UNITED STATES SENTENCING COMMISSION

PUBLIC HEARING

February 10 & 11, 2009

Atlanta, Georgia

REGENCY-BRENTANO, INC.

Certified Court Reporters

Suite 140 - 13 Corporate Square

Atlanta, Georgia 30329

(404) 321-3333

INDEX

	Page
OPENING REMARKS	
Honorable Ricardo H. Hinojosa	3
VIEW FROM THE APPELLATE BENCH	
Honorable Gerald B. Tjoflat	9
Honorable Dennis W. Shedd	15
VIEW FROM THE PROBATION OFFICE	
Ellen S. Moore	41
Greg Forest	47
Thomas Bishop	53
VIEW FROM SENTENCING PRACTITIONERS	
Nicole Kaplan	65
Lyle Yurko	72
David O. Markus	76
Alan Dubois	81
Amy Levin Weil	87
VIEW FROM LAW ENFORCEMENT	
William N. Shepherd	107
Chief John Timoney	111
Captain Larry Casterline	114
VIEW FROM THE DISTRICT COURT BENCH	
Honorable Bob Conrad, Jr.	126
Honorable Gregoy A. Presnell	132
Honorable Robert L. Hinkle	135
Honorable William T. Moore, Jr.	138
VIEW FROM ACADEMIA	
Ronald Wright	164
Dr. Gordon Bazemore	167
Dr. Rodney L. Engen	172
VIEW FROM COMMUNITY INTEREST GROUPS	
Spencer Lawton	185
Hector Flores	189
Monica Pratt Raffanel	191

CHAIRMAN HINOJOSA: Good morning. It's my honor this morning to welcome you on behalf of the United States Sentencing Commission to this public hearing, which is the first in a series of regional hearings the Commission will be having across the country. We are very happy to be here in Atlanta. I also want to thank on behalf of the Commission everyone who will be participating at this hearing.

As you all know, this is the 25th anniversary of the passage of the bipartisan Sentencing Reform Act. It was a piece of legislation that was in the making for several years, debated in Congress for a period of time, and then passed in 1984 and then signed by the President. The principal purposes of the Sentencing Reform Act were to try to correct some issues that were viewed as problems with regards to the federal sentencing process and had been so viewed by many for many years.

Here we are 25 years later and I will say that the passage of the Act included this bipartisan commission, which is the United States Sentencing Commission, which is composed of seven members and two ex-officio members. The principal purposes, of course, of the Commission are to ensure that we establish policies and principles for the federal criminal justice system with regards to sentencing that assure that the statutory purposes of the Sentencing Reform Act are carried out. For this period of time since 1987 -- obviously November 1st of 1987 was the time when the first set of guidelines when into effect -- the Commission has continued to work on this and continued to satisfy and try to satisfy the statutory principles that are given to the Commission with regards to how it should operate with regards to the promulgation and amendment of guidelines.

The guidelines themselves obviously have been in effect for over 20 years. This has been a constant process for revision as well as new guidelines that have come about. Also, this has been constant change with regards to whether it's Supreme Court decisions or statutory changes from the standpoint of several changes made by Congress with regards to criminal legislation. So the Commission has continued to strive to satisfy its

statutory requirements under the Sentencing Reform Act.

I will say that much has changed since November 1st of 1987. The size of the docket as far as the number of individuals being sentenced has doubled since 1987. The makeup of the federal docket has changed somewhat. It continues to be about 80 percent of drug, firearms, fraud, and immigration cases; however, the immigration cases now make up about 24 to 25 percent of the docket. There has been a corresponding change in the makeup of the defendants themselves, and we are now at 37 percent of defendants sentenced in the last fiscal year are noncitizens of the United States in the felony cases in the United States. Forty-two percent of the defendants are now Hispanic.

There are some things that have not changed; for example, the drug cases being a sizable portion of the docket continue to be true. Men continue to represent the majority of the defendants. The age makeup has not changed. It continues to be more than half of the federal defendants are between the ages of 21 and 35.

As I indicated, the guidelines are constantly changed either through amendments or new guidelines as new criminal legislation comes about. The Commission strives and continues to work very hard to make sure that all the guidelines represent a network with regards to making sure that the 3553(a) factors are met. That is the statutory role that the Commission has and it continues to do that.

