

UNITED STATES SENTENCING COMMISSION

+ + + + +

PUBLIC HEARING

+ + + + +

WEDNESDAY,
JUNE 17, 1998

The Commission met in Suite 2-500 South in the Thurgood Marshall Building, One Columbus Circle, N.E., Washington, D.C. at 9:30 a.m., the Honorable Richard P. Conaboy, presiding.

PRESENT:

- | | |
|----------------------------------|----------------|
| The Honorable Richard P. Conaboy | Chairman |
| Michael S. Gelacak | Vice Chairman |
| Michael Goldsmith | Commissioner |
| Deanell R. Tacha | Commissioner |
| Mary Frances Harkenrider | Ex Officio |
| John H. Kramer | Staff Director |

ORIGINAL

NEAL R. GROSS
COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVENUE, N.W.
WASHINGTON, D.C. 20005

I-N-D-E-X

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

Page

Welcome and Introduction of Commissioners	3
Opening Statement, Judge Richard P. Conaboy	4
Testimony	
Kyle O'Dowd	7
Families Against Mandatory Minimums	
Fred Bennett	17
Practitioners Advisory Group	
Adjournment	52

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 P-R-O-C-E-E-D-I-N-G-S

2 9:34 a.m.

3 DR. KRAMER: Good morning, thank you all
4 for coming this morning. In keeping with the
5 Commission's attempt to get input from others about
6 our agenda, we are holding this public hearing. We
7 have four people who have submitted comments to us and
8 we have two that are going to appear before us to
9 testify.

10 Getting started, let me introduce the
11 Commissioners, Commissioner Deanell Tacha to my
12 immediate left. To my far right, Commissioner Mary
13 Harkenrider, next to her left is Commissioner Michael
14 Goldsmith, our Vice Chair Commissioner Michael Gelacak
15 and the Chairman, Commissioner Richard P. Conaboy.

16 Mr. Conaboy, it's all yours.

17 CHAIRMAN CONABOY: Thank you, John. We
18 welcome all of you here this morning to this public
19 hearing that's been scheduled to discuss next year's
20 agenda. And we certainly welcome the input from those
21 of you who have submitted matters, and particularly
22 those people who are here to testify.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 It's important for us to hear from the
2 public and from groups like those you represent as to
3 the items that it would be important for us to
4 consider during the course of this year as we continue
5 to try to make the sentencing process in the federal
6 courts a fair and effective process.

7 And we, I'm sure you know that it's
8 impossible for us to address every single issue that's
9 brought to our attention, but as I say repeatedly
10 among our Commission members and to people like
11 yourselves, an open discussion is the beginning of
12 understanding what people are concerned about. And we
13 need to continue the dialogue to make sure that we are
14 aware of issues that are important to those people who
15 are working in the courts around the country and the
16 federal system and engage in this process of trying to
17 react to conduct that violates the norms of our
18 society.

19 In the course of this year, we indicated
20 in our advertisements that the Commission was going to
21 continue to work on the revision of the fraud and
22 theft and tax guidelines that we worked on to such an

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 extent last year, and that we would potentially begin
2 a review and assessment of the criminal history
3 guidelines that we've talked about over and over
4 again. And that we would review and develop some
5 assessment of sentences and guidelines that have to do
6 with homicide.

7 And of course, as always, we have to be
8 concerned with much legislation that has passed or is
9 in the process of being passed that has to do with the
10 punishment and sentencing and in many instances
11 requires us to make changes or amendments or additions
12 to the guidelines to follow through on the actions of
13 Congress in declaring conduct as a criminal act or in
14 directing us to review the punishment for certain
15 conduct or to increase it.

16 And we have a number of those acts that
17 have already been passed and there are others under
18 consideration in Congress that we continue to monitor
19 and will be working on during this year.

20 So we, while we seek in our advertisement
21 indicate that we were seeking comment on certain
22 issues, we welcome comment on any issues that you feel

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 are important and that you would like to bring to our
2 attention.

3 I want you to know that in spite of the
4 fact that we are short of commissioners and there is
5 great concern about filling the vacancies, and more
6 vacancies will be coming into existence, I've talked
7 yesterday with the office heads here and the
8 Commission, and we will be talking later today with
9 the entire staff here to make sure that we continue to
10 keep the work of this Commission going no matter --
11 the Commission itself and the work we do is bigger
12 than any or all of us put together. And that we are
13 continuing here to see that the work of this Agency is
14 not interrupted in spite of vacancies or changes in
15 some of our areas.

16 This morning there are two people here.
17 One representing the Families Against Mandatory
18 Minimums and the other the Practitioners Advisory
19 Group. I appreciate the fact that both of you are
20 here, not only representing your own groups but making
21 comments to us. And we welcome you here and we will
22 be glad to listen to your comments this morning. As

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 I repeat that we also welcome a number of others who
2 have submitted, who have made written submissions to
3 us on items that are of concern to them.

4 So, initially we will hear from Kyle
5 O'Dowd who is here this morning representing the
6 Families Against Mandatory Minimums. Mr. O'Dowd, you
7 can proceed.

8 MR. O'DOWD: Mr. Chairman and
9 distinguished members of the Sentencing Commission,
10 thank you for this opportunity to the Commission on
11 future policy development priorities. I'm not the
12 first to urge the Commission to re-examine the issue
13 of drug sentencing. In fact, I run the risk of
14 sounding like a broken record.

15 Quantity based drug sentences have been
16 the primary targets of criticism hurled at federal
17 sentencing. As I'm sure the Commission is aware,
18 federal drug sentences provoked judicial ambivalence,
19 academic criticism and indignation by members of the
20 press.

21 Pointing out the source of these excessive
22 sentences requires both hands. One directed at

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 mandatory minimum statutes and one fingering the
2 Sentencing Guidelines.

3 While critics derived pre-guidelines
4 practice as law without order, the drug guidelines
5 offer order without reason. The tenuous link between
6 drug quantity and culpability means that the media has
7 not been left wanting for horror stories.

