the sentence, by his characterization of the evidence, by his characterization of the defendant's degree of cooperation, by submitting or withholding recommendations for a 5(k)(1)

departure, by submitting at sentencing evidence that was inadmissible at trial, and by the vigor with which he presents his arguments in the sentencing hearing.

Legal fictions have been an accepted part of the common law tradition for centuries. Corporations and trusts serve benign ends, but today, we have new and malignant fictions which are designed to evade the evidence requirements of the Sixth Amendment. When the weight of a marijuana plant is determined by an a priori decree, when a tall, thriving plant weighs the same as a dead seedling, when people are convicted of growing plants which have never been seen and cannot be produced in court, and then they are acquitted for some plants and sentenced for those, as well, and when the number of plants charged to a defendant is determined by extrapolating from conjecture, justice itself has become fiction, and everything I have mentioned happened in the case of Joanne Tucker.

Joanne's husband, Gary, owned a hydroponic

gardening store. Joanne had occasionally smoked marijuana with a friend who had bought some supplies from Gary's store. For this, she was convicted of conspiracy to manufacture marijuana, 1,000 marijuana plants, and sentenced for ten years in jail, one kilogram a plant. Even at 100 grams, this is totally unrealistic for a garden in somebody's closet.

A system such as this so violates the American spirit of fair play that it brings the law into disrepute. The very least this Commission could do is recommend that the weight of marijuana charged against a defendant be the actual weight of the plant which can be produced in court, and that criteria should be made retroactive.

But I feel foolish discussing the method of determining the weight of plants. To do so seems to concede that the defects in our present system can be remedied by modifying the formula, while ignoring the undeniable truth that using any formula to dispense justice is itself a defect.

Under the sentencing guidelines,

acquittals become relevant conduct. The court then increases the length of the defendant's sentence, based on charges which were rejected at trial. The additional length of the sentence is clearly an imprisonment for a crime for which the defendant was found not guilty. Why not simply adopt a legal dictum of the Queen of Hearts? No, no, sentence first, verdict afterwards. When acquittals do not immunize a defendant from punishment, what does it matter which comes first?

For most defendants, the only practical way of escaping the blind wrath of the sentencing machine is to accuse someone else and testify against him. If the defendant-turned-witness was truly the dishonorable criminal that the government claimed when it sought his indictment, why would we now honor his barter testimony? Why would we permit him to designate someone else to serve his prison sentence? Why would we beg him to perjure himself?

Witnesses under duress have an ignoble history in our law. We should have learned our

lesson long ago when, in one case, the first person who was accused passed the blame to a second, and she to a third. Before long, 20 people had been executed and scores more awaited trial. Of those executed, nearly all eventually confessed, but when reason returned to the people of Salem Village, the trials, convictions, and executions for witchcraft were halted forever. How is it that we have forgotten how treacherous witnesses can be when they, themselves, are under duress?

Mr. Chairman, our citizens naturally fear felonies such as murder, rape, burglary, arson, and the like, and they support strict penalties for those crimes, but those matters, for the most part, are the proper subject of State law. The people are beginning to realize that the Federal Government's severe punishments for fiat crimes are in error.

I would ask that this Commission report to Congress that impartiality and uniformity, by themselves, do not produce justice. Blind justice is blind, but it is not justice. I would ask that

you recommend some additional discretion be returned to the trial judges. I would ask that the barter testimony of desperate defendants be presumed to be tainted, and that the courts and jurors be made aware of all the circumstances and events which influence that testimony.

Finally, I would ask that you recommend that we look to the jury as a final authority in sentencing. Of course, the jury would have the benefit of the court's experience and recommendations. A public presumption of justice usually attends a jury's verdict. Therefore, including the jury in the sentencing phase avails us of their community conscience and inspires public confidence in the criminal justice system.

Thank you again for the opportunity to speak here today and for your considerations of my opinions and recommendations.

COMMISSIONER MAZZONE: Thank you, Dr. Lord. Ms. Werth, it is a little late in the day for me to enforce a rule I should have enforced a long time ago, but which I warned all the panels

that they should adhere to, and that is to stay within the time allotted. We are two hours and 15 minutes beyond the time we were supposed to sit, and I notice you have a one-page submission. I am happy to hear from that, but for the rest of the speakers, not only those at the table but others, I am going to enforce the rule.

You have submitted written material. We have read the written material. We will read it again. You should call to our attention those portions of it that you want to highlight. It serves very little purpose to read what you have already submitted to us and which we last night, probably--last night, in my case--read. So, please, stay with us on this. We have been here since 9:00 this morning and we have four or five more people to go who want to be heard.

COMMISSIONER GELACAK: Before you enforce that rule, I was going to ask that this panel and others stop beating up on the State of Massachusetts today.

COMMISSIONER MAZZONE: I know. I am very

sensitive about that.

I am sorry, Ms. Werth. You have a very poignant plea, and I read it last night. I know you want to make it and we want to hear it --

MS. WERTH: And I am not long-winded.

[Laughter.]