The sentencing courts, of course, continue to determine and calculate the guidelines as the initial benchmark and the starting point with regards to every federal sentencing. That has been the Supreme Court decision as far as the guidance that we have received from the Supreme Court, and that continues to be the case. It also continues to be the case that the vast majority of cases continue to be sentenced under the federal sentencing guidelines either within the guidelines or government-sponsored departures within the guidelines, and those continue to be about 85 percent of the cases.

I would like to say that we are very fortunate with regards to the group of individuals that have agreed to come before us. I will also indicate that there is an understanding on the part of the Commission why the Department of Justice would not be present at this hearing. They have, of course, been invited, but it is a relatively new administration that just took office a couple of weeks ago and they are in the process of organization. And that's certainly understandable how they would not be able to attend this particular hearing, but we are looking forward to having their views expressed to us as we continue with our hearings across the country. So we certainly understand their lack of presence at this hearing but we do thank everyone who was able to make it and take time out from your busy schedules to be here.

I would ask at this point if there is any other commissioners who would like to say something, they are certainly free to do so.

COMMISSIONER HOWELL: I was going to reiterate what our chairman said. Thank you all for being here and all the other panelists who are waiting to come up to the table to talk to us. It is a very good time to take stock of the guidelines. And I commend our chairman for his leadership in undertaking this very important effort of holding hearings across the country. We are certainly living in a time of evolving Supreme Court jurisprudence over sentencing policy and about the role of different institutions in the sentencing process. The Supreme Court has in its various opinions after Booker talked about the role of the Sentencing Commission, of the sentencing judge, appellate review, and more recently the role that policy should play in terms of at least in the crack guidelines in guiding a sentencing court.

So it's a very interesting time, and just based on the written testimony, I know we are going to hear a number of criticisms of the guidelines as well as some supportive comments about the guidelines as they stand today. I think generally we've heard that the guidelines can be too complex or too severe or too opaque. I really look forward to hearing from all of our panelists about what they think we are doing well and what they

think we as the Commission can do to improve the guidelines. Some of the criticisms of the guidelines are more appropriately handled by other institutions in the sentencing process, namely the Congress, but I'm certainly interested and looking forward to hearing what everybody has to say today.

COMMISSIONER SESSIONS: Again, I also want to thank the chair for leadership in opening up the Commission to this listening process. It seems to me this is really a very exciting time. It is a time which commemorates our 25 years in existence, but more than that it opens up a period in which we can reflect upon not just the guidelines itself but also sentencing policy for the country. I would certainly hope that as we go around the country listening to observations of practitioners and contributors to the criminal justice process, that they speak to us about the guidelines and how literally the guidelines work both in its general sense as well as in particular issues, but also we put that as a part of sentencing policy for the country so that we have the opportunity to listen to what people say in regard to sentencing policy for the country and where we should be headed in the future. It is a rare opportunity to sit back and to listen to people who are the real experts in the field. And for me that's why this is such an exciting opportunity.

CHAIRMAN HINOJOSA: Is there anyone else?

MR. WROBLEWSKI: Mr. Chairman, my name is John Wroblewski. I'm the Director of the Office of Policy and Legislation in the Criminal Division of the Justice Department. Mr. Chairman, I want to thank you and the Commission for convening this hearing. We think it is an extremely good time for the Commission to be taking this comprehensive look at the federal sentencing system. Not only have we just gone through ten years of Supreme Court litigation trying to define what is a crime, what is the role of the jury, what is the role of the judge in sentencing law, but as has been mentioned by several others here, we've gone through 25 years since the Sentencing Reform Act and it has been an amazing 25 years. We have seen during that time the

federal prison population rise from somewhere in the neighborhood of 25,000 to somewhere in the neighborhood of 200,000. We have seen during those 25 years introduction of crack cocaine into our cities and a tremendous amount of violence from Oakland to Brooklyn. We have seen methamphetamine labs pop up in the west, midwest, and elsewhere. We have seen the greatest reduction in crime during those 25 years in many generations. We have seen changes in enforcement policy at the Department of Justice and a tremendous new focus along the southwest border. We've seen the rise of the Internet and new crimes pop up. We've seen new distribution systems for child pornography and other material. It's been an incredible period for crime and criminal justice, and we think it is very, very timely that the Commission take this chance to review the system as a whole rather than guideline by guideline. So we appreciate what the Commission has done. We appreciate the tremendous panelists who have come here to speak to the Commission.

