JUDGE HINOJOSA: I also want to take this opportunity to thank the members of the press, who are here, and that we hope you have found this as interesting as we have.

Our next panel is basically representing a view from the defense bar, as well as some victims rights advocates. We do have Susan Howley, who is the Director of Public Policy and Victim Services with the National Center for Victims of Crime. We have Ms. Carmen Hernandez, who is the Second Vice President with the National Association of Criminal Defense Lawyers. We have Ms. Amy Baron-Evans, who is the Co-Chair at the Practitioners Advisory Group that works with the Sentencing Commission, as well as being an attorney here in D.C.

MS. BARON-EVANS: Boston.

JUDGE HINOJOSA: Boston. I was trying to make it better for you.

[Laughter.]

JUDGE HINOJOSA: Although I do love Boston.

And David M. Porter, who is an Assistant Federal Defender with the Federal Defender's Office in Sacramento.

We'll start with Ms. Howley.

MS. HOWLEY: Thank you. Good afternoon, Mr. Chairman, and Members of the Sentencing Commission. My name is Susan Howley. I'm the Director of Public Policy and Victim Services at the National Center for Victims of Crime. The National Center is the nation's leading resource and advocacy organization for victims of crime, and our mission is to forge a national commitment to help victims of crime rebuild their lives.

I'm here this afternoon to remind you of victim concerns regarding the reexamination of sentencing procedures following the Supreme Court's decision in Blakely v. Washington. I would like to be clear at the outset that I am not here to address the structure of sentencing guidelines, or the constitutionality of various proposals for reform, but because your deliberations and the resulting actions may impact victims, I am here to make you aware of the possible implications.

The National Center for Victims of Crime will celebrate our 20th anniversary next year. During these 20 years much of our work has focused on securing rights and resources for victims of crime. At the time we were founded back in 1985, the victims rights movement was just beginning in earnest across the country, and today, every state and the Federal Government has a legal set of rights for victims of crime.

The rights of victims to be informed, present and heard throughout the criminal justice process, and the right to restitution from convicted offenders are now bedrock principles of our system of justice, strongly supported by the American public. Victims rights' amendments to state constitutions have passed by an average voter approval rating of 79 percent. These rights do more than help the victims of crime. They make our system of justice stronger by ensuring that the voice of victims informs the decisions.

The response to Blakely and the related cases may impact two core victim rights, the right to allocution at sentencing, and the right to restitution from the convicted offender.

The first of these rights, allocution at sentencing, is important to victims and to the general public. For victims it may be the first opportunity they have had to be heard in court. It's likely the first time that they'll be able to communicate to the court the personal harm that they have sustained. Victim impact testimony serves an important purpose in sentencing. In calling on judges to allow for and give appropriate weight to victim input at sentencing, President Ronald Reagan's Task Force on Victims of

Crime observed that, "A judge cannot evaluate the seriousness of a defendant's conduct without knowing how the crime has burdened a victim. A judge cannot reach an informed determination of the danger posed by a defendant without hearing from the person he has victimized.

The Supreme Court too has recognized the appropriateness of victim statements at sentencing in the 1991 case of Payne v. Tennessee. In holding that the admission of victim impact evidence at sentencing is not barred by the Constitution, the Court "reaffirmed the view expressed by Justice Cardozo...'Justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.'"

Today every state and the Federal Government allow victim input at sentencing, and nearly all allow that input to be in the form of oral statements at sentencing. At the federal level victims of violent and sexual offenses currently have that right, and because of the Justice for All Act, just passed last month, this right will be extended to all victims of crime at the federal level.

A change in sentencing procedures may affect the victim's right to allocution at sentencing if it increases the burden on victims. Because victim impact is not expressly an element to the Federal Sentencing Guidelines, with the exception of a few discrete facts such as the vulnerability of the victim, it's possible Blakely and the resulting reforms will not affect victim impact testimony. However, if victim impact testimony is determined to be an element in the severity of the punishment, and thus would have to be proven beyond a reasonable doubt, victims may be increasingly subject to cross-examination.

If they are subject to cross-examination regarding the impact of the offense, some will be too intimidated to exercise this important right. The thought of enduring scrutiny of their reactions to crime and of the physical, emotional and financial repercussions of that offense, will be more than some victims can bear. Some protection may be provided victims by expressly limiting any cross-examination to their factual statements, as is currently the case under Maryland law.

The second of the rights, the victim's right to restitution from a convicted offender, also serves an important purpose to the victims themselves, to the general public, and even to the defendant. To victims, restitution represent an acknowledgement by the criminal justice system that the harm was done to them, and that the defendant is personally responsible for that harm.

For defendants, restitution has been seen as an effective rehabilitative penalty because, as the California Court of Appeals has noted, "It forces the defendant to confront, in concrete terms, the harm his or her actions have caused. Such a penalty will affect the defendant differently from a traditional fine, paid to the state as an abstract and impersonal entity, and often calculated without regard to the harm the defendant has caused."

And the Victims Committee of the ABA, in a report issued earlier this year, called restitution "an important part of the healing process in the aftermath of crime...Even a small amount, paid regularly, instills in an offender a sense that he or she has the power to right some of the harm done during the crime, gives a measure of satisfaction to society to know the offender's being held accountable, and provides a degree of parallel justice to a victim."

All states and the Federal Government allow restitution to be ordered at sentencing, and more than a third of states require that it be ordered in every case involving harm to a direct victim of crime, unless there are compelling circumstances that warrant an exception. As you know, at the federal level, restitution is mandatory in cases of violent crimes and certain other offense, and discretionary for all other offenses.