COMMISSIONER MAZZONE: But for the others, I apologize for being lax in my enforcement responsibilities up to now, but you are going to have to abide by the time limits.

MR. KAMPIA: How many minutes will we have?

COMMISSIONER MAZZONE: Because there were five of you at the outset, we allotted a half-hour for you, but we want to leave, also, some time for some questions, you see. This puts it way out of our slot.

DR. LORD: I would just like to apologize. I was told over the phone 15 minutes, and if you were following my written thing, I left out half of it because I was trying to cut it down for time.

COMMISSIONER MAZZONE: I know. I wondered

when you were going to get to Salem Village. I knew that when you got there, you were three-quarters of the way through.

Ms. Werth, I am sorry. Please proceed.

MS. WERTH: No problem at all, and I had no intention of reading this because I don't have my glasses on.

[Laughter.]

MS. WERTH: But I did want to say that the reason I am here today, and I am Lennice Werth and I come from Southern Virginia and my husband and I run a small publishing operation, typical small business people. The reason I am here today is to put a face on the medical marijuana user. This shoulder has received many tears. Someone else has to receive my own, but because I have come out into the public with my own particular story, which I don't tell here at all--I suffer from something, what you would call epilepsy and mood swings, and believe me, I have tried every drug the doctors have.

It is not that none of them do anything,

it is just that cannabis or the active ingredients of cannabis is the best drug for what I have, and I am not everybody. Other people with my condition find different results. But I use the legal synthetic THC. My family pays dearly for it. I am lucky, because I can afford that. I can afford all the expense that went into getting that prescription. Three different physicians prescribed that for me.

I want to put a face on the medical marijuana user because there is no legal option for the medical marijuana user. Because there is no legal option and because many of these people find themselves in situations where they are all of the sudden, as in the case of cancer chemotherapy, in need, they are very unsophisticated and they are the very people who would go out and grow too many plants, because they don't know what the sentencing guidelines are and so forth.

I would rather have you ask me questions, since you did already read my testimony --

COMMISSIONER CARNES: There may not be

anything to handle this issue, but what would you have us do long term, some sort of amendment to the guidelines that would allow downward departure when the marijuana was used for medicinal purposes, or a statutory change?

MS. WERTH: For this point in time, I would like for you to do what you proposed to do, because that would actually help. Medical marijuana users live in fear of these sentencing guidelines.

COMMISSIONER CARNES: You mean the 100 grams provision?

MS. WERTH: Yes, ma'am.

COMMISSIONER CARNES: But you have a longer-range goal than that, I would assume.

MS. WERTH: I would like to see this medicine available to patients in other forms other than in smoking form, too. People don't want to have to smoke just because they are sick.

COMMISSIONER CARNES: Have people worked on language? You could see where this could be a loophole, that if you just sort of had loose

language. You would want something somewhat structured or that there were some standards that determined when somebody needed it. Have people worked on --

MS. WERTH: Perhaps a doctor's prescription. A doctor can't do that. A doctor cannot prescribe.

COMMISSIONER CARNES: That would be good.

MS. WERTH: In the State of Virginia, we have a law that allows for that in certain cases, but it can't be used because of the Federal situation.

COMMISSIONER CARNES: Thank you.

COMMISSIONER MAZZONE: There used to be a law on the Federal books back in the 1960s which allowed the use of some, if it were medically--or possession of some controlled substance with a prescription, but those were drugs which were able to be prescribed. We have never reached that level with marijuana.

MS. WERTH: And I really wonder why. This isn't this Commission's concern, but I think that

the point is that marijuana needs to be looked at as a different case than with cocaine or what have you, because there are people using it medicinally.

And I want to tell you something while I have the chance, which I really appreciate. I talk to a lot of people who come to me because my name is listed in High Times magazine as a person who could talk to somebody about this issue, so they just call me and they tell me their situations. Usually, the instance of them calling is the imminence of a drug test for employment, and they call me and I advise them that if they just quit smoking marijuana for a certain period of time, they could pass that doggone drug test and why don't they. That's when I get it. Why don't I have seizures, return to my former ill state, have terrible mood disorders? My wife will throw me out of the house because I get so violent. These are real concerns. I have brought up the ones that I hear the most.

COMMISSIONER MAZZONE: Thank you, Ms. Werth.

MS. WERTH: You are welcome.

COMMISSIONER MAZZONE: Mr. Kampia?

MR. KAMPIA: Good afternoon, and thank you for the opportunity to testify on behalf of the Marijuana Policy Project in support of Amendment No. 37. Before I begin, I would like to apologize. I am going to be coughing continually throughout this. I am extremely sick, and I might actually leave after I give testimony, so I do apologize from the start.

First, I would like to explain why marijuana plants should be considered to weigh no more than 100 grams each for sentencing purposes, regardless of the number of plants involved. The Marijuana Policy Project works to devise and promote policies to minimize the harm associated with marijuana. We support realistic regulations and restrictions designed to reduce the hazardous effects that marijuana may have on individual marijuana consumers and on society. We oppose any and all marijuana policies that cause more harm than good.