In terms of the Justice Department involvement, as you all know three weeks ago President Obama was sworn in on the east front of the Capitol, and one week ago today at about this hour Attorney General Holder was sworn in by Vice-President Biden. The Department is committed to participating in these sets of regional hearings. As Judge Hinojosa indicated, it is going to take a little bit of time before the Department can review fully federal sentencing policy and come up for the Executive Branch with new policy on everything from crack cocaine and powder cocaine to the guideline system, to charging policy and the rest. We are beginning that process, and we look forward to participating with the Commission in hearings over the course of the rest of this year. Thank you, Mr. Chairman.

CHAIRMAN HINOJOSA: Thank you. I was remiss in not actually introducing those of us who serve on the U.S. Sentencing Commission. I will say that I have been on the Commission since the year 2003 and I have found this one of the best tasks that I've taken on as a U.S. district judge from the standpoint of the people I work with on the Commission. The two vice-chairs are fellow district judges. Ruben Castillo is a U.S. district judge in Chicago. Judge William K. Sessions, III is the Chief District Judge of

the District of Vermont. And we have another vice-chair also, William Carr, who has just joined the Commission here very recently. And we have two other members of the Commission, Commissioner Beryl Howell and Commissioner Dabney Friedrich. I will say the three nonjudges on the Commission bring great expertise with regards to their personal backgrounds with regards to their work either on the Hill and/or their expertise with regards to the offices they have worked in as lawyers either in private practice or under public service. And so the expertise they bring to the Commission is extremely helpful with regards to us carrying out our statutory duties. We do have one of our ex-officio members here, Jonathan Wroblewski, who you heard from. He represents the Attorney General. So it is a Commission that is a bipartisan Commission that works and strives very hard to make sure the statutory responsibilities of the Commission are carried out with regards to the promulgation and amendment of guidelines.

With regards to all the other responsibilities we have, which is data collection, research, reports to Congress and the general public with regards to how the system is operating, training programs that we conduct, are ably led by our staff with Judy Sheon, our staff director, and we thank them for the work they do.

This is, as I said, the first in a series of public hearings across the country. And so we thank you very much for being present, and with all that I will introduce the first panel. This is the first time I know that appellate judges have waited on district judges before they are called upon. We thank them very much for their patience. We are actually very fortunate today with regards to the two individuals who are present before us to represent an appellate view with regards to the federal sentencing process and how it is viewed by appellate benches. The first individual actually has served on two appellate benches. We are also very fortunate that both of them have been district judges prior to becoming appellate judges, which I think brings a very good perspective to the appellate bench.

The first one is the Honorable Gerald B. Tjoflat of Florida who is a

judge on the 11th Circuit Court of Appeals. Before he was on the 11th Circuit, he actually was on the 5th Circuit Court of Appeals before it was split up. So he has been on two appellate benches. He was also a federal district judge appointed to the bench in 1970 and he took the appellate bench in 1975.

The Honorable Dennis W. Shedd is a judge on the 4th Circuit Court of Appeals. Judge Shedd was a federal district judge in the District of South Carolina from 1990 to 2002, and in 2002 for whatever reason he left the best bench to become a member of the appellate bench and has served very ably since then on the 4th Circuit Court of Appeals.

So we thank them for their presence, and we will start with Judge Tjoflat.