Revisions to sentencing procedures and guidelines may affect the victim's right to restitution

from the convicted offender. Courts may view restitution as purely compensatory, as opposed to punitive, and thus exempt restitution procedures from any reforms related to punishment for the crime. But if restitution is viewed as part of the punishment, the potential need for even more involved proceedings regarding restitution and the financial capacity of the defendant to pay, may make courts far less willing to order restitution.

A third issue of concern to victim advocates, and one that is arguably of even greater concern, is the prospect that evidence relating to victim harm could be subject to a higher standard of proof than evidence regarding mitigating factors at sentencing. Such a change would likely cause victims and the general public to view the criminal justice process as inequitable. Some proposed responses to Blakely call for subjecting evidence of aggravating factors, which may include victim impact testimony and restitution requests, to a higher standard of proof than mitigating factors. If the victim is subject to cross-examination regarding the impact of the offense, but the defendant's witnesses are not subject to the same cross-examination when arguing for leniency, victims and the general public may see the justice system as unfair and biased. The standard of proof for both aggravating and mitigating factors must be equal.

And then finally, as you consider the potential impact of your responses to Blakely and similar cases, and revise procedures regarding sentencing, we would urge you to take this opportunity to incorporate a system to document the implementation of victims' rights. For example, Maryland's sentencing guidelines worksheets provide a place to indicate whether a written or an oral impact statement was submitted, whether the victim was present, whether the victim was notified, et cetera. I attached a copy of the relevant worksheet pages to my written testimony.

The recently-enacted Justice for All Act requires the Attorney General in this next year to develop regulations to promote compliance with victims' rights. And the Act also calls for a study of the effect and efficacy of the implementation of the victims' rights provisions on the treatment of crime victims in the federal system. Your current reexamination of sentencing procedures provides an opportunity to promote compliance and monitor implementation by the use of a simple mechanism to record the implementation of victims' rights.

In conclusion, as you reexamine sentencing procedures to protect the rights of criminal defendants in the light of Blakely, the National Center for Victims of Crime urges you to protect the rights of victims as well. Any impairment of these rights would undermine the public's trust and confidence in our system of justice.

JUDGE HINOJOSA: Thank you, Ms. Howley.

Ms. Hernandez, with the National Association of Criminal of Criminal Defense Lawyers?

MS. HERNANDEZ: Can we be difficult, Your Honor, and go in a different order?

JUDGE HINOJOSA: I would have been very surprised if you had decided not to be difficult.

[Laughter.]

JUDGE HINOJOSA: Well, which order would you like for me to follow? Mr. Porter first?

MR. PORTER: I'll step up.

JUDGE HINOJOSA: Mr. Porter, with the Assistant Federal Defender, by popular demand, from the Federal Defender's Office in Sacramento. Sir?

MR. PORTER: Thank you. Mr. Chairman and Members of the Commission, thank you very much for the opportunity to appear before you today.

Blakely has been described variously as a 10 on the Richter scale tsunami revolution. And I

participated in a roundtable discussion at Stanford Law School last month, and on the cover you'll see that there is a picture, a little clip art here. You might not be able to see--

JUDGE HINOJOSA: That's not one of us, is it?

[Laughter.]

MR. PORTER: It's Godzilla. And this Godzilla I guess is supposed to represent Blakely. I come from you to the field to tell you and report that our nation's courts are not being trampled on by a Japanese monster, that pleas are being negotiated every day, sentences are being imposed, trials are being conducted. And the prospect that some have anticipated about chaos is, we think, overstated. There is major dislocation after every significant Supreme Court case dealing with criminal procedure. If you recall, after the Miranda decision, Congress passed a law to repeal Miranda. So that wasn't engaged by the Attorney General for quite some time. But there is dislocation after all major decisions. Blakely is no different.

The Commission's questions asked me first to focus on the Bowman Proposal. Now, what the Bowman fix proposes to do--as far as I understand it, and there are several iterations of it--is to eliminate the top of the guideline range replace it with the statutory maximum. We believe that the proposal would almost surely be found to violate the defendant's right to jury trial, but more importantly, it simply defies common sense and violates fundamental tenets of sound sentencing policy.

First let me address the constitutional issue. In Apprendi v. New Jersey the Court declared that it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the "prescribed range of penalties" to which the defendant is exposed. Now, I'll be the first to admit that I paid more attention to the alternative statement of Apprendi's holding that spoke about facts increasing the "statutory maximum." I apparently was not alone in my misunderstanding because every Circuit Court of Appeal in the nation held that Apprendi did not apply to the guidelines. But now the Supreme Court has spoken, and has cleared the confusion and declared that all facts essential to punishment must be pled and proved to the jury.

Does this mean that facts essential to a mandatory minimum sentence must also be pled and proved to the jury? Not yet. In Harris versus United States the Court ruled 5 to 4 that they did not. But joining the four-Justice plurality, Justice Breyer acknowledged that Apprendi's logic covers mandatory minimum sentences as well. He stated somewhat cryptically that he was not "yet" prepared to accept Apprendi. But with the mellowing influences of Blakely, Booker and Fanfan, perhaps Apprendi, like a fine wine, will not only be accepted, but savored.

We believe the Bowman Proposal is unconstitutional and that a majority of the Supreme Court would so hold. While the proposal's constitutionality is at least arguable, its advisability is not. First, it simply defies common sense. How does it remedy the violation of a defendant's right to trial by jury to say, "We'll simply increase the maximum sentence to which you are exposed."

Second, it is unsound policy. By allowing judges to sentence up to the congressionally created maximum, the proposal would promote the unwarranted disparity the guidelines were intended to eliminate. This disparity would be exacerbated by the unconstrained ability to upwardly depart, while subjecting downward departures to strict de novo review. If there were an empirical basis for concluding that federal sentences are generally too lenient, the proposal might be promoted on policy grounds. But the opposite is true. We imprison far too many people in this country, and we imprison them far too long. In the words of Justice Kennedy that I've quoted in my written testimony, "The Federal Sentencing Guidelines should be revised downward."