The kilogram-per-plant ratio used to determine the sentencing level for individuals convicted of growing 50 or more marijuana plants is a prime example of a policy that causes more harm than good. This ratio is unreasonable, arbitrary, and results in excessive prison sentences.

First of all, as marijuana horticulture expert Ed Rosenthal, at the other end of the table, will soon testify, marijuana plants do not produce one kilogram each. In fact, they generally produce less than one-tenth of that amount. This is accurately reflected in the 100 grams-per-plant ratio used for people convicted of growing 49 or fewer plants.

As you know, 50 is presently a magic number. If a person is convicted of growing 50 or more plants, all of the plants, including numbers one through 49, are each considered to weigh one kilogram, which is 1,000 grams.

To demonstrate how outrageous this kilogram-per-plant ratio is, my colleague and I brought 50 marigold seedlings and 50 kilograms of

grazing grass with us today. Unfortunately, we were informed yesterday that security would not allow us to bring this display into the building, so it is presently set up outside. I urge the Commissioners to take a look at the display, if you have not already.

The simple fact is that 50 marijuana plants would not produce anywhere near 50 kilograms of marijuana. First and foremost, even under very good conditions, a marijuana plant just does not produce one kilogram of usable material. Furthermore, home growers are not botanists. They are marijuana users, perhaps abusers, trying to save a buck. They don't know how to produce large yields from marijuana plants. They are lucky if half of the plants survive. It is usually because of their inadequate horticultural skills that they grew so many plants in the first place. Many users just figure, oh, I'll just poke a bunch of seeds into the dirt and see what happens.

So 50 plants would typically produce, at most, five kilograms, probably much less. For a

heavy user, that is about a year's supply. In addition, people can freeze their marijuana so that it lasts for decades. It is a marijuana user's equivalent to having a wine cellar.

Home growers are usually just marijuana users, not commercial drug dealers. Some people prefer to grow their own tomatoes and some people prefer to brew their own beer. These people grow their own marijuana. They don't want to support or interact with the criminal underground drug market. They don't want to waste their money on prohibition-inflated prices or have to start selling marijuana to others to cover their costs. They don't want to risk purchasing adulterated or contaminated marijuana. They don't want to buy marijuana from the same people who are also selling cocaine and heroin.

I should also point out, as Lennice just did, that many patients need to illegally grow their own marijuana for medicine, since the Federal Government allows only eight people in the United States to legally use medicinal marijuana. A

healthy, financially-secure 25-year-old recreational user could afford to buy a bag of marijuana on the street. An 80-year-old glaucoma or cancer patient on a fixed income has no choice but to grow their own marijuana.

Yes, growing marijuana is currently a crime, but home growers should not be punished as severely as people who possess many kilograms of harvested material. Growing a few plants is not the same as possessing 50 kilograms, which is 110 pounds of marijuana. People who are arrested with 110 pounds of marijuana are well-connected in the distribution chain.

The severity of the penalties gets even more extreme as more plants are grown. A person who grows 75 plants must serve between 41 and 51 months in Federal prison. A person who grows 99 plants must serve between 51 and 63 months in Federal prison. Five years for 99 plants, even seedlings. That is the median sentence for kidnapping and hostage-taking.

But if someone grows 99 plants, aren't

they manufacturing it to sell? Not necessarily. Many people, especially heavy marijuana users and medicinal users, use a sea of green method. They are not concerned with quality or bulk quantity, but instead want a constant, steady supply. They don't plan to let most of the plants survive to maturity. Instead, they start plucking off and smoking plant parts from the time the plants get a few inches tall.

Nevertheless, let me stress again, even if it were intended for sale, 99 plants would typically produce less than ten kilograms of marijuana, yet someone who grows 99 plants would be subject to the same sentence as someone who possessed 99 kilograms. That is 218 pounds of harvested material. This inequity should be resolved.

The kilogram-per-plant ratio is also unjust for another reason. It results in a sentencing cliff, whereby an individual convicted of growing 50 plants must receive a prison sentence disproportionately longer than an individual

convicted of growing 49 plants, as the chart over here illustrates. An individual convicted of growing 50 plants can be incarcerated for more than four times as long as someone who grew 49 plants. That is more than two extra years in Federal prison for one plant.

When policies like the Federal sentencing guidelines punish home growers more severely than people who possess more than 100 pounds of packaged marijuana, the illicit drug trade flourishes. The arbitrarily-chosen kilogram-per-plant ratio that is currently in use is not only unfair, unreasonable, and excessive for the convicted cultivators, but it is devastating to society.

The Marijuana Policy Project encourages the Sentencing Commission to promulgate Amendment No. 37. That is, the Marijuana Policy Project requests the following. If a defendant is Federally-convicted of growing marijuana plants, each plant should be considered to weigh 100 grams for sentencing purposes, regardless of the number of plants.

Thank you for your time and your concern.

COMMISSIONER MAZZONE: Thank you. I hope you are felling better. You don't sound so good.