JUDGE TJOFLAT: Thank you very much, Mr. Chairman. I will say as a matter of preface to my remarks of views from the appellate bench, I would say that I have been involved in sentencing reform since 1972. I was the newest member of the Judicial Conference Committee consisting of seven judges on the administration of the probation system in criminal law. And S-1, which was the bill that came out of the Brown Commission on the revision of the federal criminal law, was introduced in the Senate. It had two parts. The first part had to do with the rewriting, as it were, of the substantive criminal statutes, what constitutes a crime, because they had been enacted in a hodgepodge way over two centuries just about. And the back part of the S-1 had to do with sentence reform, moving from the medical model of sentencing which had prevailed for a long time in the United States, and in all the states for that matter, where you have a parole commission overseeing inmates who are serving indeterminate sentences and the commission is tasked with the job of determining when the particular inmate had been, quote, rehabilitated, unquote, and was ready to be released and lead a law-abiding life. And so that wasn't working because the parole commissions were not very good at predicting given recidivism rates depending on the crime reporting in a given jurisdiction, recidivism rates being over 75 percent generally in a three-

year period.

So the chairman of the conference committee told me that I was tasked with the job of overseeing the back part of S-1, which was sentence reform. So that went through -- during the period of the next say three or four years the General Accounting Office was examining disparate sentencing in the district courts and was finding all sorts of things. There was a move to have some kind of review of sentences to round out the rough edges of disparity, and so the Advisory Committee on Criminal Rules experimented with the idea of having three judges, three district judges, or maybe an appellate judge and two district judges, review sentences at the behest of the defendant. That failed.

Then the next step was an effort to amend the failed appellate procedure to provide for appellate review of sentencing. No sentencing guidelines or anything of that sort. Just more or less like they do in the United Kingdom, just review sentences. At any rate, the problem there was that the House and the Senate took the position that appellate review could not be provided for the government as opposed to the defendant by rule making. So the idea of having appellate review by both the government and the defendant occur pursuant to an appellate rule was abandoned.

About the same time with the pressure mounting to eliminate disparate sentences the Parole Commission and Reorganization Act was adopted I think about 1975. And the Parole Commission drew guidelines to counsel their exercise of discretion under this indeterminate sentencing model. What happened then was the district judges were able to look at the Parole Commission guidelines and sentence around the guidelines, so you had greater disparities created. For example, if the parole guideline was too low for say an armed robber or whatever, and the judge thought that -- so the judge would give a straight adult sentence and put the one-third eligibility date for parole above the guideline. If the judge thought the guideline was too severe, then the top of the sentence would be beneath the bottom of the guideline, or judges would use split sentences or some other device which

would eliminate the Parole Commission's jurisdiction altogether.

In 1975 Senator Kennedy introduced what ultimately became the Sentencing Reform Act. And it died quickly. Then in 1976 another bill was introduced. This had pretty large bipartisan support. This was in the Senate. That bill passed in 1977. I think the vote was something like 78 to 12 or something of that sort. And the Senate in each session of Congress thereafter enacted another version of what became the Sentence Reform Bill by majority vote of over 90, 95 to 3 or 95 to 2, something like that.

Meanwhile in the House the Chair of the House Judiciary Subcommittee on Criminal Law was a Congressman from South Carolina. I can't remember his name. But nothing came out of that committee while the Senate was cranking out its statutes, its bills. He retired and was replaced by Father Drinan, a Roman Catholic priest who at one time had been dean I think of the law school at Boston College. Father Drinan, I had many a conversation with him. He was against everything that he had seen. Sometime shortly thereafter the Pope told him he had to get out of Congress, and he was replaced by John Conyers from Detroit. And John Conyers from Detroit was opposed to sentencing reform if it involved appeals by the government. He thought it would be too onerous. And so that was his stance.

Meanwhile we get to about 1984. It's an election year and the Senate has passed a comprehensive crime control bill which included the Sentencing Reform Act, fine reform, bail reform, two or three other things. It overwhelmingly passed, over 90 votes on the yea side. In the House nothing was happening. There was a bill that was split up into two or three committees. The Conyers subcommittee didn't have jurisdiction of everything that was in the Comprehensive Crime Control Act. And came September they were debating a continuing resolution, around say the 25th of September, and it had -- the rule under which it was being debated precluded the attachment by amendment of anything nongermane. Congressman Lungren of California got up and moved that they amend the rule to allow a nongermane amendment, to wit, the Senate's Comprehensive Crime Control Act. That went down on a party

vote around 1:30 in the afternoon. By 4:00 in the afternoon the pressure was so great that a compromise was reached and it was as follows.