The Commission's questions suggested the intriguing idea that a process of rigorous appellate review might save the Bowman fix from the indeterminacy and unwarranted disparity that it would surely spawn. I can conceive of no such process that would not itself violate Blakely's command. But in the end the Commission should ask itself: why strive mightily to fix the fix? If certainty, proportionality and fairness must be sacrificed for no other reason than to save the guidelines, then let's not destroy the guidelines to save them.

Defenders are too often accused, with some basis, I'll admit, of being naysayers. This is unconstitutional, that's unconstitutional. But today we come to the Sentencing Commission not only to criticize the Bowman fix, but to praise the Kansas approach. True to the holding and spirit of Blakely, the Kansas legislature required that all sentencing enhancing facts be proven to the jury, and it provided for bifurcated trials. We believe the Kansas sentencing model to be eminently workable. Most sentencing determinations in federal court are relatively straightforward. No federal sentencing is as complex as a capital sentencing hearing, where juries deal with fact finding beyond a reasonable doubt routinely and in accordance with constitutional requirements.

I urge the Commission to read the amicus brief of the National Association of Federal Defenders, which is appended to our written testimony, which demonstrates that the requirements of Blakely are readily assimilated into the federal sentencing system to follow the Kansas model. We urge the Commission to amend the guidelines to modify the relevant conduct provisions and eliminate real offense characteristics in cross-references that allow a defendant to be sentenced for uncharged, dismissed and acquitted conduct. These revisions, which ameliorate the most fundamental violations of a defendant's right to jury trial can be undertaken immediately.

Other remedies, such as the proposal by the Practitioners Advisory Group, that are focused on the longer term, should be considered by an ad hoc advisory group composed of the federal defenders and other members of the defense bar, academics, federal judges, and attorneys from the Department of Justice.

Just to respond to a question--I believe it was by Commissioner Steer--about the costs of conforming to Blakely, I direct the Commission to page 7 of the amicus brief, which says that those who predict chaos rejoin by predicting that Blakely will cause an increase in trial and a decrease in plea negotiations, and the statistics actually say the contrary. Pleas have been going up; trials have been going down since Apprendi in major drug trials, while the number of those types of trials have been going up. So there is empirical evidence that would suggest that complying with Blakely does not increase costs.

Thank you very much.

JUDGE HINOJOSA: Thank you very much.

Ms. Baron-Evans--and I know I kidded you about Boston, but that's the only place I've ever lived outside of Texas, and I enjoyed every minute of it except exam periods. And you, of course, are co-chair of our Practitioners Advisory Group.

MS. BARON-EVANS: Yes. I'm one of the co-chairs. My other co-chair, Mark Flanagan, is here, and we thank you for inviting us to tell the Commission our views today.

I wanted to say one more thing about the Bowman--before I say what we do support, I wanted to say something else about the Bowman Proposal. We agree with everything that David just said in terms of the unconstitutionality and the poor policy represented by the Bowman approach. I know you're aware that it was designed as an interim fix, but even as an interim fix it doesn't make any sense.

Because one of the people on the earlier panel said that he thought that the Bowman fix could pass muster under the ex post facto clause, I am unsure how that could be because it increases the potential maximum without a doubt. And so does the upside down guidelines' interim fix that Professor Goldsmith described. So, in other words, either the upside down guidelines, or the Bowman fix, if you tried to implement that as an interim fix, it wouldn't kick in until cases in which the offense was committed after it was enacted. So by the time you got a new system in place, those cases would just be making it through the system. So it's just sort of illusory to even use it as an interim solution.

We support, the PAG supports what Jim Felman has submitted to the Commission and that he calls codified guidelines, and that apparently Professor Saltzburg supports, and even I think Professor Goldsmith supported as a long-term proposal. Under that solution, we would hope that the Commission would be appointed by Congress or directed by Congress to identify the most important sentencing factors that Congress would then codify as elements, and the Commission would also identify and perhaps simplify the other guidelines factors to be used as within range advisory guidelines. This would involve decreasing the number of ranges, and widening them accordingly. Proposals have been made for 10 or 15 ranges rather than the current 43. The bottom and top of the range would be dictated by the sentencing elements that would now be codified by Congress. The possibility of bifurcation to prevent prejudice and confusion, subject to abuse of discretion review, just like as in the Kansas solution.

We support this approach for a number of reasons, one of which is that it honors the letter and the spirit of the constitutional right to have facts that are essential to punishment charged in an indictment, submitted to a jury, and proved beyond a reasonable doubt. It's not a gimmick. It honors what we expect the Supreme Court to say in Booker and Fanfan, and what it's already said Apprendi and Blakely.

It also maintains a system of guidelines, and we agree, and I think most people who care about rational and sound sentencing policy agree, that guidelines are good because they prevent unwarranted disparity and they give us certainty. We disagree about how high they should be, but in principle guidelines are a good thing, and this system would maintain a guideline system.

We think that this will improve accuracy and fairness because the sentencing range will be found based on a higher burden of proof and a more reliable kind of evidence. This solution also preserve the judicial role in sentencing by giving the judge within-range discretion, guided discretion within the range, and departure would still be available for circumstances not accounted for in the elements or the within-range advisory guideline, subject to appeal by the government.

I think maybe what's best about this approach is that it would require the Sentencing Commission to really have a role in this and reexamine what factors are important to punishment and how much they should affect defendants' sentences. It's just sentences have just sort of inexorably increased over the years, and people have been calling for the Commission to look at that for a long time, and this presents really a great opportunity to do that.