MR. KAMPIA: I coughed more in the beginning, I think, than at the end.

COMMISSIONER MAZZONE: Mr. Rosenthal?

MR. ROSENTHAL: Thank you for allowing me to be here. Commissioner Mazzone, marijuana was part of the pharmacopeia. In 1937, at the behest of the drug companies, it was taken out, and since that time, more than 50 years, it has been illegal to use medically.

I am going to diverge a little from my written testimony, because you can read that. I wanted to go over some particular things that people should realize.

First of all, marijuana is not a harmful drug. That is the very first thing. So any sentencing that is done for marijuana or related to marijuana is more harmful than the substance it is regulating. I am not the only person to say it. We could have a parade of sociologists and

criminologists up here for the next five weeks all saying that.

The second thing is, marijuana has no part of the Federal guidelines--it should not be part of the Federal laws. We should just remove marijuana from all Federal laws and let the States regulate it. This would be part of the Republican platform, which is to return authority to the States. If a State doesn't want marijuana in its particular jurisdiction, it can restrict it.

The third thing is that sentencing should not be based on 100 grams. It should not be based on a kilogram. It should be based on actual weight. For instance, I was an expert witness in a case in which, at maturity, the plants weighed only ten grams each. Under the 1987 guidelines, this person was sentenced for 100 grams each, which meant that this person was sentenced for ten times the actual weight of what he produced, grossly unconstitutional and unfair, no matter what the Supreme Court says.

The next thing is that, even if we can't

do that, the medical use of marijuana should be a defense in Federal cases. In other words, since people can't get it by prescription, perhaps this could be written into the law, that that is a defense, that people are using it for medical reasons. In many Federal courts, you can't bring that up, why the people were using it. So a jury might think that this person was using it recreationally and they can't even bring up the medical issue.

There are a few other things. In the marijuana laws, one of the things is intent. Does this person have an intent to sell marijuana? Unless we have a brain scan or something where we can actually determine what a person is thinking, it is up to the jury to determine what intent was. That is a hit-or-miss proposition, especially when you have prosecutors and police who often exaggerate or color the actual circumstances of the situation.

COMMISSIONER CARNES: You, obviously, have a lot more expertise in these issues than we do, so

tell me, what is your kind of ballpark figure of a number of plants that if you heard somebody had that you would have a pretty good conviction that they were actually raising it to sell as oppose to use?

MR. ROSENTHAL: There is none, and let me give you an example why. Marijuana is a short-day plant. It flowers based on the number of hours of uninterrupted darkness that it receives. So I could take a plant this big and flower it, or I could take a plant this big and flower it. When people grow plants indoors, they sometimes grow nine plants per square foot. Those plants will typically yield seven to ten grams.

A plant like this, one plant, might yield--for instance, in the research that they did at the University of Mississippi, plants on three-foot centers, that means a plant that has a three-foot diameter, yields about 116 grams a bud. A plant on a six-foot center yields about 200 grams a bud.

COMMISSIONER CARNES: Is there a number at which you would feel pretty confident? Ten

thousand, maybe it is not personal use. I am sure there has to be some number.

MR. ROSENTHAL: Let me give you an example of how a person can have 100 plants in a four-foot closet. If you put nine plants per square foot in a four-foot closet, a four-by-four closet, that is 16 times nine. That is 144 plants. Plus, they might take clones from them. So in a four-by-four-foot closet, a person might have 288 plants, but that could be for personal use.

On the other hand, a person could have one plant in their backyard that is ten feet tall and six feet wide and yields several kilograms, so there is no basis for doing it.

You don't ask a farmer, when you say, how much corn did you grow, they don't say, oh, I grew 44,000 plants. They say, I grew an acre, two acres, or so on. It could be based on space, how much space the garden takes. But basing it on plants is just totally irrelevant, and I go into it in detail in my testimony, which I submitted for 1993 and 1994.

Now, I want to go into something else. I go to Europe a lot to study marijuana, and in Holland, for instance, it is practically legal and it is taxed. In two cantons of Switzerland, it is legal. In Germany, possession and cultivation is legal. In Italy, possession is legal.

When people read about the marijuana laws in the United States, they say that these laws are against human rights, that these laws violate human rights. In virtually all Western countries, when they hear that a person can receive the death penalty Federally for marijuana, that is 60,000 plants, they don't believe it. They think that we are like Singapore or Malaysia or something like that.

You are all participating, every one of you is participating in these laws. These laws, being a violation of human rights, and your participation in them, you are violating human rights. Each and every one of you, individually, is violating human rights. At some point, when the marijuana laws are eliminated, and they will be

eliminated, you could very well stand trial, because these laws are so bad, these laws are laws against humanity.

You may not think so. Forty years for marijuana is a law against humanity. The death penalty for marijuana is a law against humanity. You should think twice. Perhaps all of you should resign as a protest against these laws. If not, your names are going to be besmirched. You will be reviled by the 40 or 50 million Americans who smoke marijuana and by the hundreds of millions of people all over the world who know that these laws, not the people who are serving time behind them, but these laws are criminal.

