UNITED STATES SENTENCING COMMISSION

PUBLIC HEARING ON
PROPOSED GUIDELINE AMENDMENTS

Thursday, March 12, 1998

Suite 2-500
One Columbus Circle, N.E.
Washington, D.C.

The public hearing in the above-entitled matter convened, pursuant to notice, at 9:45 a.m., The Honorable Richard P. Conaboy, United States District Court Judge, Chair, presiding.

COMMISSION MEMBERS PRESENT:

MICHAEL S. GELACAK, Vice Chairman

MICHAEL GOLDSMITH, Commissioner

DEANELL R. TACHA, Commissioner

MICHAEL J. GAINES, Ex-Officio Commisioner

MARY FRANCES HARKENRIDER, Ex-Officio Commissioner

JOHN H. KRAMER, Staff Director

A G E N D A

P R O C E E D I N G S

CHAIRMAN CONABOY: I think we are ready to open the meeting, please, and begin our hearing this morning.

John, do you want to make some opening remarks?

DR. KRAMER: Sure. By way of beginning, this is being videotaped--we are not live, but it is being videotaped this morning.

I want to welcome you all to actually the fifth public hearing we have had since--during this amendment cycle. We had a hearing on loss in October, a December hearing on manslaughter, in February we had a hearing on telemarketing. Last week at the ABA conference we had a fraud tables loss definition hearing in San Francisco, and today we have, as you know, many people here to testify.

I want to thank personally all of you who have taken so much time to prepare for this. Reading last night and early this morning all the testimony and the details and the hard work that went into that, both personally and on behalf of

the Commission, I want to thank you for that effort.

I learned a lot. It certainly brings before the Commission different positions and different perspectives on the same issue, and I think it will provide them a great deal of fodder for their consideration. So I want to personally thank all of you for your work and efforts, and look forward to hearing from you this morning.

To get started, we have--well, Commissioner Harkenrider is here now. Commissioner Harkenrider will be joining us within the moment, I think, as she comes around to this door, and Commissioner Gaines will be here shortly.

Commissioner Harkenrider is the counsel to the Assistant Attorney General for the Criminal Division of the United States Department of Justice, and she is to my far right.

To my immediate right is Commissioner Michael Goldsmith, professor of law at Brigham Young University. Commissioner Michael Gaines will be joining us and will be down at the far end. He

is the chair of the United States Parole Commission.

Beside Commissioner Gaines and Commissioner Gelacak is Commissioner and judge Deanell Tacha, who is the United States Circuit Judge for the Tenth Circuit. And right beside Judge Tacha is the Vice Chair of the Commission, Commissioner Michael Gelacak.

And to my immediate left is chair and judge, Richard P. Conaboy, United States District Judge for the Middle District of Pennsylvania.

We will--by the way, this is a forewarning, we have a lot of people to give an opportunity to this morning, so we will have, if you look over to my right, we have selected the meanest, toughest person on our staff--

[Laughter.]

DR. KRAMER: And she has been practicing showing signs. We will try to move as quickly and as judiciously as possible, giving you all an opportunity to provide your testimony, but if you will watch a little bit for Pam, we will give you

some heads-up of when time is running short.

So, I appreciate your attention and thoughtfulness in that regard.

Judge Conaboy?

CHAIRMAN CONABOY: Thank you, John.

And I, too, welcome all of you here, and I would indicate that we, as the commissioners also--Commissioner Gaines is here now.

Michael, welcome.

We all appreciate the time that you have each taken, not only to be here, but to submit to us, many of you, written testimony, and we have that before us, and we have had a chance to look at that, and are anxious to hear from you.

We have made a very determined effort in the past two years at the United States Sentencing Commission to open up our processes, not only for hearings but to try to get as much input as we can from people all over the country on the things that we are considering, and things that we are trying to do.

And in this past year, particularly, we

have had, as John Kramer said, a number of hearings. We had a hearing out in California just last week, and we have had a number of hearings, and we have had any number of other people come before us at our regular meetings and testify, or present positions as they understand them, and concerns about some of the things that we are trying to do.

Also this year we adopted a rather restricted agenda, and we tried to keep to that as to the things that we are considering, and, as you well know, we did publish some proposals for possible amendments, particularly in the fraud loss and theft areas, and in the telemarketing areas, and a number--I believe nine--circuit conflicts that we are looking at for possible amendments that might resolve those.

And so we appreciate all of you giving your opinions and your insight, and your experience, that might help us in making these resolutions.

I would point out to everybody, as I did

to the judicial conference on Tuesday morning here in Washington that we have a rather unique situation on the Commission now, as you can see demonstrated before you.

There are only four voting members of the Commission at this point. This is a seven-member Commission but, because of the process in making appointments to the Commission, we only have four members presently serving, and the statute that ordained this Commission requires that there be four votes on anything like amendments, in order for those to be passed by this Commission.

So, it makes it a very difficult thing for us to do. As each of us looks at what is before us, we try our best to follow our own judgment and our own conscience, and we have had a very--and I want to say this publicly, about the commissioners serving me here at the United States Commission this past couple of years, that I am grateful to them for their collegial spirit and their hard working spirit.

We try our best but, try as you may,

differences of opinion--legitimate differences--are there, and sometimes it is difficult for all four of us to agree on exactly the same thing, or the same writing, or the same wording.

And so, I am not apologizing for that, nor complaining about it; I am just pointing out that it makes it a bit more difficult, when you only have a limited number of members, rather than a full Commission.

The Congress and the administration are assuring us that they are working hard trying to fill the vacancies, and I hope it won't be too long until we have a full Commission.

But I hope everybody understands some of the difficulties that we work under, and that is one of them.

We have ten people, I guess--no--yes, about ten people this morning, and I want to reiterate what our staff director said, and ask each of you, if you will, to try to keep within the time frames that generally we have set, although we are a few minutes late in getting started.

And as a result, I want to start rather quickly and begin with the first person who is going to testify before us, and at the end of the testimony I will, of course, ask all of the hall and any of the commissioners if they have any questions, and we will try to move through this and give all of you the opportunity to present your testimony.

I do want to remind all of you who are speaking this morning--I think all ten people--that we do have your written submissions, and we will also have that before us, as well as the oral testimony you will give this morning.

The first person this morning we are calling is John Bliss. John is with the International AntiCounterfeiting Coalition--indeed, the president. John is on my left here, and John wishes to talk to us this morning about this problem of counterfeiting, and particularly in large trade and international trade.

We are happy to have you here this morning, John.

STATEMENT OF JOHN BLISS

INTERNATIONAL ANTICOUNTERFEITING COALITION

MR. BLISS: Thank you, Mr. Chairman and Commissioners; good morning.

I am John Bliss, as the Commissioner said. I am the president of the International AntiCounterfeiting Coalition, or IACC for short. I am joined by our general counsel, to my left, David Quam.

We are a nonprofit trade association, headquartered here in Washington, that was founded in 1978 by trademark holders. They are concerned about the growing problems associated with trademark counterfeiting.

Our members are drawn from a broad cross-section of U.S. industry, from auto, apparel, luxury goods, pharmaceutical companies, consumer products, software, publishing, entertainment, to name just a few.

Consumers who use our members' products expect these products to be safe, and to be of high quality. Unfortunately, counterfeiters too often

undermine those expectations, and they steal the names and the reputations of legitimate manufacturers, to sell inferior products for quick profit.

Oh behalf of the IACC, let me express my gratitude for being afforded this opportunity to testify before you on the NET provisions relating to counterfeiting, specifically on how the criminal infringement of copyright and trademark in the fraud and deceit sections should be amended to deter counterfeiting activity.

In our view, simply put, the only way to effectively deter counterfeiting is to put counterfeiters behind bars. Stringent criminal penalties are necessary, civil remedies have failed to stop the tide of counterfeiting. As a cash business, counterfeiting does not lend itself to civil enforcement.

Damages are very difficult to prove without a paper trail; counterfeiters treat monetary damages and fines as merely the cost of doing business.

The only real concern of counterfeiters is the imposition of criminal penalties, that result in actual jail time served, of one year or more.

In 1982, the International Trade Commission estimated that counterfeiting cost American companies about $5.5 billion. Today that figure has exponentially mushroomed to exceed $200 billion in lost sales, tax revenues, jobs and investment, and across the world losses are estimated to exceed $350 billion.

So, faced with this explosive problem, we at the IACC went to Congress in 1995 to provide law enforcement with new tools with which to fight this counterfeiting epidemic, and the end result of that was the Anticounterfeiting Consumer Protection Act of 1995, or ACPA.

ACPA, among other things, made counterfeiting and piracy a predicate act, for purposes of RICO, and we and Congress, then, believed that the threat of heightened criminal penalties under RICO would encourage prosecution, and deter counterfeiting activity.

Unfortunately, we were wrong. Without a commensurate increase in the Federal Sentencing Guidelines, to match the statutory sentences proscribed by Congress, the prosecutors throughout the country have been reluctant to take counterfeiting cases.

Some of our members have even informed us that in certain jurisdictions prosecutors outright refuse to prosecute counterfeiting case, or piracy cases. And this lack of prosecutorial will has also spilled over into the investigative agencies.

In conversations that we have had at the IACC with the FBI and Customs officials, agents will frequently express a reluctance to expend resources investigating counterfeiting cases.

Why? Well, they know the AUSAs won't prosecute, so why should they expend their time and effort?

As a result, trademark holders are left to combat this vast, interstate counterfeiting problem by combining limited state resources with generally ineffective civil remedies to enforce their rights.

To help correct this problem, Congress directed this Commission to raise criminal penalties for counterfeiting to levels that will encourage investigation, and prosecution, and thereby deter these crimes.

Our specific recommendations are set out in the written comments, but I would like to stress just a couple of points.

First, and as I previously mentioned, the only real deterrent to counterfeiting is the threat of receiving actual jail time for their crimes. That means a minimum sentence of one year imprisonment for those caught trafficking in counterfeit merchandise.

Two, unfortunately, counterfeiting has been characterized as a fraud crime, and it has been given lower prosecutorial priority than crimes such as traditional theft or larceny. Counterfeiting and piracy, in our view, however, constitute the theft of intellectual property.

In fact, Bruce Lehmen, former Assistant Secretary of Commerce, Commissioner of Patents and

Trademarks, had this to say about that point, quote: "There is no difference between this economic crime [counterfeiting] and the harm that it has on Americans than literally of somebody walks in and steals money out of your purse, or money out of your wallet, or from your credit card...It is taking away from our own ability to make a livelihood and have a workable economy."

So the IACC believes that the theft of intellectual property should receive the same level of priority as more traditional forms of property theft. The Commission's proposal, to combine the theft and fraud provisions under the Guidelines, is consistent with this position.

Finally, judges should take into consideration all aspects of the crime of counterfeiting when calculating losses. For example, judges should consider the sales price of the authentic goods, the harm to a company's reputation, the dilution of its trademark, and other lost investments, such as marketing and research associated with the product.

And any proposal that examines only the value of the counterfeit merchandise, or the infringing merchandise, will grossly underestimate the damage done by the counterfeiter to the U.S. industry.

So, in conclusion, we at the IACC applaud the Commission for taking these steps to increase criminal penalties for intellectual property crimes. The proposed changes will help to make the United States a leader in counterfeiting enforcement.

And I should add, it is doubly important in this day and age, when we are seeking the same kind of IP regimes with our trading counterparts, that we too live up to our own statutory authority, and seek the requisite criminal penalties.

I thank you very much, and we both--Dave and I--will be glad to answer any questions.

CHAIRMAN CONABOY: Thank you.

I didn't catch your last name again, Dave.

MR. QUAM: Quam.

CHAIRMAN CONABOY: Mr. Quam, do you have

any additional comments you wish to make?

MR. QUAM: Not at this time.

CHAIRMAN CONABOY: Commissioner Gaines, do you have any questions?

COMMISSIONER GAINES: No, thank you.

CHAIRMAN CONABOY: Commissioner Tacha?

COMMISSIONER TACHA: On just one point, your point about figuring the loss. I don't know how much of the current proposal for the loss definition you have seen; does the "reasonably foreseeable" language cover that?

MR. BLISS: Do you want to take that, Dave?

MR. QUAM: It provides some additional flexibility, and calculating losses in counterfeiting cases is extremely difficult. There is no paper trail, the price at which infringing goods are sold certainly does not represent the loss to the manufacturer, which goes far beyond just a one-for-one sale, typically.

You can include the investment, the good will, and so the language that is proposed adds

some flexibility that will allow us, as trademark holders, to put in some points as to what those losses comprise.

MR. BLISS: In fact, if I could add, Commissioner, that in 1995, with ACPA, Congress acknowledged the inability of the IP community to accurately estimate loss, because they provided for the statutory damages.

In the legislative history, you will see reference to the fact that it is virtually impossible, when these guys are shady--they have no real--they have shell corporations, they are a cash-only business.

What inventory they do have is generally fraudulent, just to hide the extent of their profits.

CHAIRMAN CONABOY: Commissioner Gelacak, do you have any questions?

COMMISSIONER GELACAK: Is most of the actual counterfeiting done outside of the United States?

MR. BLISS: It used to be probably the

majority, but more and more now we are seeing a lot of counterfeiting being manufactured within the United States. They are trying to evade the interstate trafficking aspect of ACPA, by simply importing the raw goods and then assembling the offending trademark indicia--logos and labels--on the products here in the United States.

COMMISSIONER GELACAK: What kind of products are manufactured here in the United States?

MR. BLISS: Pretty much everything now. Everything you see imported is also starting to be manufactured in the United States.

CHAIRMAN CONABOY: You are talking about anything? Do you mean clothing?

MR. BLISS: Everything that has a well-known brand name, from baby formula to shampoo--

CHAIRMAN CONABOY: Food?

MR. BLISS: To food, to auto parts, airplane parts, software.

MR. QUAM: Just two days ago, The New York

Times reported that a factory had been busted in Harlem, in New York, that was running over 500 videotape machines, twenty-four hours a day, turning out 8,000 copies of videotapes per week, and putting them onto the open market.

CHAIRMAN CONABOY: And those places have to be getting some of their materials from legitimate business people, don't they? So-called "legitimate business people."

MR. BLISS: We call it willful blindness.

CHAIRMAN CONABOY: Yes, well, that is a kind way to put it, I guess. What I am getting at is that it seems that, the larger this counterfeiting business gets, the more involved so-called "legitimate" people are involved in it.

MR. BLISS: You make a very good point, Mr. Chairman. In fact, in New York, on Broadway, there was a raid in the last year, and there were probably twenty retail stores selling T-shirts. Twenty-two of them were selling fake T-shirts, and only one of them was selling legitimate T-shirts.

And when he was asked why he was selling

legitimate T-shirts, he said it is getting harder and harder to be a lawful, abiding citizen, because the price at which the bad guys were selling it were so steeply discounted to the legitimate retail price that he was going out of business.

So, as it takes hold, it becomes increasingly more difficult to combat. That is why I think the proposal you have is so important.

COMMISSIONER GOLDSMITH: Maybe his were highjacked, and that is how he got the legitimate ones.

[Laughter.]

CHAIRMAN CONABOY: We have been working, as you know, on corporate guidelines, and working--we just had hearing here recently on--with corporate leaders on talking about raising ethical conduct in the corporate world, and of course this would be one of the key areas that legitimate producers should be careful not to make their raw products available to these people you are talking about, because they have to get their raw products somewhere.

MR. BLISS: Right. For example, in our industry, the particular problem is with leased embroidery machines and printing machines and so forth, where they know, or should know, that those machines are being used for counterfeiting activity. Yet they continue to allow that to go on.

