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PUBLIC MEETING

Friday, April 6, 2001

2:00 p.m.

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Diana E. Murphy, Chair  
Ruben Castillo, Vice Chair  
William K. Sessions, III, Vice Chair  
John R. Steer, Vice Chair  
Sterling Johnson, Jr., Commissioner  
Joe Kendall, Commissioner  
Michael E. O'Neill, Commissioner  
Michael E. Horowitz, Commissioner [ex-officio]

ABSENT:

Michael Gaines, Commissioner [ex-officio]

STAFF PRESENT:

Timothy B. McGrath, Staff Director  
Susan Hayes, Executive Assistant to the Chair  
Charles Tetzlaff, General Counsel  
Andy Purdy, Chief Deputy General Counsel  
Kenneth Cohen, Director of Legislative and  
Governmental Affairs  
Judith Sheon, Director, Office of Special Counsel  
Lou Reedt, Acting Director, Office of Policy  
Analysis

GUESTS:

Jonathan Wroblewski, Representative, Department  
of Justice  
Vicki Portney, Representative, Department of  
Justice

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P R O C E E D I N G S

CHAIR MURPHY: It's 2 o'clock. I would like to call the meeting to order. I know that I have displayed the chart of our year's work at an earlier meeting, and I am sure it is indelibly imprinted in your minds.

Susan Hayes suggested I might want to display it today, but this was where we had the categories of work that we had on our schedule, and trying to see how we were going to program this to come to this meeting and do the bulk of the voting, and it was color coordinated, it was a difficult thing for the staff to get it all on one piece of paper.

And if you looked at it, you saw this meeting in all purple, and purple was the color for votes. And it was pretty daunting looking at that in the year to realize what a crunch time there would come at the end because of the fact that we have published proposed amendments, and revisions of them, and issues for comment, and the Criminal Law Committee's proposal, and various things during

the year. We have gotten a lot of input back.

We, of course, have had the public hearing, also, where we got input, and we have been revising our thinking in many of these areas as a result of the input. We have met with some of our advisory groups, and the Criminal Law Committee, which had been working on economic crimes themselves for a couple of years, had quite a few things that they wanted to communicate to us. So this has brought us to this point, and we have a lot of things on our agenda today.

I did mention at the last meeting, which was right after the public hearing, that at that public hearing there was some suggestion made--or that would be your positive way of saying it--or some criticism of--the expressed desire to have more access to all of the materials that we receive. And I said last time that we are considering how to go about making things more available, and we haven't had time to do it in the last couple of weeks because we've got all of these other things on our plate, but we are looking at--

and I've asked one of the Vice Chairs to draft a rule for our consideration--and we are thinking about how to do this.

In talking about the year and how we've gotten to this point, I haven't mentioned staff, but I think we've been in office now I was thinking a year and a half, I guess it's actually 17 months. And I think in this year's cycle, with all of the material on our agenda, we have learned how important the staff is to be able to consider the ramifications of what we're doing. I referred to the public comment from all of you, but during the year we--sometimes Commissioners have taken their hand at working on some things, and we realized how important it is to have staff that is familiar with all of the aspects of the guidelines helping us.

I think, in respect to the staff, Tim, you might want to say something about that.

MR. McGRATH: I just wanted to express a word of thanks to the staff. As staff director, I am to lead the group, but in many ways I am usually following them because they are doing an awful lot

of work, and I am just trying to catch up to them. They do a great job.

For example, last night I came back, after having dinner with the Commissioners, Charlie Tetzlaff and I came back to find Jeanne Gabriel, Judy Sheon, Andy Purdy, Ken Cohen working away at about 10:30/11 o'clock last night trying to finish everything up that was worked on yesterday. It's just to show that that was just one example of many nights I know that that particular group and staff, in general, have really worked very hard in a very ambitious, for us sometimes grueling, amendment cycle, and I just wanted to say thank you to all of them for the work that they have done, and I do truly appreciate it.

CHAIR MURPHY: We sort of, belatedly, the Commissioners came to the realization that we had taken really too much on our plate this year. In our first half-year cycle, the staff had had time to prepare a lot of background information in the interim, when there were no Commissioners, and we got through that cycle, working at break-neck

speed. And then by a combination of things, things that we wanted to take on ourselves, things that Congress sent to us, we have arrived at just a very full agenda.

And at this point, all of these things have critical aspects that affect people, that affect institutions, and there never has been a proposal that I can think of that everybody unanimously thought was wonderful. So we have tried to really listen to what everybody has said and to work out the balance in the best way we could.

Without--oh, I would, just before we get into the substantive agenda, we have minutes now from several public meetings that have been presented, and it would be appropriate now to get a motion, if there is a Commissioner that has a motion on the minutes.

COMMISSIONER JOHNSON: I move they be adopted.

VICE CHAIR CASTILLO: Second.

CHAIR MURPHY: Okay. And that would be



the minutes of the February 13 meeting and the March meeting. Any discussion?

VICE CHAIR STEER: Vice Chair Steer informs me he hasn't found an error.

All in favor of approving the minutes, as circulated, say aye.

[Chorus of ayes.]

CHAIR MURPHY: Opposed, no.

[No response.]

CHAIR MURPHY: Okay. The first item on the substantive agenda is economic crimes package. This was a very large group of proposals that we've been looking at.

Andy Purdy, would you describe, briefly, I know that our proposal is available for the people who have come today, but could you remind us about the different components.

MR. PURDY: Yes, and let me say at the outset, for the record, that the Commission has considered the prison impact of all of the potential amendments that are on the agenda today, to the extent that they are available from

available information, and where it's not, generally, for monitoring information and data about the frequency of various applications and provisions.

Regarding the economic crimes package, it is essentially in the general form which it was published in the Federal Register; that is, there is a consolidation of the theft, fraud, and property destruction guidelines so that they will be in one guideline, they will have one loss definition, and they will have one loss table.

In the consolidated guideline, there is the provision of a victim enhancement which includes specific categorization of victims in theft of mail cases. We also have within the language of Part A, the consolidation, the response to the congressional directive on college scholarship fraud. Beginning at Page 18, the loss tables, this amendment reflects essentially for the consolidated guideline of the loss table that was Option Two, published as Option Two in the Federal Register, with some very minor modifications to

that table and to Option One of the tax loss table so that those tables are consistent.

Concerning the loss definition, the general concept on causation that was adopted came from Option Two, essentially, which also was contained in Option One, as an alternative draft, and that is the standard of reasonably foreseeable pecuniary harm. Certain rules of construction and the rules of practice are added. The principle about the judge estimating the loss is strengthened and certain exclusions and credits are provided. This loss definition, the pertinent part, was field tested in a joint effort with the Criminal Law Committee in 1998.

Very minor modifications have been made to the referring guidelines. In the tax loss area, this amendment reflects an amendment of the sophisticated concealment definition to revise the language to be consistent, both with sophisticated means, as it occurs currently in the fraud guideline, and will appear in the consolidated guideline, and with earlier incarnations of the tax

guideline in which sophisticated means appear as well.

In the area of circuit conflict concerning corporate diversion in tax, this amendment reflects the adoption of essentially the Cepelo case, on that side of the split, and that is detailed in an example.

I think that summarizes the key elements of the economic crime package.

CHAIR MURPHY: Is there a motion with respect to this?

VICE CHAIR CASTILLO: I'll move this amendment.

CHAIR MURPHY: Is there a second?

VICE CHAIR SESSIONS: Second.

VICE CHAIR CASTILLO: Discussion?

Let me also just take a second to thank the staff for all of the hard work that's been done this amendment cycle. We are mindful of all that goes into this. And this economic crime package, all I can say is this is the culmination of a three-year process. We want to thank colleagues on

the Criminal Law Committee. I know Cathy Goodwin is here, my good friend Phil Gilbert, who some would say was injured in action in the course of helping us.

What this really does, I think, is bring more focus, definition, and hopefully increases the ease of application to an important area of federal criminal law. Make no mistake that the bottom line is, according to prison impact, is more people will go to jail for economic crimes, and it's always sobering to see the overall prison impact being, at a minimum, estimated to be about 1,300 prison beds, but the majority of the Commissioners feel that this is appropriate because most of these prison beds, if this works the way we want it to work, will be at the high end of the scale. And that is there has been a feeling that sentences, at the high level of theft and fraud cases, have not been sufficient.

I, also, want to pause and say that many of the Commissioners see a real connection between the money laundering guideline that's going to be

talked about a little bit later and this economic crime package, even though they are being voted separately. There has been a lot of discussion and compromise. People feel strongly, and they are going to speak to certain issues.

One of the issues that's been discussed is consolidation, another is the loss tables. There's been a discussion about what the loss tables really accomplish. It's my firm belief that they bring a little moderation and expand sentencing options for low-end offenders and increase penalties, in no uncertain terms, for high-end-dollar offenders. Why do we do that? Well, I think it's easy to say that I believe that high-end white-collar criminals need to go to jail.

On the other hand, my own personal emphasis is on restitution for those low-end offenders--and I define that as \$70,000 and less--I would like to see more sentencing options available, more emphasis placed on the victims of those offenses, and more opportunity, when appropriate, for judges to sentence those offenders

with split sentences that put a premium on restitution as one of the outcomes of the entire sentencing.

Now, I will say there is always going to be levels of disagreement with regard to this. Some say there is no need at all to increase these tables one iota. In making that argument, some have accused this Commission of somehow increasing these penalties just overall to bring them more in line with the drug penalties. Nothing, and I want to emphasize this, nothing could be further from the truth.

I, also, want to emphasize that criminal tax penalties overall will be increased and that the Commission strongly supports the enforcement efforts of the IRS in every respect.

Lastly, one of the few things that we probably stop short of this amendment cycle, and probably one of the rare things, we received all kinds of very meaningful comment on trying to do something with this economic crime package with regard to the important issues of the Archeological

Protection Act and the Native American Graves Protection and Reparation Act.

We think these things are important. We think that these topics might justify an independent standing-alone guideline because, within our schedule, we are going out to visit an area that is within the Native American Protection Act. We decided to get some feedback before proceeding here, so this is one area where we stop short. But with regard to the rest, there are a lot of compromises that have been reflected and a lot of hard work on the part of all of the Commissioners.

CHAIR MURPHY: One of the things that Judge Castillo touched on here, but I have heard him speak on it at greater length, was his belief that in restitution for the victim and one of his reasons to support this, I believe, is because it allows a split sentence for the appropriate situations so that somebody can work and try to make restitution for the victim. And you touched on it, but I thought perhaps that would split it



out a little bit.

This is a complicated guideline. Well, it's our group of guidelines. And there are a lot of issues in it, and I know there are at least two Commissioners that have some concern about parts of it, and so perhaps, Commissioner O'Neill, do you want to--

COMMISSIONER O'NEILL: In some respects, the economic crime package is a little bit like having a wedding and receiving wedding presents. Some presents you like, others presents you wish, occasionally, you could return. And although I accept, and support, and strongly endorse, in fact, the economic crimes package in its totality, there are a couple of things--only one issue that I'll dwell upon, for the moment, just for the sake of the record--that I have a little bit more difficulty with, and that deals with the consolidation of the fraud and the theft loss tables.

Occasionally, the sum does not equal the combination of its parts. Here I think I have two

fundamental concerns, I think. The first just involves a practical concern. Currently, with the existence of the fraud and the theft tables, there didn't seem, to mean at least, in reviewing the public comment that we received--although, in fact, most of it was for consolidation of the tables, a sort of a simplification effort of the guidelines--and yet it seemed to me, in looking sort of beyond the cosmetic changes in the fraud loss and the theft tables, looking beyond sort of the cosmetics of the issue, it didn't seem to me, at least, that there was a particular practical problem that people were having in actually applying those tables. It, generally, seems to me if something isn't broken, why bother to fix it in that respect?