Every one of you, every Congressman, everybody who is enforcing these laws, is on notice. You are engaging--you are engaging--in criminal behavior.

COMMISSIONER MAZZONE: I don't want you to hold back at all.

[Laughter.]

COMMISSIONER MAZZONE: I want you to tell

us exactly what you are thinking. Don't be too gentle with us, now.

MR. ROSENTHAL: Everybody treats this as if --

COMMISSIONER MAZZONE: I am sorry. I didn't --

MR. ROSENTHAL: Everybody treats the marijuana laws as if they are rational, and they are not. You are dealing with a group of irrational laws. Can you --

COMMISSIONER MAZZONE: We really have to --

MR. ROSENTHAL: I would like to just ask the Commissioners one question, which they don't have to answer. Do you think that these marijuana laws are stopping one person who wants to use marijuana from getting it? If not, why do you have the laws? Why are you engaged in, in some way, keeping these laws on the books?

COMMISSIONER MAZZONE: I am not going to answer, but I am just going to suggest, Mr. Rosenthal, that perhaps you should read the

Sentencing Reform Act and establish, in your own mind, the position that the Commission is in. We do not make laws.

MR. ROSENTHAL: But you do make recommendations, though, and one of the recommendations that you should make is eliminate the marijuana laws.

COMMISSIONER MAZZONE: Is there anything on my right here or on my left?

[No response.]

COMMISSIONER MAZZONE: Thank you very much for your attendance and your strongly-held convictions, I am sure. Thank you.

COMMISSIONER MAZZONE: The next panel, Ms. Edmundson--I was here with you at a quarter-of-nine this morning. I thought you were first on the list and you end up being last. How very nice of you. You sat through this whole thing.

MS. EDMUNDSON: I came all the way from Southwest Missouri. It's a long way.

COMMISSIONER MAZZONE: Weren't you here before?

MS. EDMUNDSON: Yes, I was.

COMMISSIONER MAZZONE: I know you were here, and I said, she has to be first. As a matter of fact, I gestured to you to come forward and be heard.

MS. EDMUNDSON: I could have been.

COMMISSIONER MAZZONE: I am sorry. You are first.

MS. EDMUNDSON: I'll condense my whole six pages down.

COMMISSIONER MAZZONE: Would you, please?

MS. EDMUNDSON: My husband was a respected electronics engineer that designs floor polishing machines at Clarke Industries in Springdale, Arkansas. He made $45,000 a year. He had a 3.9 grade point in college. He is not a person that deals in drugs. He is a person who grew for his own personal use.

But because of a confidential informant who gave testimony that we were growing marijuana, State and local authorities came in, did not find evidence to convict us on, so they brought in the

DEA. They brought in their thermal imaging technology, and because we had an exhaust pipe in our shop that vented the heat from his small grow room, they granted the search warrant. In that search warrant, they found 47 marijuana plants in his grow room, which was the size of a small bathroom, and then they found four other plants out in the woods on our property. We do own our property. We own 40 acres in Southwest Missouri.

He is not a person who drinks. He drinks occasionally. He has never smoked any tobacco products at all. But he, because of his high stress and demanding job, marijuana gave him a release. He suffers from insomnia and he could smoke a joint after work. He never smoked before or during work. He only smoked after work, where he could just sit down, relax, take a breather.

I don't even smoke marijuana and never have. I don't use any other drugs. But because I was also caught up in this, I could have gone to prison, too, but I plea bargained for probation and was granted six months' probation because, through

repeated drug tests, I proved that I had no involvement in this. Even when my husband was setting it up, I said, I don't want to have anything to do with this.

Since then, I have gone on. He is in Leavenworth, Kansas, for 24 months. He has already been in one year, at the end of February. During the past year, I have gone through 500 hours of massage therapy. I have passed the national certification for massage and body work people and have an Arkansas license to practice massage therapy. So we are not people that just sit back and not do anything with our lives. We are the people that get out there and make America what it is. It is real sad that he had to do 24 months in here.

COMMISSIONER CARNES: What would happen if we changed it to 100 grams per plant? How much would that help you?

MS. EDMUNDSON: As of right now, he is scheduled to get out in November of this year, so, actually, it probably is not going to help him any

at this time.

COMMISSIONER MAZZONE: No, but if he had been at the time, it would only have been about ten months, as I remember your paper. He would have received ten months.

MS. EDMUNDSON: Yes, or just some probation. And why it was even brought to Federal prosecution was something that our attorney wanted to know, because it was only 51 plants, and the only reason I can come up with is because the DEA was called in, so they have to justify bringing in their technology.

I guess that's all. Thank you.

COMMISSIONER MAZZONE: Thank you.

Jeff Stewart?

MR. STEWART: Mr. Chairman, Commissioners, thanks. It has been a very long day. You have been very patient. You have heard a lot more testimony than I have. I didn't get here until lunch and I am already weary.