We all know that the real offense system was instituted to prevent the transfer of power from the Sentencing Commission and from judges to the prosecution. Judge Breyer talked about that again at the Blakely argument, and he wrote about that, and that was very important to him. I think a couple of things have happened as a result of real offense sentencing that nobody anticipated or intended. One of them, the main thing is that it has transferred power to the prosecution in less visible ways. When the prosecution is able to charge an easily provable offense and get a sentence for other offenses that either

weren't charged or were dismissed or of which the defendant was acquitted, it gives the prosecutor undue power. It gives the prosecutor undue power at sentencing and in plea negotiations. It also reduces the fairness and accuracy at sentencing.

Under the codified approach, relevant conduct would no longer be able to be used at sentencing. If a fact could be charged as an element or as a separate offense, it would have to be charged that way. And I think that is pretty much the result of Blakely anyway, or if Blakely is applied to the guidelines, I think that's the result of that decision. The defendant would have notice of what he or she would be sentenced for. Unlike the situation now, there's no surprise attack. You would know what your range was going to be, and there would have to be discovery of the sentencing elements just like any other element today. So you could make a more informed decision in plea bargaining and in deciding whether or not to go to trial.

Those are the reasons we support the codified guideline solution. We do not support advisory guidelines because we think that it--maybe not at first, but eventually will invite too much disparity. In order to prevent that, you would end up having to impose controls that would just basically put us back to the guideline system we have today that would be unconstitutional for the reasons that this one is.

Let me see if there were any others. The Kansas approach, I will just say it's our experience too, you know, our group as practitioners who represent both the poor and the rich, and we have not seen chaos as a result of Blakely either. You know, based on the Ray memo, where Assistant Attorney General Ray has directed prosecutors to charge and prove these items, these factors to a jury beyond a reasonable doubt, they obviously can do that. They've been doing it in our district, and I would just--I think the chaos argument is overstated, and that we do hope that the Commission will advocate a decent interval in which a new system can be studied and implemented.

Thank you.

JUDGE HINOJOSA: Thank you, Ms. Baron-Evans.

Ms. Hernandez with the National Association of Criminal Defense Lawyers.

MS. HERNANDEZ: Good afternoon.

JUDGE HINOJOSA: Is it okay now? Is it your time?

[Laughter.]

MS. HERNANDEZ: I was going to say congratulations, Judge, for--this is your first hearing as Chair, and also I think--

JUDGE HINOJOSA: Obviously, a total disaster.

[Laughter.]

JUDGE HINOJOSA: Couldn't control the witnesses.

[Laughter.]

JUDGE HINOJOSA: But go ahead. I'm cutting into your 10 minutes.

MS. HERNANDEZ: And I want to congratulate the whole Commission. I think this is a great opportunity. You know, had Blakely not come down, we would have been sitting here, at least on this side of the fence, railing about the next set of enhancements, the next set of guidelines that have lost any relationship to the original intent of the guidelines. So I think, I hope that the Commission really takes this time and whatever fix comes out of this is a fix that's consistent with what you've learned, what we've all learned over the past 20 years. And in some ways, I mean a lot of the discussion that we've had today about the enhancements and identifying loss in quantity, for example, as two items that juries would like, I mean, our experience has been that loss and quantity in fact overstate culpability for a lot

of people, and until six months ago I think we all--a lot of us--agreed about that. So I hope that in this sort of turmoil, not in the courts, but in the world of academia and in the world of the Sentencing Commission that's taking place, that we don't lose sight of what we really do know here. And so I hope, as far as quantity and loss, it's one big deal.

The other proposal that's being floated around in a number of ways is this idea of either building enhancements into the base offense level, or an upside down, where the defendants would have to prove that they're less culpable than the guideline.

Again, I mean, I hope that if--I hope that's not the resolution. But if that is the way you go, I hope that you use the data that you have so that you end up with a base offense level that resembles culpability and what crimes are committed. I mean, your data, the data that we have--and I know you have a lot more data and I hope you publish it as soon as possible, as an aside--your data reflects that most enhancements are very rarely applied. I mean, I think the gun enhancement in the drug guideline is probably the most prevalent enhancement, and even that's only about 16 percent of cases. So if you build in that type of enhancement into a base offense level, 80 percent of the defendants are going to be sentenced for something that they didn't do. I want to--I mean, that's the one major point that I want to make as far as fixes.

The other thing that I think we may be overlooking is a point that Amy just made about ex post facto and the illusory nature of rushing to get a fix in. In fact, nothing you do is going to start applying to the hundreds of cases that are sitting in the pipeline waiting for the Supreme Court to rule--or at least it's a very difficult situation. I mean, if Blakely says that the statutory max is the unenhanced base offense level, there's a ceiling out there for every defendant who's sitting waiting to be sentenced. And nothing, no Bowman fix, nothing is going to change that.

So perhaps I would suggest that maybe Kansas is the only thing that can fix it. And it wouldn't be ex post facto as to those defendants. I'm not conceding that. But I mean, that may be--I mean, I'm not joking. It's a complex issue. But I think that may be the best solution to what's happening. And it also may be a response to Congress if they're trying to rush to get something, that you do in fact have six or eight months to sit down and try to figure out what you want to do. And I do hope the Department of Justice joins us in this effort and does the right thing, as I define the right thing.