8 The story of Kemba Smith appearing in
9 Emerge magazine caught the attention of one high
10 school class in Dayton, Ohio. On their own
11 initiative, 50 students from Colonel White High raised
12 money for a bus trip to Washington in order to protest
13 a sentence prescribed by the Sentencing Guidelines.
14 The students were shocked by the 24 1/2 year sentence
15 imposed on this young, first-time offender. This
16 event is a poignant reminder that excessive punishment
17 erodes public confidence in the Sentencing Guidelines.

18 One could almost say the federal
19 sentencing is drug sentencing and that federal prisons
20 are drug prisons. Drug offenses generally comprise
21 more than 40 percent of guideline sentencings. Nearly
22 60 percent of those occupying federal prison space are

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 drug offenders.

2 COMMISSIONER GOLDSMITH: Mr. O'Dowd?

3 MR. O'DOWD: Yes?

4 COMMISSIONER GOLDSMITH: Do you mind a
5 question before we leave the point? Your concern
6 about Ms. Smith's case, if you could just take a
7 moment to depart from your notes and tell us to what
8 extent her sentence was driven by guideline
9 considerations and to what extent it was dictated by
10 mandatory minimums or statutory considerations.

11 MR. O'DOWD: It is my understanding that
12 she was held accountable for a quantity well above the
13 mandatory minimum 10 year level. She did not have a
14 prior, so it did not trigger recidivist mandatory
15 minimums, and therefore it was entirely a guideline-
16 based sentence. If there is such a thing as a
17 guideline-based sentence.

18 COMMISSIONER GOLDSMITH: Are you saying --
19 drug conduct rules --

20 MR. O'DOWD: Correct. She was held
21 accountable for the entire quantity of crack cocaine
22 distributed by the drug conspiracy. But there were

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 also money laundering charges in that, but I believe
2 they were far outweighed by the drug quantity.

3 COMMISSIONER GOLDSMITH: Okay.

4 MR. O'DOWD: In light of the sheer volume
5 of federal drug cases, the drug guidelines should
6 always be a priority. But parity is not the only
7 reason to remove drug sentencing from the back burner.
8 There is a respectable body of opinion that the drug
9 guidelines are generally greater than necessary to
10 satisfy the purposes of sentencing.

11 By some measures, it appears that drug
12 trafficking guidelines have not even fulfilled the
13 promise of reducing disparity. Regional differences
14 may have increased under the Guidelines and drug
15 sentences account for a disproportionate percentage of
16 total departures.

17 These are symptoms of a crude and over
18 simplified guideline that has utterly failed to
19 reflect advancements in knowledge of human behavior as
20 it relates to the criminal justice process.

21 Despite minor reforms, mandatory minimums
22 are still the hobgoblin of the Guidelines. The

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 prolonged confinement of non-violent drug offenders
2 for decades or natural life does not reflect the
3 expertise of this Commission. These sentences are the
4 result of ill considered consistencies with the
5 mandatory minimum penalties.

6 Subservience to the mandatory minimum
7 statutes, if it's required at all, does not
8 necessitate extrapolation of sentences above the ten
9 year mandatory minimum.

10 Some experts have argued that
11 interpolation below this level is also unwarranted.
12 Remember that the Sentencing Reform Act did not
13 require the Guidelines to be quantity based. And
14 Congress has never required that the guidelines
15 reference the mandatory minimums.

16 Aside from a necessary deference to
17 Congress, the first commissioners apparently
18 incorporated the mandatory minimums to create a smooth
19 continuum and avoid sentencing cliffs. Whether
20 passage of the safety valve calls for a different
21 approach is a question worth considering.

22 In a recent year, the safety valve

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 released judged from the mandatory minimum in 17
2 percent of the drug cases. Justice Breyer has said in
3 Guideline writing, the best is the enemy of the good.
4 But with respect to the drug guidelines, the
5 Commission has settled for something miserably
6 inadequate. The question that has not received enough
7 attention is how to fix it.

8 FAMM urges the Commission to study the
9 full range of alternatives, from Michael Tonry's
10 suggestion of complete independence from the mandatory
11 minimum statutes to Steven Schulhofer's recommendation
12 that the drug quantity table be capped at the ten year
13 mandatory minimum level, which is Level 32.

14 Amendments that would encourage greater
15 reliance on offender characteristics such as Roll or
16 departures should also be explored. Such policy
17 analysis promotes discourse, help educate legislators
18 and may lead to workable and politically viable
19 solutions to the Guidelines' most notorious flaw.

20 The Guideline writing process is supposed
21 to be evolutionary. But so far the evolution of the
22 drug sentencing guidelines has been blocked. Despite

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 past political frustrations, only through research and
2 analysis today will the Commission be poised to take
3 advantage of future opportunities for reform. Thank
4 you.

5 CHAIRMAN CONABOY: Thank you, Mr. O'Dowd.
6 You list in your written submission some suggestions
7 about reform, as you call it. Would you want to
8 comment on any -- I know you made very quick reference
9 there to some of the suggestions that have been made.
10 But are there any other suggestions that you want to
11 elaborate on a little bit more?

12 MR. O'DOWD: The three primary
13 suggestions, and one of them I note has been added to
14 the Federal Defender's Suggestions, that is a window
15 or a window of 30 days in which to determine drug
16 quantity, total drug quantity.

17 The other two suggestions, one Michael
18 Tonry's completely decoupling the guideline from the
19 mandatory minimums. Stephen Schulhofer, it's my
20 understanding, believes that that does not pay
21 adequate deference to Congress' determinations that
22 certain quantities trigger a certain sentence.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 Professor Schulhofer would merely cut off the drug
2 quantities at the ten year minimum level, and leave
3 the interpolation that exists below that level.

4 And therefore sentences would group around
5 the ten year level for quantities above and beyond
6 that quantity, triggering the ten year level. And the
7 differences in culpability and in terms of possession
8 of a gun, use of the gun, role would be reflected and
9 in many cases cause the sentence, draw the sentence up
10 into the upper ranges of the Guidelines and better
11 account for differences in culpability.