I have the unfortunate distinction of being the only person here to testify today that

just got out of Federal prison. I got a five-year sentence for growing pot back in 1990. Thank the Lord, it is over. The 3rd of March, they took the bracelet off of my ankle and now I am on supervised release for four more years.

Julie Stewart of FAMM is my sister. She and I kind of had--she started this organization because of my misfortunes, or whatever.

I wanted to address Amendment 37 and the proposal to change the guideline weights for marijuana. I think it is a very good idea. I would like to see it go to 100 grams per plant for all plants, regardless of the number.

I did submit written testimony which explains in some detail, I suppose, about marijuana, my understanding about marijuana. If the original intent of this guideline was to more severely sentence the individuals apprehended with larger numbers of plants, doesn't the simple expedient of a longer sentence for a larger number of plants serve the purpose? Why do we need a ten-factor multiplier?

But what you might see on pages three and four of my little four-page missive here is that we did a little survey. As Julie mentioned, FAMM has some 28,000 members, so we knew that you guys were going to have this hearing today and we wanted to try and prepare for it. We did a survey of our membership through the newsletter and asked marijuana growers to write back to us. We gave them a little form they could fill out, how many plants did they have and how many months did they receive, so that we could get a feeling for what are the guidelines now doing to marijuana growers.

We have contacted the Bureau of Statistics over at the Department of Justice. They keep a lot of good records. They do a heck of a good job there. But, as yet, they do not provide numbers on how many marijuana growers are in the Federal system. Marijuana offenses are lumped all one in the same together, whether it be importation or conspiracy or manufacture or possession, for statistical analysis. We don't know how many growers are among the total of marijuana offenses

in the Federal system.

But those that responded to our survey, I tried to break it down as best I could. This is, by no means, an authoritative survey. We did what we could with the resources we have. We didn't have any respondents in the 49-plant or under category. Those are the people that are not subject to the one kilogram stair-step or cliff, however you want to describe that.

We did get about 16 percent of the respondents feel in the 50-plant to 99-plant category. That group does not fall under the mandatory minimum five-year that the Congress created by statute, so you know, going out of the gate, anybody with 99 plants or fewer would derive benefit from a change in your proposed guideline.

The curious things that emerged to me, the largest number of respondents, nearly 40 percent of them, were in the 100- to 399-plant category. Of that group, 22 percent would benefit from a change in the guidelines. That is to say that they are now serving a sentence greater than the mandatory

60 months, due to the sentencing guidelines and the one-kilogram-per-plant calculation. If that calculation were to change, they could fall to the statutory 60 months.

So you would have approximately 20 percent of your detainees that are in there now, or the guy that comes in the door tomorrow in the courtroom, that would derive a benefit, even though he would still be subject to the mandatory minimum 60-month sentence. That rough 20 percentage figure holds true, which, in a way, indicates that your smaller stair-steps of guidelines are doing their job. If the guy had, instead of 100, if he had 200, he got a little more time than the guy with 100.

But so you have a feeling for what your proposed change might do, I wanted to be able to provide some kind of analysis. If you plan to make it retroactive and so on, and even if you do not, this, going out into the future, would benefit approximately 20 percent of the people that are being sentenced for marijuana convictions.

As Commissioner Mazzone stated, there is

no need for me to reiterate what you have in writing, so I will try not to. I wanted to briefly touch upon a couple of points that occurred to me this afternoon as I heard the testimony.

One of the things, I don't know if the Commission can do this, but it seems to me that we could make a stride forward in marijuana justice in this country if we could ask the Congress to review this scheduling of marijuana. As you probably know, the DEA schedules heroin, cocaine, methamphetamines, marijuana, and so on. Someone earlier today said that marijuana is scheduled the same as cocaine, but that is incorrect. Marijuana is a Schedule I drug, as is heroin, whereas speed and cocaine are Schedule II drugs because they are known to have medicinal uses.

If there is some way the Commission could urge that to be changed so that marijuana would no longer be a Schedule I drug--I don't know if that is possible, but I think that is something we could examine to bring about a little more rationality in the marijuana laws in this country.

I might point out that when I was arrested in 1990, growing marijuana was not decriminalized. It was not less harmful, it was not--it was legal in the State of Alaska when I went to prison, in Federal prison, when I was busted in the State of Washington. In Alaska, it was legal. So we used to have something like what the repeal of the Volstead Act created. It was like, well, States, we are going to let you sort this out on your own.

Why is this a Federal matter? It is, but why? I would just say that mail fraud, bank fraud, murder, rape, have never been legal anywhere, in any State. So we are dealing with a very ambiguous sort of a thing here and it would be nice if we could allow the crazy patchwork quilt of American States' rights to have some say in this issue. Sure, it wouldn't be the same everywhere, but that would make it a democracy.

I am also aware of the health issue that came up. The AIDS representatives that were here make a pretty good point. All of a sudden, we are talking about criminalizing AIDS, and I guess it

already is. I didn't know that. But I might point out that everybody that goes to prison gets out, with the few unfortunates that get life or die while they are in there, and the incidence of AIDS is more than ten times as high in prison as it is out here on the street.