No, I mean, I do hope--it was interesting, I was reading some articles in preparation for today--you know, Judge Wilkins's article with Commissioner Steer on how relevant conduct was the cornerstone of the guidelines. And the first sentence was about how the 1984 Sentencing Reform Act was overwhelmingly passed with bipartisan support. I know we live in a different world and we have red and blue states, but this is an issue that affects, you know, a lot of people. We are imprisoning people at an incredible rate for very long periods of time. Whatever comes out of this is going to stay with us for many years. And I would really hope that we could find some common ground that doesn't--that looks to what we're doing here. And in terms of the cost, I mean, if we even reduced punishment by 5 percent, that would be all the money you needed to fund probably four new judiciaries.

So, I mean, I really want to reach out to the Department of Justice. They've got all the cards, frankly, the truth is. And I think it's going to be very difficult for them to give up a lot of what they--I mean, it's been 20 years of getting more and more power each day that passes. And their power's not just in the courtrooms; it's in Congress, it's before the Sentencing Commission. And I would hope that they would try to look at the big picture and try to create a better system.

Because I think the Sentencing Guidelines are broken, have been broken for a long time. We are incarcerating more and more poor people, more and more minorities. I mean, 40 percent of the federal prison population is Latino, 30 percent is black. The other 20 percent, maybe 25 percent, are, you know, poor. A lot of them are mentally disturbed, mental health problems. We're going to start bringing in some white collar people now, it looks like, to even out those numbers. But in fact, it is a sad situation.

And I can't imagine that--I see Bowman as a waste of this incredible opportunity to do something about the problems with the guidelines. It just--it preserves everything bad in the guidelines and makes it worse. I mean, one of the horribles of the guidelines is relevant conduct. Commissioner O'Neill, who has been talking about the bad things from relevant conduct since the first day you became a sentencing commissioner. And Bowman keeps that in place at a time when Blakely gives us an opportunity to do something about it.

There is actually a very simple fix that would go into effect the moment the Supreme Court issues its opinion, and that is judges get all the power back for about six hours, it looks like. And it depends on how the Supreme Court comes down. But if the Supreme Court says that the guidelines are--if the Supreme Court says the whole system is broken, in other words, no guideline can be imposed because you can't sever it out, I think you still retain one sentence in 3553(b) that says if there are no guidelines, judges are supposed to--if there is no applicable guideline, judges are to look to 3553(a) and to 3553(a)(1) and (2).

So the moment the Supreme Court decides the case, if a smart defense lawyer appears before a judge, what the law says is go to a judge, have him impose a sentence without reference to the sentencing guidelines, using "sufficient but not greater than necessary" and "the purposes of sentencing" as the guide. That would not be a bad response in the interim while you prepare to do whatever gets done. I mean, the system does not come to an end.

The other part of that, I think, is this notion that--I mean, that, I think, I would prefer to advisory guidelines, although if you're going to do advisory guidelines, I would propose, and my testimony lists it, that you eliminate some of the worst of the guidelines even during the advisory guidelines.

If you do fact-finding in a, like, Kansas-type fix, I don't know why people think that that's not doable. And I found it interesting that one of the people testifying earlier was talking about how difficult it is to present these issues to a jury. I mean, every day defendants are brought before a court, are asked to plead guilty--a knowing voluntary waiver, a knowing voluntary guilty plea. They stand before the courts, courts require them to say, Oh, yes, we absolutely understand, my attorney explained the guidelines to me and I absolutely understand. If our clients can understand, juries can understand.

What else--is there one more thing that I can say?

Mandatory minimums are a horrible thing. We all know that. I would hope that the Commission would update its 1991 report. I would hope that the Commission comes out with the 15-year study and provide us with more information.

And I think we can do this, but I hope we do it in the right way.

Thank you.

JUDGE HINOJOSA: Thank you.

Before we start with the questions, I guess I'm going to invite some Perry Mason-type moment from the spectators. If at any point either John Sands, who's here with us, who's the defender from

Arizona and is with the Guidelines Committee at the Federal Public Defenders; or Andrea Taylor, who's with the Federal Public Defenders here in D.C.; or Mark Flanagan or Jim Felman feels like he would pop up and want to answer one of these questions because of your expertise and your work with the people who have made the presentations, we certainly would not object to that Perry Mason-like action on the spectators section, if you feel comfortable enough to do that.

COMMISSIONER SESSIONS: As long as you understand you're admitting to guilt.

[Laughter.]

JUDGE HINOJOSA: Vice Chair Steer?

COMMISSIONER STEER: Two things I'm wondering about. They're not, I don't think, directly related, but I'll ask them now because I may not get another chance.

The first question is, in your guideline reform world, to what extent are aggravating factors elements and to what extent are they not? I'd like your description of that.

Second, in your guideline reform world, I realize that you are advocates for the defendant. But tell me how you do accommodate, do you think, the concerns and rights of victims, or accommodate them procedurally?

MR. PORTER: On the first question, I'll be glad to address that. I don't think there is any need to parse things too finely. There are elements for all purposes. The plurality opinion in Sattazahn v. Pennsylvania suggests there is no reason to distinguish between the Fifth Amendment double jeopardy right and the Sixth Amendment right to jury trial when you're talking about these sentencing factors. And so--

COMMISSIONER STEER: Could I just ask you one further on that? You mean to say if, let's say, the government contends the aggravating role applies and the jury finds that it doesn't apply, the defendant goes free?

MS. HERNANDEZ: Yes. That's a good idea.

MR. PORTER: Yeah, sure.

COMMISSIONER STEER: I mean, I don't think you really mean that, do you?

MR. PORTER: No, I do, Your Honor--Commissioner Steer. I don't think there is any reason to say that a fact has dignity under the right to jury trial provision but does not under the double jeopardy provision. That's part of our constitutional heritage. I don't see that there's a distinguishing factor.