12 FAMM has suggested Mr. Schulhofer's
13 recommendation in the past two amendment cycles.

14 CHAIRMAN CONABOY: Does anyone else have
15 anything?

16 COMMISSIONER GOLDSMITH: Judge? I just
17 wanted to thank you for your testimony today and ask
18 that you pass on the Commission's regards to Julie
19 Stewart who testified last year. I recall her
20 testimony in which she, in her typical low key way,
21 said that the Commission had been so misdirected and
22 in many regards impotent that she viewed us as being

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 in danger of becoming extinct, or characterized us as
2 soon to be an endangered species.

3 And I might want, might add that if you
4 take a look at the June issue of the American Lawyer
5 magazine, there is a paragraph or two about the
6 Commission and it characterized the Commission by
7 virtue of the vacancies as an endangered species and
8 soon likely to be extinct. So, Ms. Stewart may have
9 been quite prescient in her observations during her
10 testimony last March, March of 1997.

11 MR. O'DOWD: Hopefully that won't be the
12 case.

13 COMMISSIONER GOLDSMITH: Hopefully not.

14 CHAIRMAN CONABOY: Anyone else? Questions
15 or any comments? [No response.] All right, Mr.
16 O'Dowd. Thank you very much and this is an area of
17 course that concerns all of us and troubles all of us,
18 the whole area of drugs and what to do. And I'm sure
19 you know that there are those who still feel
20 punishment is not severe enough and we run into that
21 on many occasions and yet with all the assets we have
22 in this country we are struggling, not only us but

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 others in government and out of government to find as
2 an answer to the drug problem and a way to handle it.

3 So we appreciate your coming here and
4 reminding us of these things and helping us try to
5 think this thing through. Yes?

6 COMMISSION GELACAK: Just one thing before
7 you leave. Does your organization keep track, do you
8 keep a list of a compilation of particularly
9 outrageous cases?

10 MR. O'DOWD: Yes we do and we are
11 frequently called on by the media to provide them with
12 examples of excessive mandatory minimum sentences and
13 as the case has been recently and excessive sentences
14 under the Sentencing Guidelines as well.

15 COMMISSION GELACAK: Do you know of any
16 reason why you or your organization would object to
17 providing us with that information?

18 MR. O'DOWD: Absolutely not. I'm certain
19 that Ms. Steward would be --

20 COMMISSION GELACAK: If not, I would like
21 you to do that.

22 MR. O'DOWD: -- pleased to compile.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 CHAIRMAN CONABOY: It is important and we
2 ask a number of people to do that anytime there is a
3 case or several cases that involve what people think
4 is a very unusual result from using the Guidelines.
5 It's helpful for us to hear. So that would be helpful
6 if we had a list of some of those that you say your
7 organization keeps.

8 MR. O'DOWD: I included two examples in my
9 written submission of excessive guideline sentences
10 that have attracted media attention, in particular.

11 COMMISSION GELACAK: I am sure there are
12 quite a few.

13 MR. O'DOWD: There is quite a few that
14 haven't made it into the papers, yes.

15 CHAIRMAN CONABOY: All right, thank you
16 Mr. O'Dowd. Our next presenter is no stranger to this
17 room or this Commission and an attorney friend that
18 has long been an active member of the Practitioners'
19 Advisory Group and we are happy to have you here this
20 morning and you can proceed Mr. Bennett.

21 MR. BENNETT: Thank you, Judge. Members
22 of the Commission, I submitted a two page letter on

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 May 29th but I am going to be in my remarks going far
2 beyond that for a simple reason. I spoke to Mr.
3 Courlander after that. I indicated to him that we
4 would be having a meeting of the Practitioners'
5 Advisory Group the morning of the public hearing. And
6 that because our members are spread throughout the
7 country and frequently participate by telephonic
8 conference, that we would probably be adding numerous
9 additional items so to speak to the areas that we
10 thought should be priority areas for the Commission.

11 So I hope you have paper and pencil so to
12 speak. Some of them are repeated by both the
13 Probation Office Group, POAG, and by the Federal and
14 Community Defenders, so it won't be hitting you out of
15 left field so to speak.

16 The area that was covered in the letter
17 that we do think needs to be a high priority, and the
18 fact is our number one wish list, so to speak, on
19 priority items is continuing the study and bringing
20 back for votes, formal votes, during the next
21 amendment cycle on money laundering. We think this is
22 a critical area. You've done studies on it.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 Of course, you are all familiar with what
2 went up to the Hill and as part of an amendment
3 package a few years ago and was rejected. But we
4 think that the problem areas on these Guidelines, the
5 S-Guidelines, 2S1, 2S1:2, 2S1:3 are well documented
6 and should be a high priority, along with the economic
7 crime package which we know is a carryover from this
8 amendment cycle. So that is covered in our May 29,
9 1998 letter.

10 Now in addition to that, we have the
11 following: substantial assistance. This is covered
12 generally in the Federal Defenders' Position Paper on
13 page three, it's the second item up from the bottom.
14 We concur and in fact, feel very strongly that the
15 Commission should consider an amendment in the area of
16 revising the current provision to include a guideline
17 that would permit a departure without a government
18 motion in non-statutory mandatory minimum cases.

19 That is, where the sentencing judge could
20 depart downward without a motion from the government
21 on the defense motion, or so to speak sua sponte by
22 the court in the non-statutory mandatory minimum

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 cases.

2 Our third area is in the standard of
3 proof. And this is basically two-fold. We are very
4 concerned, and it's been addressed by the Supreme
5 Court but so to speak not reached a final decision,
6 and it's not the basis of a holding. It comes up in
7 two areas. One area has two subparts and the other is
8 by itself. And that is acquitted conduct which is
9 mentioned by the Defenders on page two, their first
10 comment, relevant conduct would be 1.3, a revision to
11 possibly preclude consideration of acquitted conduct.

12 I put it under standard of proof. A,
13 should a sentencing court be allowed to consider at
14 all acquitted conduct? B deals with two areas. The
15 first deal with when you have charge conduct, what
16 should the standard of proof be? You have in 6A1.3
17 the Commission already has in its commentary a
18 discussion that the use of the preponderance standard,
19 which is the standard of proof at sentencing, does
20 meet due process and policy concerns, citing an old
21 Second Circuit case, Fatico which is really a bail
22 hearing case.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 I'm concerned and I want to raise it in
2 terms of just a common example of how this comes up.
3 It comes up in charge conduct really in three areas.
4 In drug cases, in gun cases and the other one that's
5 the most noticeable to me is in the area of the
6 aliens, unlawfully entering after deportation. The
7 16-level enhancement.