In fact, there is a move afoot in New York at the City Council this week, or next week, to introduce legislation that would add counterfeiting to the nuisance abatement laws, along with prosecution and drug peddling and so forth.

So that if the landlord has been given constructive notice that the tenants are committing counterfeiting in his building, and he fails to do anything about it, the building can be padlocked.

CHAIRMAN CONABOY: Commissioner Goldsmith?

COMMISSIONER GOLDSMITH: A few questions. You mentioned that the annual losses attributable to counterfeiting, either directly or indirectly, amount to about $200 billion? Is that it?

MR. BLISS: Um-hmm.

COMMISSIONER GOLDSMITH: Could you provide the Commission with any further documentation in support of that? In other words, on what is that based?

MR. BLISS: The very back of the envelope, unfortunately. There has been relatively little study on the number since the mid-'80s. The last sort of authoritative study was done in '85 or so, by ITC at the request of the USTR.

At that point, it was a $60 billion figure, but a number of people, including Ambassador Mickey Kantor, have said recently that the number, they believe, is in the 200 range.

COMMISSIONER GOLDSMITH: The reason I expressed some skepticism about that is only because, years ago the Attorney General reported that the annual fraud losses, nationally, amounted to 200 billion.

MR. BLISS: Um-hmm.

COMMISSIONER GOLDSMITH: All fraud. And now you are saying counterfeiting alone amounts to 200 billion.

MR. BLISS: Yeah.

COMMISSIONER GOLDSMITH: And so I would like to follow up on that to some degree.

I also just wanted to question further why civil RICO is ineffective. Civil RICO, of course, provides for treble damages plus counsel fees, and it seems to me that if you have a so-called legitimate business that is trafficking in counterfeit goods, you have got a potential target that is a legitimate deep pocket--a very real deep pocket--and treble damages ought to be a very real threat under those circumstances--treble damages and counsel fees--would make sense.

I am not necessarily opposed to adding--to increasing the penalties in this criminal context, but it strikes me that on the civil side there is in fact an effective deterrent.

Is that not the case?

MR. QUAM: There is an important point that you just made--it is if there is actually a deep pocket to go after and fine those assets. Counterfeiting rings are set up in a very notorious

way, much like traditional organized crime groups.

It is a cash basis, there are very few paper trails. It is hard to get to those deep pockets and actually fine them.

In addition, the problems with civil enforcement are just the processes of notification and bring the cases; the cost and time involved is not nearly as effective in fighting counterfeiting as criminal penalties have been.

COMMISSIONER GOLDSMITH: Wouldn't the merchant that is trafficking in counterfeit goods also be on the hook? In other words, if it is a major department store, for example, that purchases them, and then begins to resell them, wouldn't that also be a violation?

And if so, wouldn't that department store constitute a viable deep pocket?

MR. BLISS: Well, fortunately we have had few instances in which traditional retail stores have been found to be culpable. At lot of times they are duped as often as we the consumers are.

COMMISSIONER GOLDSMITH: Um-hmm.

MR. BLISS: And there are fraudulent bills of lading, there are fraudulent business cards, fraudulent stationery used to dupe them. Particularly with respect to sales of pharmaceutical counterfeits.

COMMISSIONER GOLDSMITH: Okay. Thank you.

MR. BLISS: You are welcome.

CHAIRMAN CONABOY: Commissioner Harkenrider?

COMMISSIONER HARKENRIDER: When you say sales of pharmaceuticals, what types of products are you talking about?

MR. BLISS: Rx, over-the-counter--you know, from Tagamet to prescription drugs.

COMMISSIONER HARKENRIDER: Have you considered sort of--do you think there should be any differentiation on the type of goods that are counterfeited, based on the type of harm that might be caused?

MR. BLISS: I think from a policy standpoint, to the extent products present health and safety risks, there probably ought to be more

serious offense levels associated with those. And states actually are starting to do that at the state level, when they are imposing felonies for counterfeiting.

COMMISSIONER HARKENRIDER: Thank you.

CHAIRMAN CONABOY: Commissioner Gelacak, did you have another question?

COMMISSIONER GELACAK: Just one. What information can you provide us that increasing penalties will alter anything?

MR. BLISS: A lot of anecdotal evidence is basically what I can tell you. At the state level, for example, in the last three years we have imposed felony statutes in fifteen states, and our investigators, who are retained by the IP owners, say that they are seeing migration of counterfeiting activity away from the felony states towards the misdemeanor states.

That is one anecdotal bit of evidence, I think, that would suggest that when there is a real threat of some serious penalty being meted out, the counterfeiters react.

CHAIRMAN CONABOY: All right, thank you very much, gentlemen.

COMMISSIONER GAINES: Mr. Chairman?

CHAIRMAN CONABOY: Oh, I am sorry.

COMMISSIONER GAINES: Excuse me. I have a question handed to me by staff.

CHAIRMAN CONABOY: Sure.

COMMISSIONER GAINES: I am going to try to read this, and Mr. Steer--he writes quite well, so--

[Laughter.]

COMMISSIONER GAINES: --if it is faulted, it is not his fault.

"If loss admittedly is extremely difficult to determine in most counterfeiting cases, why not retain the current measure of retail value of the counterfeit items as a proxy for loss, and then invite upward departure to the extent that that measure inadequately reflects the harm?"

MR. QUAM: The retail value of the counterfeit merchandise underestimates, on its face, the loss to a legitimate manufacturer.

If you think of, say, the wholesale or retail price of a legitimate good, factored in there you have research and development, you have marketing, you have good will and a reputation built in.

All of that is for sale on the counterfeit market; that is what they bank their money on. And the difference between those two levels can be great enough, where the loss to the company does not even begin to approach the actual value of the counterfeit merchandise when it is sold.

Now, in some cases, that is--you know, the gap closes, but in other cases that is a very wide gap, and so we don't believe that that is a legitimate level to even start at.

We prefer to see the level of a legitimate retail good as the preferred level to start at, and then bring in these other factors.

CHAIRMAN CONABOY: All right, thank you very much, gentlemen, and we appreciate your submissions, and we would certainly use your input to help us make some of our decisions.

MR. BLISS: Thank you.

MR. QUAM: Thank you.

CHAIRMAN CONABOY: Our next presenter is Mr. David Wikstrom, from the New York Council of Defense Lawyers.

Welcome, Mr. Wikstrom, and we have your written presentation also, and we are ready to hear from you. We appreciate the extent to which your group has gone in analyzing all of the matters that we have up for consideration.

STATEMENT OF DAVID WIKSTROM

NEW YORK COUNCIL OF DEFENSE LAWYERS

MR. WIKSTROM: Thank you, Chairman Conaboy, and I want to thank the Commission for the opportunity for the NYCDL to appear today.

Because of time constraints, our submission regarding the income tax proposed modifications did not make it into the bound booklet, so I have brought copies to submit later on today.

The discussion that just took place is a perfect example of why this is so vexing a problem,

because we have legitimately aggrieved manufacturers who are damaged in many different ways, to the tune of hundreds of billions of dollars, and we have protagonists who appear before you and say that what you should do is make people spend more time in jail, as either a deterrent, specifically or generally, and it is not a neat algorithm.

It is not--"quotidianness" doesn't work in this. They may well--a manufacturer may well lose $100 million from the loss of profits on a trademarked item. That does not neatly translate into 24 or 27 months, as opposed to 12 or 16 months, from the defendants' point of view.

Now, I am here on behalf of a defense lawyers organization, and we represent a constituency whose claims that sentences are harsh enough already are pretty ease to ignore, and I also remember one of the graphs at last March's public hearing, that estimated that defense lawyers had about one-tenth of one percent impact on the final guideline sentence, compared to prosecutors,

who had 50 to 70.

But I want to soldier on, and our booklet contains many responses to the specific proposals, but I want to limit my comments today on some of the underlying assumptions, and at the process itself.

Three days ago, I received a third definition of loss, in addition to the two that were published in The Federal Register. I am told that there is yet a fourth version, which I haven't even seen.

My difficulty is that I speak in a representative capacity, and while I might fly down on the shuttle and think about it, and formulate a personal position, I cannot speak on behalf of my organization with respect to it, because it is not possible to achieve any kind of consensus, or even review.

And if this process is to be meaningful, and anything more than cosmetics, it simply can't be done this way. We have not responded to the third option, because it wasn't possible.

This is why we believe that significant modifications to the definition of loss should not be done at this time, and they certainly shouldn't be done in a rushed fashion.

If they are going to be adopted, then we think it is preferable that the definitions and the loss tables be modified simultaneously. To amend the tables pending receipt of changes in the loss definition down the road, which threatens to make the minor modifications to sentencing tables inundated with a flood of new kinds of loss that now gets counted in the universe, is counterproductive.

As we set forth in the written comments, it seems possible to resolve circuit conflicts and splits without a whole revamping of the notion of what constitutes the universe of loss for 2(b) and 2(f) in similar cases.

We recognize that the Commission has worked very hard on putting the proposals together, and there is almost an institutional momentum, that we are sensitive to, to select one or another

option, particularly since similar proposals were shelved last year.

But we believe that there is something fundamentally wrong with the primary impetus. The published comments state that the purpose of both options is to raise penalties for economic offenses, in order to achieve better proportionality with Guideline penalties for offenses of comparable seriousness.

Now, the statute talks about resolving the--I am referring to 18 U.S.C. 3553--asks us--asks you to eliminate disparity among defendants who have committed similar crimes.

They don't talk about different crimes of, quote, "comparable," unquote, seriousness, and the legislative scheme does not mandate you to eliminate disparity between offenses of comparable seriousness, and certainly not to erode the difference between punishment, which has traditionally been different for violent versus nonviolent crime.

The Commission should be, but has not

been, we believe, skeptical--institutionally skeptical--of the politically expedient clamor to raise punishment rates, and increase duration of prison sentences.

Reading some of the comments at the public hearings last year, representatives purporting to speak on behalf of influential groups endorsed changes, almost unanimously, of the view that white collar crimes were underpunished.

And yet, if you look at the statistics which supposedly justify this motivation, the motivations are not borne out.

There was a study that the judicial conference itself, which argued strongly last October before you for an increase in white collar crimes punishments, saying that these crimes were underpunished, their own survey indicated that 60 or 70 percent of judges thought that adequate punishment existed already, under the existing Guidelines, and some even felt that they overpunished particular defendants.

With respect to small monetary losses, the

judges were evenly divided between whether over- or underpunishment took place.

And in actual practice, from the Commission's own annual report--the 1996 annual report--the actual practice bears out our contention that existing Guidelines adequate punish theft and fraud and tax offenses.

Nowhere in these proposals is it explicitly recognized, or stressed anyway, that these kinds of defendants are also subject to, often, restitution and fines, and tax penalties, that other types of crimes are not subject to, with the same statistical readiness.

Downward departures outstrip upward departures anywhere from seven to one to twenty-five to one, by case category, and within the sentencing range itself, the vast majority of white collar defendants are sentenced in the bottom quarter of the available sentencing range.

These comparisons indicate that, at least in these individual cases, federal judges act as if they believe downward departures are often

warranted, while upward departures rarely are. And from the placement within the sentencing range, it would suggest that federal judges believe that the Guidelines perhaps overpunish white collar criminals.

And yet, paradoxically, the motivation to increase the tables, and start counting additional forms of loss, is a belief that these cases are underpunished, and we simply don't believe that the statistics bear out that, nor justify it.

It is easy, I submit, to take--the example we were just talking about--a counterfeiter--someone making huge amounts of money at the expense of a legitimate organization--it is easy to find within oneself the notion of criminal fault, and the need for punishment.

All too often, however, the prosecutions bring in not just the architect of such a scheme but the "embroiderer."

I don't know what factory Mr. Bliss was referring to in New York, but if there are ten laborers working off the books to embroider the

Polo logo on a T-shirt, their loss of--their--and their then prosecuted federally--their Guidelines are going to be based, in large measure, on the millions and millions of dollars of losses, with a maximum of only four level reduction for role in the offense.

And those are the difficult cases, where the--where notions of reasonably foreseeable damages, or consequential damages, fall short in assessing how much time this person ought to spend in jail.

I also do not know the extent to which recidivism has been shown to be a problem over the last ten years, whether or not, in fact, fraud and tax and theft defendants, because of the supposed underpunishment of these crimes, go back on the street while serving supervised release sentences, and commit the same type of crime again.

For all of these reasons, while we urge the Commission to address circuit conflicts, and have taken a position about them, and while we urge the Commission to better define the larceny based

definition of loss, we believe that the inclusion of consequential damages is a major revamping of the notion of loss, which is adequate as it is, and we urge you not to adopt it at this time.

CHAIRMAN CONABOY: Thank you, Mr. Wikstrom.

Commissioner Gaines, do you have any questions?

COMMISSIONER GAINES: No questions, thank you.

CHAIRMAN CONABOY: Commissioner Gelacak?

COMMISSIONER GELACAK: Not a question so much, Mr. Wikstrom. As someone who has tried to be somewhat sensitive to the concerns of the defense bar, I am a little chagrined to hear that I have only been successful in a tenth of a percent of the time.

[Laughter.]

COMMISSIONER GELACAK: I thought I was doing a little better than that, but--

MR. WIKSTROM: Your Honor, the question was, by respondents category, whom did judges feel

was the most influential, and I think judges gave themselves about 30 percent, and prosecutors 50. Probation officers blamed prosecutors, and defense lawyers were either zero percent or zero point one, and it was kind of demoralizing.

[Laughter.]

COMMISSIONER GELACAK: I just wanted to assure you that you have somebody up here that is--and all of us are concerned about the concerns of the defense bar.

COMMISSIONER GOLDSMITH: Let me ask just a few questions. Assume, hypothetically, that we have got a white collar defendant; let us assume he has got the--whatever characteristics you want to attribute to him in terms of being part of a community, a successful businessman--he has committed a fraud in which he has stolen a million dollars--stolen or defrauded someone of a million dollars.

What, under those circumstances, in your view, is an appropriate penalty for that individual?

MR. WIKSTROM: Um--

CHAIRMAN CONABOY: I don't know if I should advise you, you don't have to answer that.

[Laughter.]

COMMISSIONER GOLDSMITH: I think that would be wrong to do.

MR. WIKSTROM: It is not--it is almost not an answerable question. Has he given any of it back? Is it recoverable? Did the--I mean, it is almost--

COMMISSIONER GOLDSMITH: Let us assume that the actual loss is--

MR. WIKSTROM: Probation is my knee-jerk. You should get probation. You know, that is the knee-jerk reaction, but I don't know what--

COMMISSIONER GOLDSMITH: What about your more thoughtful reaction? Do you think that probation is appropriate for someone who is defrauded the victim of a million dollars?

MR. WIKSTROM: Personally, no, I do not.

COMMISSIONER GOLDSMITH: Okay. So what would be the appropriate penalty, in your view?

MR. WIKSTROM: I think some confinement, restitution, supervised release.

COMMISSIONER GOLDSMITH: And how much confinement would be appropriate?

MR. WIKSTROM: I don't want to appear, you know, flummoxed. It is just that it is not--it depends.

COMMISSIONER TACHA: It needs to be the result of the client.

MR. WIKSTROM: Or it depends. I mean, I--

[General remarks.]

MR. WIKSTROM: There is something more--there is something viscerally more offensive about taking a million dollars from someone, as opposed to being part of a business which violates a federal law, and having the loss figure become a million dollars.

Someone processing paper in a business that ends up indicted and convicted of money laundering, where the money didn't go into the defendant's pocket, I am not--I don't think the confinement is necessarily--

COMMISSIONER GOLDSMITH: Granted that the relevant conduct rules may be problematic, and that--or else there may be difficulty by virtue of the penalties associated with money laundering as a way of increasing the exposure.