So those people that are going in are going to come out. They are going to be bitter, they are going to be dysfunctional. I am lucky. I guess I got through it all right. I don't have AIDS. But what is to say the next fellow will be the same as me? Chance are, he won't, and so we have to look at that.

There is a lot of stuff you guys came up with today. My crime was 60-month mandatory. To do that in white collar and get a mandatory five-year sentence would require an $80 million white-collar offense. I wish to the Lord I had $80 million for what I did, but let's be realistic. I had 300 plants, 375 plants the DEA counted. I am guilty. I can't plead for mercy; I am not here to whine. But let us weigh that. Is that an $80

million offense? Did I harm society to the tune of $80 million? I don't think so. Eighty million is a bigger number than most people can get their arms around. That is a lot of money.

You Commissioners have been appointed, as another man said here, to provide cover to the Congress. They don't have the backbone. That is why the need the balanced budget amendment, because they can't find the fortitude to do it without something like that, and you are the ones that can provide them the smoke-screen, the excuse, whatever it is they need to make right decisions, and I urge you to consider your--actually, it is a fortunate responsibility, because it is something that needs to be redressed and I think you want to do it and I would urge you to do it.

I wonder what the meaning of the word "justice" is in the popular vernacular. I think it no longer has a connotation of fairness. It has a connotation of retribution and punishment. I think that is very unfortunate for this country, which once was the shining beacon to the world, the

nations of the world as a place of freedom. It is very unfortunate. We need to redefine ourselves a little bit around the term "justice".

Lastly, I would point out that we are in a climate that wants to be tough on crime. That is hard for those that would like to see changes, to bring rational discussion to a very emotional issue. Saudi Arabia is often trotted out as the example of the most draconian, repressive, and backward regime on earth. They just freed 5,000 prisoners on the king's decree because he felt like being nice to people. Even in Saudi Arabia, they let prisoners go.

So, please, let's put some humanity back in these tables, in these numbers. I thank you for your time.

COMMISSIONER MAZZONE: Thank you, Jeff.

Mr. Boaz?

MR. BOAZ: I am David Boaz from the CATO Institute. I thank you for this opportunity, and I apologize in advance to my colleagues and the Commission if I have to leave before this is

formally over. I committed myself to be on a radio show that I didn't anticipate was going to run into a problem here.

With any public policy matter, you have to consider costs and benefits. That is what I want to talk about here today. I think that, in 1987, an earlier incarnation of this Commission substantially increased the penalties for marijuana possession without giving a lot of thought to the costs and benefits, without looking at what past practice had been or anticipating what the results, in terms of the price of the drug or the crime that that might lead to, would be.

There are a whole lot of factors that could be considered in the whole question of the penalties for marijuana possession, which, in most cases, are not the province of the Sentencing Commission. Today, I want to talk about a much narrower issue, and that is Amendment 37.

I would suggest, first, that as many people have testified, 100 grams is a much closer, correct assessment of the yield of one marijuana

plant, and, therefore, it just makes sense to make this change.

Second, I want to make a couple of economic points. It costs about $20,000 a year to keep somebody in Federal prison. By my calculations, there are about 800 people a year who would be affected by this change. That gives you a yield of about $16 million a year to keep those people in jail.

If you figure that they are getting about four additional years because of the way the sentencing guidelines are and the way they might be changed, then we are talking $65 million for the prisoners who, each year, are assigned to jail under these guidelines. That is a cost worth considering.

There are a couple of other costs you should look at. No matter how many prisons we build, prison space remains a scarce good. Any bed can only accommodate one prisoner. We should think about who is occupying those beds and who is not. Because of the mandatory minimums, people who grow

marijuana plants, for instance, can be given a mandatory sentence. On the other hand, violent criminals do not necessarily get mandatory sentences. That is not to say that they go free, but if a prison gets crowded, you are not allowed to dismiss the people with mandatory sentences. You can dismiss people with severe sentences for violent crimes.

You should take a look at what a violent criminal does to society in any given year and compare that to the cost of keeping somebody in jail this extra four years for a marijuana offense.

Finally, you should look at the productive work that is not done by people kept in prison. We are spending the $20,000 a year to keep each person in prison for a year. At the same time, something like that amount is not being produced by that person's productive work on the outside. In fact, $20,000 is pretty close to the median income of an American man.

Now, let's assume that marijuana offenders typically are younger than the average man and

possibly don't come from--you are less likely to find doctors and lawyers falling afoul of these laws, so let's say they only earn 75 percent of the median income. That is still a cost of $12 million a year for the people incarcerated, or $48 million for the four years extra that they might be taken out of society.

That comes to a total of $28 million a year, maybe $100 million for the four years additional that those people are taken out of society. I think you should consider that cost, and, I think, if you do, you will conclude that it is a cost that exceeds the benefits that we are getting from this additional penalty. Thank you.