The other thing on that, at least the fraud and the theft tables were, in part, constructed on the basis of empirical evidence and empirical work that the initial Commission had done. It seems to me that there is no real strong justification that I see for consolidating the tables at this point.

The second concern I guess that I have is more of a theoretical one, and that's that I believe that the nature of a fraud and the nature of a theft crime, as substantive criminal activities, are fundamentally different. And those differences are, at least in part, and can be, in part, captured by the nature of the loss tables themselves.

Given the fact that there are these fundamental differences in the types of fraud crimes and the types of theft crimes that we routinely prosecute, and given the fact that there are proof differences, in terms of scienter, that there are different interests that are served by the prohibition of certain types of fraud crimes and certain theft crimes, I just am not entirely convinced that we're well-advised at consolidating these particular tables.

Even though I have these two problems with consolidating the tables, both the practical problem or the lack of a practical problem and the need to consolidate the tables, and also this

theoretical issue with respect to fraud versus theft crimes, and the substantive differences for why we prohibit those crimes and why we choose criminally to prosecute them, I, nevertheless, support the package as a whole.

CHAIR MURPHY: John?

VICE CHAIR STEER: I would like to make some comments about the fraud theft loss table, but before I do that, we just got the revised package, and we were working on some parts of it until right up before meeting time.

I would like to just ask the staff, in regard to the closely connected corporate individual tax problem, the so-called Harvey Cepelo circuit conflict, I have no problem with the language that you worked out, although I disagree with the resolution of this issue. But I wonder if it would not be better--and this is on Page 54--in the actual guideline if we used the phrase "offenses added together," instead of "taken together." I think they have a potential different meaning. The "taken together" was essentially the

preexisting language, and that obviously led to the split, and the offenses "added together" is the new language that I believe you have come up with in the commentary that explains it.

If that is okay with everyone, I suggest that as a friendly amendment.

COMMISSIONER O'NEILL: I'll accept it.

CHAIR MURPHY: It seems to be a technical improvement. Is there a second to that amendment?

COMMISSIONER JOHNSON: Yes, I second it.

CHAIR MURPHY: All of those in favor of the amendment that he's offered, say aye.

[Chorus of ayes.]

CHAIR MURPHY: Opposed, no.

[No response.]

CHAIR MURPHY: The amendment passes. We will have to come to the motion later.

VICE CHAIR STEER: Again, I just would note that I personally disagree with the resolution of that particular issue, but I don't want to dwell on it at this time. It's not as important in the scheme of things.

But I would like to say a few things about what relates to my disagreement with the outcome on the fraud theft loss statements. Going into our discussions this year, we had the benefit of where the previous Commission had left off on this, and the stated proposal that they had considered and came within one vote of adopting, that, in the published materials, was Option One, and then we had a distinct proposal from the Criminal Law Committee that was published as Option Three. The one that we are adopting is essentially Option Two, developed by the staff and this group of Commissioners.

I tend to favor, overall, the Option One or Three. Specifically, Option Three, the Criminal Law Committee came the closest to achieving the balance that I thought was appropriate. Judge Castillo, for whom I have the greatest respect, I think spelled out very well the reasons why he, and perhaps his thoughts are similar to those of others, have come to the particular point that they have and why he thinks that it is appropriate to

provide, in effect, some sentence reduction for offenses of \$70,000 or less. I think that figure is, frankly, too high. I agree with the resolution with regard to the upper end of the table. I am not opposed to some modest reduction at the lower end of the table, but I think that the \$70,000 point is simply higher than is warranted. We are talking about \$70,000 happens to be the break point, for two-thirds of the fraud offenders have dollar amounts less than \$70,000 and about 80 percent of the theft offenders.

Now, the actual sentence reduction, thankfully, is not--because of the interaction of more than minimal planning, which it will no longer be a specific offense characteristic--is not as great if we are estimating on--the data estimate that we are reducing sentences for about 21 percent of the fraud offenders and about 16 percent of the theft offenders. And, again, the reduction is not that great. On average, it's about three months or more or less. It depends on the type of offense. But it's simply a judgment call as to where you

draw the line. I would draw it lower in the table and would limit the reduction to a point that is substantially lower than \$70,000. And my colleagues prefer, where they have come out, I respectfully disagree with that part of the judgment, but will support the overall package.

CHAIR MURPHY: Does any other--yes, Mr. Horowitz, our ex-officio member from the Department of Justice. I am not sure that--I don't know if I introduced you at the last meeting, Michael Horowitz.

COMMISSIONER HOROWITZ: Let me just, just briefly on two issues that were mentioned by Commissioner Steer and Commissioner Castillo with regard to the amendment.

First, with regard to the loss table, I would just echo Commissioner Steer's comments about the reductions being more modest at the what I would consider the mid-level fraud figures, which statistics tend to show are roughly the middle range of what the fraud cases were historically, and the Department had supported the Criminal Law



Committee's proposal, which would have had that change at about the \$40,000 level.

And we felt that the Criminal Law Committee, which expended a significant amount of time addressing this issue, considering this issue, and which [inaudible] have had some dealings in this case, is--was the right way to go. We certainly do appreciate the Commission, though, taking very seriously the high-end fraud [inaudible], tables in these revisions do take into account and will have an important impact in dealing with those problems.

With regard to the cultural resources issues, since it was brought up, I just want to mention, as the Commission knows, from [inaudible] discussions, the Department strongly supports the drafts[?], the effort made by the Commission to consider this issue. There was a joint judgment made by the Commissioners and the staff that this was needed to consider the next cycle, and we certainly hope that the Commission will take this up early in the next cycle so that we don't press

against any deadlines next year because this is a very important problem and I think something that a number of groups across the country, who have important cultural heritage resources in their communities, would support us doing[?].

CHAIR MURPHY: Any other comments?

Yes, Commissioner Sessions?

VICE CHAIR SESSIONS: I would like say just a couple of things and be brief. It is--it is clearly a compromise. This is obviously a guideline or a set of guidelines, which had been worked on for years. And I want to say that the work of the CLC has been incredibly helpful, as well as the staff. We've gotten a lot of comment about that really there is no reason to fix the penalties for fraud on the high end, as well as the low end.

And my view, as we entered into negotiations, was fairly simple. I think that the penalties, at the high end, are not significant enough, and I've always felt that way because I think there's a level of culpability, which is

attendant with a person's education, and intent, and experience at the high end, which needs to be reflected appropriately in the sentence.

At the same time, I also think it's incredibly important to make sure people at the low end, persons who are first offenders, have a sentence which is reflective of their lack of experience and their criminal history, in the criminal context, and so, therefore, I have strongly supported the loss table.

The other thing that I wanted to talk about is that I've got some personal concerns about the loss definition. There, obviously, is an extensive debate. I trust the CLC and all of the work they did to define loss. My concern is that there's a possibility that reasonable foreseeability could lead to overly consequential damages, if that is such a term. I don't think it is. I think there's certain limits here that we've put in place, which would not encourage judges to add layers upon layers of consequential damages. Most are persuaded with I think something that

Judge Castillo said, that we can trust judges, in regard to interpretation of reasonable foreseeability. And as a result, I agree to that definition.

VICE CHAIR CASTILLO: The only thing I would like added is to point out that the Criminal Law Committee, with all of their experience, defer to us on the loss tables, and I appreciated that. And these are modest reductions that I think, in the bottom line, only create sentencing options for low-end offenders. That having been said, as you can see, the whole package is a result of compromise and a lot of discussion with my fellow Commissioners, and I appreciated the way you kept us going through this, Madam Chair.

That's all I'm going to say. Thank you.

CHAIR MURPHY: Any other comments?

[No response.]

CHAIR MURPHY: Well, we discussed how we should go about voting on this because there are some points on which individual Commissioners disagree. This has just been reflected. But

rather than go through each item in the economic crimes package, we decided that we would vote. The vote would be on the package itself, with the understanding that the individuals who have expressed their concern about the loss tables or about consolidation or about the outcome of that tax question they would have been able to make their statement on the record.

But it is a very comprehensive package here, and I think the feeling is, among all of us, even though there are parts of it that I would have done differently, if I were making the decision by myself. But it's like being on the Court of Appeals, you don't--you can't just make the decision yourself here very well, if you want to get a workable result.

So I think maybe we should call the roll on it.

COMMISSIONER KENDALL: I have one question. The synopsis of the proposed amendment, does that become part of the guideline itself? Because it sets forth certain reasons that aren't

necessarily my reasons.

MR. PURDY: No. The staff is in the process of drafting the actual reasons for the amendment. The synopsis is not involved[?]. It's only the amendment language that's[?] involved[?]. And I will review through the chair the actual reasons that will go to Congress.

COMMISSIONER KENDALL: Okay.

CHAIR MURPHY: Yes?

COMMISSIONER KENDALL[?]: One technical amendment, similar to what John, or Commissioner Steer posed[?], on Page 53, in the introduction on the Harvey issue, the third paragraph states that the amendment adopts the Harvey approach, and actually it now adopts the Cepelo approach.

CHAIR MURPHY: Right. It--since--the unpronounceable approach.

COMMISSIONER KENDALL[?]: That's right.

CHAIR MURPHY: Since we aren't adopting these synopses, I don't think we need to have an amendment on it, but that's good to call it to our attention.

Okay. I'd ask the staff director then to call the roll on the amendment, which is to adopt the package, the economic crime package.

MR. McGRATH: Vice Chair Castillo?

VICE CHAIR CASTILLO: Yes.

MR. McGRATH: Vice Chair Sessions?

VICE CHAIR SESSIONS: Yes.

MR. McGRATH: Vice Chair Steer?

VICE CHAIR STEER: Yes.

MR. McGRATH: Commissioner Johnson?

COMMISSIONER JOHNSON: Yes.

MR. McGRATH: Commissioner Kendall?

COMMISSIONER KENDALL: Yes.

MR. McGRATH: Commissioner O'Neill?

COMMISSIONER O'NEILL: Yes.

MR. McGRATH: Chair Murphy?

CHAIR MURPHY: Yes.

MR. McGRATH: The motion passes.

CHAIR MURPHY: Okay. Now the related, which we have always seen in our work as related, and I think everybody that looks at the area does see the relationship, is the work that we've been

doing on money laundering. And can you give us the synopsis--lead us into it, Andy?

MR. PURDY: Yes. We have it's labeled the "Third Revised Proposed Amendment, Money Laundering," the actual text of which begins on Page 5.

The fundamental concept of this approach is to tie the punishment levels more directly to the underlying criminal conduct and to provide appropriate enhancements, such as looking at (b)(1), whether defendant knew or believed that any of the laundered funds were the proceeds of or intended to promote an offense involving manufacture of controlled substance, a crime of violence, et cetera, increased by six additional levels.

And, similarly, there are alternatives to specific offense characteristics specified in (b)(2).

VICE CHAIR STEER: Madam Chair, I move adoption of this amendment.

VICE CHAIR CASTILLO: I'll second it.



CHAIR MURPHY: Do you want to make any statements?

VICE CHAIR STEER: Yes, I would be pleased to make a few remarks in regard to the money laundering amendment package.

The economic crime package has a fairly lengthy and involved history. If anything, the money laundering package exceeds that both in terms of length and perhaps in terms of other ways that one would measure the age back and forth to Congress, et cetera. I think what we--this is quite an achievement. Hopefully, it will be able to stand. I think it's a fair compromise, although it's still not perfectly satisfactory to perhaps any of us.