8 But the most common two with the highest
9 numbers would be in the drug area and in the gun
10 areas. And I'm talking about the enhancement/cross
11 reference to the murder guideline.

12 I came back less than two weeks ago, and
13 Judge I'm going to talk about it because this is not
14 going to be an issue on appeal. It is a Tenth Circuit
15 case. The case is United States vs. Fortier. Michael
16 Fortier. He plead the gun counts and failure to
17 report -- and failure to report the offense. And
18 lying to an FBI agent. But the gun count is what
19 drove the Guideline.

20 The gun count was based on his trip to
21 Kansas with Mr. McVeigh, bringing guns back to
22 Kingman, Arizona, selling guns at a gun show. And

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 according to the probation officer's report which
2 drove the cross reference enhancement, the possible
3 use of the proceeds from the sale of guns in the
4 Oklahoma City bombing venture.

5 He would have been without this Guideline
6 cross reference and enhancement at a 17, which is a
7 time served sentence. It means out the door at
8 sentencing. Walking, free man.

9 The probation officer applied on a
10 preponderance of the evidence standard, the murder
11 cross reference enhancement which drove it up to a 43
12 which was adopted by the Court.

13 The specific statement at sentencing: I
14 find by the preponderance of the evidence that the gun
15 -- this was even an extension of the Smith case that
16 is, that the gun was not used in the felony but the
17 proceeds from the sale of guns were used potentially
18 in the Oklahoma City bombing. On a preponderance of
19 the evidence standard which gave him an offense 43
20 level which was eventually, if you read the final
21 outcome in the case, based on a downward departure
22 motion by the government, he finally ended up with 12

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 years.

2 And the 12 years to many people would say,
3 well 12 years, the man caught a significant break.
4 But what everybody is missing from it if this murder
5 cross reference did not apply it was a time served
6 sentence.

7 Your finding in the drug area increases to
8 43 on a preponderance of the evidence standard, more
9 trouble even than the gun area. I think there are 67
10 or actually 75 reported cases applying the cross
11 reference enhancement to the murder guideline, jumping
12 it up from a 36 to a 43, sometimes even below a 36 to
13 a 43, adding years in maybe 30 or 40 percent higher
14 sentence.

15 In the Fortier case, more than quadrupling
16 the sentence on a preponderance of the evidence
17 standard. So that's the first problem area.

18 The second subcategory, I think is even
19 more dangerous. And that is relevant conduct coming
20 back at sentencing not charged in the indictment.
21 That say taking the Fortier case but not even having
22 a gun count in the indictment, but then giving him a

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 murder cross reference and gun count, gun conduct
2 sentencing.

3 This happens across the country on a
4 regular basis. A form of hiding the ball so to speak.
5 We will not charge it with a standard of proof either
6 on a bench trial or a jury trial would be beyond a
7 reasonable doubt, but we will in fact raise it at
8 sentencing on a preponderance of the evidence
9 standard.

10 So I'm suggesting to the Commission both
11 in light of charged conduct and in light of uncharged
12 conduct, this whole area needs revisiting. Standard
13 of proof. Expressly left open in Watts, in the Watts
14 case by the Supreme Court. But it is, and in fact
15 it's been even discussed at oral argument in other
16 cases, I think even troubling to some of the justices,
17 I won't say a majority, but some of the justices of
18 the Supreme Court.

19 So I think standard of proof in the area
20 of acquitted conduct and relevant conduct generally
21 should be on the Commission's plate, and it's one of
22 our highest priorities.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 COMMISSION GELACAK: What is your
2 solution?

3 MR. BENNETT: Solution potentially could
4 be in two areas. You could in fact, I think, on the
5 acquitted conduct bite the bullet that you have been
6 unwilling to do in the past, and pass a guideline that
7 prohibits sentencing on acquitted conduct.

8 On the other you could perhaps draw a
9 guideline or a policy statement saying that if in fact
10 adopting the language of Kikumura out of the Third
11 Circuit, if in fact the sentence wags the dog, or wags
12 the tail, excuse me, that if there is going to be set
13 a limit, a 30 percent increase or greater in a
14 sentence for enhancements or cross references, the
15 standard of proof recommended by the Commission, you
16 could do it right in 6A1. Replace the language in
17 6A1, standard -- or add to 6A1 that the preponderance
18 evidence standard applies for two, four or minor
19 enhancements.

20 For major enhancements or cross references
21 that would increase the sentence in excess, you put
22 whatever number you want in. Thirty percent, 25

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 percent, Commission recommends a standard of proof by
2 clear and convincing evidence. Or beyond a reasonable
3 doubt.

4 I don't think that it raises
5 Constitutional concerns in terms of the Commission's
6 ability to act.

7 CHAIRMAN CONABOY: Wouldn't that fractured
8 way of doing things though possibly raise more
9 concerns? In other words, if you are only going to
10 send me to jail for a short period of time, you can do
11 it by a lower standard of proof.

12 MR. BENNETT: Well we have that in the
13 civil area. For instance we have that in the civil
14 area.

15 CHAIRMAN CONABOY: I realize we have that
16 in the civil area, but what I'm talking about is
17 deprivation of freedom. Which is much different than
18 a civil balance of power. It seems to me --

19 MR. BENNETT: That's true but it's better
20 than a system in which for both high end and low end,
21 it's the same standard. I mean --

22 CHAIRMAN CONABOY: I'm sympathetic with

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 your concern on the standard of proof and there has
2 been, I think Judge Becker has written an article on
3 this business of standard of proof and relevant
4 conduct and matters which drive the sentence. I'm
5 just chatting with you on the fracturing the standard.

6 MR. BENNETT: Yes, it raises conceptual
7 policy concerns, is it right if a man or a woman is
8 only going to get a six or four level enhancement, can
9 we do that by a preponderance, but if it's eight, by
10 clear and convincing? The problem is, that's exactly
11 why I think we need a study and perhaps some
12 proposals. How can we do this in a way that would be
13 both fair but would also not in fact increase
14 sentencing hearings or difficulties at sentencing
15 hearing in every case across the board.