But, for example, if you were to change the fraud penalties so that they were higher and more commensurate with the underlying activity, there wouldn't be as much of an incentive on the part of the prosecutors to rely upon money laundering.

Let us assume that money laundering is not a problem here, and we have someone who is not a little guy pushing papers, but an active participant in the fraud; he runs a mail order business fraudulently--he is the owner of the business, and it is clearly a fraudulent mail order operation.

The person has--the loss has been defined as one million dollars. And let us assume further that there is no ambiguity here about the fraud itself. This is a law professor's hypothetical--it

is a million dollars. No question at all.

What was an appropriate period of incarceration for that individual?

MR. WIKSTROM: I guess I would want to say two things. I mean, I would--my own personal view is six months the first time, and several years the next. But I want to say also that the existing tables seem to bring about that kind of a result.

I am not--I don't have the numbers right in front of me, but it is--that seems ball park--I mean, that certainly doesn't offend my individual notion of punishment, depending on other factors--restitution, the availability of recovery of any of the assets, and other personal circumstances.

COMMISSIONER GOLDSMITH: Okay. I just wanted to get your frame of reference. I understand. So, in essence, six months you think would be about right?

MR. WIKSTROM: Yes.

COMMISSIONER GOLDSMITH: Okay.

MR. WIKSTROM: Is this a trick question?

COMMISSIONER GOLDSMITH: And you made reference to a study--the same one that Commissioner Gelacak talked about a moment ago, in which you said that the prosecutors have a disproportionate influence in the outcome.

Is there any chance that we could get a copy of that study? Or if you can just cite us to it?

MR. WIKSTROM: It was actually an attachment you wrote to the Commission last April. It was page 18-23, or 18-24. But I have a copy with me; I can show you what I am referring to.

COMMISSIONER GOLDSMITH: We are talking about the underlying FJC study then?

MR. WIKSTROM: Yes.

COMMISSIONER GOLDSMITH: Okay.

MR. WIKSTROM: That is the one.

COMMISSIONER GOLDSMITH: Okay. I wanted to make sure that that was it and not something else, and thank you. Thank you.

MR. WIKSTROM: Thanks.

COMMISSIONER HARKENRIDER: Very quickly.

You mentioned the embroidery. I just want to understand. You are not conceding that you think the embroiderer in the counterfeit operation is accountable for the relevant conduct of the entire operation?

I mean, I presume you would not be arguing that when you were defending your client in front of a judge.

MR. WIKSTROM: I would not--I certainly wouldn't concede it.

COMMISSIONER HARKENRIDER: Because that is the scenario you just gave, the poor embroiderer who is going to get everything that the corporation, or that the overall outfit counterfeited, and only four level role reduction.

In fact, you would be arguing that he is not accountable for all of that conduct.

MR. WIKSTROM: I would argue that, and I would be moving for a downward departure.

But I think, on whether I am accountable under 1(b)(1.3) or 2(f), I think I have a losing position. In fact, in most courts I think I have a

losing position.

COMMISSIONER HARKENRIDER: For the embroiderer?

MR. WIKSTROM: Yes. Because of the reasonably foreseeable acts of coconspirators, or the reasonably foreseeable harm, as under these proposals.

COMMISSIONER HARKENRIDER: So you are conceding then it was jointly undertaken?

MR. WIKSTROM: Yes. Oh, yeah. I mean, I am assuming that the embroiderer is a knowing participant in the counterfeiting scheme, and therefore eats however many hundreds of millions of dollars of loss.

And I wouldn't concede it as a litigant, but I don't think I would have the strongest position.

Thanks.

CHAIRMAN CONABOY: All right, thank you very much, Mr. Wikstrom.

The next person to appear is a Mr. Dennis Lynch of the Department of the Treasury.

Thank you, Mr. Lynch, for being with us, and we have your submission also, and you can proceed with your statement, if you will, sir.

STATEMENT OF DENNIS LYNCH

DEPARTMENT OF THE TREASURY

MR. LYNCH: Judge Conaboy and members of the Commission, thank you for giving me the opportunity to speak to you today.

My name is Dennis Lynch; I am the special agent in charge of the Secret Service's Counterfeit Division.

I am here to discuss the significant increase in counterfeiting of U.S. currency attributed to the advanced technology which includes scanners, computers, laserjet and inkjet printers and color copiers, and to outline how this impacts on current Federal Sentencing Guidelines.

The substance of my testimony is contained within the letter of Secretary Rubin, dated March 5, 1998, but I would like to use my time to highlight a few points.

With me is Mike DuBose, from the

Department of Treasury's General Counsel's Office.

Traditionally, counterfeiters employed offset printing as the predominant method of manufacturing counterfeit currency. This is a time-consuming process that requires extensive lithographic skill and training, as well as expensive equipment.

In contract, the computer related technology needed to produce counterfeit currency today is affordable and readily available, easily transportable, and user-friendly. In fact, there is ample evidence that very little, if any, technical skill is required to make deceptive counterfeit currency with this equipment.

Furthermore, the deceptive quality of these counterfeits, and the speed at which they are produced, continues to improve as this technology becomes increasingly sophisticated.

Paramount to the process, once the image of a currency note is scanned or digitally captured, a personal computer may be used to enhance its quality. The image can then be

transmitted electronically, computer to computer over the internet, and printed by individuals who lack any specialized computer or graphics knowledge.

As a result, today's counterfeiter is able to produce counterfeit currency using a high quality inkjet printer that can cost as little as $300. The Secret Service would welcome the opportunity to provide a demonstration, in executive session, of computer generated counterfeiting--

[Laughter.]

MR. LYNCH: --at another time, if this Commission would find it instructive.

[Laughter.]

MR. LYNCH: The increase in computer generated counterfeiting represents, not only a threat to our law enforcement interests, but also threatens the worldwide confidence in our U.S. currency.

Maintaining the stability and integrity of the U.S. currency is essential to preserving the

benefits derived from the dollar's status as a world currency. Any perceived toleration of counterfeiting seriously undermines the government interest in maintaining the integrity of U.S. currency.

As a result, the Secret Service has adopted a zero-tolerance policy for counterfeiting crimes. Every case is investigated and pursued.

Sentencing guidelines that adequately punish criminals who engage in counterfeiting, particularly those who exploit the new computer and printer technologies referenced above, would be an extremely beneficial deterrent.

As currently written and applied, the sentencing guidelines do not adequate address the seriousness of counterfeiting cases, especially those involving computer generated counterfeit notes.

As you know, the current guidelines applicable to offenses involving counterfeit U.S. currency, U.S.S.G. § 2(b)(5.1), begins with a base offense level nine, and provides for incremental

increases in offense level in accordance with the fraud monetary loss table in 2(f)(1.1).

Thus, the defendant's guideline range in counterfeiting cases depends largely upon the amount of counterfeit inventory seized when the operation is shut down. A low seizure amounts--results in little if any increase to the base defense level, which in turn yields a minimal sentence.

For instance, if the amount of seized counterfeit currency is less than $5,000, and a defendant accepts responsibility for his actions, under the current guidelines he may be eligible for a sentence of straight probation.

This is exactly the scenario most often encountered in counterfeiting cases involving computer generated notes and inkjet printers.

As reflected in the investigative files of the Secret Service, these cases rarely involve seized currency in excess of $2,000, much less $5,000. A counterfeiter using an inkjet printer to produce counterfeit computer generated notes can

run off currency on an as-needed basis, and does not need to maintain a large inventory of counterfeit currency.

This differs markedly from the more traditional offset printing method, where the cost of a single production run, and other factors, cause defendants to create large inventories of counterfeit currency at one time.

Therefore, computer generated counterfeiting cases usually result in minimal inventory seizures, and, consequently, minimal prison terms under the existing sentencing guidelines, despite the law enforcement and financial risks presented by this criminal activity.

It was recently brought to my attention that an defendant arrested after passing a number of computer generated counterfeit $50 federal reserve notes in Virginia three months ago had a rather illuminating comment to make, when told by Secret Service agents from our Richmond field office that he might be charged federally.

He said, "Good. Under the Federal Sentencing Guidelines you can't do anything to me."

Actually, he didn't use the word "anything," but as a gentleman I have resolved that I wouldn't say exactly what he said, here.

[Laughter.]

MR. LYNCH: The proposed amendments to the fraud, theft and tax guidelines for the 1997-98 amendment cycle, now published in The Federal Register for public comment, do not address this problem.

The amendment options for 2(b)(5.1) call for the elimination of the Fraud Monetary Table in 2(f)(1.1), and the substitution of a new Reference Monetary Table in § 2(x)(6.1).

While these options raise penalties for economic offenses that have a medium- to high-dollar loss, they leave virtually unchanged the penalties applicable to case involving lower dollar amounts.

This simply fails to confront the very real and growing threat presented by computer

generated counterfeiting. The penalty for such offenses remains dependent on the amount of currency seized.

Indeed, one of the amendment options, Option 1, appears to take a step backward, by raising the cutting point of the initial offense level from $2,000 to $5,000. We, of course, do not favor this option, and instead would argue for any combination of options in 2(b)(5.1) and 2(x)(6.1) that provide for the greatest penalty increase at the lowest monetary threshold.

In our view, the necessary remedy must go beyond the amendment options that are currently being considered by the Sentencing Commission. Among other things, we ask that the Commission consider adding a specific offense characteristic that would increase the adjusted offense level an additional two levels in all cases involving counterfeit notes produced on printers and full-color copiers.

This latter amendment would prevent, at least in part, the sentencing windfall defendants

currently enjoy when they use new counterfeiting technologies, instead of the traditional offset printing methods.

Of course, it would also be helpful if the base level offense 2(b)(5.1) were increased by two levels, in order to adequately address the harm counterfeiting offenses cause to the integrity of U.S currency, both domestically and abroad.

Let me close my remarks by saying that the Treasury Department, the Bureau of Engraving and Printing, the Federal Reserve Board, and the Secret Service are individually and collectively pursuing initiatives, and seeking solutions in several areas, to effectively combat this threat.

We want to assure you that in the coming months we will work diligently with the Department of Justice, and will do everything within our power to assist the Commission in its consideration of this important sentencing issue.

CHAIRMAN CONABOY: Thank you very much, Mr. Lynch.

Mr. DuBose, did you have anything to add

to those remarks?

MR. DUBOSE: Nothing to add, but I'm available to answer any questions you have.

CHAIRMAN CONABOY: Okay, thank you.

Mr. Gaines, do you have any questions?

COMMISSIONER GAINES: Yes. Is it fairly uncommon now, then, to make the hugh volume type cases that you historically would have seen in the old days, under old technology?

MR. LYNCH: Yes, sir. As a matter of fact, it is much less common today than it was even three years ago.

COMMISSIONER GAINES: So most cases you make are the small operation, small volume--I am assuming that it is nearly all domestically manufactured now?

MR. LYNCH: Yes, sir. As a matter of fact, there has been a substantial increase. Today, approximately 43 percent of all the counterfeit currency passed domestically is printed using computer related technology.

That does not include the approximately 7

percent that has been manufactured using color copiers.

COMMISSIONER GAINES: Thank you.

CHAIRMAN CONABOY: Commissioner Gelacak?

COMMISSIONER GELACAK: How much is that?

MR. LYNCH: That amounts, sort of--the total amount of counterfeit currency passed this year will probably reach approximately $45 million. That is passed on to the public with a loss. That does not include the amount of counterfeit currency that is seized through law enforcement efforts prior to getting into circulation.

COMMISSIONER GELACAK: Now, what is the basis for that figure?

MR. LYNCH: The basis--

COMMISSIONER GELACAK: Is that an estimate?

MR. LYNCH: No, sir, that is money that we--

COMMISSIONER GELACAK: That is actual--

MR. LYNCH: --that we count; that comes into our field offices around the country from law

enforcement--from police departments, and from all the financial institutions in the Federal Reserve--is sent to the local field offices, and then is forwarded to our headquarters, and we count virtually every dollar.

The $45 million that I alluded to, that is the projected figure for Fiscal Year '98, is--are actual dollars.

COMMISSIONER GELACAK: And some 40 percent of that would be computer generated?

MR. LYNCH: Forty--currently, sir, it is 43 percent for the fiscal year, but it is approaching--in last week, for instance, it was at 49 percent. It seems to be--it is gradually increasing week by week, as a matter of fact.

CHAIRMAN CONABOY: Commissioner Goldsmith?

COMMISSIONER GOLDSMITH: No questions.

CHAIRMAN CONABOY: Commissioner Harkenrider?

COMMISSIONER HARKENRIDER: Just real quickly: How are you able to differentiate when you don't have the mounds of money, basically,

lying around? Somebody who has been counterfeiting a large amount of money, or is planning counterfeit a large amount of money, versus, you know, a college student playing on the computer?

MR. LYNCH: Well, what we are able to do is take a look at the features on the note--the changeable features--the face plate and back plate number--and we were able to analyze where our money is coming in, and literally count that money by changeable features.

For instance, if we receive counterfeit $20 bills from seven or eight states that all have the same back plate number and front plate number, check letter and quadrant number, series year, then we look at analyzing that currency forensically, to ensure that that money has come from the same printing operation.

And that is the way that we have done it over the years with the offset method. We literally catalog every family of counterfeit notes.

COMMISSIONER HARKENRIDER: So if the

Commission were to look at counterfeiting aside from the fraud guidelines next year, to see if there is some problem with the computer generated, there would be ways, other than just the amount of money involved, to differentiate a larger scale defendant from a less culpable defendant?

MR. LYNCH: Yes, that's correct. Yes, ma'am.

CHAIRMAN CONABOY: All right, thank you all very much, gentlemen.

MR. LYNCH: Thank you very much.

Our next presenter is Ms. Robin Spires.

Ms. Spires?

Ms. Spires is going to talk to us about the sentencing, particularly a matter involving your brother, this morning.

STATEMENT OF ROBIN SPIRES

MS. SPIRES: Right, yes. And may I preface--

CHAIRMAN CONABOY: Would you just speak into the microphone, please? I want to assure everybody hears you.

MS. SPIRES: Okay. May I preface anything I say by, this is quite as a stay-home mom, and this is certainly not a position that growing up in a Christian family, having a parochial school background, I never thought that I would be before a group such as yourselves today.

So, it is quite intimidating, so if I stumble or falter, please do bear with me.

CHAIRMAN CONABOY: I am married to one of those stay-home moms, and I find she never has any troubles expressing herself.

[Laughter.]

MS. SPIRES: Not to my husband. I have no trouble at all, or to my children. I have been told I am quite eloquent, so--to a fault--to please stop talking.

[Laughter.]

MS. SPIRES: But I do thank you for the opportunity to be heard. You do have my letter, and I don't know as to which--if everybody has been given that information to read.

CHAIRMAN CONABOY: Well, we have had

it--some of this information came to us not too long ago, so I don't know that everyone had a complete chance.

MS. SPIRES: Okay.

CHAIRMAN CONABOY: So if you want to explain, use your own terminology with your own chance to do it.

MS. SPIRES: Okay. Thank you. Thank you.

The reason I do come before you, as you said, some issues have been brought up based upon my brother's recent sentencing and incarceration, and those circumstances were due to the current Federal Guidelines and mandatory minimums for drug offenses.

You know, obviously because of my background, I never thought--you know, I didn't think anything twice about it, and didn't think I ever needed to make myself privy to any type of information based upon these, because I would never need it.

But these things do happen--bad things happen to good people; sometimes good people make

really poor judgment decisions, and in this case that is what happened. Just let me tell you a little bit about what happened to my brother.

He owned an auto body shop, and he used auto business--this was sort of his first love as a child. You know, unfortunately the situation and this sort of line of work--there is not--and I hate to dare to say this, but there is not a lot of honesty that we have found.