I'd like to--again, I'd like to thank the principal groups who have worked tirelessly on this project: the Practitioners Advisory Group, other defense bar groups, the Department of Justice, for the very good faith that they have operated in over a long period of time, our own staff, particularly, in this the last several years, Paula Desio, Ken

Cohen, and Courtney Semisch for the analysis, but others as well--Judy Sheon for drafting it, plus Andy, Charlie, and many others have done a phenomenal job on this. And I think that Commissioners, as well, had to really get into the nitty-gritty of this particular issue and helped to work things out.

I think it's a fair compromise. As I said, it follows a structure that was recognized sometime back as being an improvement over the original structure; i.e., we are trying to tie penalties more closely to the underlying offense. It maintains very stringent penalties overall and recognizes that money laundering is a distinct and separate offense, although we give it only a modest incremental [inaudible], unless there is significant additional criminal conduct.

So, again, you know, I think if I [inaudible] for everyone is I think a pretty good deal that we have before us.

CHAIR MURPHY: Does anyone else have anything they want to say?

Michael?

COMMISSIONER O'NEILL: I would just like to say, too, just to add my voice here in thanks for the staff and the great work that they have done, not only the staff on the Sentencing Commission, but also certainly the staff of the Department of Justice. I have seen this both when I was--or all three times now--when I was at the Department of Justice this being worked on, when I later served as general counsel of the Senate Judiciary Committee and had an opportunity to be involved with it, although only very peripherally at that time, and now since I've become a member of the Sentencing Commission.

Money laundering and the ability to prosecute money laundering offenses has obviously been a very important and a significant tool in the arsenal of prosecutors in bringing down organized crime and large-scale drug distribution and organizational schemes.

Nevertheless, even though it's an important tool, and has been a powerful tool for

prosecutors to use, it's important, when we choose to criminalize individual acts, that we ensure that those acts are criminalized on the basis of not only the specific act of money laundering, but also the intent. This was a crime that needed to be somewhat "cabined," in the sense that I think we've made a major advance here in tying the money laundering offenses much more closely to the substantive underlying offense, oftentimes to which the money laundering is being attached.

And while no proposal is going to be perfect in satisfying probably any side of this debate, either the criminal defense bar or certainly the Department of Justice, I think that this proposal strikes a reasonable and a fair balance in trying to achieve some sort of equity and justice, in terms of penalizing these specific sorts of offenses.

CHAIR MURPHY: Michael?

COMMISSIONER HOROWITZ: I would just, briefly, on this, I also want to thank the staff for working so hard with our folks on going back

and forth on this guideline, for certainly longer than the two months I've been part of the Commission, for however many years it's been. And I [inaudible] worked very well going back and forth, trying to reach a fair compromise.

[Tape change: T-1A to T-1B.]

COMMISSIONER HOROWITZ: --trying to reach a balance and, as I say, I wish there had been a little more time to do a little bit more to try and resolve some of the-- [inaudible] the other issues that we have not been able to reach an agreement on. But I certainly appreciate all of the hard work that went back and forth to reach a resolution of this issue and to address what we have said publicly is a legitimate concern about the use and making sure it's an appropriate use of the money laundering statute.

CHAIR MURPHY: Any other comments?

VICE CHAIR SESSIONS: I think Andy has something.

CHAIR MURPHY: Oh, Andy?

MR. PURDY: Yes, Judge Murphy, just for

the record, I wonder if I might direct a question to Vice Chair Steer.

Not to characterize the past, but some of the characterizations of the past effort that failed on the Hill characterized the initiative for money laundering as an effort to reduce sentences for certain offenders. I just wondered if you might want to, just for the purposes of the record, indicate your sense of what this is attempting to target.

VICE CHAIR STEER: I think the data analysis that is part of this summary makes it clear that, overall, the sentencing impact of this proposal and, as I recall, from that proposal, actually increased the penalties.

Now, there is some decrease, and it was a deliberate decrease for first-party fraud offenders who launder money, but that comes about because of the change in structure necessarily when we tie the new structure closer to the underlying--penalty for the underlying crime. For drug crimes and for other serious type of offenses, I think it is clear

that this proposal will provide a substantial increase in penalties, and overall I think it should--certainly should not be criticized as an effort by the Commission to reduce penalties.

VICE CHAIR CASTILLO: Let me just add, before I vote in support of this, that everyone who has taken a look at this, be it judges, even the Department of Justice recognizes the fundamental unfairness that can occur when fraud defendants who merely deposit the results of their proceeds are charged with money laundering and what that does to sentences. I've had experiences, in sentencing criminal defendants, where I've seen those unfortunate situations.

On the other hand, I've seen situations, and I have not hesitated to sentence the more egregious offenders, who are appropriately targeted by money laundering, in the nature which they are supposed to be. And I think this guideline does a better job of targeting the most appropriate violators, and like with some of the other guidelines we're going to see passed today, bring

some moderation, fair compromise, but the true violators are going to see their penalties increased, and that is the reason I am going to support this.

CHAIR MURPHY: Yes?

VICE CHAIR SESSIONS: Could I just say I think the staff has just done a phenomenal job working on this for a period of many years. I also commend Michael and the Justice Department for trying to make resolution of a very complex issue.

I do want to say that there were significant compromises made along the way. We tried, as best we can, to arrive at a resolution. We see this as part and parcel of the economic crimes package. That is clear. And they were considered as a part of it. They are a part of it. That's, obviously, one of the primary motivating factors in its resolution.

And I guess I find it unfortunate we were unable to agree to every possible part of that, but I appreciate the effort on the part of the Justice Department, and I also really appreciate all of the



effort of the staff.

CHAIR MURPHY: Well, I would just add that I think the process of these conversations that have been had have been very respectful on both sides, and we've all listened to each other. And of course, in addition to what the Department says, we have got all of the other comment coming from other groups that are interested in working on the Sentencing Reform Act. There has been a full airing of these things, even if there is no perfect resolution for any of these guideline problems.

If there is no further comment, did you want to say something more?

VICE CHAIR SESSIONS: No.

CHAIR MURPHY: Do you want to call the roll?

MR. McGRATH: Certainly, Judge.

On the motion by Vice Chair Steer and seconded by Vice Chair Castillo, Vice Chair Castillo?

VICE CHAIR CASTILLO: Yes.

MR. McGRATH: Vice Chair Sessions?

VICE CHAIR SESSIONS: Yes.

MR. McGRATH: Vice Chair Steer?

VICE CHAIR STEER: Yes.

MR. McGRATH: Commissioner Johnson?

COMMISSIONER JOHNSON: Yes.

MR. McGRATH: Commissioner Kendall?

COMMISSIONER KENDALL: Yes.

MR. McGRATH: Commissioner O'Neill?

COMMISSIONER O'NEILL: Yes.

MR. McGRATH: Chair Murphy?

CHAIR MURPHY: Yes.

MR. McGRATH: The motion passes.

CHAIR MURPHY: Immigration, which is one that we have been working on, going through various options as we heard earlier, in view of all of the problems being experienced, particularly in some of the border areas, and then trying to write a guideline that would address the--what many see as a crisis and a test of the guideline system.

Do you want to bring us up-to-date a little bit with the option you've got?

MR. PURDY: Yes. Essentially, what this

amendment does is provide proportionality among those aggravated felonies that warrant increases under the 2L1.2. Compared to what was published in the Federal Register, this amendment does not use the concept of time served, nor, as in the evolution of it, does it require--except with a minor exception--that an analysis of the prior offenses include what is the statutory max of the prior offenses because of the difficulty and burden of those two processes.

What it does you see in (b)(1)(a), it builds from what was published in the Federal Register as Option One. In the Federal Register, Option One details certain offenses that would, in effect, be guaranteed to get the plus-16 enhancement which, before this amendment, all of the prior aggravated felonies get the plus-16 enhancement. So it expands and clarifies that list of offenses that will automatically get the plus-16.

One partial exception to that you see at the beginning of (b)(1)(a) is for drug trafficking

offenses. Only drug trafficking offenses, for which the sentence imposed exceeded 13 months, gets the plus-16. And you will see commentary language that makes clear that where sentences were suspended or stayed, for example, that does not count in the determination of the sentence imposed being greater than 13 months. So you see an attempt here to delineate those offenses that, when one looks at the congressional history, are the most serious, and which this amendment would reflect the Commission concurrence that these are the most serious offenses warranting the plus-16.

Then, for other drug offenses, you see a provision under (b) (1) (b), other drug offenses, where the sentence imposed was not greater than 13 months, it provides an increase of 12, rather than the current 16.

And, finally, Category (b) (1) (c) is added that provides for a conviction for aggravated felony; in other words, any aggravated felony that didn't get covered by Parts (a) or (b) result in an increase of eight levels.

CHAIR MURPHY: Thank you.

Is there a motion?

COMMISSIONER KENDALL: I would make a motion that we adopt the proposed amendment, in its most recent version, which is as late as about an hour and a half ago or maybe two.

CHAIR MURPHY: Is there a second?

VICE CHAIR SESSIONS: I second.

CHAIR MURPHY: Do you want to make a statement?

COMMISSIONER KENDALL: I can. I think it would be helpful because of the various history that's behind what brings us to the amendment that is in front of the Commission at this time to talk about how this came about.

To begin with, I think it's important to note that, systemwide, in the federal criminal justice system, immigration cases in 1999, the most recent year for which we have complete data, consisted of 9,669 cases; 17.5 percent of federal criminal cases in 1999 were immigration cases. We are talking about a significant number of cases, a

significant number of people. I think it's also important to note that the vast majority of these people are people of color, primarily Hispanic individuals.

I do think that it is a major concern of the criminal justice system, and should be a major concern of all Americans, to protect our country from foreign criminals who would return to our country illegally.

Having said that, the guideline, as it currently exists, has been roundly criticized from virtually every source because of its basic unfairness and lack of proportionality in that it treats all aggravated felons the same and that problem is exacerbated by the fact that virtually all felonies or most felonies that one sees in the criminal justice system are "aggravated felonies," and I put those terms in quotes, for purposes of the immigration law that we are talking about, primarily because of the definition being lifted out of Title 8, and being brought over into Title 18, where the crimes are--or, excuse me, not into

Title--Title 18 definition is used as well, but, in any event, there is no proportionality.

I think it's important to note and to recall that this initially, it got put on our agenda not because it was an initiative of this Commission, this really came from without, as a result of rumblings that we heard from a number of different sources, including defense lawyers, probation officers, and primarily the judiciary, generally, and involved judiciary in affected areas of the country, primarily the border areas, particularly. And the complaint was a basic unfairness and lack of proportionality.

In September of 2000, this Commission met with the judges of the District of Arizona, in Phoenix. And at that meeting, one of the number one concerns expressed regarding the guidelines was this issue, the lack of proportionality, the lack of fairness that the one-size-fits-all, 16-level enhancement has on such a large number of cases.

In October of 2000, this Commission was called upon to go to Capitol Hill for an oversight

hearing, which we responded to criticisms that were being leveled by the Senate Judiciary Committee with regard to the departure rates of judges. And, indeed, the Justice Department, at that time, was the beneficiary of some criticism, as well, for not, if you will, riding herd through the appellate process on those departures. Many of those departures, I believe, are--or come about as a result of the response of the system, the criminal justice system, both prosecutors and judges, particularly along the border, in response to this very guideline and its, again, one-size-fits-all, 16-level enhancement.

This Commission heard about the so-called explosion of cases along the border. And, indeed, the statistics reflect that, as you can see by the number of immigration cases that are an overall percentage of federal criminal cases.