COMMISSIONER MAZZONE: Thank you, Mr. Boaz. If you have to leave, please feel free to do so. Thank you for coming.

Reverend Gunn, please?

REVEREND GUNN: Thank you, Commissioners, for allowing me to give a brief overview to you of my thinking. I am the pastor of a local Methodist church here in Washington, on Wisconsin and Calvert

Street. I am also the President of Clergy for Enlightened Drug Policy.

You and I know that in order to have peace and tranquility in this great nation of ours, we have to have good laws. We have to have fair laws. We have to have wise laws. We are a nation under laws and we are a nation of laws and laws must be fair and they must be good. Our democracy, of course, elects officials who make our laws, and if they do make these laws in anger or in vindictiveness or in fear, then we no longer have good and just laws and our society is in jeopardy, and I do believe that our society is in jeopardy.

I am here this afternoon to tell you that there is a large and growing number of clergy and citizens who have become more and more disenchanted with the criminal justice system and the way in which the laws are being enforced. I regret to say that the O.J. Simpson trial isn't helping very much.

There is growing anger toward the mandatory sentences and their injustices. Congress

passed these laws, of course, when they were angry, and anger makes for excessive and mean and punitive laws. Many of these laws are against non-violent offenders. There is growing hostility and resentment and disrespect for the injustices of these mandatory laws and the legal manipulation of the law by legal professionals and by the seizure laws and the drug laws that often, in our opinion, are counterproductive and do far more harm than good.

We now have over a million people in our jails. We are paying a tremendous sum of money to keep those people in jail. Many of the conditions of our jails and prisons are inhumane, in my judgment.

So these draconian mandatory laws are unjust and unfair. They do more harm than good. They destroy families, they destroy individuals, and they are doing a tremendous amount of harm to this country of ours.

We demonize drug offenders. We demonize a lot of things in our society today, and that is not

very helpful. We have demonized the whole drug problem. During the time of Christ, those who had leprosy were demonized, but Jesus did not demonize them. He healed them and helped them. As the President of Clergy for Enlightened Drug Policy, we receive hundreds of letters all over this country from people who have been demonized and who have been unjustly dealt with. I am not going to read the letter that I have included in my testimony.

As a citizen and as a pastor, of course, I am against drugs, hard drugs, marijuana, nicotine, which we, of course, legalized, and alcohol, which we legalized, but we do not legalize the other drugs. It is time we consider some other kinds of answers to the problems that we have.

I think that we need, for example, to make marijuana and cocaine serviceable to the medical community, and you have heard testimony concerning that. They should become prescription--at least, marijuana should become a prescription drug that a person like my son, who is a doctor, could prescribe. There is nothing wrong with that.

We have to rethink our failed drug policies. They have been excused by the police to violate civil rights and to do violence to our citizens. The drug war has, in many ways, become a war on people, and we have been fighting this drug war now for 35 years. Our politicians have failed us and the drug war has been a disastrous failure.

We will not begin to really deal with this drug problem, I believe, until we see it as a medical issue, as a mental health issue, because most of the people that take drugs that we know are mentally depressed. They are clinically depressed. And it is an economic/social issue, instead of just a law enforcement issue, which we have made the whole drug problem into just a law enforcement issue. We must let our judges be judges and end the mandatory sentences.

Our society is decaying, and part of the decay is the drug problem that we have. We need to involve the medical and mental health communities in our efforts to overcome the drug epidemic. We need more education, much more, and not less. The

drug rehabilitation centers are absolutely essential. Housing and jobs for people in the inner city are badly needed.

Enlightened political, judicial, social, religious leadership is essential. We don't have enough. We are in bad shape. Instead, the status quo prohibitional mentality continues to rule in our land and we are not making any progress.

The Washington Post, I am sure you saw the editorial that was in last week's Post. If you haven't seen it, I will be glad to get you a copy of it.

Thank you very much. I appreciate it.

COMMISSIONER MAZZONE: Thank you very much.

The last listed speaker is Teresa Aviles.

MS. AVILES: Good afternoon. I would like to thank you for this time to be here, and I will just be very brief, because everything has just about basically been said.

I am the mother of a son that has been sentenced to 23 years in jail under the mandatory

minimum, although he never did anything. It was information based solely on a confidential informant's word. Because he wasn't a criminal and he was never in trouble in his life, he didn't know what to do so he pleaded guilty to avoid a mandatory life in jail.

I would just like to let you know that we are not solving the drug problem by the mandatory minimums. We are only filling up the jails. Whatever you can do to right this wrong, we would appreciate it.

COMMISSIONER MAZZONE: Thank you, ma'am.

Are there any questions for this panel?

[No response.]

COMMISSIONER MAZZONE: Thank you so much.

It has been a very long day, and I thank everybody who has been with us from the beginning to the end. We take these hearings, of course, very seriously, and you have helped us a lot with the written as well as oral testimony. You can be sure that we will give this all our most careful attention.

Thank you all very much for coming.

[Whereupon, at 4:34 p.m., the hearing was adjourned.]

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