You know, there are sort of a lot of unseedy characters, and you know, here, here is a hot part. You know, you can just sit there and be there, and try to be this good and moral person, and it, just being human as it is, it just got the best of him, and it--these continued opportunities of easy money--he was lured.

Not to say that he is responsible for what he has done. He was lured into this idea, not even a drug user himself, but lured into this idea that, yeah, this is a way to make some easy money, and his whole thought--oh, yeah, I will put it back into my business, you know.

So, that surrounded. They didn't--the investigation didn't originally involve my brother; it started out as investigating another individual. My brother was then brought up on charges based upon the information gained.

Unfortunately, my brother had very, very poor counsel. We didn't--because we had such little knowledge, we didn't know that--you know, we took everything that attorney said literally word-for-work, and yes, this the law, and this is what you must do.

He was told that--urged, drastically, and feverishly urged that he should sign a plea agreement for a weight of drugs that was much, much larger than what he had--what was involved--to get the ball rolling--just to do this.

Had he known that his sentence would be based upon this weight, or any other foreknowledge of what would happen--none of this was told to him, so he signed it, because this was what he was urged to do by this particular attorney.

However, that being signed, it indeed get

the ball rolling. My brother--they were told by the federal prosecutor in that area that he was to forfeit $50,000 as part of the plea agreement, and a $40,000 truck, he indicated, and they had his financial records to know.

He had no money, his house was second--it was mortgaged. The money involved in all this was stolen by one of the other participants, so he had no funds, which, in my opinion, is just as well.

I think that I didn't really want him to have any of that--it was wrong what he did.

So he had no money, and it was made very clear that, you are going to spend, you know, 20 years in jail. It doesn't matter where you come up with this money--come up with it or you are not going to get a plea agreement.

So that was sort of dangled, and so of course he rallied. Fortunately my parents had the means to do so, and they paid it--made a loan to my brother and they paid it for him. We were all obviously scared to death for his own--for his future.

CHAIRMAN CONABOY: When you say they paid it to him, to be used as--

MS. SPIRES: Part of the plea agreement.

CHAIRMAN CONABOY: Part of the--as a fine? Or restitution? Fine, I guess.

MS. SPIRES: I don't--

CHAIRMAN CONABOY: Let me just--I don't mean to interrupt your thoughts, but as I understand, one of your concerns, and if this is wrong you can correct me and just continue, but I want to get at the point that you seem to be raising.

As I understand your submission, if I reviewed it correctly, your concern is that you and your family feel that your brother offered substantial assistance to the officials, and that he wasn't given credit for it; am I right?

MS. SPIRES: Based upon this and other things that were done as well. Additional things that were done, yes.

CHAIRMAN CONABOY: Okay.

MS. SPIRES: But that is not really--as I

do a lot more studying and a lot more praying about this, a lot more research, sort of the stance I have is that the--and I have some--a quick quote that I would like to read, but the stance that I take, as well as my family--the prosecutor, who is--who takes an adversarial role in--you know, you are to prosecute.

They are making the decision whether or not to take--to look at a case individually and say, well, yes, there are mitigating circumstances here, and then I am not saying that it applies to everyone.

But he is a first-time nonviolent offender, who currently at this point--it has taken, if you can believe it--we were un--it was bizarre--that took my mother two to three months just to get him his Bible. All he wanted was his own personal Bible.

And I mean, not to say he is a saint. He made a huge, huge mistake, and he knows that he and his family will pay for the rest of their lives. Their lives are destroyed; he has lost his

business, he is currently--you know, is his wife going to leave him?

He has gotten so--in a situation like that, you know, that is our concern. He continually--on four separate occasions he wore a wire; two times he wore it with no police backup. They said, oh, do you have a tape recorder? You do it.

Because of the information that he was--that he obtained through his wire wearing--whatever--you know, I feel like this is a soap opera--the undercover work, whatever--that one person was incarcerated.

This substantial assistance, on many, many occasions, was continually dangled. He would--it was just continually dangled, like a carrot, in front of him. He would appear at a hearing--well, you didn't say just the right thing, but if you do this we might grant you substantial assistance.

So it was just continually--

CHAIRMAN CONABOY: And you say that, as I understand it, the prosecution then at the

sentencing refused to make a motion for a reduced sentence?

MS. SPIRES: Correct.

CHAIRMAN CONABOY: For substantial assistance.

MS. SPIRES: Correct, correct.

CHAIRMAN CONABOY: And as I understand it, you seem to be arguing in concern that perhaps the Court ought to--

MS. SPIRES: Correct.

CHAIRMAN CONABOY: --make the decision on substantial--

MS. SPIRES: Correct.

CHAIRMAN CONABOY: Even without a motion.

MS. SPIRES: Correct.

CHAIRMAN CONABOY: I am trying to get at--

MS. SPIRES: Yes, yes, for lack of--yes. Again I apologize. I don't know the lingo.

CHAIRMAN CONABOY: No, that is all right.

MS. SPIRES: I don't know that--

CHAIRMAN CONABOY: That is why I am trying to help you to get at what is the point you are

making.

MS. SPIRES: Right, because the judge had said, and I have, you know, even what he said on his--and some of his terms were, "The Court notes that the defendant is unusually suited for rehabilitation and, therefore, any program that facilitates rehabilitation or early release is recommended."

And he had, you know, said--this sentence, he didn't like it any more than anybody else, that, you know, and I quote from him that he remembered a time when the penalty for second degree murder was five to eighteen years, and the penalty for first degree murder, with mercy, had a ten year minimum, and that the drug--the federal drug laws are harsh, and that they are severe.

So he--you know, our impression was--and so everyone else involved with this--wasn't real pleased because of the situation of my brother personally, individually, not as--you know, he--we had 75 letters, we have character references.

You know, he is a stupid, dumb idiot, yes,

but he is a good guy. He is--you know, he is--

CHAIRMAN CONABOY: How old is he?

MS. SPIRES: How old is he? He is 33.

CHAIRMAN CONABOY: Thirty-three.

MS. SPIRES: He has a ten-year-old little boy and a ten-month-old little girl, who is not going to see her dad.

Anyway, it is just that there were comments made, and we found this to just be horrific. There were comments made--my mother was told by a family friend, or acquaintance--pardon--that they overheard drug task agents saying, oh, yeah, we got one over on my brother's attorney, we got--you know?

So this was--it seemed to really appear that it was personally motivated. My brother would call that office day and day after day, what can I do to help you? How can I help you? What can I do to help you?

And it really appeared, and not to seem biased, and I am sure that I am, but not to appear biased, it seemed to be that there was this almost

personal vendetta. My brother would repeat over and over, you know, as he would pray, why does this man hate me? Why does he hate me?

Because this one man had the sole opportunity to direct his future.

CHAIRMAN CONABOY: Was your brother represented by a privately engaged lawyer?

MS. SPIRES: Yes, yes. We--in the area of the country--we didn't know anything. We just--you know, we got recommendations--good guy, good guy, he is a good guy. Upon the poor counsel of the first attorney, pardon, my parents did get another attorney.

So we did the best we could with a bad situation, not knowing anything. We are just learning.

CHAIRMAN CONABOY: I understand why you are--and the reason--I didn't mean to interrupt you. What I am trying--see, just so you will understand, I am going to try to say this to you quickly.

The Sentencing Commission, as such,

doesn't set the maximum penalties; that is done by the legislature. I don't see that as an excuse.

MS. SPIRES: Oh, he got the minimum penalty.

CHAIRMAN CONABOY: And a lot of people think that they penalties for drugs or others are very severe, but we do have jurisdiction over a lot of other things. For instance, this concept of acceptance of responsibility and so forth, and these things we do like to hear about.

It helps us--

MS. SPIRES: Right.

CHAIRMAN CONABOY: --understand, and also representation by counsel. As among other things, we try to train lawyers all over the country. So these things are important--

MS. SPIRES: Right.

CHAIRMAN CONABOY: --for us to hear, and I was trying to help you--

MS. SPIRES: Right, right.

CHAIRMAN CONABOY: --say to us some of the things that are important to our work here.

Commissioner Gaines, do you have any questions of Ms. Spires?

COMMISSIONER GAINES: Just, how much time did he--

MS. SPIRES: Ten years.

COMMISSIONER GAINES: He got ten years?

MS. SPIRES: Ten years.

COMMISSIONER GAINES: And did you ever get any feedback from the U.S. Attorney's Office as to why they did not make the motion for the substantial assistance?

MS. SPIRES: They didn't feel it was warranted. Just as simple as that. Didn't feel it was warranted. When other people involved in the conspiracy, who had had prior convictions, had sold drugs for twelve years, will, you know, be out in a few years.

But they told on somebody, so that makes it okay. It was just sort of--the problem--and what I want to state is that it was arbitrarily given. Some people got it, some people didn't.

It didn't matter--it wasn't based upon,

well, this person did this much work to help us, or this person did this--you know, didn't do this much.

And I guess, as a private citizen, it concerns me that--I thought, there was no need for a judge. There was no need for a judge. It was already--everything was already--all he did was deliver the information.

He did nothing--there was nothing that he could do. So then, as a citizen, why am I paying this man any money for that? Why did they take up--you know, we are struggling, as a family, and so tax issues concern me.

Why were my tax dollars used for this man? He could do nothing. It was purely in the hands of this prosecutor, and, from what I read, this happens all over the country, that these first-time nonviolent offenders are--yes, it should be harsh.

Should he be punished? Absolutely. Should he go to prison? Yes, he should. I feel that, you know, as a mom and as his sister--what he did was wrong. But should it be for ten years? No.

CHAIRMAN CONABOY: Judge, did you have any questions?

COMMISSIONER TACHA: The ten years was the mandatory minimum, is that correct?

MS. SPIRES: Correct.

COMMISSIONER TACHA: Yes.

MS. SPIRES: And he--and within that range, the judge even stated that--he said, you know, this is the lowest that I can go; this is all that I can do.

CHAIRMAN CONABOY: Yes, under many of the drug statutes--

MS. SPIRES: Right.

CHAIRMAN CONABOY: --there are many--in spite of whatever the Guidelines would refer to, there are mandatory minimums of the judge.

MS. SPIRES: Right, and the minimums essentially are in addition to the prosecutor. My point, the prosecutor, I feel, has too much power. He--in my brother's case, justice wasn't served, because he is the adversary, and he does deserve a fair chance, as a United States citizen.

Also, the mandatory minimums, I feel, are very, very harsh, you know, without a judge having a leeway to have any maneuverability, or consider any--you know, my sister-in-law works swing shift--who is going to take--my mother drives, you know, two hours to get these kids--this is a man who will never do this again.

CHAIRMAN CONABOY: Yes.

Commissioner Gelacak, do you have any questions?

COMMISSIONER GELACAK: Yes. There were other people involved and charged in this conspiracy?

MS. SPIRES: Correct. He got the worst.

COMMISSIONER GELACAK: Were any of those defendants given substantial assistance motions?

MS. SPIRES: Yes, yes.

COMMISSIONER GELACAK: How many?

MS. SPIRES: I believe two. I am not--because I live in Virginia, and this happened farther away, but I believe two. One--one, I take that back. My mother came from Ohio too.

COMMISSIONER GELACAK: But there was someone else who received the substantial assistance motion?

MS. SPIRES: Yes, yes.

COMMISSIONER GELACAK: Do you know what the--can you characterize the difference in what their assistance was as opposed to what your brother offered?

MS. SPIRES: They had the sting operation. They set somebody up, and which my brother tried to do on several occasions. For my brother they would say, well, the tape was muffled. Well, is that--

COMMISSIONER GELACAK: So it wasn't information with regard to the conspiracy they were charged with?

MS. SPIRES: No, no.

CHAIRMAN CONABOY: Commissioner Goldsmith?

COMMISSIONER GOLDSMITH: No questions.

CHAIRMAN CONABOY: Commissioner Harkenrider?

COMMISSIONER HARKENRIDER: Where was this prosecution? Not in Virginia?

MS. SPIRES: No, it was in West Virginia.

COMMISSIONER HARKENRIDER: In West Virginia?

MS. SPIRES: Yes, and currently, I must say, there are some individuals who have offered--who have sort of mended their ways and have led lives of crime--that are offering up information to help my brother's cause.

And so now, once again, substantial assistance--they are going to dangle it, and say, well, look, here, Guy A, if you give us some information we might help this guy Jeff out. So we just feel kind of abused by the system, I guess.

CHAIRMAN CONABOY: Well, we appreciate your coming here. We know how difficult it is to talk about something when it is very personal, and yet it does help us. We can't always respond in a particular case, but this whole area of substantial assistance, and the whole area of using parties to tell on each other, and to use that method of prosecution, is one that has been around for a long time.

Sometimes the prosecutors have no other way of working at it, other than that.

MS. SPIRES: Oh, it was definitely used.

CHAIRMAN CONABOY: And--but oftentimes we find people who feel it has been--it makes a difficult situation in their own area.

Commissioner Gelacak, did you have something?

COMMISSIONER GELACAK: I am sorry. I meant to ask this question, and I apologize for forgetting it.

Recognizing that you are not an expert in the system, or you don't even really probably even know what we do--

MS. SPIRES: I am learning, I am studying.

COMMISSIONER GELACAK: But, as an end result of your talking to us today, what would you like to have--I mean, what is it that you really want to accomplish, other than--

MS. SPIRES: What is it that I really--I want for--I want the power of the prosecution to be drastically restricted, so that it becomes fair,

and that an unbiased party, such as a judge, who is paid to do this, would be able to look at the situation and evaluate the situation, and then the sentence would be based on that evaluation.

CHAIRMAN CONABOY: All right, thank you very much, Ms. Spires.

MS. SPIRES: Thank you. I appreciate your time.

CHAIRMAN CONABOY: We appreciate your taking the time to come here today.

Our next witness is Robin Piervinanzi.

Did I get it right? Good morning.

STATEMENT OF ROBIN PIERVINANZI

MR. PIERVINANZI: Yes. Good morning, Judge Conaboy and members of the Commission.

CHAIRMAN CONABOY: Good morning.

MR. PIERVINANZI: I want to thank you for allowing me to speak here today. I have come here to tell you about the case of my brother, Michael Piervinanzi.

I think it illustrates a problem which the United States Sentencing Commission has devoted

substantial attention to, namely the use of money laundering guidelines in cases where fraud charges and money laundering charges are included in the same indictment.

The introductory pages of the Federal Sentencing Guideline Manual set forth three goals the Congress had in mind when it enacted the Sentencing Reform Act of 1984: honesty in sentencing, uniformity in sentencing, and proportionality in sentencing.

Use of the Guidelines for the past ten years appears to have eliminated much of the disparity in sentencing that prevailed in the pre-Guidelines era.

However, there is significant evidence that present use of money laundering charges, and applications of money laundering guidelines, rather than functioning to reduce disparity, are in fact contributing to an increase in disparity, especially in cases where fraud and money laundering charges are joined in the same indictment.

In the hope that what I have to say about my brother's case will contribute to a better understanding of the problem, let me describe his case.

My brother Michael was arrested in 1989. He was one of seven people accused of participating in a scheme to steal $38 million from two banks by wire transferring the money to a foreign bank in the Cayman Islands.

One of the defendants obtained information about a certain bank account, and banking procedures, which made this scheme possible. The first case involved the transfer of $14 million from the Irving Trust Company, the second case involved the transfer of $24 million from Morgan Guaranty.

In order to wire transfer money from a domestic bank to a foreign bank overseas, it is necessary for the foreign bank to designate a correspondent bank here in the United States. Wire transfers move from the domestic bank to the correspondent bank, and then to the foreign bank.