In November--September was Arizona, October was Capitol Hill--in November, myself, Judge Johnson, and Ken Cohen, of the staff, met with Judges of the Fifth Circuit in Austin, Texas.



And that circuit, comprising three states--Texas, Louisiana, and Mississippi--accounts for 30-percent-plus immigration cases nationwide. Those judges expressed the exact, same concerns that we heard regarding this guideline from judges of the circuit and several states away, same story that we heard in Arizona; that there's a problem here that needs to be addressed.

Through this process, we also learned about what is referred to as the "fast track," and this is a program that, as I understand it, of some--it's a local practice of some U.S. attorneys in certain districts. It's not a uniform practice, and that is a practice of dealing with immigration cases and, in fairness to both the judges and the prosecutors in those areas, as a result of just the exigent circumstances of having a caseload that required extraordinary measures to deal with the caseloads in immigration cases.

However, there is no, as I understand it, consistent policy district-to-district. And although it is called a fast track, the bottom

line, as I understand what happens, is if an individual comes to court initially who is charged with an immigration case, agrees to waive the presentence process, plead guilty in a fast manner, that certain considerations are given that individual for pleading, considerations that may or may not, and probably, if truth be known, do not strictly comply with the guideline structure.

What this has resulted in is, even in border districts, district-to-district, because of no uniform policy, a wide disparity in sentencing. And, again, I don't want to be critical here, with regard to justice, this couldn't happen unless the judges went along with it, and they do. But it's people trying to wrestle with a burden dumped upon them of this caseload faced with an inflexible guideline that they uniformly agree needs something done to it.

Furthermore, it causes a problem that flies in the face of the basic principle and philosophy of the guidelines, is that similar defendants, charged with similar crimes should be

treated similarly without regard to where they are. And the simple fact of the matter is an illegal reentry case in Laredo, Texas, is treated differently, and indeed more leniently, than a similar immigration case and, frankly, even as near as my district in the same state--Texas--in Dallas, it's treated differently because there is no such fast-track program, much less somewhere like Kansas City or Des Moines or somewhere in the heartland, and heartland in the sense of the country.

[Laughter.]

COMMISSIONER KENDALL: We received public comment. And although everyone had a different idea about what ought to be done, the consensus that came screaming out, as you read through the commentary from the public comment, is that something should be done.

This amendment attempts to achieve proportionality and consistency, district-to-district, and obviate--and this is what I think is important for prosecutors and judges in the affected areas, the primary affected areas of the

border--is that, hopefully, because of the proportionality brought to bear, obviates the need for fast-track process. And, hopefully, that will be a result of it.

The original published guideline called for a methodology that viewed or--what's the word I'm looking for?--that punished people incrementally based upon time they had served on the underlying felony, and in hopes that that was an appropriate proxy to capture the seriousness of the underlying aggravated felony.

Criticism was received, and primarily from probation officers objected to it and the Department of Justice. Bottom line, the Department of Justice was against that proposal. It was taken out. The Department of Justice recommended, and at least in one place I know, in the letter of Mr. Mueller that we've talked about before, it was sent to the Commission on or in January of this year, a methodology of dealing with this problem, based upon the character of the underlying offense, as a means of differentiation between various--the

seriousness of the underlying aggravated felony. That was a suggestion of the Department of Justice. this proposal adopts that.

It was a provision, in one version of this proposal, that the judges supported. And with regard to shelf life or recency limitations on aggravated felonies being considered, the judiciary was, from the comments we received, seemed to be the consensus, from my read, was that they were for this. The Department was against it. We took it out.

There was a departure provision provided that gave judges more flexibility in, if there was an offense that overstated the seriousness of the prior aggravated felony. The Department was against it. We took it out.

The original proposal, the most recent proposal, provided for those felonies, other than the most serious ones that are treated still the same, and I'll talk more about that in a moment, but "aggravated felonies," setting that word off again in quotes, that are not crimes of violence,

sex crimes, firearms violations, drug trafficking crimes, the enumerated list that is set forth in the proposal was at a level six. That was objected to. We raised it to eight.

There were some specific offenses in (b) (1) (b) of the guideline that the Department wanted included. We included them. The Department wanted some specific language tweaked as recently as three hours/two and a half hours ago, we tweaked it.

So, as I see it, and I'm sure Michael will probably--Mr. Horowitz--will have some comment on it, the only thing that DOJ, to my knowledge, has suggested that we have not done to amend this guideline, the only thing that's been suggested that we're not doing is doing nothing. And so, having said that, that's kind of the history of where we are.

What this guideline does, the proposal, is it does nothing to lessen the prosecutors' and judges' creative abilities, if they're so inclined, to deal with the tremendous case loads that they

are faced with. And, again, that raises a philosophical question as to whether that's the Sentencing Commission's bailiwick or whether that's a matter that's internal to the Department of Justice, and I think that the consensus is it's the latter.

Secondly, this brings proportionality to the sentences for criminals who--or crimes that are of the serious nature that I have mentioned earlier, the amendment itself speaks for itself with regard to crimes of violence, drug trafficking, sexual offenses, firearms violations, illegal alien smuggling for profit, crimes that involve national security or terrorism, and I'm sure I'm probably missing one or two others, but those serious enumerated felonies.

This group statistically counts now, in its most recent version, counts for well over 50 percent of cases from the data of '99. So, in other words, the bottom line is well over half the people that are prosecuted or were prosecuted in '99, their sentences stay exactly the same, and are

not affected one bit. This guideline very well may legalize what's going on in certain districts by-- because of the necessity we talked about anyway. And most important, this amendment, I believe, has answered all of the concerns that I am aware of, but yet still achieves the goal that we heard from everyone we talked to asking us to do something, which is bring some proportionality to this guideline.

CHAIR MURPHY: All right. One thing that I would just add is that we got a lot of negative feedback on the time served proposal, not just from the Department, the prosecutors, but also from probation officers and from some judges and others because of the difficulty of getting that information in a timely fashion for wanting to deal with the situation. So that was why we were persuaded that we had to get another approach, and that's what we've been working on, and I think you've certainly covered it, Joe.

COMMISSIONER KENDALL: Could I say one other thing that I forgot to mention? And that is,



too, I understand there was an expressed concern about timing on this, but I would say that we've been wrestling and dealing with this now, and it's been out in the public domain for months.

So that's all I had to say, Madam Chair.

VICE CHAIR CASTILLO: I just--there's not much to add to what Commissioner Kendall said--

[Laughter.]

VICE CHAIR CASTILLO: --other than you can see how strongly he feels about it because he has taken this on, and I commend him for doing that, for meeting with the judges along the border, not only his colleagues in Texas, but in other places.

Everyone agrees this amendment, as it stands, is just wrong in the way it treats everyone the same way. Again, what we're doing here is just adjusting this guideline to target the right offenders. And with regard to the rest, I move to adopt Commissioner Kendall's statements as our findings of fact.

[Laughter.]

CHAIR MURPHY: Okay. Michael--there are

two Michaels, I think--

COMMISSION O'NEILL: He probably wants to rebut.

COMMISSIONER O'NEILL: Madam Chair, I would just like to say that I also commend Commissioner--Judge Kendall for really taking the bull by the horns in this circumstance and trying to address what has been quite a naughty problem down for some of our border states.

The main reason that I'm supporting this amendment, in large part, in addition to providing some sort of relief to the judges that are dealing with this problem, it's a very real and a very substantive problem down there, but also I hope that this does serve to bring some attention to the difficulty we have in terms of controlling the borders and controlling immigration, generally. While I am a strong proponent of legal immigration, I certainly recognize that, with the addition of many, many new immigration INS agents down at the borders, what we have unfortunately not seen is a concurrent increase in the number of probation

officers, judges, assistant United States attorneys to deal with what has become a very real problem. So, as what is ultimately a compromise, as is anything that we do, I support this amendment as a way of dealing with what has become a very difficult problem.

CHAIR MURPHY: Michael?

COMMISSIONER HOROWITZ: Just briefly concur and respond to some comments of Judge Kendall, who has worked tirelessly at this, and certainly I appreciate all of the responsiveness and willingness to work with us and hear our concerns during this.

We have always said at the Department, whether I was speaking, the deputy, the acting deputy attorney general was speaking or someone else was talking for us, that the one-size-fits-all approach was not the right way to go and that there needed to be a fix there. That has never been an issue for us. We recognize that that has been a problem.

And all of the concern, up until, as far

as I know, last Friday, was focused on the time served versus time imposed issue. And not only did the probation officers oppose that use, along with us, but the Criminal Law Committee also weighed in against using that factor. Fortunately, the Commission decided to take that into account and to shift into this new offense-based guideline.

And we had asked--we didn't say, by the way, do nothing. I don't think that's a fair comment on what we've said. What we've said is do something, but do it in the right way and get it right because this does impact almost 20 percent of the federal criminal cases in the country. The largest [inaudible] directly, but I would guess it's easily, by far, the largest single category of crimes prosecuted across the country by the Department.

The issue that we had with this is that, in its current version or in close to its current version, it wasn't in place until sometime this week. [Inaudible] yesterday, maybe by Tuesday's version, whatever form it took, it started to

really take shape this week. And the concern that we've had all along, and the reason we asked to go slow here and figure out what you have and what impact it would be, because it deals with almost 20 percent of the cases in the country.

And it may well be that when the prosecutors out there who see this, the border patrol who see this, the judges on the Southwest border can see this, the probation officers who work out there see this, they will think that the 8-12-16 level works just fine. But we will have passed a proposal today that will be in effect now for one year starting on November 1. And if any of those groups come back or notice a problem with this proposal, the Commission won't have the benefit of hearing that advice or that information when they have decided on this.

And I must say my guess is, when the Commission first published the time served proposal, it probably would have been a surprise to learn that not only the probation officers and the Justice Department opposed it, but the Criminal Law

Committee had serious concerns about it. And that's the issue that we're focused on, which is this is a very significant issue on public policy. It has very significant ramifications for the criminal justice system.

And at least a significant group of players in that system, which are the prosecutors out there who do the majority of these cases, haven't had a chance to digest this, haven't had the time to comment on how these categories break out. That's our concern. Hopefully, they will come back and say, "This looks good. We think it will implement fine," and it will go forward in a positive way.

Having said all that, again, I think the Commission has done a very important job here in trying to get, as fast as it possibly could, a proposal that was at least addressing the significant concerns that already had been raised, and for that, we certainly appreciate the Commission's hard work.

COMMISSIONER KENDALL: The only response

I'd like to make to that, with regard to my "do nothing" comment, is I kind of still stand by that because that is the way I read Mr. Mueller's letter of January, when we were asked to, with regard to immigration, as well as some other issues, to defer it and to do nothing this amendment cycle. And, you know, I respect--I disagree with that position, but I respect it because everyone else in the system seems to think that what we're proposing to do is long overdue.

With regard to the Criminal Law Committee, the Criminal Law Committee only opposed time served, and from reading the response, I think it had something to do maybe with John Hughes' office and the probation officers, and maybe the former chairman, Judge Kazen, who apparently had gotten them to change their positions recently. That's old news. But what I want the record to be clear on is that, is that any delay in any of this has been because of--not of us trying to sneak something in at the eleventh hour, but it has been totally because of a nonstop effort to address

every concern, and as I can stand by it, I think we have every concern raised by the Department we have addressed. So that was the only thing I wanted to say.

COMMISSIONER HOROWITZ: Just briefly, since January, I think it's fair to say, that we've worked awfully hard with the Commission--

CHAIR MURPHY: Could I just say something about--and then you can add, if you want, but I wanted to also thank Judge Kendall, Moe, for all of the work that you've done on this throughout the year, I mean, with judges and working through the process.