MS. BARON-EVANS: I would answer that by saying that the Commission--this might not be what you're after, but that the Commission would identify which factors are elements and which aren't. And I assume that would be done on the basis of frequency of application or how clearly they reflect culpability. A lot of people have complained that quantities and loss amounts actually overstate culpability to the exclusion of role in the offense. And the Commission could make adjustments that way. They could be, then, alleged in an indictment, and if the jury doesn't agree that it's there based on proof beyond a reasonable doubt, the defendant wouldn't go free; the defendant wouldn't get that enhancement.

As to the question about victims' rights, I would just say that, as our Constitution is written today, the defendant has the right to prove beyond a reasonable right and to cross-examine witnesses, and that's just a function of our constitutional structure. But as a practical matter, I don't really think that there are very many enhancements that you need--that either require or--and you would know this better than I, but if you say drug type and quantity or loss amount are the most commonly applied

enhancements, that doesn't require and is hardly ever proof by--well, there usually isn't a victim in drug crimes. So I'm not sure this is a very widespread problem, if it's a problem at all.

MS. HERNANDEZ: I think there's, actually, a very practical response to the question about the victims' concerns. I mean, if you're proving a case to a jury, the last thing a defense attorney wants to do is cut into the victim to the point where, you know, they've got the victim crying. So there is a natural sort of deference to a victim, particularly if we're talking about sort of a sentencing enhancement type issue. So I don't know that, as Amy said, first of all, I don't know that there are that many enhancing-type issues that arise in federal crimes to begin with. But even then, I think there will be some inherent ability not to sort of cross that line.

As far as your question, Commissioner Steer, on elements, I would prefer that they not be--I would prefer that they be sentencing enhancement, you know, the functional equivalent enhancement, whatever that was, that language in Apprendi. Because I think, in some ways, although I would like, you know, all the Fifth Amendment jury guarantees because I think in that way you might have a better chance at bifurcation--or the bifurcation balance might be different if you're talking about a sentencing enhancer as opposed to if you're talking about an element of the offense. I think if you're talking about an element of the offense, the judge is going to be weighing that differently.

And also, I think--I don't know that the Commission--if they're true elements of the offense, I think Congress has to identify those. I don't see how the Commission could decide what all these elements are. I mean, that definitely would cross the Mistretta line for more than just Justice Scalia.

JUDGE HINOJOSA: Commissioner O'Neill.

COMMISSIONER O'NEILL: Let me, again--we appreciate your coming here and bearing with us on this long afternoon. We really appreciate, obviously, your good work and your testimony here today.

Let me ask you sort of three things. And I guess one of the questions is a follow-up to what we've been discussing.

I've heard a lot and have been able to talk extensively with people at the Department of Justice about those sorts of factors that they believe it would be very difficult to prove to a jury. And I don't know, maybe this is something that you want to address later and submit to the Commission at some later date or we can talk about informally at some point. But I was wondering if there were any sorts of things within the guidelines now, specific offense characteristics or enhancements, that would be particularly difficult to defend against if in fact they were elements moved and placed as elements in the indictment.

The second thing is how do you feel about bifurcated proceedings? How do you feel about jury sentencing generally? I know that the House of Representatives in particular has expressed some interest in bifurcated trials or bifurcated--and having sentencing proceedings separately, done by a jury. Just from your perspective, there are obviously resource issues, there are other issues, obviously, that go to the defendant, and whether defendants you think it's in their best interests to have a bifurcated proceeding.

And then finally, in light of Blakely, and this is a question that I ask the judges as well--if there was a particular area of simplification--again, given the context of Blakely and Blakely's application if in fact Booker and Fanfan comes out as, you know, Blakely applies to the sentencing guidelines--where the Commission should focus its simplification efforts.

MS. HERNANDEZ: Well, relevant conduct is, you know, a grandaddy of simplification. I

mean, I think, as far as attorneys, as far as, you know, failure to really represent a client well because they don't understand how relevant conduct works, I think that's the one area that could be simplified. And it's also the one area where you have the most sort of Sixth Amendment issues, with acquitted conduct, uncharged conduct, dismissed conduct. Certainly, it seems to me that you should eliminate the same course of conduct or common scheme or plan. I mean, with your eyes closed.

Cross-references, that was a major problem in the Net porn cases, was--those Net porn guidelines--of course, you may not be able to do anything with--you have some Protect Act issues on Net porn cross-references. But cross-references are horrific--horrific from multiple areas. You're sentencing someone for something they didn't do, and it's also hard to assess where the case is going.

So, I mean, I think in criminal history the petty offenses create a lot of problems--proof problems. Probation officers have come to you and told you it's very hard--you know, the offenses that are like the driving-type offenses or the bounced checks that count in some instances but don't count in others, and those are also very susceptible to disparity.

The juvenile, I know juvenile adjudications also are complex. Data that's available to defense attorneys when they're representing young men is--in some states you get to see what the basis of the juvenile adjudication was; in others, you don't; so you have built-in disparity. And you have a lot of the juvenile--the purpose of juvenile court, supposedly, is for the juvenile, and sometimes the juvenile is adjudicated delinquent to get them out of a lousy home situation and has nothing to do with whether they actually committed a crime. So that's another area that would benefit from simplification.

Factors difficult to prove. You know, let me say this. I reached out to two people before I came. I reached out to the attorneys in Houston who just tried that Enron-related case. I didn't speak to one of the attorneys who was actually in the jury sentencing, but I did speak to another attorney who was in the case. And they--you know, they weren't perfectly happy with it, but it was not a problem. I mean, that sentencing went forward, I think, in about a day or a day and a half. I guess the proof is that the jury came down in the middle. The government was alleging $43 million loss, and the defendants were saying $200,000 loss, and the jury came out at $12 million or something like that, which is probably--isn't that the test, when both sides are unhappy?