Both of these schemes failed. In the Irving Trust case, the bank learned of the fraud before any funds could be transferred. In the Morgan Guaranty case, funds were wire transferred to the correspondent bank. Morgan Guaranty then discovered that the transfer was unauthorized, and immediately reversed the transfer.

The banks did not lose any money.

My brother and one other person went to trial. The government presented a seven count indictment, charging conspiracy to commit wire fraud, bank fraud and money laundering; two counts of attempted bank fraud; wire fraud; two counts of attempted money laundering, under 18 U.S.C. 1956(a)(2), and one count of attempted money laundering under 18 U.S.C. 1957(a).

The jury found him guilty on all counts. At sentencing, on the attempted money laundering charge, he requested a downward departure, on the grounds that the conduct charged--attempted bank fraud--was outside the heartland of money laundering conduct.

The Court denied his request. The Court imposed sevens concurrent sentences of 210 months, or 17 and a half years. Upon Section (2)(s)(1.1), the Court found the base level of 23, and added eleven levels for the amount of money, bringing his total level to 34.

Under Category 3, his sentence range was 188 to 235 months; 210 months represented the middle of the sentencing range. My brother had prior convictions for gambling offenses.

On appeal to the Second Circuit, he argued that the evidence was insufficient to support a charge of money laundering, or attempted money laundering.

In an opinion reported as United States versus Piervinanzi, 23 F.3d 670 (2nd Cir. 1994), the Court rejected his argument, and found that the attempted money laundering charge, under 18 U.S.C. 1956 (a)(2) was established because the attempted transfer of funds overseas was designated to promote the underlying crime of bank fraud, at page 679.

The Court dismissed the charge of attempted money laundering under 1957 (a) because the funds transferred from Morgan Guaranty were not yet property derived from wire fraud and bank fraud, and 1957 did not apply.

The Appeals Court remanded the case for sentencing, because the charges of conspiracy, attempted bank fraud, and wire fraud, carried a maximum penalty of five years. The trial Court's sentence exceeded the five year maximum.

On resentence, the Court imposed four concurrent 60-month sentences on those charges. The Court also reduced the sentence on the money laundering conviction from 17-1/2 years to 15-1/2 years.

I believe my brother's case represents an overly broad interpretation of money laundering activity. His crime was not connected to organized crime or drug trafficking. There was no intent to use the funds to promote additional criminal activity.

Because his indictment contained money

laundering charges in addition to bank fraud, my brother is serving ten and a half years more than he would be serving for the same criminal activity if there was no money laundering charge.

His was one of the first cases of money laundering to be tried in the Southern District of New York. The Second Circuit had to rely on decisions from other circuits to support their argument that money laundering charges had been proven.

The Court cited three cases: United States versus Cavalier, 17 F.3d 90 (5th Cir. 1994); United States versus Paramo, 998 F.2nd 1212 (3rd Cir. 1991); and United States versus Montoya, 945 F.2d 1068 (9th Cir. 1991).

The Sentencing Commission, in its September 18, 1997, report to Congress, cites the very same cases to highlight its concern that the application of money laundering statutes to cases of fraud and bribery, and other nondrug-related activity, is leading to disparity in sentencing.

I note parenthetically that the opinion in

my brother's case has never been cited as support for the proposition that fraud activities such as his also constitute money laundering. The case is cited by other courts, but for legal principles unrelating to money laundering analysis.

In closing, I wish to say that I agree with the Commission that changes in guidelines are needed. I do not claim to know what these changes should be.

But if the Commission should devise a more flexible guideline structure, that would require courts to examine underlying criminal conduct, and consider what connection and relationships such conduct has with money laundering charges in deciding what punishment should be imposed, many of the problems giving rise to disparity would be significantly reduced.

Thank you for your consideration.

CHAIRMAN CONABOY: Thank you very much, sir.

Commissioner Gaines, do you have any questions?

COMMISSIONER GAINES: No questions.

CHAIRMAN CONABOY: Commissioner Tacha?

COMMISSIONER TACHA: None.

CHAIRMAN CONABOY: Commissioner Gelacak?

COMMISSIONER GELACAK: I'm going to defer to Commissioner Goldsmith, who's our expert on money laundering.

COMMISSIONER GOLDSMITH: Thank you.

In your judgment, what would have been a fair sentence for someone in your brother's position, who was--who in essence defrauded a financial institution or someone else of $34 million?

MR. PIERVINANZI: Let me begin by saying that, as of this date, my brother has served eight years of his sentence, you know, with dignity and respect for our system. And personally, I believe he should be released immediately, without any conditions of supervised release.

COMMISSIONER GOLDSMITH: But at the outset, putting aside the time that he has served, what do you think is an appropriate term of

incarceration, if any, for someone who has committed a fraud or theft amounting to $38 million?

MR. PIERVINANZI: Three years would be more than adequate, because if any punishment or anything is going to be learned from this, an inmate learns it within the first six months of incarceration.

COMMISSIONER GOLDSMITH: Well, from the standpoint of deterrence, I could see that three years might be enough, but what about from the standpoint of the gravity of the offense? I mean--

MR. PIERVINANZI: Well, also keep in mind, there was no monetary loss here, and other sentence--other codefendants, who were sentenced, their sentences ranged from probation to 14 months, and my brother's was the highest at 17-1/2 years.

COMMISSIONER GOLDSMITH: And what basis for the codefendants, given that there was this term? Do you know?

MR. PIERVINANZI: That I can't answer, honestly. I don't have that information in front

of me.

COMMISSIONER GOLDSMITH: Thank you.

CHAIRMAN CONABOY: Mary Harkenrider?

COMMISSIONER HARKENRIDER: Just a very quick question. I know how hard it is to come and testify about family members.

Had your brother been incarcerated previously on the gambling charges?

MR. PIERVINANZI: The gambling charges stemmed back from when he was in his early teens, and they were--consisted of fines--monetary fines of $100.

COMMISSIONER HARKENRIDER: So this was the first time in prison?

MR. PIERVINANZI: Yes.

CHAIRMAN CONABOY: All right, thank you, Mr. Piervinanzi. It was nice to have you come down here and to take the time.

MR. PIERVINANZI: Thank you.

CHAIRMAN CONABOY: This is a topic, as you know, that the Commission has looked at before, as Commissioner Gelacak mentioned. We try, as we are

listening, to hear what areas we can look at, and this is one we are looking at very closely, and we appreciate hearing from you.

MR. PIERVINANZI: Thank you.

CHAIRMAN CONABOY: The next presenter is Ms. Kathleen Williams. Kathleen is here on behalf of the Federal Public and Community Defenders.

STATEMENT OF KATHLEEN M. WILLIAMS

FEDERAL PUBLIC AND COMMUNITY DEFENDERS

MS. WILLIAMS: I'd like to thank you for the opportunity to present the viewpoint of the Federal and community defenders around the nation, and all of our clients.

CHAIRMAN CONABOY: By the way, I want to tell you, we appreciate your thorough analysis of all of the matters that we've had out for comment.

MS. WILLIAMS: Thank you, Judge.

Because our clients constitute the vast majority of defendants in the federal criminal justice system, and because they and their families' lives are irrevocably shaped by what it is you do, it is important that we continue to have

open communication with you, and often.

And I noted Judge Conaboy's reference to the progress that has been made in that regard, and I want to say how very much we all do appreciate that. But, to advance that goal, I would like to make a particular request of this panel.

Judge Conaboy, I don't know if you recall, but about three years ago you and I met in south Florida with the then U.S. Attorney, and at that time I raised the suggestion that a defender be allowed to participate, just as Ms. Harkenrider and Mr. Gaines, in order to give a full panoply of experience and perspective to this group.

I believe that that might go a long way to eliminate the perception that Mr. Wikstrom had brought up earlier, and also, hopefully, assist the Commission in its very important work.

The decisions that you make govern an extraordinary adversary system, and to add a defender, I think, would only enhance the quality and integrity of that decision making process.

I believe the single-most significant

proposition that we would like to explore--

CHAIRMAN CONABOY: I think I agreed with you at that time, didn't I?

MS. WILLIAMS: I think you did, Judge.

[Laughter.]

CHAIRMAN CONABOY: I haven't made much progress then.

MS. WILLIAMS: More interestingly, I believe, the then U.S. Attorney also agreed with me.

CHAIRMAN CONABOY: Yes. Well, most people, I think agree with that. It has been a problem of trying to get it done, you know?

MS. WILLIAMS: I note Ms. Harkenrider discussing the fact that he's gone. It was not due to his agreement with me on that particular issue.

[Laughter.]

COMMISSIONER HARKENRIDER: I was just kidding.

MS. WILLIAMS: Although one never knows.

[Laughter.]

MS. WILLIAMS: I believe that the single

most significant proposition that perhaps we could explore more fully, and that may be treated somewhat parenthetically in the context of these visits, is that the Guidelines are too harsh.

We are not just telling you this as adversaries in the system; we are not giving you anecdotal information that a disrespectful and impudent defendant in Michigan has expressed disdain for the Commission's work.

I refer you to your own data--Table 27 of your most recent report--which demonstrates the position of the sentences relative to guidelines. In 43.8 percent of the cases, it was in the first quarter of the guideline range; in over half, it was in the first two quarters.

Incidents of downward departures were 11.5 percent, to the one percent for upward departures.

And yet, despite the statistical information, we are here today to discuss conflicts or problems with Sentencing Guidelines, and in all of the proposal menus there is suggested higher sentences, and even more mechanistic treatments of

the unique circumstances of the people I represent.

I can only tell you that the bottom line philosophy of the paper we have submitted is that it is time to stop automatically equating solution to guideline issues and questions with increased incarceration, and, hopefully, to fashion amendments which reflect a renewed confidence in the abilities of our federal judiciary.

Maybe that would answer Ms. Spire's question, as to why the taxpayers are paying the salaries of those men and women who occupy the bench.

Because of my limited time, and I have been noting the fierceness of your timekeeper--

[Laughter.]

MS. WILLIAMS: --I am only going to--

CHAIRMAN CONABOY: We keep trying, right?

[Laughter.]

MS. WILLIAMS: I am only going to focus on three amendments, that go to the heart of what I believe is very, very important language in The United States versus Koon, and it bears reiteration

here.

It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and punishment to ensue.

We quoted that to you in a section with regard to our proposals and recommendations on aberrant behavior. The proposal which defines single acts of aberrant behavior as spontaneous and thoughtless, we believe to be untenable.

And if this Commission is inclined to adopt this extremely restrictive approach, we believe it is tantamount to--and you may as well eliminate the language from the Guidelines altogether.

No one has ever received such a departure under the case law interpreting it that way, and it is unlikely anyone ever would, because I believe it runs afoul of the reality of federal prosecutions, the reality of our clients' life experiences, and, quite frankly, the reality of what is criminal

behavior.

CHAIRMAN CONABOY: How would you--would you explain that a little bit more? How you come to that conclusion?

MS. WILLIAMS: A carjacking. In order for somebody who had been convicted of carjacking to receive an aberrant behavior departure, essentially that person would have to have encountered--run afoul--of a running automobile with the key in, waiting to be taken away with a sign on it saying "Steal me."

Because there would have been no consideration--it would have been a spontaneous to an opportunity. That is not going to happen. More often, you may find individuals, particularly young individuals, who, perhaps because of a death in their family, perhaps because of mental health issues--any number of considerations--fall in with a crowd, and get involved in what would ultimately be a carjacking situation.

I believe that the totality of the circumstances tests in the first, tenth and ninth

more appropriately addresses an aberrant behavior situation, and fulfills what I believe was the original intent of the Commission, to recognize those situations as a possibility.

I also think the concern that to adopt this test would open a floodgate of aberrant behavior litigation is not borne out by the litigation that has been taken to conclusion thus far, particularly after Grand Maison, or Grand Maison, depending on how you want to pronounce it.

There have only been eleven cases since then that even mention aberrant behavior. Two were affirmations of denial of aberrant behavior; one was a remand because the Court said, I did not have the authority, and when remanded, he took the authority and denied the departure, which cannot be reviewed; and the others were barred procedurally.

So I don't think that there is any risk, as far as that goes, with adopting the totality test. And I also think, if the Commission has strong concerns, some limiting language can be included, that just because you are a first time

offender does not automatically entitle you to this type of consideration.

The second amendment I would like to address is the one going to diminished capacity. We support the adoption of Option 4, which eliminates the qualifying language "nonviolent offense."

I think this presents, in nonlegal parlance, the classic apples and oranges situation. The definition in The Career Offender, 4(b)(1.2), of Crime of Violence, was designed to mete out harsher punishments to people who "just didn't get it." Earlier encounters with the justice system had had no impact on them.

(5)(k)(2.13) is designed to acknowledge that there are those for whom the normal mechanisms of control and interaction with other people are just not available as they to you and me.

To put it another way, it is, the legal equivalent of compassion has been the tradition in the court, and to deal with these people with a certain sense of lenity.

I think to impose an artificial

distinction of nonviolent versus violent inhibits the discretion of the judges unduly, and it leads to categorizations that--I believe a good example was in the dissent in Poff, that you would treat a mentally ill woman the same way you would treat a thwarted terrorist.

I don't think anyone here, hopefully, would agree that that is appropriate, and I think that no one's interest is served if that type of distinction remains.

Finally, the failure to admit drug use while on pretrial release. We wholeheartedly support the amendment recognizing that obstruction of justice is not warranted in this instance.

What I wanted particularly to point out, though, is that we do oppose that part which provides that it could be grounds for denial of acceptance of responsibility.

Aside from the legal considerations which we set for in our paper, and others have so ably discussed, I believe this just runs counter to and ignores the pathology of addiction. We want these

people to get help; we want them to come into a system which can accommodate these problems and, hopefully, solve them.

I know statistics with regard to persons suffering from addictions and getting clean and sober may be daunting, but the fact of the matter is, this type of barrier is erected.

I don't think there is any hope that pretrial services, me as counselor to this individual, or even the Court, can find their way to steering this person in the right direction, because it will dampen and chill every impulse in that direction.

So, I wanted to point that out to you, along with our legal factors we discussed, and thank you again for allowing me to speak to you.

If you have any question, on this or any other matter--

CHAIRMAN CONABOY: And we thank you, too. And I thank you again for the thoroughness that you have shown in the submission you made to us.

Commissioner Gaines, do you have any

questions?

COMMISSIONER GAINES: No questions.

CHAIRMAN CONABOY: Commissioner Tacha?

COMMISSIONER TACHA: No.

CHAIRMAN CONABOY: Commissioner Gelacak?

COMMISSIONER GELACAK: No.

CHAIRMAN CONABOY: Commissioner Goldsmith?

COMMISSIONER GOLDSMITH: I have one question, which goes beyond the scope of your testimony. Let me pose to you the same hypothetical that I did to Mr. Wikstrom earlier, about a white collar offender who engaged in a million dollar fraud.

What if any is an appropriate term of incarceration for that individual? Recognizing that I am not getting giving any personal attributes.

MS. WILLIAMS: Right. Recognizing that, I don't know, but, unlike Mr. Wikstrom, I would say probation could be appropriate, because I believe that when you consider an individual, as stated in Koon, and the analysis in Koon is predicated on

this, you have to consider their circumstances, their human failings.

Now, it could be that the history of this individual shows somebody who has been living on the edge for quite some time, a reckless disregard for the victims of that fraud--any number of considerations which might indicate a prison term.

However, this person could also be a noted philanthropist, somebody who has gone out of his way to benefit both charity and the government, and, because of some unknown circumstance--again, a situation in family, the onset of a mental health issue--engaged in this conduct.

And, because of those considerations, as well as others, might be appropriately considered for a probationary period. But I think you have to, again, look to the entirety of that person's, not only criminal activity, but that person's life, to fashion a sentence which is just, and serves everyone's interests.