But I did want to thank you, Michael, and also Bob Mueller. We did get the letter that's been referred to asking us to defer on this on some other issues, and I want to express our appreciation. Because, despite that request, you have worked with us in talking about the issues and saying where the concerns were that you had heard up to that point about any particular thing that we were discussing, and we recognize that you've done



that, and it's impossible to say everything, as we are going along here.

So I just wanted to add that little thought because this has been a very good process, and we'll see, you know, how this works and what people think of it.

COMMISSIONER KENDALL: Well, one thing, too, I might add is, if it doesn't work, if we do it for a year and if it doesn't work, this isn't written in--these books aren't written in stone, and it certainly can be changed if it's problematic.

CHAIR MURPHY: Did you want to--

COMMISSIONER HOROWITZ: No. The other thing we said to do nothing on was money laundering, and something is happening today.

[Laughter.]

CHAIR MURPHY: Yes.

COMMISSIONER HOROWITZ: We did a lot of work on that one, also.

CHAIR MURPHY: Yes, you did.

COMMISSIONER HOROWITZ: But just on the--I

understand, and I certainly, the Commission has been very concerned and responsive to our issues, that we've raised on these, and I think they've been fair issues to raise. My concern is just that the field hasn't had a chance to digest it, and there may be others out there that if we had brought forward, you would have--

COMMISSIONER KENDALL: It's 3:12. Is there anything else you want us to change? If there's anything else--

CHAIR MURPHY: Anybody else want to say anything on this?

John?

VICE CHAIR STEER: Just one quick comment. It sort of strikes me that the process by which we have arrived at this point today, with regard to this amendment, it strikes me is in a microcosm of sort of like the process of adopting the initial guidelines. It's a very compressed time frame to considering, but it's important and difficult subject matter that affects a lot of individuals. Some dramatic changes in direction in what was

first proposed to what we have here, which demonstrates, as Joe said, I think, a responsiveness to concerns at play.

And I must also join everyone else in saying that I think this process also demonstrates a great deal of commitment on the part of Judge Joe Kendall, individually, and strong leadership on his part to get this accomplished, if at all possible. And I really am grateful, with other Commissioners, for what he has done on this particular issue.

But in the final analysis, we are up against it. This is the crunch time, and we have to make a decision. I think it appears to be a fair and reasonable product, one that appears to be well-drafted, but we're not going to know until there's a test of this, both by people looking at it who handle these cases every day and probably, and we will--this is the type of guideline that will impact quickly because of the nature of the cases--we'll know some results fairly quickly, too.

And I was pleased to hear Judge Kendall say that we--things aren't written in stone. We

have to be, as much as we like to do things and move on to others, we have to be willing, I think, to respond, if we see that there are problems that do develop, and I am sure we will.

I am very pleased to go forward with the product that we have and thank everybody.

MR. McGRATH: Thank you. As you all know, John is the historian, since he's been here from the beginning. That was an interesting addition.

If there's no other comment, then would you call the roll on this.

MR. McGRATH: On the motion by Commissioner Kendall and seconded by Commissioner Johnson, Vice Chair Castillo?

VICE CHAIR CASTILLO: Yes.

MR. McGRATH: Vice Chair Sessions?

VICE CHAIR SESSIONS: Yes.

MR. McGRATH: Vice Chair Steer?

VICE CHAIR STEER: Yes.

MR. McGRATH: Commissioner Johnson?

COMMISSIONER JOHNSON: Yes.

MR. McGRATH: Commissioner Kendall?

COMMISSIONER KENDALL: Yes.

MR. McGRATH: Commissioner O'Neill?

COMMISSIONER O'NEILL: Yes.

MR. McGRATH: Chair Murphy?

CHAIR MURPHY: Yes.

MR. McGRATH: The motion passes.

CHAIR MURPHY: Okay. The next issue is our guideline area of sexual predators.

Andy?

MR. PURDY: Yes, we have before us the fourth revised proposed amendment on sexual predators. I would just point out a couple of key points, some of which reflect changes relative to the published version. This amendment would adopt 4B1.5 for repeat and dangerous sex offender against minors, rather than two separate guidelines that are reflected here as Subsection A and Subsection B.

Regarding Subsection A, it provides very substantial punishment for those who have qualifying prior offensive conviction and qualifying instant offensive conviction patterned

after the career offender model, and it provides, from among the two options that were published, that the floor criminal history category will--5 will apply to these cases, as frequently defendants have quite significant criminal histories.

And Subsection B is an additional part of the response directly responsive to the pattern of activity directive the Commission received some years before, and this is part of an ongoing effort by the Commission to adequately address these offenses in being responsive to Congress on this.

The particular provision, B1 on Page 2, provides the five-level enhancement in this Chapter 4 guideline. Rather than choosing to put an enhancement in individual guidelines, those guidelines that get here are subject to the pattern of activity increase if they didn't receive the increase under Subsection A.

The floor offense level for B was chosen to be a Level 22. What was published was bracketed 30 and 32. We felt that 22 was the appropriate floor for this offense conduct. You have,

contained in the definitions, you have a definition of pattern of activity that is tailored to this kind of conduct. It doesn't rely exclusively on the definitions elsewhere in the guidelines of patterns of activity.

In addition, on Page 6, at the top, a carryover from 5B1.2, terms of supervised release. This proposal, at the top of Page 6, recommends that where the instant offense or conviction is a sex offense, the statutory maximum term of supervised release is recommended.

In addition, on Page 7, this amendment with group offenses involving child pornography, and trafficking, and receipt and possession cases.

Finally, turning to Page 8, proposed revisions to 2A3.2, and it was suggested in the amendments that this Commission sent to Congress just over a year ago provides additional changes to the 2A3.2 guideline, including the adoption of (a)(1), with an offense level of 24. And this particular provision (a)(1), varies the language that was published in terms of attempt and provides

that the floor applies, excuse me, the base offense level of 24 applies with the qualifying violations and the commission of a sexual act or sexual contact, rather than relying on the attempt concept as part of that. A corresponding change, of course, is made to (a)(2).

You have increases in base offense levels that currently exist, which are 15, as the general lowest base offense level is increased to 18, and then, too, for the Chapter 117 offenses, they are proposed to be increased to 21, with the corresponding appropriate additional three levels, as I said, where you have the commission of a sexual act or sexual contact.

The other change in this, relative to what was published, is that there is no provision in the amendment involving incest.

CHAIR MURPHY: Is there a motion on this one?

COMMISSIONER KENDALL: I would make a motion we adopt the amendment.

CHAIR MURPHY: Is there a second?



VICE CHAIR STEER: Second.

CHAIR MURPHY: Okay. Do you want to make a short statement?

VICE CHAIR STEER: The only statement I would want to make is this: When you think about the types of cases we deal with, when you talk about, take drugs, for example, the argument that you often hear made against penalizing drug offenses generally and as harsh as sometimes we do particularly as well, that only affects the individual taking the drugs. Property crimes, you're talking there about, although you're depriving individuals of their property, you are talking about property.

When you look at something like a sexual offense, you're talking about an offense against an individual's very person.

And, secondly, when you talk about those persons being the most vulnerable in our society; that being children, and indeed these types of offenses can have an effect on such individuals for the rest of their lives, to my way of thinking, if

we're going to punish anything harshly or seriously, this ought to be it.

So I'll get off my soap box now, but that's my view on it.

VICE CHAIR SESSIONS: Well, can I get on the soap box?

CHAIR MURPHY: Vice Chair Sessions?

VICE CHAIR SESSIONS: But perhaps it's a different soap box. I dissent from this vote, and I do that for a number of reasons.

I'm really appreciative of the fact that this is really an appalling kind of offense. It involves children. I think certainly all of the Commissioners are very sensitive to that, and I particularly am also sensitive to that. But I think it's also important to actually reflect upon what are the Commissioners doing here.

And there's a number of objections with which I hold very strong feelings. They first are the pattern of activity, and, second, to the increase in regard to the base offense level for statutory rape, from the 15 to the basic 18. And

the reason I do so is because of, in my view, the enormous impact that this is going to have upon Native Americans. Essentially, if one looks at the sentencing impact, the average sentence for these kinds of offenses for Native Americans, in many cases, more than doubles.

And, first, in regard to pattern of activity, there's two different kinds of increases. In regard to pattern of activity, I do want to say that I met with the sexual predators team. They've done a tremendous job and thought hard about these very difficult issues. I'm not, in any way, critical of the ultimate conclusions that they have reached or recommended nor actually, you know, I treat, certainly, the decision of the Commission extraordinarily respectfully, but I disagree.

And if one, first of all, goes to Subsection A of the new guideline, 4B1.5, one sees that if one has one prior conviction for sexual assault or a sexually-related offense, then one automatically jumps, at a minimum, to Criminal History Category 5, which is going to have, in my

view, a tremendous impact upon the sentence.

And the difficulty that I have with that is that there are many different kinds of circumstances in which that may be totally appropriate. It may be appropriate or it may not. There may be defendants who have been through treatment and failed, and there may be some who were afforded no treatment and had no possibility of treatment, and despite that fact, based upon a prior conviction, of which there is no erasure for age, one will necessarily have a Criminal History Category 5.

But the one that I feel more fervently about, although it's sort of tough to imagine, in light of the way I'm talking here, is the second category. The guideline, you will see, is entitled, "Repeat and Dangerous Sex Offenders." So, in regard to the pattern of activity in Subsection B, a repeat and dangerous sex offender is a person who has no criminal record or could have no criminal record who is involved in two separate incidents with two or more persons.

Now, indeed, there may be dangerous persons who risk recidivism rates--risk recidivism who fit that definition, who have no criminal record, but are, in fact, dangerous, but there may very well be many others who don't fit it, who have never been through treatment, who have never--who have worked with no one prior to this one particular incident. In fact, this might be the first time that the criminal justice system intervenes in their life. And despite that fact, they are given the label of "repeat and dangerous sex offender," and they are subject to a 5-level bump.

I think that is too much. And, again, I want to say that I'm very sensitive to the serious consequence that this crime commits, but I also think that one has to look at each individual defendant in situations like that, especially when they haven't been before a court ever before, and especially when there hasn't been that kind of intervention which, in the long run, may very well reduce recidivism rates. Essentially, people who

leave prison may very well create more crimes more frequently than persons who engage in treatment. And at least in regard--

[Tape change: T-1B to T-2A.]

VICE CHAIR SESSIONS: --statutory rape in the first place are bumped up to a level which is the equivalent of them having been guilty of forcible rape. And, again, the impact upon Native Americans, in this particular situation, is enormous.

Now, I respect tremendously the thought that went into this decision. I, respectfully, disagree. Obviously, I feel fairly fervently about it, but I think that I am a minority of one, so I will remain silent.

[Laughter.]

CHAIR MURPHY: I am not going to try to respond to all of your points, but I would say, for members of the public that are here, that one of the things that we did hear, we did look at experts on the area. We looked at a lot of the cases that the staff had gathered, the actual facts of the

cases, including the Native American cases. And I am not going to say any more because, you know, I respect that Bill has his position, but--yes, Michael?

COMMISSIONER O'NEILL: Yes, I just want to say that, I mean, I think it's fairly clear that sexual offenses, particularly those perpetuated against children, are among the most devastating crimes that occur in society. I mean, certainly, they not only visit a great deal of emotional, physical, and mental trauma upon the individual who's victimized, but also causes untold devastation in families and can be perpetuated for years after.

I think that the best evidence suggests that those people who are involved in these types of crimes often have themselves suffered at the hands of an abuser when they were children themselves, which makes it extraordinarily difficult.