16 MR. YURKO: The solution is to have a
17 clear and convincing standard across the board.

18 MR. BENNETT: Yes, that's another
19 approach, as a compromise between beyond a reasonable
20 doubt and preponderance. Especially on the basis that
21 you are in a Guideline driven basis or Guideline
22 system now and not a discretionary system so it's, it

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 should be a higher standard of proof than before.

2 The next area is role in the offense. And
3 we are talking about the proposal of the Federal
4 Community Defenders at the top of page three. Whether
5 or not the offense levels of minimal or minor
6 participants should be capped based on the type of
7 drug involved. And also whether or not the Commission
8 might want to consider raising the minimal role both
9 up and down from four to either five or perhaps six.
10 We raise this and in fact Jim Feldman who was on the
11 telephone today made a big point of this. And we
12 think this logic is impeccable in this area.

13 The Guidelines in three areas are quantity
14 driven. Drugs, economic crimes and money laundering.
15 As a way to get around the total driving of the
16 Guidelines by quantity, if there is more flexibility
17 in the area of the role of the offender, such as an
18 aider or an abetter or an accessory, or co-
19 conspirator, but not a dominant player such as a
20 higher reduction, five or six, you can temper, so to
21 speak, justice with mercy in terms of the sentencing
22 at the high end. And that you can do it in both

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 respects.

2 For the super persons that have the most
3 significant role, if you are going to have a minus
4 five or a minus six, you could have a plus five or a
5 plus six. So we are not suggesting that you just
6 lower it for those that are less involved for those
7 that are greater involved, the kingpin so to speak,
8 you could have the plus number.

9 The next area is an umbrella that covers
10 two or three things mentioned by the Federal
11 Defenders. I put it under the umbrella of greater
12 uses of alternatives to incarceration. We are
13 concerned, since we know the main area, one of your
14 main areas is going to be your economic crime package,
15 the fraud, theft and tax guidelines, that the
16 Commission heed and take into account and the new
17 Commissioners, 28 U.S. Code 994J, and that is the
18 admonition from Congress that on non-violent crimes as
19 much as possible, that alternatives to incarceration
20 be explored.

21 The Defenders have address that in their
22 area on Chapter 5, Zones A, B and C expanded to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 encourage courts to impose sentences of probations
2 where there are relatively short jail terms. That's
3 one way. Imposition of terms of probation for non-
4 incarcerated sentence and alternatives to confinement,
5 community service. In other words, opening up the
6 window of use of alternatives to incarceration in non-
7 violent crimes.

8 COMMISSIONER HARKENRIDER: Fred, can I
9 stop you there and just ask you, are you suggesting
10 increasing where the zones are? Is that what you are
11 suggesting?

12 MR. BENNETT: Yeah, a little bit.

13 COMMISSIONER HARKENRIDER: One of the
14 questions I have in this area, and just don't
15 understand, is looking at -- I was just looking, and
16 I may have these numbers wrong, but I don't think so.
17 Looking at where the judges sentence within the zones,
18 and even in Zone A where the judges could give
19 straight probation, 30 percent of them give
20 imprisonment.

21 So, I'm wondering if the problem in terms
22 of alternatives to incarceration really isn't

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 something different than the zones not being
2 sufficient. If it isn't something either in terms of
3 training of the judges as to what's available, it goes
4 up in Zone B, and clearly in Zone C too. But if it's
5 really not something else that's driving this. And
6 I'm wondering what your thoughts are.

7 MR. BENNETT: I think it's a combination
8 of the two. I think we have the same point that was
9 made earlier in the debate in this amendment cycle on
10 the need for increased sentences in the fraud, tax and
11 theft area because the judges weren't sentencing at
12 the top end of the guidelines, even in the areas that
13 they were complaining about.

14 So I think your point is well taken, that
15 the judges --

16 COMMISSIONER HARKENRIDER: I mean, I don't
17 know why the judges are doing what they are doing, and
18 I'm wondering, I mean, I'm not sure they need more,
19 that you need to change where the zones are. It seems
20 to me you've got to figure out why they are not using
21 the zones.

22 MR. BENNETT: I --

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 COMMISSIONER HARKENRIDER: How the zones
2 are being used.

3 MR. BENNETT: I think it's a combination.
4 I mean, I agree that you can find a number of cases
5 where the judges have a full range of probation,
6 straight probation available to them and they are not
7 using it. On the other hand, the point that I'm
8 making, which I don't think is inconsistent with what
9 you are saying, that there are judges that would like
10 to give straight probation for a less sentence, who
11 feel that their hands are tied by the zones. So I
12 think it's a combination of the two.

13 MR. YURKO: And remember it says the
14 Commission shall ensure that the Guidelines reflect
15 the general appropriateness of imposing a sentence
16 other than a prison sentence when you talk about the
17 fact.

18 MR. BENNETT: Our next area is revising
19 the sentence of responsibility. We see that this has
20 been the echo and feel of the major concern that we
21 have. We discussed it by telephone this morning. The
22 question of whether or not there should be -- the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 Guidelines be more explicit, automatic reduction for
2 a guilty plea.

3 It raises the question, we think it should
4 be on the table, but it does raise the question
5 whether or not in fact if a defendant enters a plea of
6 guilty before trial, should he at least get, he or
7 she, an automatic two or three points? And that would
8 perhaps entail then raising it say, in conjunction
9 with that, whether or not it should be an automatic
10 three and then raising for other forms of acceptance
11 such as super timely acceptance, or acceptance with
12 assistance but not enough assistance to get the 5K
13 motion, whether you might have a four point.

14 But whether or not at a minimum on a
15 guilty plea, in terms of conservation of resources and
16 court time, there should be an automatic three level
17 if it's above a 16, an automatic two levels if it's
18 below a 16.

19 It certainly would also, if that was the
20 move made by the Commission, decrease litigation in
21 that area. There is, as you know, a fair number of
22 cases litigated on whether or not the court has made

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 a correct finding in terms of declining to give either
2 the third point or declining to give acceptance at
3 all.