And I talked to someone else who had a drug case that bifurcated. In fact, they didn't present any additional evidence. They just gave the jury questionnaires to determine the exact quantity of drugs.

JUDGE HINOJOSA: Commissioner Reilly, you had a question?

COMMISSIONER REILLY: Oh, I didn't have really a question. I wanted to make an observation, that Carmen and Amy and David, all three, have referred, obviously, to my native state of Kansas, the fix that we obviously came up with.

JUDGE HINOJOSA: There's no place like home.

COMMISSIONER REILLY: I take no credit. I was long gone when the legislature dealt with it. But I think it's interesting, because I've heard about the Kansas experiment and experience. I hope we look at it because, as one of our famous senators who ran for president once said, from Kansas, If it's happening anywhere, it's happening in Kansas. Apparently we have a fix on this. I appreciated their comments in that regard.

MR. PORTER: Yes. Being from the 9th Circuit, where we have the Ameline decision, which approves of these bifurcated proceedings and endorses them, we've had very positive experiences. In the Eastern District, we've had trials that have been bifurcated, and very similar to the situation that

Carmen discusses, where the jury had some complicated factual issues. They were able to be presented and, just like the result there, neither side got 100 percent. The jury came down in the middle.

So I think they work, they're practical. I don't--

MS. HERNANDEZ: Maybe we shouldn't be saying that. The government won all those bifurcated trials, didn't they?

MR. PORTER: Well, the result came out in terms of the amount of loss. It was not as the government alleged.

JUDGE HINOJOSA: Vice Chair Sessions?

COMMISSIONER SESSIONS: You used the word "codification." We don't have--you know, we're in the judicial branch, I think, and codification is not our deal. The question is not one of codification, it's essentially if you have enhancements and if the Supreme Court decides that Blakely applies to the guidelines, then you have a right to a jury trial in regard to enhancements. I don't see why we need to deal with, first of all, the issue of codification.

And second, isn't the fact that there are 240 enhancements a problem if in fact you have a jury trial right to 240 enhancements, if that's the right number? And isn't it more a question of simplification of, you know, just basically taking those ones that are important and put them in one spot, and those ones that aren't and incorporate it within a system that is not necessarily attaching a jury trial right? Is it as simple as that? Or do you really feel that we have to codify? I mean, Jim Felman's proposal was excellent. He talks about codification. That's going to Congress and getting Congress to incorporate elements to an offense. Why do you have to do that, is my question.

MS. BARON-EVANS: I'm going to let Jim answer that.

MR. FELMAN: I'll try to answer.

My assumption was that there would be elements, in response to Commissioner Steer's question, because I'm not familiar with a duck that has to be proved to a jury in compliance with the Sixth Amendment and yet is divorced from other aspects of the Bill of Rights. And I think if we travel down the path where we're going to create some new animal called a sentencing factor, that you have a right to a jury trial under the Sixth Amendment but you don't have a Fifth Amendment right to an indictment by a grand jury, then don't we put ourselves in the position where we're going to go right down the same rat hole that we've been doing with Blakely, where somebody like Scalia is going to say you guys are obviating people's Fifth Amendment rights to a grand jury by defining everything as sentencing factors instead of elements.

And so if it creates some new creature that is heretofore unknown, that is something you have a jury trial on but not other rights, I think that's problematic. Once you identify that these are elements, then I think Mistretta compels that only the Congress can write them, and I think that this Commission would be on pretty soft ground, after Mistretta, to promulgate that which is essentially an element of an offense.

COMMISSIONER SESSIONS: But the presupposition of the debate, really, of the debate we're engaged in right now is that the Supreme Court will come down and say--let us say--Blakely applies to the guidelines and as a result, the guidelines are just fine; it must means that the jury should be used to deal with these enhancements. That resolves the whole question, why do you have to codify when in fact you've got a directive from the Supreme Court that applies the jury trial right to these enhancements.

MR. FELMAN: It could well be that if you decide you want to keep the manual as it is and put it all to the jury, that that would maybe require only some changes to the rules of criminal procedure and rules of evidence and little tinkerings like that, and you could go forward on that basis without codification.

COMMISSIONER SESSIONS: Then we're left to the 240 enhancements.

MR. FELMAN: My proposal was that is unduly complex and it was never written with the intention of putting all of that to a jury. And there's no need to have a manual that complicated so juries can slice things 43 different ways. And while we're at it, we ought to simplify. And if what we're really doing there is laying out additional elements, then we probably ought to call it that.

MS. HERNANDEZ: Judge, I don't know of any case that would have 240 enhancements.

COMMISSIONER SESSIONS: Well, no. I'm just using the number that was discussed.

MS. HERNANDEZ: You know, could I say something also?

COMMISSIONER SESSIONS: I bet you would say that there's a due process violation there somewhere if 240 enhancements were applied to an individual defendant.

MS. HERNANDEZ: Well, there would be.

You know, one thing about how you could do a Kansas fix really quickly without going through the rules, I believe, might be by changing 6A 1.3, which says that you don't--you know, the standard of proof is preponderance. I would think if you get a Supreme Court decision that says you need jury findings, every rule that doesn't provide for it would unconstitutional. So you would be left with only the guideline manual, which you could fix, and 6A 1.3 is a policy statement that might be subject to amendment without--I'm looking at Commissioner Steer--without the publication process. But you might be able to fix that in that fashion.

Another thing that speaks in support of the Kansas fix, it seems to me, is if the Supreme Court says the guidelines are unconstitutional as applied, you want a response that results in one single system. If you have--if the Supreme Court says "as applied," there are lots of cases that can go forward as applied. There's lots of guidelines that don't have enhancements, or that every enhancement is proved to a jury. So if that's the Supreme Court decision, you would have cases that would go forward as applied, that are perfectly constitutional under Blakely. And then the best way to bring that all into one system, at least temporarily, would be to provide a jury right to those cases that would require jury enhancements or only have the truncated system, which I know the government doesn't want.