For that reason, and despite the fact that I recognize clearly, as my colleague, Judge

Sessions, recognizes, these are such serious offenses and so deserving of, in my opinion, high penalties simply for the fact not so much as a deterrent, because I'm not clear how much of a deterrent these penalties can really be to individuals who engage in this type of behavior, but rather as a means of selective incapacitation and making sure these individuals can't reoffend again.

And despite the fact that I advocated that the decay factor be relaxed from determining prior conduct and allowing prior conduct to come into play in these cases--because I do think that that's important, that the normal way in which we look at the decay factor, excluding offenses from criminal history, perhaps is not applicable here--the one concern that I will bring up, and it's a theoretical concern that not only has troubled me, in some respects less so with respect to this guideline, but more across the board, and that's the difficulty with pattern of activity.

Ordinarily, when we use the criminal law



as a tool for punishment, as the Supreme Court in Apprendi v. New Jersey has just recently taught us, we require juries or judges to make certain findings, beyond a reasonable doubt, in certain specific factual situations. But one thing that troubles me here--and, again, I am fully supportive of this amendment, although I simply raise this as a touchstone or a problem that I have with many of the things that we've done--is that when you start using uncharged, uncounseled allegations, for which there have been no criminal conviction actually put in place, it always troubles me that, on that basis, we apportion criminal punishment.

Certainly, in situations where we do provide an involuntary--civil commitment, for example, I have much less of a problem in those circumstances in allowing that type of prior conduct to come into play in making that determination.

For the criminal law, however, I think our concerns and the reason that we apportion punishment are certainly slightly different. And

so it does give me some pause that in the pattern of behavior, at least, we allow uncharged and unproven, in the sense that not proven beyond a reasonable doubt by a jury, to be allowed to affect someone's quantum of punishment.

But, again, that consideration--and, again, that's an important consideration that I have--aside, I, nevertheless, support this amendment.

CHAIR MURPHY: Any other comments?

Joe?

COMMISSIONER KENDALL: I would like to just respond to one thing that Judge Sessions brought up, and that's with regard to the Native American issue. I am, just like many crimes, because of jurisdiction, and jurisdiction alone, Native Americans are more affected because they are subject to federal jurisdiction in the criminal area. That just sort of goes with the territory, no pun intended.

But with regard to if it is an argument about it adversely somehow being unfair to Native

Americans, I would point out, like Paul Harvey, the other half of the story, and that is this: For every Native American defendant, there is quite likely, if you look at our data, a Native American woman or a Native American child who is the victim of that Native American defendant. And so I don't think that that should be lost in the equation.

But that's all I'm going to say about it.

CHAIR MURPHY: Okay. If there is no further comment on this, would you call the roll on it.

MR. McGRATH: On the pending motion, Vice Chair Castillo?

VICE CHAIR CASTILLO: Yes.

MR. McGRATH: Vice Chair Sessions?

VICE CHAIR SESSIONS: No.

MR. McGRATH: Vice Chair Steer?

VICE CHAIR STEER: Yes.

MR. McGRATH: Commissioner Johnson?

COMMISSIONER JOHNSON: Yes.

MR. McGRATH: Commissioner Kendall?

COMMISSIONER KENDALL: Yes.

MR. McGRATH: Commissioner O'Neill?

COMMISSIONER O'NEILL: Yes.

MR. McGRATH: Chair Murphy?

CHAIR MURPHY: Yes.

MR. McGRATH: The motion passes.

CHAIR MURPHY: Okay. The next guideline issue is the safety valve. That probably won't take too much identification, Andy.

MR. PURDY: Yes. I think that this proposal is essentially as published. I would just point out that the provision on Page 3 of Subsection B includes an amendment to the safety valve guideline that defendants who meet the criteria to have mandatory minimums of at least five years shall not receive a guideline level less than Level 17.

CHAIR MURPHY: Is there a motion on this?

VICE CHAIR SESSIONS: I would move that this motion--that this be adopted.

CHAIR MURPHY: Is there a second?

VICE CHAIR CASTILLO: I'll second.

CHAIR MURPHY: Do you want to make a

statement?

VICE CHAIR SESSIONS: I would like to make a brief statement. I feel a whole lot better about this one than the last one.

[Laughter.]

VICE CHAIR SESSIONS: This seems to remove an obstacle which impacted first-time offenders or persons in Criminal History Category 1, in particular, who were convicted of drug offenses. The threshold level is 26 in the past. There could not be a reduction of two levels, based upon a safety valve application, aside from negating the mandatory minimum, if your base offense level was under 26, and really I don't think there was a reason for that particularly. And I think that this would give many first-time offenders, first-time drug offenders, an opportunity to have that application, and I think that will be a significant contribution toward justice regarding the sentences of those individuals.

There is a second part to it, and the second part is the minimum level of 17. It really

stems out of a directive from Congress, in 1994, the directive saying that if a mandatory minimum, basically, if a mandatory minimum was indicted, that the safety valve would apply, but the sentence could not be less than 24 months.

And this is in response, direct response to the congressional directive. And it seems to me that one of our primary functions here is to be directly responsive to the will--to the will of Congress. And as a result, that's the reason for that being included at this particular point. So I seek its acceptance.

CHAIR MURPHY: I think one of the things that I would just like to throw in is that it's a mark of how well people generally think that the safety valve has worked, that this is an issue that we can have on the table now to expand it, not that there aren't some who question it. But I think basically the experience with the safety valve, at least the recidivism figures that we've seen, and we are undertaking, as I think many of you know, a more in-depth study of recidivism, but that

[inaudible].

Judge Castillo?

VICE CHAIR CASTILLO: I am happy to support this amendment. It's the first one in a long time that I can think of that actually frees up close to a thousand prison beds within the next two years.

I receive letters all the time. Recently, I received a letter that was forwarded to me from the chief judge. It says, "I'm writing you on behalf of myself and fellow inmates now incarcerated in the federal prison camp for women in Pekin, Illinois. We are all first-time nonviolent offenders with sentences that fall under the mandatory minimum sentencing guidelines. We are pleading with lawmakers of this country to vote for the restructuring of the sentencing guidelines."

This is a move, a moderate move, a modest move in the right direction. This letter was signed by about 60 women that are in prison. I'm hoping that some of them might benefit in the

future from this modest move. We have studied this. The recidivism rates, I should point out, unlike the guideline we just dealt with, are significantly different. They don't represent a threat.

I'm frustrated, I will tell you this, that there is this congressional directive that creates a base offense level of 17, and I'm hoping that in the future we can address that by having a better dialogue with Congress about the safety valve.

CHAIR MURPHY: Any other comments?

VICE CHAIR STEER: I would just like to thank the federal public defenders for their letter and analysis with respect to Part B, dealing with a floor of 17. It had me convinced for a while. I might have even had--it may have had other Commissioners convinced for a while. I think, in the final analysis, we don't want to, in the face of a clear directive, risk any concern on the part of Congress, since what we are doing here in Part A is what we all support. And as Judge Castillo points out, that benefits--will free up about 1,000



prison beds in five years. It benefits an estimated 3,300 defendants a year.

CHAIR MURPHY: Michael?

COMMISSIONER O'NEILL: Very briefly, I, too, am supportive of this amendment, and would like to note that I was also, in believing that it's important that we do give effect to the plain language of the directives of Congress. I, nevertheless, note that, although I believe it's important for us to leave this floor of 17 for the 24 months for the purposes of the directive, I would also like to note that--we don't bring this up often--but in 28 USC 994(j), Congress has also directed us to ensure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender.

So I think it's truly incumbent upon the Commission that we make sure that we give effect to all of Congress's directives, both those specifically directing us not only to raise penalties or to establish floors, but also that

we're careful that, in looking at criminal history, which is one of the areas that I believe that it's very important for us to revisit in these circumstances, that we make sure that we revisit this directive of Congress, as well, and to do what Congress has specifically, and quite appropriately, told us to do, and that is to ensure that, in Criminal History Category 1, we don't continue to group offenders together who may be very differently situated in terms of their prior offense status.

I think it's important for us to take that into consideration, as well.

COMMISSIONER KENDALL: Madam Chair, I'm so much in favor of this amendment, I can't wait to vote on it.

[Laughter.]

MR. McGRATH: On the motion by Vice Chair Sessions, and seconded by Vice Chair Castillo, Vice Chair Castillo?

VICE CHAIR CASTILLO: Yes.

MR. McGRATH: Vice Chair Sessions?

VICE CHAIR SESSIONS: Yes.

MR. McGRATH: Vice Chair Steer?

VICE CHAIR STEER: Yes.

MR. McGRATH: Commissioner Johnson?

COMMISSIONER JOHNSON: Yes.

MR. McGRATH: Commissioner Kendall?

COMMISSIONER KENDALL: Yes.

MR. McGRATH: Commissioner O'Neill?

COMMISSIONER O'NEILL: Yes.

MR. McGRATH: Chair Murphy?

CHAIR MURPHY: Yes.

MR. McGRATH: The motion passes.

CHAIR MURPHY: Okay. In the interest of time and moving along, if somebody needs to step out for a moment--

[Laughter.]

CHAIR MURPHY: The next item on the agenda is the guideline related to methamphetamine labs.

Andy, do you want to give us a brief intro?

MR. PURDY: Yes. The issue here is the repromulgation, as a permanent amendment, of an

emergency amendment regarding amphetamine or methamphetamine laboratory operators. And relative to that emergency amendment, on Page 4, and this amendment would revise that amendment with respect to the A1.1(b)(5)[?]. And this amendment would make the provisions contained therein alternative, rather than additive. So, in other words, rather than 5A being potentially applicable in addition to 5B, the provision is written so that you apply the greater of.

CHAIR MURPHY: Okay. Is there a motion on this topic?

COMMISSIONER JOHNSON: I move we adopt this amendment.

CHAIR MURPHY: Is there a second?

COMMISSIONER O'NEILL: Second.

CHAIR MURPHY: Do you want to make a statement?

COMMISSIONER JOHNSON: Yes. This amendment increases the penalties for manufacturing amphetamine and methamphetamine.

Congress found, and I agree, as a former

narcotic prosecutor, and as a parent, that the manufacturing of these substances create a substantial risk to human life or the environment. And I support this--for the passage of this amendment.

CHAIR MURPHY: Is there anything anybody else wants to say?

VICE CHAIR STEER: Yes, and I will try to be very quick about it.

But I'm troubled by--I'm going to support this amendment--but I'm troubled by the way in which the Commission has chosen to implement this directive, and I'm troubled by the directive itself in this part, in respect to its impact in Guideline 2D1.10.

With regard to the first issue, it has--it has been not an invariable practice, but I think the usual practice for the Commission historically, when it gets a directive from Congress, to try to be responsive, of course, but to ask the question, when doing what Congress asks, how do we meld this directive with the basic guideline principle of

treating similar offenders similarly?

And so, as a consequence, time after time, the Commission has gone broader than the directive, usually has said so in the commentary, a couple of times we've gotten in trouble, and I've had litigation when we forgot to say that we were invoking our broader authority, but the Commission always tried to round out the directive to ensure that comparable conduct was punished in the same way.

Today, in implementing this directive, we have decided not to do that. What I mean is that, if you have a controlled substance manufacturing offense that does not involve methamphetamine or amphetamine, and admittedly these will probably be pretty rare, but manufacturing includes growing marijuana, and some of those operations have been known to be protected by dangerous devices.

But as a result of our decision today, if there is such an operation that endangers human life or the environment, the guideline provides no increase, and I disagree, respectfully, with the

decision not to broaden this particular enhancement to cover all comparable conduct involving controlled substance manufacturing offenses.