4 Just two more areas. The next area is
5 grounds for departure 5K2. This is found at the
6 reference at the bottom of page three and the top of
7 page four of the Defenders. And I think was broached
8 earlier, and in fact, if I'm not mistaken, Judge
9 Conaboy, was something that I think that you at least
10 tentatively spoke orally on at one of the meetings.

11 Top of page four, an amendment that would
12 have the following language: "After determining the
13 applicable guideline range, the sentencing court has
14 the responsibility to consider when determining the
15 appropriate sentence whether there are case-specific
16 circumstances that may warrant a departure."

17 We would like to see that. We don't think
18 that the mere reference by the Commission to the
19 Koon's case and the Koon's language is the be all and
20 end all and that this in fact would make it available
21 to a sentencing court to say I find under the
22 circumstances of this case a combination of case-

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 specific circumstances in this case that a departure
2 of two levels is warranted.

3 COMMISSIONER TACHA: How is that different
4 from what Koon's says? Which says prohibited and
5 encourage factors in between it's up to the Judge.

6 MR. BENNETT: It is not explicitly
7 different than Koon's except that we do not have, this
8 would put it in the Guidelines and bring it -- the way
9 it is now --

10 COMMISSIONER TACHA: Almost every circuit
11 by now has an opinion that says roughly that.

12 MR. BENNETT: Then the defendant could
13 also cite a Guideline reference. In addition to the
14 Supreme Court we have the Sentencing Commission
15 weighing in with a specific guideline in this area.
16 And look I know that a lot of you think that out there
17 every judge in the United States at the District Court
18 level, not every, but a number of judges do not like
19 the Commission. Do not like the work of the
20 Commission.

21 But there are a number of judges out there
22 that in fact very strongly believe in the Sentencing

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 Guidelines one, and two, the work of the Commission.
2 And so to the extent that we got this Guideline, we
3 think it would help.

4 And the last area is --

5 COMMISSIONER GOLDSMITH: I just want to
6 point out a law review article written by Judge Stuart
7 Dalzell of the Eastern District of Pennsylvania which
8 he characterizes -- I guess the title of the article
9 was One Cheer for the Guidelines. Suggesting that
10 there was at least one judge -- I looked and couldn't
11 find another article that says another cheer or two
12 cheers for the Guidelines. But at least Dalzell, One
13 Cheer for the Guidelines.

14 MR. BENNETT: When did that come out? Was
15 that recent?

16 COMMISSIONER GOLDSMITH: About two years
17 ago in the Villanova Law Review. I looked for an
18 article entitled How I Learned to Love the Sentencing
19 Commission. But --

20 [Laughter, several people talking at
21 once.]

22 MR. BENNETT: The last area, it raises the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 question of how as a practical matter the Commission
2 could do this. I suppose the only way you could do it
3 would be in a commentary.

4 CHAIRMAN CONABOY: How we could do what?

5 MR. BENNETT: Well I'm going to talk about
6 it right now and I'll tell you.

7 CHAIRMAN CONABOY: Oh, okay.

8 MR. BENNETT: It's the next area.

9 CHAIRMAN CONABOY: I thought maybe I
10 missed something.

11 MR. BENNETT: No.

12 [Laughter, several people talking at
13 once.]

14 CHAIRMAN CONABOY: That would seem to be
15 appended to it.

16 [Laughter.]

17 MR. BENNETT: And this deals with is very
18 troubling to the defense bar and defendants, waiver of
19 appellate rights. We are finding now in an increasing
20 number of districts around the country that are
21 demanding, and it is strongest in non-defender areas,
22 follow me, non-public, non-federal defender areas

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 where they feel that they can roll over the panel
2 attorneys with impunity, so to speak. Requiring a
3 defendant that pleads guilty to sign language in a
4 plea agreement, or in effect not plead, waiving his
5 right of appeal.

6 Now we are seeing, which is even more
7 odious and offensive, not only waiving your right to
8 appeal, but in effect waiving your right to file a
9 2255 motion to vacate sentence and including, which is
10 the coup de grace so to speak, language in the plea
11 agreement that the attorney has been effective. And
12 in effect almost waiving any Strickland vs. Washington
13 challenge to ineffective assistance of counsel.

14 This should be discouraged by the
15 Commission for a number of reasons. First of all, any
16 defendant should have the right to look at his case
17 anew for purposes of the 2255, especially in the area
18 of ineffective assistance of trial counsel. I need
19 only cite a case out of the Third Circuit, U.S. vs.
20 Day which is the 2255 area remanded for a new hearing
21 on the basis that the attorney handling the case was
22 totally unfamiliar with the Sentencing Guidelines.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 Even though he passed a plea agreement on to the
2 defendant, failed to tell the defendant what would
3 happen under the Sentencing Guidelines, i.e., career
4 offender, he would be a career offender if he didn't
5 plead guilty.

6 We should not be -- the Commission should
7 discourage the practice of the Department of Justice
8 seeking waiver of appellate rights in any area. For
9 another reason, it's going to hurt, cut back on your
10 data, your information. The fewer number of appeals
11 gives you fewer cases for your data bank in all of
12 these areas.

13 COMMISSIONER TACHA: Fred, let me just ask
14 you a question about that area. I haven't seen one of
15 these plea agreements that waives the Strickland
16 standard, but even if we agreed with you, why does
17 that question fall within the purview of our
18 jurisdiction?

19 MR. BENNETT: Well you have a section in
20 connection -- the whole 6A section in terms of
21 standard of proof, sentencing process, recommending --
22 I think there is a section in there recommending you

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 don't hide the ball on conduct and recommending fair
2 play on plea agreements. You could put it right in
3 that section where -- does anybody have the
4 appropriate language?

5 COMMISSIONER TACHA: We could, but the
6 question is how would -- we could, of course, we
7 could. But the question is how does that help at all
8 because that's going to be a Constitutional
9 interpretation in any case --

10 MR. BENNETT: The Strickland would.

11 COMMISSIONER TACHA: That's the piece of
12 it --

13 MR. BENNETT: I don't think you should
14 address that separately. And I didn't mean to say
15 that this language is -- there is nothing in the plea
16 agreement that per se waives Strickland. I'm saying,
17 it's a statement to the effect the defendant
18 acknowledges and agrees that he has been well served
19 by his defense attorney. That's the thrust of it.