JUDGE HINOJOSA: Commissioner Horowitz.

COMMISSIONER HOROWITZ: Just a question that I asked to the first panel about changes in rules and the issue regarding guilty pleas. I wonder what you all think of the notion of whether, at a--assuming a jury trial right of some sort for sentencing issues--at a guilty-plea proceeding, would a defendant have a right to reserve sentencing issues and plead guilty nonetheless to the offense? And if you envision that system, why should we have that system? Why shouldn't a waiver of all Sixth Amendment rights be required for a jury plea?

MS. HERNANDEZ: I mean, I think in fact that post-Apprendi you have that type of situation. Because if the statute defines the elements, a defendant I don't think can be required, in order to enter a plea of guilty, to admit to something in a guideline manual that's not an element of the offense. So, I mean, I think some courts today post-Apprendi would accept a plea, for example, to--and in fact, that's how Ameline went up there. The court accepted a plea to a drug charge without accepting a plea to the drug quantity, and therefore you had a valid guilty plea that--

COMMISSIONER HOROWITZ: No, I understand. I guess my question is why should that be the system?

MS. HERNANDEZ: Because it would be fair.

COMMISSIONER HOROWITZ: I'm asking the question to each of you.

MR. PORTER: I agree. I think that's a fair system, it's been going on in the 9th Circuit since the Court decided United States v. Thomas, after the Apprendi decision, and both--I can't speak for the prosecutors, but the defense believes that that's a fair approach.

MS. HERNANDEZ: I mean, I think that--and it's a matter of reality. A lot of times the dispute really is over the enhancement. I mean, I think a lot of times the defendant is only guilty of a less aggravated offense. In some cases where judges refuse to accept that sort of truncated plea, you go to trial and the jury will acquit on that one count that people were--

COMMISSIONER HOROWITZ: And in the 9th Circuit, have judges been awarding or not awarding acceptance of responsibility points in those circumstances?

MR. PORTER: I think most of them have been awarding it afterwards. Maybe not the 3 points, but they will give 2.

MS. HERNANDEZ: And I don't think it's only the 9th Circuit that accepts those type of pleas. I think others--I want to save this argument, because if it's only the 9th Circuit--

COMMISSIONER HOROWITZ: I don't think there's uniformity, I'm asking as a policy question. You've all endorsed the jury trial, and Amy, in your letter you go through a number of changes in the rules and that one isn't--there's no discussion about what a waiver entails, and that's what I'm curious as to--that is because I know some judges are requiring complete waivers of Sixth Amendment rights.

MS. BARON-EVANS: Well, if part of the purpose of this, if you're trying to--if this is an opportunity to reexamine the system, and if one of the problems in the current system is that prosecutors have too much leverage by being able to require people to plead guilty blind, plead guilty for the sole purpose of getting this third point, then I think there is a difference between guilt of the offense--you know, the act and the guilty state of mind--and what harm flowed from it. There is a logical difference in that, and I think it should be permitted. I think it should be permitted if you mean, you know, is there a principled reason to permit a guilty plea just to the elements of the offense and ask for a trial on the amount of harm that resulted. I think it makes good sense.

JUDGE HINOJOSA: Vice Chair Castillo.

COMMISSIONER CASTILLO: Ms. Hernandez, just to show you how responsive we are, I think our chair will have an announcement tomorrow on our 15-year study. Just so you know.

MS. HERNANDEZ: Great.

COMMISSIONER CASTILLO: But my concern is one of time. To a certain degree, we're all shooting in the dark. We don't know what this opinion is going to look like or the contours of it, and yet we've had this just-in-case hearing. The last panel, there was some strong recommendation made to us and the talk about having 12 months to deal with the issue. I don't think we're going to have 12 months. And I tell you in all sincerity that, as much of a fan I am of ad hoc advisory groups, which I think is a very principled way to make policy--and you know as well as I do the two times we did appointment advisory groups, I think it worked well. We gave them an 18-month time frame. I don't think we're going to get a year. I don't think we're going to get 18 months. I don't think there's time for an advisory group to be appointed.

This is all a plea to you that once we do get an opinion, I would suggest that all four of you get your recommendations to us as soon as possible, because we will be lucky to have another public hearing. I would hope that we would, because I think that's the reasoned way to proceed. But I'm just worried that time is clicking away, and as soon as the decision comes down, Congress might seek to act quicker than we would like. And we have stalled them in the past--e.g., the Protect Act report.

So I think that the bar on responsiveness, in all seriousness, is really up there and time is going to be the key factor.

JUDGE HINOJOSA: Mr. Taylor or Mr. Sands or Mr. Flanagan or Mr. Felman, if there's anything else you all wanted to add?

MR. FELMAN: You'll get stuck listening to me tomorrow.

MS. HERNANDEZ: Mary Price is here, too.

JUDGE HINOJOSA: We do appreciate your work as well as--all four of you. We realize that you took time off from what you do on a regular basis to be here, and we appreciate it very much.

I would like to close by thanking everyone who appeared here as well as the people who came to listen. It's been very helpful to the Commission. I think it will help us quite a bit with regard to the work that we have, regardless of the outcome of the cases.

I do want to report one final Commission action. Professor Goldsmith suggested that we take an act unanimously. And so because of the fact of the inability to reach a unanimous decision, we have not given the congeniality award to Ms. Hernandez.

Thank you all very much.

[Whereupon, at 4:17 p.m., the hearing was adjourned.]