Now, with respect to the implementation of the directive in 2D1.10, we have found no flexibility in the directive and are implementing it literally to provide an additional three-level increase. But the problem is that apparently Congress did not recognize, as least we have no evidence that they did or they didn't, but in this particular guideline, there is already a three-level increase above the base offense level determined on the basis of drug quantity if the conduct involves endangering human life, while manufacturing a controlled substance.

So we add an additional three because the directive seems to require it. Now, that creates a number of anomalous results, and I hope that we will find a way to hopefully inform Congress of the problems that we've encountered in implementing this directive. It means, for example, that, for the same conduct, if the defendant is prosecuted

and convicted under the statute that goes to this guideline, 2D1.10, the offense level will be three levels higher than if the defendant is convicted of drug manufacturing or drug trafficking and is sentenced under the main drug trafficking guideline.

And because, again, the Commission has not broadened this to cover all controlled substances, there is a difference of as much as six levels under this guideline between consequences for methamphetamine or amphetamine manufacturing and-- as opposed to other controlled substances.

So these kind of inconsistencies trouble me greatly. They are inconsistent with our basic statutory mandate. Part of it we can't do anything about because of the constraints of the directive, but we can, of course, open a dialogue with Congress and stuff, and others have mentioned it, and I hope we will pursue this so that we can have a more consistent--a greater consistency among the guidelines in the future.

CHAIR MURPHY: Sir?



VICE CHAIR CASTILLO: I just want the record to reflect that I agree with Commissioner Steer.

COMMISSIONER O'NEILL: As do I.

CHAIR MURPHY: This was something that was--this was something that was discussed at some length about whether to expand the scope of the directive or to respond to the directive.

Is there any other comment?

[No response.]

CHAIR MURPHY: Would you call the roll then.

MR. McGRATH: On the motion by Commissioner Johnson and seconded by Commissioner O'Neill, Vice Chair Castillo?

VICE CHAIR CASTILLO: Yes.

MR. McGRATH: Vice Chair Sessions?

VICE CHAIR SESSIONS: Yes.

MR. McGRATH: Vice Chair Steer?

VICE CHAIR STEER: Yes.

MR. McGRATH: Commissioner Johnson?

COMMISSIONER JOHNSON: Yes.

MR. McGRATH: Commissioner Kendall?

COMMISSIONER KENDALL: Yes.

MR. McGRATH: Commissioner O'Neill?

COMMISSIONER O'NEILL: Yes.

MR. McGRATH: Chair Murphy?

CHAIR MURPHY: Yes.

MR. McGRATH: The motion passes.

CHAIR MURPHY: Then there is anhydrous ammonia.

Commissioner Johnson?

COMMISSIONER JOHNSON: I--

CHAIR MURPHY: I'm going to ask Andy, first. I'm rushing to the--to--

MR. REEDT: Rushing to hear what Sterling has to say.

MR. PURDY: This proposed amendment was revised in some minor ways so that the proposed language would conform with the new statute at 21 USC 864 and does not have substantive changes. This amendment reflects the decision by the Commission not to add a specific offense characteristic particularly targeted to the

anhydrous ammonia offenses.

CHAIR MURPHY: Is there a motion on anhydrous ammonia?

COMMISSIONER JOHNSON: I move in support of this amendment.

CHAIR MURPHY: Is there a second?

VICE CHAIR SESSIONS: Second.

CHAIR MURPHY: Any comment?

COMMISSIONER JOHNSON: It being ten minutes to 4:00 on a Friday evening, I'm going to stand up, speak up, and shut up.

[Laughter.]

COMMISSIONER JOHNSON: This amendment provides for a new offense: the theft of anhydrous ammonia. The substance is often stolen to be used for the manufacturing of methamphetamine. This new provision will be under the guidelines that covers unlawful possession of any product, chemical or material which may be used to manufacture a chemical substance, and I support it.

CHAIR MURPHY: Any other comment?

[No response.]

CHAIR MURPHY: Okay. Would you call the roll.

MR. McGRATH: Certainly. On the pending motion, Vice Chair Castillo?

VICE CHAIR CASTILLO: Yes.

MR. McGRATH: Vice Chair Sessions?

VICE CHAIR SESSIONS: Yes.

MR. McGRATH: Vice Chair Steer?

VICE CHAIR STEER: Yes.

MR. McGRATH: Commissioner Johnson?

COMMISSIONER JOHNSON: Yes.

MR. McGRATH: Commissioner Kendall?

COMMISSIONER KENDALL: Yes.

MR. McGRATH: Commissioner O'Neill?

COMMISSIONER O'NEILL: Yes.

MR. McGRATH: Chair Murphy?

CHAIR MURPHY: Yes.

MR. McGRATH: The motion passes.

CHAIR MURPHY: We have an amendment related to nuclear, biological and chemical. Andy?

MR. PURDY: Yes. This amendment,

entitled, "Third Revised Proposed Amendment," significantly adds chemical and biological elements to the existing nuclear provisions in 2M6.1. In addition, it adds attempts, and it--relative to the published version ceiling, Subsection (a)(3)-- provides an alternative base offense level of 20, if the offense involved a threat to use the listed conduct and did not involve any conduct evidencing an intent or ability to carry out the threat.

It also, in Subsection (b)(1), specifies an enhancement, where there's a threat to use more serious kinds of substances that can cause additional consequences, in terms of law enforcement response. And there's a provision in (b)(3) that provides an additional four levels if the offense resulted in a substantial disruption of public, governmental or business function or expenditure of funds to clean up, et cetera, and provides appropriate cross-references, as well.

CHAIR MURPHY: Is there a motion?

COMMISSIONER O'NEILL: I would move that we adopt this amendment.

VICE CHAIR STEER: Second.

CHAIR MURPHY: Do you want to say anything about it, Commissioner O'Neill?

COMMISSIONER O'NEILL: Just, given the lateness of the hour, I'll only be very brief in the sense that obviously among the most serious offenses that can be perpetrated against citizens of the United States would be the use or the threatened of nuclear, biological or chemical weapons. I think this amendment is a necessary and important step to be taken, particularly in response to the 1996 Antiterrorism and Effective Death Penalty Act that Congress enacted, as well as the 1997 National Defense Authorization Act, which contained the sense of the Congress to ensure that we increased penalties and considered these particular items that we're adopting today.

This is, obviously, a very necessary and important step.

CHAIR MURPHY: Any other comment?

Okay. Bill and then Michael.

VICE CHAIR SESSIONS: I want to compliment

the Department of Justice for making the specific recommendation to reduce the base offense level for threats in certain circumstances.

COMMISSIONER HOROWITZ: We try.

[Laughter.]

COMMISSIONER HOROWITZ: I just want to compliment the Commission and the staff for working very hard on a very important amendment, particularly at a time when this threat is growing. And this is really an outstanding effort, and we really appreciate all of the hard work that went into it.

CHAIR MURPHY: Anything else?

[No response.]

MR. McGRATH: On the pending motion, Vice Chair Castillo?

VICE CHAIR CASTILLO: Yes.

MR. McGRATH: Vice Chair Sessions?

VICE CHAIR SESSIONS: Yes.

MR. McGRATH: Vice Chair Steer?

VICE CHAIR STEER: Yes.

MR. McGRATH: Commissioner Johnson?

COMMISSIONER JOHNSON: Yes.

MR. McGRATH: Commissioner Kendall?

COMMISSIONER KENDALL: Yes.

MR. McGRATH: Commissioner O'Neill?

COMMISSIONER O'NEILL: Yes.

MR. McGRATH: Chair Murphy?

CHAIR MURPHY: Yes.

MR. McGRATH: The motion passes.

CHAIR MURPHY: The next item was not on the notice that or the agenda of this meeting. It relates to a possible reduction for a mitigating role.

We did publish proposals in this area earlier in the year, and then with the crush of business, it was put aside, and I guess it's fair to say was resurrected recently. So I believe that we need to have a motion to suspend the rule. Would you indicate exactly what we need here, Andy.

MR. PURDY: Yes, Rule 3.2 of the Rules of Practice and Procedure requires that, to the extent practicable, the Chair shall issue a public notice of any public meeting at least seven days prior to



the date of the meeting, and the public notice shall indicate the general purpose of the meeting, including agenda-related documents.

Rule 1.2(b) provides that the Commission temporarily may suspend any such rule and adopt the supplemental or superseding rule.

So I would encourage the Commission to invite a motion to suspend the applicability of Rule 3.2, as it applies to consideration in this meeting of an amendment concerning mitigating role.

VICE CHAIR CASTILLO: I'll make the motion, under Rule 1.2(b).

COMMISSIONER JOHNSON: I'll second it.

CHAIR MURPHY: Okay. Any discussion on this? I'll just call for a voice vote, unless there's some discussion.

VICE CHAIR CASTILLO: I think that we've discussed this, and the outcome is the correct outcome. That's all I'm going to say.

CHAIR MURPHY: Well, I just meant on the motion to suspend the rules. I didn't think we--

VICE CHAIR CASTILLO: I don't think we

need discussion on that.

CHAIR MURPHY: Because of the fact that we have published the various options and people were aware that we had it on the agenda and got response from the public and so on.

Is there any--or all of those in favor of suspending the rules so that we can address the subject matter at this meeting, say aye.

[Chorus of ayes.]

CHAIR MURPHY: Opposed, no.

[No response.]

CHAIR MURPHY: Okay. Andy, sorry, could you just say a few words to lead us into this.

MR. PURDY: Yes. Relative to the published version of this amendment, it is substantially similar. On Page 3 of the second revised proposed amendment, you see there, under new application of 4, minimal participant, contrary to the published version, this amendment will retain the language that appears exactly in the middle of the page:

"It is intended that the downward

adjustment for a minimal participant will be used infrequently."

That's the major change, relative to the published amendment.

CHAIR MURPHY: Thank you.

Is there a motion, then, on the proposed amendment?

VICE CHAIR CASTILLO: I'll so move.

COMMISSIONER JOHNSON: Second.

CHAIR MURPHY: Is there anything you want to say about, as the mover, Judge Castillo?

VICE CHAIR CASTILLO: No. I think some people have misinterpreted this as somehow a reduction for couriers. All it really is, is it provides an option, and a moderate one at that, that is consistent with the majority view of what the circuits have.

Other than that, I think we've discussed it fully throughout the year, and I won't take up any more time.

CHAIR MURPHY: Does anybody else have any comment?

VICE CHAIR STEER: Very quickly. I think I'm going to have to vote against this amendment. I guess I don't have to, but I'm going to choose to do that. I do so reluctantly because I don't agree with the minority circuit view, which holds that defendants are entitled to no mitigating role reduction.

I guess I come down, and I actually offered an alternative, but my colleagues decided that they preferred this one, but my alternative would have allowed a minor role reduction that would have included a greater reduction for these defendants who are held accountable only for the drugs carried or, if we're talking about a [inaudible] kind of defendant, for the conduct the defendant was involved with.

With the contraction of relevant conduct, particularly in the drug area and the lack of standards in the guidelines for differentiating between a minimal and minor role, I think what we're going to get here is basically trading legal disparity for disparity based on application of the

guidelines to the facts, and I'm concerned that it will be an unwarranted disparity. And in many cases, judges who are frustrated with the severity of the drug guidelines will use this as a mechanism to provide lower penalties for some couriers who-- where it may not be warranted.

For those reasons, and some others, I'm reluctantly going to oppose it.

CHAIR MURPHY: Michael?

COMMISSIONER HOROWITZ: I want to echo Commissioner Steer's comments, although I think I would have gone further in the proposal, and we put forth a proposal that would have generally agreed with the--well, it's a close circuit split. I think my understanding is it's 4-3, roughly, right now. So this is not, by any means, a lopsided split in the circuits, but I think it's unfortunate.