20 COMMISSIONER TACHA: But in any case,
21 that's going to get litigated, whatever we say.

22 MR. BENNETT: Right, that's true. But you

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 have, you do have current language in there that I
2 think was passed three or four years ago at the
3 request of the Defense Bar. In the area recommending
4 full and honest disclosure on plea bargaining between
5 the Defense Bar and the government. I think you can
6 put it in the section there that the Commission
7 discourages the seeking of waiver of appellate rights.

8 COMMISSIONER HARKENRIDER: Well, Fred do
9 you really want that? Basically, I sit on the
10 Criminal Rules Committee as well and I've heard Tom
11 Hillier talk about this and a number of other
12 defenders who agree that the limited waivers which to
13 my understanding are more prevalent where, for
14 example, the defendant and the government agree say to
15 a very difficult fraud calculation or something, and
16 then there is a waiver of the right to appeal the
17 fraud loss. Or something of that sort, many defenders
18 I think are very much in favor of those types of
19 waivers.

20 MR. BENNETT: Because it so to speak
21 shields from appeal the right of the government to
22 take something up if they get a bad finding?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 COMMISSIONER HARKENRIDER: Some of them do
2 and some of them don't. But I guess what I'm saying
3 is that these things come in all sorts of shapes and
4 forms. I have never seen the one you are referring to
5 and would love it if you could pass that on to me.

6 MR. BENNETT: Somebody that was present at
7 the Defender's meeting today, the PAG meeting,
8 referred specifically to new language that they had
9 seen.

10 COMMISSIONER HARKENRIDER: Okay, well if
11 they could get that to me.

12 MR. BENNETT: Northern District of
13 California, that would be San Francisco.

14 COMMISSIONER HARKENRIDER: Well if you
15 could pass that on to me, I'd really appreciate it.

16 COMMISSIONER TACHA: But I am wondering
17 what it is you are really asking for, the Strickland
18 certainly we don't think people can waiver their
19 effective counsel.

20 MR. BENNETT: But if you waive a 2255,
21 that's the only way you can raise Strickland. So if
22 you've got language in there waive right of appeal and

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 waives his right to seek collateral review of his
2 sentence and conviction, he is waiving a claim of
3 ineffective counsel because the courts hold all over
4 the country, the only way you raise ineffective
5 assistance is on a 2255. Because no record will have
6 been made below.

7 And that's what I think the Northern
8 District -- what I'm saying is I can see a quid pro
9 quo waiver. That seems to me to be fair. But a
10 forced waiver is what I'm talking about, where it's a
11 one way waiver. The government gives up nothing.
12 What we are seeing more and more of. The government
13 give up nothing. The defendant waives his right to
14 appeal, not the government.

15 Both Sentencing Guideline issues and 2255.
16 They will put in a standard sentence he does not waive
17 his right to appeal from an illegal sentence.

18 COMMISSIONER TACHA: And I think the case
19 law is clear that --

20 MR. BENNETT: That you can't waive that.

21 COMMISSIONER TACHA: -- ineffective
22 assistance is also not waivable.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 CHAIRMAN CONABOY: That brings us into
2 that area that you are talking about where we are
3 trying to advise both sides on what is in our opinion
4 the right thing to do. Don't waive, discourage
5 waivers unless both sides waive.

6 MR. BENNETT: Yes.

7 CHAIRMAN CONABOY: Waiver is usually part
8 of bargaining.

9 MR. BENNETT: Well the cases I think are
10 legion that say a waiver that's knowingly and
11 intelligently entered into, since you can waive
12 Constitutional rights, you can certainly waive
13 statutory rights.

14 CHAIRMAN CONABOY: Oh sure. And there is
15 no -- that's why I'm saying, it would seem to me to be
16 very hard to design something to put in the Guidelines
17 Manual. This is something that always concerns me
18 what we put in there. That really amounts to advice
19 on how to handle a case.

20 MR. BENNETT: I think it would be a one or
21 two sentence policy statement that the Commission
22 strongly discourages plea agreements which force one

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 side, you don't even have to pin point the government,
2 one side to waive appellate review or collateral
3 attack review without both sides being bound, without
4 both sides having given up rights --

5 CHAIRMAN CONABOY: I don't like the
6 waiver, I don't like the waivers so I'm not arguing in
7 favor of them. I think it's an atrocious thing
8 because it's mostly -- it embarrasses me really
9 because the only justification I hear for it is it's
10 less work for the judges and that's always an
11 embarrassing thing for me. That's what we are
12 supposed to do.

13 MR. BENNETT: Well, it's less work for the
14 appellate judges if it's for -- and I know it's a
15 concern because your Sentencing Guideline cases drive
16 your docket on appeal in a large number of cases.

17 CHAIRMAN CONABOY: Well that's still a
18 concern to me as to whether or not we can, and the
19 Commission, as the Commission or in the Guidelines, we
20 have to be very careful about giving advice it seems
21 to me. Because bargaining has become a way of life in
22 the criminal sentencing process. And you wouldn't

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 want to take that bargaining capacity away really from
2 either side, I guess.

3 MR. BENNETT: I don't think it would be
4 binding. I think it would be what we are talking --

5 CHAIRMAN CONABOY: Yes, I understand you
6 are talking about an advisory comment.

7 MR. BENNETT: Advisory comment.

8 COMMISSION GELACAK: As a practical matter
9 it doesn't have any effect because --

10 CHAIRMAN CONABOY: -- binding effect, but
11 --

12 COMMISSION GELACAK: -- you still have the
13 defendant coming in saying that he is making a knowing
14 waiver here. I mean what does it get us?

15 MR. BENNETT: It gets you that -- I'm
16 saying this should be in the area of a study. I think
17 the Commission needs to be fully advised what's
18 happening here, getting new sample plea bargainings
19 up. If nothing else, it may, and it gets back to
20 Justice what's happening in the Northern District of
21 California, through any activities of the Commission,
22 it may in fact lead Justice to reconsider it.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 I think it's an area of concern in the
2 criminal justice system with the Guideline.