COMMISSIONER GOLDSMITH: But Koon, by definition, is concerned with situations that are

extraordinary in some respect.

MS. WILLIAMS: Correct.

COMMISSIONER GOLDSMITH: And consequently fall outside the scope of my question. And I recognize my question is a little bit unfair, because it is beyond the scope of your presentation today.

But what I have in mind is your run-of-the-mill million-dollar fraud.

CHAIRMAN CONABOY: That's it.

[Laughter.]

CHAIRMAN CONABOY: That is quite a statement in itself.

[Laughter.]

COMMISSIONER GOLDSMITH: Well, your heartland, typical fraud, typical case--whatever you conceive of that to be--would you imagine probation to be the appropriate penalty? Or some terms of imprisonment?

MS. WILLIAMS: Well, you see, I think that is where--I am not meaning to be intractable, but I--there is--I don't recognize the typicality of

the situations that involve my clients.

Now, I will say, with regard to the million dollar--be it a million dollars, be it five million dollars--take it up to savings and loan presidents--30, 40, 50 million dollars--I don't think amount of money is the sole and exclusively dispositive factor that this Commission or report should look to.

Certainly, it is a consideration, and certainly who the victims are, how the crime was perpetrated is a consideration. But I don't think, by giving me an amount, I can intelligently tell you that this would be a heartland or typical sentence to be given in that--in any situation.

CHAIRMAN CONABOY: Commissioner Harkenrider?

COMMISSIONER HARKENRIDER: On your last point, regarding failed drug tests, I generally don't disagree with you.

I am interested in the question as to whether you would agree that it might be worthwhile for this Commission to study how to ensure the

possibility of graduated sanctions and incentives in the pretrial arena, so that many of the defendants basically are able treat their addictions prior to sentencing.

This has been extremely effective in the District of Columbia. Commissioner Gaines and I have both worked recently with the District of Columbia to make sure that their drug testing program remains effective, both pretrial and also in the supervised release arena.

I take it you wouldn't object to such a graduated system of penalties and testing and incentives for people to get involved in drug treatment early.

MS. WILLIAMS: Well, I certainly would welcome any study which would propose and perhaps adopt an incentive for individuals to get help.

With regard to the penalties, I believe that what is available now, in terms of, if somebody's urine test comes back positive and it is reported to a judge, and bail may or may not be revoked. I think those are sufficient to address

the situations.

I know, in my district, the head of pretrial services is a gentleman by the name of Ben Frazier, and he and I have discussed at length trying to help our clients get the kind of help they need.

Our concern is always, however, that--and we have had occasion to have to challenge U.S. attorneys who try to use statements made to pretrial and contravention of the statute which protects them, in order to assist in guilt phase components of the trial.

So I wouldn't like to expand any penalty component of the pretrial process anymore. I certainly would like to find more ways to get these people appropriate treatment, and perhaps even house them in facilities other than FDCs, where that treatment is likely to be more successful.

COMMISSIONER HARKENRIDER: Well, my understanding is that in many districts they have actually taken care of the problem of statements, et cetera, in the course of the treatment, in terms

of--through conversations between people like yourself and U.S. attorneys.

MS. WILLIAMS: Correct. Unfortunately, I have not yet been that successful with the U.S. attorney in my district.

COMMISSIONER HARKENRIDER: With your new U.S. attorney.

[Laughter.]

MS. WILLIAMS: With my new U.S. attorney--my seventh in seven years.

COMMISSIONER HARKENRIDER: But one of the questions I have is basically, it seems to me to make sense that if somebody is in treatment, whether they are succeeding at the time or not, but trying, that you wouldn't add on points for obstruction of justice--

MS. WILLIAMS: Precisely.

COMMISSIONER HARKENRIDER: --or the person's responsibility, and that might be an incentive, and a way to sort of carve--

MS. WILLIAMS: I see.

COMMISSIONER HARKENRIDER: --the picture

such that there are some incentives, et cetera, to programs.

MS. WILLIAMS: Well, again, I see your point, and it is a very good point, and well taken. I don't know that I would necessarily want to use a carrot and a stick, with obstruction of justice as the stick and treatment as the carrot.

But perhaps, with study, there could be something where that is integrated into the process, and again, the people who actually need this help will get it.

COMMISSIONER HARKENRIDER: I think it is something worthwhile for the Commission to look at.

CHAIRMAN CONABOY: Thank you very much.

Anyone else?

MS. WILLIAMS: Thank you.

CHAIRMAN CONABOY: Thank you very much; we appreciate your help here.

The next presenter is Shari Steele. Shari Steele is with the Electronic Frontier Foundation, and is going to talk to us a little bit more on what we heard some about already this morning,

about new technology in the world of copyright infringement and so forth.

So you can proceed, Ms. Steele.

STATEMENT OF SHARI STEELE

ELECTRONIC FRONTIER FOUNDATION

MS. STEELE: Great, thanks.

I would like to thank the Commission for the opportunity to appear here today on behalf of the Electronic Frontier Foundation, to comment specifically on Section 2(b)(5.3), which is the governing provision for criminal infringement of copyright or trademark, and the various proposals to revise it.

EFF is a national, nonprofit, civil liberties organization, working to safeguard rights and promote responsibility in the rapidly developing online world. Since 1990, we have been working to protect free expression, individual privacy, and open access to information in cyperspace.

Last year, Congress enacted the No Electronic Theft, or NET, Act, which for the first

time extended criminal penalties to willful copyright infringement, undertaken without commercial purpose.

Under the Copyright Act, as amended by the NET Act, criminal penalties for copyright infringement may be triggered in one of two ways. The first is contained in Section 506(a)(1) of the Copyright Act, which broadened the definition of financial gain to include bartering.

The second trigger for criminal punishment is entirely new. Governed by Section 506(a)(2) of the Copyright Act, this provision holds that any unauthorized copying of software, even the production of a single copy, that exceeds a retail value of $1,000, is a criminal act, regardless of the absence of commercial or trade purpose.

There are fundamental differences between noncommercial infringement that may fall within Section (a)(2) and the commercial or trade piracy anticipated in Section (a)(1). Commercial or trade piracy tends to be more organized, it is a sophisticated activity, involving large underground

networks, high levels of activity, and large amounts of illicit data.

Noncommercial infringement, on the other hand, takes no more than a single individual making a single unauthorized copy.

Commercial or trade piracy involves a second step that magnifies the harm of the first infringement, and tends to facilitate or encourage more piracy. The harm from noncommercial infringement tends to be limited to the underlying violation only.

An all commercial or trade piracy is criminal. Noncommercial infringement straddles the boundary between civil liability and criminal liability, depending entirely on the price tag of the software being copied.

Whereas criminal and trade piracy dominate one end of the severity scale, noncommercial infringement sits on the other. Noncommercial infringement, under Section 506(a)(2), should be treated more leniently than commercial or trade piracy under 506(a)(1).

Yet under the currently proposed Guidelines, an offender who has committed the much less serious offense could potentially receive the same sentence as the software pirate.

For example, consider the individual who copies two high-end applications retailing for $1,500, in order to install them on his home computer, so he can bring home some of his work with him. He shares the software with no one else, uses it only in connection with work, and makes no further copies.

Now consider a commercial offender, a software bootlegger who produces a CD rom containing an illegal copy of one of the newest and most popular games that retails for $50. The bootlegger markets and sells 30 copies of this CD to people all over the world.

The $1,500 noncommercial infringement and the $1,500 commercial piracy could be treated exactly alike.

EFF believes that a new specific offense characteristic in Guideline 3 should be adopted, to

reflect the varying levels of culpability in the offenses that are now reached under the provisions of the NET Act.

The effect of this special offense characteristic would be to grant a one level decrease in offense level for any infringement not committed for purposes of commercial advantage or private financial gain.

In its directive to the Sentencing Commission under the NET Act, Congress instructed that the applicable sentencing guidelines should do two things. First, ensure the penalties were sufficiently stringent to deter, and second, take into account the retail value and quantity of the infringed upon items.

In spite of this, the DoJ argues for the replacement of the retail value of the infringing item standard, with a, quote, "loss to the copyright or trademark [owner]" standard, justifying this change on the grounds that, quote, "when copyrighted materials are infringed upon by electronic means, there is no 'infringing item,' as

would be the case with counterfeited goods."

Furthermore, the DoJ proposes language that would specifically permit a court to consider lost profits, value of infringing items, and injury to the copyright owner's reputation, in addition to the value of the infringed items.

We disagree with the DoJ. Even in the realm of electronic infringement, the illegitimate reproduction of a protected work results in the production of an illegitimate copy, which is an infringing item.

Furthermore, none of the new three factors specified by the DoJ does anything to fulfill the congressional directive. The DoJ's broad notion of loss to copyright or trademark owner incorporates factors not contemplated by the statute, and introduces a vagueness that hinders the effectiveness of the guideline itself.

We urge the Commission to adopt the narrower standard that looks to the retail value of the infringed item. The DoJ proposes an application note, suggesting the consideration of

an upward departure in circumstances where, quote, "the calculable loss to the victim understates the true harm caused by the offense."

EFF believes that the Commission should substitute the language retail value of the infringed upon items for calculable loss to the victim, and severity of the offense for true harm caused by the offense.

Furthermore, we regard the DoJ suggestion to insert departure commentary as somewhat unfinished. In addition to an upward departure comment, we propose corresponding guidance that would advise the consideration of a downward departure under specific circumstances.

Just as retail value may understate the severity of the offense in certain circumstances, it may overstate it in others. One example would be a situation in which the infringing act clearly did not result in the loss of a sale to the copyright owner, thus reducing the utility of retail value as a measure of an event's severity.

For example, a father might give his old

computer to his college-bound daughter, with software preloaded on it, while he retains the original software diskettes for himself.

When he loads that software onto his new computer, he has technically violated the criminal provisions of the Copyright Act. But his daughter might not ever access the preloaded software, and certainly would not have purchased it on her own.

The software producer did not lose a sale as a result of this transaction, and a downward departure would probably be appropriate.

Another special situation that might justify consideration of a downward departure would be where the retail price of a particular software package is so high that the infringer is boosted into an offense level clearly out of proportion with the underlying offense.

Finally, EFF would like to comment very briefly on the various amendment options to Guideline 3 being considered in connection with the proposed revision to the fraud loss table.

First, we support a cross-reference to the

alternative monetary table, rather than to any revised fraud loss table. Referencing the new fraud loss table, which has the more than minimal planning enhancement built in, would have the effect of indirectly incorporating the MMP enhancement into Guideline 3 as well.

This would be a mistake. The MMP enhancement was a fraud-specific provision that never was a part of the copyright infringement guideline, and it is not at all clear why such an enhancement would be appropriate now. For this reason, we urge the Commission to reject Options 3, 3(a) and 4.

Second, we support a $5,000 threshold sum for any table that is adopted. The next lower level is $2,000, which falls within the misdemeanor range of the criminal copyright section. We do not believe that any upward adjustment is appropriate at that level of wrongdoing.

Furthermore, we feel that the tables with an opening threshold of $2,000 include upward adjustments that are too high for their

corresponding dollar values, at amounts under $1,200,000. Therefore, we urge the Commission to reject Option 2.

Third and finally, we are opposed to Option 1A's offense-specific +1 adjustment at levels above $2,000, that would have the effect of lowering the table's $5,000 threshold amount to $2,000.

Again, $2,000 only represents a misdemeanor, under the copyright statute, and we are of the opinion that an upward adjustment, whether the result of a loss table or a specific offense characteristic provision, would not be warranted at this level.

Consequently, we strongly urge the Commission to adopt Option 1 as the appropriate loss table amendment to Guideline 3.

By amending Sentencing Guideline 2(b)(5.3) in these ways, we believe the Commission will have crafted a sentencing solution to the software copyright infringement problem that is far more effective and fair than the DoJ proposal.

I would like once again to thank the Commission for the opportunity to speak to you today, and I invite you to contact me if I can answer any questions.

CHAIRMAN CONABOY: Thank you, Ms. Steele.

Commissioner Gaines, any questions of Ms. Steele?

COMMISSIONER GAINES: No questions.

CHAIRMAN CONABOY: Commissioner Tacha?

COMMISSIONER TACHA: No.

CHAIRMAN CONABOY: Commissioner Gelacak?

COMMISSIONER GELACAK: No.

CHAIRMAN CONABOY: Commissioner Goldsmith? Commissioner Harkenrider?

Well, thank you very much, Ms. Steele. We appreciate your submission to us.

Our next presenter is Christopher Fleming. Mr. Fleming is going to talk to us about the problems in the drunk driving area that we have been talking about ourselves on a number of occasions.

We welcome you here, Mr. Fleming, and you

can proceed when you are ready.

STATEMENT OF CHRISTOPHER P.T. FLEMING

MR. FLEMING: Thank you. Good morning.

I too have a wife who may not necessarily have her terminology, but she makes her point.

CHAIRMAN CONABOY: It is nice to get here where you can speak freely, huh?

MR. FLEMING: Yes.

[Laughter.]

MR. FLEMING: In our household the air is very free. She just went like this to me--nobody can.

CHAIRMAN CONABOY: It is nice to have both of you here.

MR. FLEMING: We thought we would bless you with our presence. [Laughter.]

You are probably a little confused from my testimony, because I have found, since my mother's death, the wealth of existing information in regard to drunk driving and alcohol related fatalities is huge--it is mind boggling.

And, also reviewing the work of the

manslaughter group on these issues is of great help, and I am very impressed, and I am very happy to see that people are working very, very hard--

CHAIRMAN CONABOY: Were you able to get some of the latest matters we have on that? If not, you might want to talk to some of the staff before you leave here.

MR. FLEMING: Yes, I plan to stay in contact.

CHAIRMAN CONABOY: Because that group has been doing great work.

MR. FLEMING: And see how things are progressing.

And, additionally, I would like to just note, in the good direction, that everybody that I have been involved with in regard to federal authorities, right from the FBI, the U.S. District Attorney and the Court, and yourselves--I have never met a more dedicated group of people, and it is very refreshing.

Oftentimes, in conversations, people are saying much less desirable comments about anybody

who works for the federal government, and as I said in my testimony, I am otherwise opinioned.

And most people don't even know they can come here and have this opportunity, which is fantastic.

Now I would like to try and summarize, and focus in on some elements of what I am trying to convey to you.

In short, after looking after recent medical research data, information that was provided from you, and learning how the system works--the legal system works--and reading newspapers, and getting a gist of what is happening in the public sector, if I can assume it to be an accurate gist, I agree with a lot of the options that the Manslaughter Commission is citing, insofar as punitive measures, for people who choose to drive drunk.

And I support measures that reflect a more realistic responsibility, to rest on the criminal's shoulders. For a better description, that is how I was raised.

But I am a little bit troubled with trying to give these people something that I think they need, and also what I think the public really needs, is to get to these people very early--very early.

Alcohol is the number one substance consumed in this country. The history of alcohol, both for Native Americans and non-Native Americans for a better term, is a long and repetitive history. It has been troublesome, since the pre-Columbian period, that I know of.

Our laws today comparatively to, say, the Aztec laws for violating consumption of alcohol, are lenient. For instance, a second offender of getting drunk in public was sentenced to death.

If you were a nobleman, and you were caught ingesting alcohol with some discretion--and I assume that means without the public eye upon you--you were immediately removed of your privileges and your status. It must have been a substantial penalty in that society.

If you were a nobleman and witnessed

consuming alcohol in the public sector, you were sentenced to death. They would kill you in front of everybody else.

So, I am not suggesting we go there--

CHAIRMAN CONABOY: And still they had brutal problems with alcohol.