And Commissioner Steer put forward, I thought, a very fair, balanced, moderate approach to this issue that would have, I don't think, tipped the balance either way, but would have laid

out much more clearly for a judge, for judges and prosecutors, and probation officers how to deal with this issue.

We feel strongly this is the wrong way to go with this amendment. There are 5,400 cases, it looks like, just in '99 that would be now eligible for--or would have been eligible for this mitigating role enhancement.

And I think one of the significant results of this will be a large uptake in litigation in these 5,000-plus drug cases over this very issue, where couriers and other solo defendants who are caught at the border and are not charged in any larger conspiracy, are only be held accountable for the drugs that they have, will litigate this issue as to whether they, and they alone, because they're the only ones here, you heard, are entitled to two levels off.

And for those reasons, I was disappointed that the Commission did not go with Commissioner Steer's compromise.

[Simultaneous conversation.]

CHAIR MURPHY: Okay. Michael?

COMMISSIONER O'NEILL: I would just say that I'm also inclined to oppose this amendment, basically for the reasons that Commissioner Steer and what Mr. Horowitz have represented, and the fact that I don't think that it's fundamentally unfair to hold the individual responsible for the drugs that's found on him.

I do have problems, as I've mentioned before in other contexts, with the idea of relevant conduct, especially in the light of Apprendi v. New Jersey. But in with regard to these particular facts of this type of a circuit split, I don't find it particularly unfair. But I do think that this does bespeak, especially the closeness of the circuit split in this instance, bespeaks the problem that many people have with the perception of the relative harshness of the drug tables, and not only the harshness of the drug tables, but also the importance of the role in the offense.

What I would hope at some time the Commission would do is to rethink, and I hope to

propose this at some point in time, to rethink the way in which role of the offense, and quantity of drugs, and drug type interact with one other to revisit what I think we all recognize is an enormous problem: the fact that quantity sometimes, not all the time, but at least sometimes will greatly overstate the culpability of the criminal in any given offense.

I don't think, as a policy matter, that adopting the amendment that Judge Castillo has proposed is the right way of going about it. I do think, however, a comprehensive review of both the drug tables, in terms of quantity, and also role in offense is something that's incumbent upon the Commission to do.

VICE CHAIR CASTILLO: I will look forward to working with Michael on that. But in the meantime, the situation is this: In four circuits, this reduction, and I emphasize this, is available. It's not necessarily mandated. My review, close review of circuit law in those four circuits is most of the time they are affirming situations



where the District Court, in its discretion, has decided not to give any reduction, neither minor or minimal.

I think that this amendment makes it plain that the downward adjustment for a minimal participant will be used infrequently. Moreover, I think it creates unwarranted disparity that there are three circuits where this role reduction is not even available. And to allow that to continue to go ahead, while we plow ahead into the areas that you've described, would be, to me, simply unconscionable. That's why I hope that my colleagues will support this amendment.

COMMISSIONER KENDALL: There's one thing I'd like to say to something that was just said, and I just want to take exception to it. There are two things.

First of all, while it is true when you're a federal judge and you raise your little right hand and take that oath that pretty much the genie is out of the bottle, and if you have a willingness to violate your oath, you can do it any time you

choose to, and most of the time it's not reviewable.

Having said that, in my experience, I know a whole lot of judges who gripe, and complain, and carry on about the guidelines, but even those individuals, and there are relatively few of them who I've ever run across who I believe openly and defiantly violate their oath, and so I reject the proposition that that's somehow driving what's going on with regard to the application of this amendment. That's number one. I mean, I--in the circuits, I believe that they make a good-faith analysis and apply it if it applies, and don't if it doesn't.

Indeed, Judge Castillo pointed out, in the cases he read to us, the circuit decisions, most of them deal with appeals of denials of giving this adjustment. That's number one.

Number two, with regard to uptake in litigation that was mentioned by Mr. Horowitz earlier, this is the majority view. This is status quo in probably over half the--I don't know the

breakout--but in a goodly number of cases, this is what's being done now anyway, as I understand it. So I just wanted to make those two points before we vote.

CHAIR MURPHY: Yes?

VICE CHAIR SESSIONS: I just very briefly would like to say that this is, like many others today, the result of a compromise, and I'd remind everyone that it remains the language, which had been recommended obviously by the staff to omit, but the language remains that minimal role--I don't know exactly what the word is, minimal--or it is intended that the downward adjustment for minimal participant will be used infrequently.

CHAIR MURPHY: Well, I think that in the last analysis, this is another area where are you going to have faith that the judges are going to make sensible decisions based upon the evidence that's produced before them, and the trial judge is the one that is able to evaluate the system--the situation.

Michael Horowitz did present to us the

situation that in a lot of these circumstances the only actual witness that would be available would be the defendant, and that was something that was considered. But there was the counter view that this is something that judges do all the time, and judging the credibility. So the availability of this doesn't mean that it will be applied in all of these cases, by any means.

VICE CHAIR CASTILLO: In fact, there is some language, Madam Chair, that says that, as with any other factual issue, the Court, in weighing the totality of the circumstances, is not required to find, based solely on the defendant's bare assertion that such a role adjustment is warranted.

COMMISSIONER KENDALL: Madam Chair, I had a question on your comment about trusting the District Court to make the right decision. Are you speaking as Chair of the Sentencing Commission or as a judge of the Eighth Circuit?

[Laughter.]

COMMISSIONER KENDALL: I guess you don't have to answer that.

[Laughter.]

CHAIR MURPHY: I'm very sympathetic. I was a trial judge for, you know--

COMMISSIONER KENDALL: I know that.

CHAIR MURPHY: --19 years. I'm very sympathetic to the role of the trial judge.

Is there any discussion? This is an area that I--well, the circuit conflict shows that it's an area where reasonable people are going to think about it a lot and have disagreement.

We have been given the job by the Supreme Court to address these conflicts. And one of the goals of the Sentencing Reform Act is uniformity, and by having the conflict resolved, even if it is an imperfect resolution, we are serving the purposes in that way.

Are there any other comments?

[No response.]

CHAIR MURPHY: Would you call the roll?

MR. McGRATH: On the motion by Vice Chair Castillo and seconded by Commissioner Johnson, Vice Chair Castillo?

VICE CHAIR CASTILLO: Yes.

MR. McGRATH: Vice Chair Sessions?

VICE CHAIR SESSIONS: Yes.

MR. McGRATH: Vice Chair Steer?

VICE CHAIR STEER: No.

MR. McGRATH: Commissioner Johnson?

COMMISSIONER JOHNSON: Yes.

MR. McGRATH: Commissioner Kendall?

COMMISSIONER KENDALL: Yes.

MR. McGRATH: Commissioner O'Neill?

COMMISSIONER O'NEILL: No.

MR. McGRATH: Chair Murphy?

CHAIR MURPHY: Yes.

MR. McGRATH: The motion passes.

CHAIR MURPHY: Then we have a group of issues that are in a pack called "Remaining Items." These are a large part of this group are issues that we have voted on earlier this year as emergency amendments, and now the issue is making those into a permanent amendment. And this would apply to the ecstasy, the amphetamine, GHP, List 1 chemicals, human trafficking.

And then there are some other matters that we felt did not need individual explanations here because of the bulk of the work that we needed to do on these votes today.

Andy, is there anything that you want to say about this package?

MR. PURDY: I would only say that those amendments which are repromulgations of emergency amendments are listed in the heading of the particular amendment.

CHAIR MURPHY: Is there a motion related to these items?

COMMISSIONER O'NEILL: I would move that we adopt these items, Madam Chair.

VICE CHAIR STEER: Second.

CHAIR MURPHY: Does anybody feel compelled to talk about any of the substance of these?

COMMISSIONER O'NEILL: I promise I'll keep, with respect to each of the 11 items, I promise I'll keep my remarks to no more than five minutes per item.

[Laughter.]

COMMISSIONER O'NEILL: No, Mr. Chair.

CHAIR MURPHY: Anything anybody wants to say?

[No response.]

CHAIR MURPHY: Okay. Let's have a voice vote on this one.

MR. McGRATH: On the pending motion, Vice Chair Castillo?

VICE CHAIR CASTILLO: Yes.

MR. McGRATH: Vice Chair Sessions?

VICE CHAIR SESSIONS: Yes.

MR. McGRATH: Vice Chair Steer?

VICE CHAIR STEER: Yes.

MR. McGRATH: Commissioner Johnson?

COMMISSIONER JOHNSON: Yes.

MR. McGRATH: Commissioner Kendall?

COMMISSIONER KENDALL: Yes.

MR. McGRATH: Commissioner O'Neill?

COMMISSIONER O'NEILL: I would just note, for purposes of the Chair, that this is technically a voice vote, as well.

[Laughter.]



COMMISSIONER O'NEILL: Yes.

CHAIR MURPHY: Yes, I was just trying to be flexible.

[Laughter.]

MR. McGRATH: And Chair Murphy?

CHAIR MURPHY: Yes.

MR. McGRATH: The motion passes.

CHAIR MURPHY: Okay. Now is there a motion to make anything retroactive at this time?

MR. PURDY: Pardon me. Could I just read the rule, briefly?

CHAIR MURPHY: Yes, you may.

MR. PURDY: Rule 4.1 provides as follows:

"Generally, promulgated amendments will be given prospective application only. However, in those cases in which the Commission considers an amendment for retroactive application to previously sentenced imprisoned defendants, it shall decide whether to make the amendments retroactive at the same meeting at which it decides to promulgate the amendment."

So, in other words, the rule requires that

the Commission decide whether to make the amendment retroactive. So I would encourage the Chair to entertain a potential motion for retroactive application of any of the amendments that the Commission has passed.

CHAIR MURPHY: Does any Commissioner have such a motion?

[No response.]

CHAIR MURPHY: Okay. Then you have a concern about the technical conformity.

MR. PURDY: Yes. I would ask the Chair to entertain a motion to designate the effective date of each of these amendments as November 1st of this year and to authorize the staff to make such technical conforming and clarifying amendments as may be necessary.

VICE CHAIR STEER: So moved.

CHAIR MURPHY: Is there a second?

COMMISSIONER JOHNSON: Second.

CHAIR MURPHY: All in favor, say aye.

[Chorus of ayes.]

CHAIR MURPHY: Opposed, no.

[No response.]

CHAIR MURPHY: Do you have anything else?

[No response.]

CHAIR MURPHY: I would say that there obviously are some things that we published along the way this year that we have taken off the table, and you may have recognized that there were some flexibility options. There were some sentencing tables.

It was mentioned the incest portion of the sexual predators, there may be others that aren't coming to my mind right now, but with the tremendous amount on our agenda, and taking into consideration the comment that we got back, we concentrated on where we thought we could do a thorough job. And we did deliberately pull the incest portion of the sexual predators because of comments that we got from people who were aware that we were going to have a public hearing in Rapid City, South Dakota, on June 19, and that there would be people that would like to address that issue, and also the issue on the

anthropological and cultural treasures.

So far as I know, that completes the business.

VICE CHAIR SESSIONS: Move to adjourn.

COMMISSIONER O'NEILL: Second.

CHAIR MURPHY: All in favor, say aye.

[Chorus of ayes.]

CHAIR MURPHY: By unanimous--

COMMISSIONER KENDALL: Could we have discussion on that?

[Laughter.]

CHAIR MURPHY: Well, just because you were able to step out--okay. The meeting is adjourned.

[Whereupon, at 4:15 p.m., the proceedings were adjourned.]

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