3 COMMISSION GELACAK: I couldn't agree with
4 you more and I think it's an outrageous practice. I
5 just don't think we are going to have any impact on
6 it.

7 CHAIRMAN CONABOY: Maybe just talking
8 about it might have some effect, I agree with that.
9 And I think it's already had some effect. I think
10 there are a few districts now who have abandoned and
11 will not accept pleas where there are waivers. I'm
12 not sure of that.

13 COMMISSIONER HARKENRIDER: Judge, I can
14 tell you, I've had an ongoing dialogue with the
15 Defense Bar about this and have basically opened the
16 doors of Justice to coming, for defense attorneys to
17 come to us when they are confronted with a waiver that
18 they are unable -- that they think is onerous and is
19 basically overbearing and unfair and that they have
20 not been able to go to their U.S. Attorney and deal
21 with.

22 And quite frankly, nobody has come in the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 Northern District of California in the past, my
2 understanding was that any problems there had been
3 taken care of in terms of this exact issue. I mean
4 this is an issue that the Department is open to
5 dialogue on. The memo that the Department sent out
6 regarding waivers of appeals talked about the
7 inappropriateness of seeking waivers and the fact that
8 the courts have already held that you cannot waive
9 things such as ineffective assistance of counsel. And
10 that's how a 2255 would still be raised.

11 So, I mean this is something that we are
12 certainly open to talk about.

13 MR. BENNETT: Does the Justice Department
14 -- I would like to see that kind of a -- is that a
15 memorandum to the U.S. Attorneys' Office?

16 COMMISSIONER HARKENRIDER: You've seen
17 this memo, it's been published. The Keeney memo.
18 It's been widely -- we've disseminated it.

19 MR. BENNETT: Well in the particular case,
20 it may be a situation where the defense attorney bit
21 the bullet, didn't want to raise a ruckus at that
22 point on it, had what he considered to be a generally

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 decent plea agreement, but he was offended personally
2 by that and now he shared it and then -- history.

3 COMMISSIONER HARKENRIDER: We'll be glad
4 to look at it and talk to you about it.

5 MR. BENNETT: That's about it.

6 CHAIRMAN CONABOY: Thank you very much.
7 Those are, of course, the matters you raise, as I said
8 to Mr. O'Dowd very important items. And many of them,
9 as you know, we've discussed at length.

10 MR. BENNETT: Oh I had one last point.
11 I'm sorry.

12 CHAIRMAN CONABOY: That's fine.

13 COMMISSIONER GOLDSMITH: Thirty seconds.
14 Wait for next year.

15 [Laughter.]

16 MR. BENNETT: As the judge said, you've
17 made your record, Mr. Bennett, move on. I said, well
18 then can I over lunch go back and type up a short
19 pleading and submit it for the record, because he
20 didn't want to hear any more. I guess I can't
21 prohibit you from doing that.

22 COMMISSION GELACAK: Commissioner

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 Goldsmith's comment is worthy of a Utah Jazz fan.

2 MR. BENNETT: Be it worth of a Utah, you
3 are right. The last, it's in my letter but I want to
4 make sure, we are concerned on this criminal history,
5 we think it should be at least on the two year cycle.
6 It's worthy of research, but we think the case law is
7 so embedded in that area, you've got ten years of case
8 law.

9 I wouldn't suggest major tinkering at this
10 point in this area, it's a matter I think of research
11 and then if there are two or three bullet areas that
12 you come up with in criminal history to bring it back,
13 but I don't think it's on the one year -- I hope it's
14 not on the one year cycle. Because it's a big area,
15 criminal history.

16 [Several people talking at once.]

17 MR. BENNETT: Well, I'm not sure we would
18 disagree.

19 CHAIRMAN CONABOY: We just feel it's one
20 of those areas that needs to be looked at, but we
21 agree with you that it's not something can be done
22 overnight by any means. There is a lot of

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 implications in there and every time you think you
2 have a solution it's sometimes worse than the problem
3 that we have.

4 COMMISSION GELACAK: You are not
5 suggesting that the Practitioners' Advisory Group
6 would say to us that criminal history is not worthy of
7 looking at?

8 MR. BENNETT: No, no. That would be
9 inconsistent with our past positions in a whole lot of
10 other areas. But I'm saying that I don't think it's
11 certainly not on the highest priority in our
12 judgement, in terms of your resources at this point.
13 And the --

14 CHAIRMAN CONABOY: All right.

15 MR. BENNETT: -- question of when you are
16 going to get new Commissioners.

17 CHAIRMAN CONABOY: I'm going to say thanks
18 again, so if you've got one more --

19 MR. BENNETT: No, that's it.

20 [Laughter.]

21 CHAIRMAN CONABOY: -- get it in before the
22 thank you. Thanks. I do mean that and we appreciate

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 your, and I repeat that we've got several other
2 written submissions and we will promise to look at
3 those as carefully as we can and keep them in our
4 consideration.

5 Is there anyone else who has any comment
6 here this morning?

7 [No response.]

8 CHAIRMAN CONABOY: If not, I think we can
9 declare the meeting adjourned and thank you all very
10 much for coming.

11 (Whereupon, the above matter was concluded
12 at 10:27 a.m.)

13

14

15

16

17

18

19

20

21

22

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

CERTIFICATE

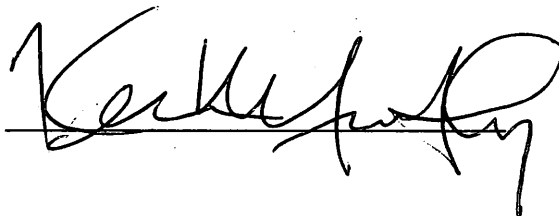
This is to certify that the foregoing transcript in the
matter of: Public Hearing

Before: U.S. Sentencing Commission

Date: June 17, 1998

Place: Washington, DC

represents the full and complete proceedings of the
aforementioned matter, as reported and reduced to
typewriting.

A handwritten signature in cursive script, appearing to read "Kerley", is written over a horizontal line.