MR. FLEMING: Yes. I am not suggesting we go--

CHAIRMAN CONABOY: In spite of the brutal punishment, they had brutal problems with alcohol. So--

MR. FLEMING: Yes, yes.

CHAIRMAN CONABOY: --you just wonder what the relationship between penalties and results are, sometimes.

MR. FLEMING: And I don't know if we can ever really know that, historically, as far as that society is concerned.

CHAIRMAN CONABOY: But we are learning a great deal, I hope. We had a very interesting discussion here yesterday with that group--or the day before--I just forget--about the different

approaches--the tribal approaches, and the approaches on reservations, as far as, not just determining penalties or guilt or innocence, but finding out what to do with those people who have the problems.

And knowing that they are going to be into the community, finding how the community can act, totally, and not just make a decision on guilt or innocence.

MR. FLEMING: Yes, that too. For everybody. Like I say, consumption of alcohol is so intricately attached to our social behavior.

I didn't know how many patients doctors see and treat for illnesses and diseases, and these patients may either be at risk, or they are abusing, or they are dependent on alcohol. It goes for everybody that lives in North America.

That number is large, and however recent data suggests and supports the very early intervention, by a simple, noninvasive review of a person's alcohol consumption habits. I believe there what is happening is that the public is being

provided with substantial information, that they can make a judgment on their personal habits.

And right there we are getting at the crux of the problem, even before somebody gets the keys to the car. I think that if the Commission could encourage that direction strongly, that would balance out the whole approach to the punitive end, as opposed to getting people in the very early stage preventively.

Also, in reading more materials, and finding out, and based on my own personal experience with drinking, I know that there are too many variables associated with consumption of alcohol for any one person to effectively evaluate their own mental status or motor abilities when they drink alcohol.

And I know that often, in advertisements, people are being warned not to drink and drive, to find a designated driver. Well, I don't think that that option should be open for the public, based on the number of people who continue to die as a result of drunk drivers.

I think that there should be a zero tolerance drunk driving law, one that encompasses strong preventive measures, gets people very early, and understands that, through an active law enforcement, communities, such as supporting officers who pull people over and enforce the seat belt law. Simple thing.

And then the officer smells alcohol, and we go from there. This is very valuable.

So, if we do some of those things, I think--and I don't if the Commission has powers to recommend that to Congress in a federal--to make a federal law, or to attach that to existing federal law, which brings me to another point.

I think that concentrating on the involuntary manslaughter, and attaching new amendments to that law, in and of itself, to try and solve the drunk driving issue, is not going to allow the Commission, or the federal government, to fully address the broadness of the issue.

I would rather say, let's leave the involuntary manslaughter the way it is, because

involuntary manslaughter can happen so many different avenues.

Compared with the other laws, laws of fraud or laws of--drug laws--there are numerous calculations and references to calculate and determine what the punitive measures should be in that regard.

With the involuntary manslaughter, there is careless and reckless with one application of it. The woman who killed my mother had five or six opportunities to changer her course of direction; she didn't.

In fact, the law enforcement community failed us, but you don't know that. But this woman was reported twice. It was over an hour and half's worth of time before the law enforcement community responded.

I have with me a document where a sheriff is talking to a dispatcher, and is giving him the information about this woman, who just missed another motorist by six inches thirty minutes before this woman ran over my mother.

And the sheriff's reply was that the woman was headed--the defendant was headed--it was a Native American--into Indian country, and there wasn't a damn thing he could do about it. And what he is referring to is concurring jurisdiction.

This cannot continue. You have a powerful suggestion here of a behavior among the law enforcement community, where they are not working together. So what can the Commission do to approach that issue?

I think that the Commission has recognized some of these issues that exist. You need to address them, and those get into a whole 'nother ball of wax--the sovereignty issue.

I mean, we can write the laws, and we can pass them, and we can make amendments, but if we don't have the cop on the corner, and we don't have the public knowledge, and we don't have the general practitioner seeing a patient in his annual exam and saying, Mr. or Mrs. So-and-so, I have 15 questions here I want to ask you about.

Just, do you drink? How many drinks do

you usually have daily? Or within a week? Da-da-da-da. And make a determination there.

Now, the draft that I gave you--it is just an artist's thumbnail sketch, because I realized in trying to do something like this is enormous--is absolutely enormous.

But what I wanted to get across was, let's get everybody early--very early. We have still 4,000 lives, approximately, being killed--being lost, rather--as a result of drunk drivers, whose blood alcohols are 0.01 to 0.09 percent.

With all due respect to the current federal legislation, of 0.08, Mr. Lautenberg, and their estimates of saving 600 lives--I don't see the logic in this approach.

It is palatable, probably, for business and individuals, and public perception, but it is unrealistic--grossly unrealistic.

And I am--I didn't even refer to my notes.

CHAIRMAN CONABOY: Well, we appreciate your coming here--

MR. FLEMING: I am open for questions.

CHAIRMAN CONABOY: --and I think you have analyzed the problem in the ways that we are doing ourselves here, and that there are many facets to it.

But each of us--for instance, our own Commission--has to try to address those facets that we have some influence on, and that is what we are trying to decipher now--where do we fit in in much of this. And we appreciate your statement here today, Mr. Fleming.

Commissioner Gaines, any questions?

COMMISSIONER GAINES: No questions.

CHAIRMAN CONABOY: Commissioner Tacha?

COMMISSIONER TACHA: No.

CHAIRMAN CONABOY: Commissioner Gelacak?

COMMISSIONER GELACAK: No questions.

CHAIRMAN CONABOY: Commissioner Goldsmith? Commissioner Harkenrider?

Thank you very much, Mr. Fleming, and I believe it is your sister who is next?

MR. FLEMING: Yes.

CHAIRMAN CONABOY: Mary Jo Rakowski?

MR. FLEMING: Yes, and thank you again for this opportunity. Very much so.

CHAIRMAN CONABOY: We are very happy to have you here, and I am sorry about the circumstances that bring you here.

MR. FLEMING: I will write you many more times.

CHAIRMAN CONABOY: But it is good of you to make your presence here, and to make the effort to come.

MR. FLEMING: Well, it is really an opportunity, and it is a big one for people.

CHAIRMAN CONABOY: You are welcome to stay there.

STATEMENT OF MARY JO RAKOWSKI

MS. RAKOWSKI: Thank you.

During an eight-month period in LaPlata County, a small community in southwest Colorado, twelve lives were lost in traffic crashes. Of these twelve, eight lives--more than 66 percent--were lost as a direct result of drivers operating a vehicle while under the influence of

alcohol.

That number of traffic deaths within a small community in such a small period of time is staggering in its own right. The number of traffic deaths related to the abuse and misuse of alcohol is more than difficult to comprehend.

In our attempt to address this national epidemic, experts, professionals, lay people and survivors seek for clues and answers in a variety of areas: socioeconomics, employment status, availability of alcohol, lack of education and boredom.

While some of the findings may point to the basis of the dilemma, these findings do not give one the license to kill by getting behind the wheel of a lethal weapon, and wielding it while under the influence of alcohol.

It does not justify the all too lenient federal sentences available at the present time. There is a profound lack of social conscience in regard to drinking and driving. There is a complete lack of personal responsibility.

We, as a people, have closed our eyes and donned blinders to this national crisis. We exchange the rites of the innocent, the rights of those now dead, for the rights of others to act with total disregard for the sanctity of human life.

Coming before this Commission presented a daunting challenge. How does one impart to you the breadth and depth of the effects such tragedies have on the survivors and the communities? What can I possibly have to say that would effect change in the Federal Sentencing Guidelines?

Perhaps in testimony based in emotions rather than facts and figures, and results of study after study after study. Facts and figures that grow in alarming numbers with each passing day, but seem to do little to effect real change.

On April 30, 1997, while returning home from a motorcycle ride with her husband of 48 years, Ginny Fleming was hit head-on by a drunk driver at approximately 2:00 p.m.

She was killed instantly, every bone in

her body was broken, every major organ lacerated, her new Harley Davidson motorcycle demolished, her husband left with a haunting vision of senseless destruction for the remainder of his life.

Ginny's family and friends would soon suffer additional heartache when the knowledge of the inadequate charges and sentences available to the prosecutor came to light. Ginny was killed on a stretch of roadway that falls within the Southern Ute Indian Reservation.

An overwhelming sense of injustice enveloped the community, and remains ever present to this day.

I choose to share with you some of the words and thoughts submitted as impact statements from the community, family and friends, in response to the death of my mother, Ginny Fleming. Quote:

"No words can explain the loss that occurred when a truck crossed the double yellow line, took dead aim on my wife and killed her. In that moment, I lost more than a wife: I lost my buddy, my lover, my best friend."

"As my mother, she taught me many things, but one of the most important, if not the most important, of these lessons is that each person is responsible for the choices he or she makes. Good or bad, we must answer for our choices and subsequent actions. Again and again she advised me to make conscious decisions, to rejoice in the good ones, be prepared to answer for the bad ones."

"I hope what emerges from our tragedy is justice, reflective of the crime; thus evidence of the Court's regard for what human life means, whether it be Ginny Fleming or another innocent human being."

"The penalty in this case does not fit the crime. I think about a victim killed by gunfire. The bullet enters and exits the body, usually striking a major organ or blood vessel, resulting in death. Ginny's death was not nearly so simple. She did not go easily into the night.

"The shooter intends to kill when he discharges his weapons. Likewise, the defendant's decision to operate a motor vehicle while drunk

showed her disregard for Ginny's life, and the lives of others. Her motor vehicle was an instrument of death, just as certainly as a firearm. There is no excuse, there is just senseless loss."

"I have not only lost my mother, she was also my teacher, student, soul mate, guide, favorite travel partner, my heart and full inspiration. You see, I owe my life to this woman, because she was a survivor of a family of alcoholism.

"She inspired me to remove alcoholism from my life. I know that for my mom it is very important to take full advantage of this tragedy, and put the message out that to be so careless as to drink and drive a motor vehicle, and to cause bodily harm and death, is not acceptable.

"And that the lawmakers, and also the people, have to change their view on acceptable drinking behavior in our communities."

"After almost 40 years in law enforcement, I cannot believe that a drive with a blood alcohol

reading of 0.21, and a prior conviction, would only receive a year or so in jail, and in this case it is the death of my sister. I pray that in Ginny's name you prevent the next tragedy."

"When I first learned of Ginny's death, I was at a loss for words and feelings, like someone stripped them from me. As time passed, I began to heal, and I realized that this senseless hurt and killing must stop.

"We as individuals, families, communities, towns, cities, states and this country, but say enough! We must be held responsible for our own actions and suffer the consequences. Our judicial system must also assist us in correcting the problem of alcoholism, and drinking and driving.

"We have the knowledge, we have the technology, but we lack the "tough love" to do what we know is correct."

"Yes, it is true. It takes an act of will, and the first act of will for all of us that is required is an act of faith. One must believe in the potentiality of the law before it can be

changed.

"Ginny Fleming had a vision to create a safe passage for drivers, and to educate the public with her message not to drink and drive."

"In 1974, my own brother was killed by a drunk driver. Twenty-three years later my family still suffers from his loss. Back in those days, drunk driving was not a public issue, and there was never a trial for my brother's killer.

"Twenty-three years later, it saddens me to see that we still have no effective deterrent for driving in a violently drunken state, and killing another human being."

"There is a big void where her dignity, beauty, pride and power existed. Her death, her killing, is a senseless loss. In a place where dire consequences are an absolute requirement, those same consequences cannot atone for the loss.

"The available consequences are insufficient. There are hundreds of victims in our communities suffering the aftermath of Ginny's death." End quote.

Finally, from Robert T. Kennedy, the Assistant U.S. Attorney, quote:

"It is indeed unfortunate that the Sentencing Guidelines as presently structured seem to focus upon the final acts of the defendant that constitute the crime of involuntary manslaughter, where a defendant under the influence of alcohol may be in such a drunken stupor as to be unable to form what is commonly called a specific or general intent to commit a crime.

"However, the defendant in this case had made at least several apparently conscious, and deliberate, decisions to drink and drive during the 24 hours immediately preceding the collision that took the life of another.

"The relatively lenient sentencing parameters within which the Court must sentence the defendant offer no genuine opportunity for societal justice." End quote.

While I know some may argue the validity of testimony based primarily on emotion, should we not remember that what sets us, you and me, apart

from the rest of the animal kingdom is our ability to recognize the difference between right and wrong, to make choices based on experience and knowledge, and most importantly to feel compassion.

Perhaps the time is now, the opportunity is ours, today, to acknowledge the emotions, the passions put forth by those I have quoted, and the many other survivors who have not been heard.

I ask that you heed the quiet voice of a once private woman, Ginny Fleming, in urging Congress to revise the Federal Sentencing Guidelines as regards to involuntary manslaughter, voluntary manslaughter, and vehicular homicide, resulting from drunk driving, to better fit the crime, and to exact a more palatable and appropriate societal justice.

I thank you for your time and your attention.

CHAIRMAN CONABOY: Thank you very much, Ms. Rakowski.

MS. RAKOWSKI: I am sorry for the tears, but--

CHAIRMAN CONABOY: We appreciate the difficulty it is for you to come here, and the courage you have to follow through on this.

Commissioner Gaines, do you have any questions, or Commissioner Tacha?

COMMISSIONER TACHA: Nothing.

CHAIRMAN CONABOY: Commissioner Gelacak?

COMMISSIONER GELACAK: I have no questions. I would just point out that Pam ~~Burn~~ Barron is in the back of the room, if you haven't--

MR. FLEMING: Oh, good, I wanted to meet her.

MS. RAKOWSKI: I wanted to meet her.

CHAIRMAN CONABOY: Yes, you might be interested in some of the follow-ups that we are trying to develop in this area. It is a very difficult area, and as you said, fraught with tragedy and emotion, but really we have to try to do our best to look at each aspect of it.

But I don't know how many of the areas this Commission can address directly, but I think general awareness of the problem is what we need,

and every little bit will help someone, we hope.

Commissioner Goldsmith, do you have any questions? Commissioner Harkenrider?

Thank you again for coming here.

MS. RAKOWSKI: Thank you.

CHAIRMAN CONABOY: Our final presenter today is Mr. Ted Brown. Mr. Brown is with the Internal Revenue Service, and has also submitted a statement today.

We welcome you, Mr. Brown, and we are happy to hear from you this morning.

STATEMENT OF TED BROWN

INTERNAL REVENUE SERVICE

MR. BROWN: Good morning, Judge Conaboy.

I want to thank the Commissioners for allowing me to testify today on behalf of the Criminal Investigation Division of the Internal Revenue Service.

The prosecution and imprisonment of tax offenders is our primary reason for existence, and we are grateful for the opportunity to let you know why it is essential that the sentencing table for

tax crimes be reformed.

Every year that the Commission delays has the potential to further erode compliance with tax laws, thereby costing the government billions of dollars in lost revenue.

Federal criminal income tax prosecutions are complex. They take a long time to investigate, and they involve a substantial commitment of time and money on behalf of the Internal Revenue Service, the Department of Justice and the federal judiciary.

They are also quite rare. Convictions for tax offenses involving legal source income--that is, income unrelated to illegal activities, such as narcotics or organized crime--only number approximately 1,500 cases per year, nationwide. Of these, less than 1,000 result in a sentence with true imprisonment.

When one considers that over 115 million individual tax returns are filed each year, and that there are millions of illegal nonfilers, the situation is clearly intolerable.

Tax evaders realize that their chances of being punished for their crimes are minuscule. As a result, honest taxpayers are being forced to pay an ever greater share of the burden.

The estimated tax gap, which is the difference between the tax reported and that that should have been reported, continues to grow, to the point that it now exceeds $100 billion per year.

Without the effective deterrents of meaningful prison sentences for tax evaders, this trend will continue, and the entire system of tax compliance will be in danger of collapse.

We are not asking for unduly harsh or--

COMMISSIONER GELACAK: Mr. Brown, could I just interrupt you?

MR. BROWN: Sure.

COMMISSIONER GELACAK: You don't really mean that you anticipate the collapse of the income tax--

MR. BROWN: We have watch an erosion in tax compliance over the last 25 or 30 years.

COMMISSIONER GELACAK: That is probably true, but the overwhelming majority of taxes are collected from payroll deductions. How do you anticipate that that system is going to collapse if you are not able to prosecute people and give higher sentences?

MR. BROWN: Well, we believe that the criminal prosecution of people has an important deterrent effect, that taxpayers have two reactions. Number one, if they are paying their fair share, their correct amount, that they expect us to detect those who aren't, and prosecute them.

And secondly, to deter other people that are considering violating the tax laws, that there is in fact serious punishment available, and that that would deter them from committing that crime.

COMMISSIONER GELACAK: Well, that is an interesting point, and I might be wrong on the numbers here, and if I am, I apologize and I'll stand corrected.

But I seem to recall a case involving Willie Nelson, where he knowingly and willfully

evaded $30 million worth of tax penalties, and I am not sure whether it was the IRS or the Justice Department that settled that case with him for $10 million.

Now, Willie, who--I love his music--he is still singing, he is still performing, he was not prosecuted. He got off with 33 cents on the dollar for a $30 million tax evasion.

And it seems to me that that case alone does more to destroy any perception that the American public might have with regard to deterrence than just about anything I could think of, and it certainly doesn't counterbalance prosecuting somebody who steals--steals--who fails to pay two or three or four--and I realize it is assessed--thousands of dollars, and you can get the money back from those people just as easily as you got it from Willie.

Now, if you are not going to prosecute the Willie Nelsons of the world, why are you going to prosecute people on the low end of the scale? What deterrent effect is that going to have?

MR. BROWN: I am not sure about it. First of all, it is difficult for me to respond to a specific example, because of the disclosure laws. You know, I can't discuss--

COMMISSIONER GELACAK: This is not any--I mean, this was, I believe, 60 Minutes that did Willie.

MR. BROWN: Well, they have the advantage of being able to talk about him, and I don't, because then I open myself up to either criminal prosecution or civil sanctions, if I were to make any statement that is not in the public record that could be attributed back to the IRS.

I want you to understand--

COMMISSIONER GELACAK: I will respect that.

MR. BROWN: --that is a complex place for me to be when you mention a specific taxpayer.

But our research indicates, and we have done some work recently--we call it indirect effects--that there is a deterrent effect because criminal prosecution exists.

And I also go back to the anecdotal or your personal experience. I recall a conversation when I was probably ten or twelve years old, this time of year, when my dad was complaining about having to pay his taxes, and I asked him, well, why do you do it?

And his answer was, I don't want to go jail. And I think that is a very visceral human reaction, and that is why it is important that the Criminal Investigation Division exists. And I think to maintain that credibility, there has to be some potential, at reasonable levels of fraud, that there is a chance of jail.

I think that is what has its deterrent impact. It is not going to deal with every single tax violator. Some people, the chance to--I frankly like your first statement--steal the money from the United States government I think is an accurate characterization.

COMMISSIONER GELACAK: Well, that isn't--that is not--

MR. BROWN: There is no question. It is a

theft from all of us. That has to be a credible threat, that the Sentencing Guidelines would say even if you steal an amount of money--and our specific support here is that today it would take about $40,000 in tax fraud loss before you would even be exposed to the possibility of incarceration.

And we think that only potentially applies to about 4 percent of the taxpaying population, and therefore that for the 96 percent of the taxpayer population that is not a credible threat. It is not a credible deterrent.

COMMISSIONER GELACAK: Well, but when we raised the tables three or four years ago, not you but somebody from the IRS came in here and told us that was enough, and told us that it was more than adequate to provide a deterrent effect.

And I believe someone also has come in and told us that you don't even know whether that is true or not, because the cases haven't germinated far enough through the system to determine whether those increases and penalties were sufficient.

But you would like more penalties.

MR. BROWN: Well--

COMMISSIONER GELACAK: I don't mean to be picking on you, but the answer to everything--

MR. BROWN: I am with the IRS, I am just here.

[Laughter.]

COMMISSIONER GELACAK: Yeah, well, I apologize for that.

The answer to everybody's problems--

CHAIRMAN CONABOY: You can feel at home here.

COMMISSIONER GELACAK: --when they come in here is to say, we need more punishment, and in some areas maybe we do need more punishment. But I don't happen to believe that increased penalties are the answer to every societal ill.

I think that is a ridiculous way to approach society's problems, and this is one--I am picking on you, because you are here.

[Laughter.]

COMMISSIONER GELACAK: But this is one

that really drives me up a wall. I don't believe that there is any deterrent effect to 1,500 prosecutions a year. I really don't.

I believe people are concerned that they may be prosecuted. I believe they are concerned about that because they know the potential exists. I don't believe they are concerned about that because you prosecuted 1,500 people.

MR. BROWN: Well, I think I would disagree with you there, Commissioner. I think the impact that we have, first on the individual who is the subject of prosecution, but we know that--

COMMISSIONER GELACAK: Specific deterrents I will grant you. You put me in jail, you have got me first.

MR. BROWN: Oh, no, but I am about the broader. In your profession, in your community, in the geographic area, that word is broadly known, you know, and in the process of investigating you a lot of people become aware of that, and they follow the story to see what happens.

So I think that we find that there is a

broader deterrence, and then in certain high profile cases there is nation impact, you know, that some of our cases do make U.S.A. Today and The Wall Street Journal, and therefore across the whole country people are aware that there are significant prosecutions for significant dollars for misconduct.

And I think that does have a deterrent impact, you know, and again, anecdotal examples, when I am out speaking at the Rotary Club or at some other type of small setting, you get those comments--I read last week in the paper about your conviction of so-and-so, whether it is a local figure or a national figure.

I think that is the broader deterrent impact that our business has. I mean, that is--we tried a noble experiment.

The modern tax law was enacted in 1913. For the first six years there were no criminal penalties, and it was a noble experiment that because all Americans felt that the support of their government was important, that they would all

properly and accurately pay their tax.

After six years they realized that was not the case, that some people still would not pay, and they created this division, the criminal arm of the IRS. And so, for the last 78 years, that has been our job.

It has never been a large number of cases, but yet we know that most taxpayers understand that if you violate the law there is a chance you are going to be investigated and prosecuted.

COMMISSIONER GELACAK: Sure.

MR. BROWN: And then our argument today is that when that happens--

COMMISSIONER GELACAK: You should get more of a penalty.

MR. BROWN: At lower dollars. I mean, that is the real impact here, is the concern that at the present point in which a potential incarceration kicks in under the Sentencing Guidelines, that it is at a level where a lot of taxpayers can say, I can play this lottery.

One, I've a chance they won't even detect

me; if they do, all the exposure I've got is a potential for probation, and so they make that personal value judgment, as to whether the money they are going to steal is worth that risk, and we think that risk ought to be higher.

COMMISSIONER GELACAK: All right. I just--I guess it just drives me crazy. I think that--not you, but I think that the administration and the IRS, and not just this administration but all administrations, make the mistake sometimes of coming in here and overstating your case.

I mean, to say to me that--or to say to this Commission that you are concerned that the entire system of tax compliance will be in danger of collapse is a bit of a stretch. I mean, it really is.

I believe that to be an impossible result, and to say to me that you need a reason for honest taxpayers to remain honest offends me.

MR. BROWN: I don't want to draw that conclusion. I think part of it is--

COMMISSIONER GELACAK: That kind of

characterization is not something that ought to be coming from the government.

MR. BROWN: Well, let me clear that. I think that the one important message is to those taxpayers who do comply, and what we get from our surveys, et cetera, of them is that part of that is, they expect us to make the people who don't pay correct that--to pay the tax, and, if they have done it from a criminal standpoint, to be punished.

CHAIRMAN CONABOY: Do any of them mention Willie Nelson?

COMMISSIONER GELACAK: Yeah, and then they watch 60 Minutes and they see Willie Nelson.

MR. BROWN: No, well, we get mentions of a lot of other of the high profile cases in which those people were incarcerated.

You know, there have been a number of those as well, and so I think that--and sometimes the specific answer is, yeah, I will get a comment about--I mean, I get similar comments, Commissioner, when even a local figure gets probation.

COMMISSIONER GELACAK: Sure.

MR. BROWN: And they will say, I can't believe that guy, you know, took you for $100,000, stole it from all of us, and all he got was probation. I get the same kind of comments there.

COMMISSIONER GELACAK: I know, and I grant you that people make those comments, and I make them, and Willie Nelson offended me, but I still pay my taxes, and I think the vast majority of people pay their taxes, and the vast majority of people want the government to be successful, and want to support it.

There are some concerns about of taxes people want to pay, but, you know, this notion--the notion that prosecuting people, and being able to put them in jail for three months or six months longer is going to deter, or alter their performance on how they pay their income tax just escapes me. I don't believe it.

MR. BROWN: Well, it is a point that--and I don't know that ten year sentences, you know, make that big a difference. I am looking at the

low end, where that difference between no incarceration and an exposure to incarceration does make a difference.

And where there is--

COMMISSIONER GELACAK: Why do you want to bother with those people at the low end? Get their money, get penalty.

MR. BROWN: We get that anyhow.

COMMISSIONER GELACAK: We are more concerned about that. The American public is more concerned about that. They don't want the government to be defrauded.

You get the money and the penalties--I would venture to say most of them don't care if you put those people in jail. It might be nice if you incarcerate them, because they committed a crime, but they don't have to be put in jail for a long period of time, because you have not proven anything by doing that.

MR. BROWN: No, that is why--the whole proposal here is, one, to lower that point at which the initial exposure to jail exists, and I think

that is our important point here.

We haven't asked for some, you know, at the other end much greater or more severe penalties.

COMMISSIONER GELACAK: I understand, and we just haven't just agreed on what point ought to be.

MR. BROWN: We certainly do. But then the other part too, I think you have to--the one, the criminal arm of the Service is focused strictly on the prosecution of criminal defendants, and then, once that process is completed, there is still the civil arm of the Service, which then comes behind and says, you know, regardless of what the outcome of your criminal case was--

COMMISSIONER GELACAK: I know, I know, but the civil--

MR. BROWN: --you still--

COMMISSIONER GELACAK: --but the civil penalties are substantial. The ability to get that money back--you have more ability to get money back than practically any other arm of the government.

MR. BROWN: Right, but I see that argument consistent with--

COMMISSIONER GELACAK: And that is terrific.

MR. BROWN: --the point that if a bank robber returns his money--

COMMISSIONER GELACAK: But see, you are--

MR. BROWN: --then apparently the recovery of the money--

COMMISSIONER GELACAK: This is the perfect example--

MR. BROWN: --would not be a deterrent.

COMMISSIONER GELACAK: --of the fact that we tend, or we want now--we are living in a time, at a time, where we want to criminalize everything, and I am not going to go there, for want of a better term.

I don't want to criminalize everything. I don't think every person in this country is bent upon committing a crime. I really don't.

MR. BROWN: Well, I think that--

COMMISSIONER GELACAK: It offends me. I

had someone come in San Francisco and tell me that I needed to increase penalties so we had a realistic threat to the American public. That offends me.

It offends me when people come in here and say that we need a reason for honest taxpayers to remain honest. Honest taxpayers remain honest. They don't remain honest because they are worried about you coming to knock on their door and say, we are going to put you in jail for your honesty.

MR. BROWN: No, sir, and I think what we said--

COMMISSIONER GELACAK: This kind of rhetoric just drives me up a wall.

MR. BROWN: Well, I apologize for that. That was not the intent; the intent is that we believe that the exposure to jail time is a valid deterrent, one, to people actually committing crimes.

COMMISSIONER GELACAK: Sure, that is a deterrent.

MR. BROWN: For that segment of the

population, however small it might be, that would actually commit a tax crime. That that is hopefully a deterrent to them doing that.

But just as importantly is that reassurance to those 90-plus percent of taxpayers who do pay their full amount, that we pay attention to this, and the people who cheat and shift that tax burden to the rest of the American taxpaying public will pay a price for it.

I think that is the real argument we are making here.

COMMISSIONER GELACAK: We could keep this up, and I apologize, because you are here, and I don't want to--

CHAIRMAN CONABOY: I need somebody with the time card.

COMMISSIONER GELACAK: Where is the flag? And I apologize. I assume you know that this is not personal.

MR. BROWN: Oh, absolutely.

CHAIRMAN CONABOY: It energizes.

COMMISSIONER GOLDSMITH: I just wish that

Commissioner Gelacak would stop sugar-coating it and give it to you straight. So thank you.

[Laughter.]

COMMISSIONER GOLDSMITH: Don't hold back.

COMMISSIONER GELACAK: I am trying.

CHAIRMAN CONABOY: Commissioner Gaines, do you have any questions?

COMMISSIONER GAINES: Wouldn't dare.

[Laughter.]

CHAIRMAN CONABOY: Well, let's energize--we will all have lunch a little bit later maybe and--

MR. BROWN: Well, I think it is positive here, Judge Conaboy, that everybody--

CHAIRMAN CONABOY: No, it is--it is a positive discussion.

MR. BROWN: Everybody talks about how threatening the Internal Revenue Service is, and obviously Commissioner Gelacak, you know, doesn't see that, and I think that is important.

CHAIRMAN CONABOY: Well, it is a positive discussion.

COMMISSIONER GELACAK: [Remark off-mike.]

MR. BROWN: I hope we are not. We are very concerned that that is not the case, but at the same time, for that small segment of the population that does cheat, I think we need a credible threat.

CHAIRMAN CONABOY: You have had tough year at the IRS, and--

[Laughter.]

MR. BROWN: I am afraid it is not going to get any better in the near term.

CHAIRMAN CONABOY: Every once in a while it behooves us in this country to have this kind of a discussion, because we do sometimes overlook, and I think it is the point Commissioner Gelacak is making, that most people do try to follow the law, and most people try to live in a civilized way, and it is an aberrant group that causes the problems.

And perhaps we shouldn't overstate it sometimes to make us think that everybody in this country is a law violator, you know, and we appreciate your responses.

Commissioner Goldsmith, did you have any questions?

COMMISSIONER GOLDSMITH: No questions, thank you.

CHAIRMAN CONABOY: Commissioner Harkenrider, any other comments?

COMMISSIONER HARKENRIDER: The only thing, that there was one comment about the lower level offenders, and yet your testimony shows that it would take somebody--only 4 percent of the population makes enough money to have cheated on all of their taxes for three years to get a possibility of imprisonment.

So we are not talking low end.

CHAIRMAN CONABOY: Okay, thank you. Thank you very much.

MR. BROWN: Thank you.

CHAIRMAN CONABOY: It was nice of you to come at the end of the line. Thank you.

[Laughter.]

CHAIRMAN CONABOY: Is there anyone else here whose name is not on the list, or who wishes

to offer any testimony or anything further?

If not, we appreciate all of your coming, and especially you people who came here at some personal difficulties.

We appreciate your being here, and, though it may not seem that your testimony, or our responses, were in direct connection with what you are involved in, it does help us to hear this, and we appreciate your coming very, very much.

Thank you.

MR. BROWN: Thank you very much.

CHAIRMAN CONABOY: All right, we will adjourn the meeting at that point.

Thank you.

[Whereupon, at 12:15 p.m., the public hearing was adjourned.]

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