The House meantime had reported out a bill that could not pass so the bill was sent back to the House Judiciary Committee with instructions that it report out the Senate Crime Control Bill, which it did in about 20 weeks. The Crime Control Bill from the Senate was then attached to the continuing resolution, and so we had sentencing reform when the continuing resolution finally was adopted in conference. By the way, I think there was some angst against federal judges about this time and so there were no judges to be on the Commission, or maybe one. In conference they made provision for the number of judges that are now on the Commission.

Now, during all this time the judicial conference through the committee I was chairing, we were holding sentencing institutes all over the country and telling judges, trying to figure out ways to avoid disparity through sentencing councils in large district courts and such like, that this was coming. And when it came there was a hue and cry, our discretion is being removed, et cetera, et cetera, et cetera. And there was a move around 1986 or thereabouts mainly in the Conyers subcommittee either to repeal the Sentencing Reform Act or to delay its effective date. And there were hearings there. I testified over there, and there were hearings on the Senate side. And the effort in the House side failed. And so we came to 1987.

Now, my first experience in observing -- I was involved in the drafting of a model rule. The criminal rules took too long to be amended in order to accommodate the sentencing reform, the new sentencing hearing, so we sent out a model rule with the conference's permission which provided for exchange of information and what not. The format created by the Sentencing Reform Act called for an adversary proceeding, a bench trial. A sentencing hearing under the statute is a classic bench trial as if you were in a civil court. And the presentence report serves the same purpose that a pretrial stipulation does in a civil case, that is, it frames the issues. That's the

way it's supposed to be. The government has the burden of proving, demonstrating the most onerous sentence or most severe sentence that the law requires under the facts, and the defendant has the burden on some things like acceptance of responsibility and some other issues.

In any event, my observation -- I'm now on the Court of Appeals for some time -- was over the first dozen years I'd say that trial judges and prosecutors and defense counsel with minor exception had a very difficult time understanding that this was the kind of a hearing that the act called for. They had a very hard time. And there is a reason for that. First of all, under old sentencing there was no adversary proceeding at all. There was no appellate review. And the classic sentencing hearing was the defense counsel begging the judge to issue a (b)(2) sentence. That's Title 18 4208(b)(2), which would be a fully indeterminate sentence, if you could convince the defendant if you got an indeterminate sentence somehow you're going to get out earlier, that the Parole Commission will help you out. The idea of fact finding or anything else was foreign. Not only that, the district judges knew if they said too much at a sentencing hearing, even though there wasn't appellate review of sentencing, that some courts might vacate the sentence while they are reviewing the appeal of the conviction. And in some circuits that happened not infrequently.

But at any rate, so lawyers on both sides -- well, criminal lawyers, criminal practitioners, were unused to bench trials. The only bench trials people who just practiced criminal law ever did were suppression hearings or some such thing. This whole idea was just foreign, this whole idea that the PSI was a format for the hearing just didn't register.

Well, now we come to Booker. Of course, the odd thing about it is you hear judges screaming and hollering they wished -- back in the old days they wanted to retain their discretion. Now they don't want the discretion. They want the Commission to tell them what to do. Somebody said the more things change, the more they remain the same.

In any event, judges now and lawyers don't understand what's happened

as a result of Booker. I see this on appeal all the time. We had an appeal I sat on about three months ago by the government, and it was obvious that the government's lawyer, who had been doing appellate work for 15 years in that particular district, had no foggy idea what a sentencing hearing was like, just none. Under Booker what's happened and what judges don't understand -- some do; some don't -- is that prior to Booker the Commission determined the Title 18 3553(a) sentencing factors: punishment, general deterrents, specific deterrents, or incapacitation and rehabilitation. The Commission in setting the severity scale, as it were, the offense level, was speaking to the first two sentencing factors. A lot of judges and practitioners don't quite get that. And the criminal history category, the commissioners simply -- it's a proxy for recidivism. So what's happened is that with Booker the policy determinations under 3553(a) have been shifted from the Commission to the district courts. And what I see happening in the district courts post-Booker is that sentencing judges in announcing sentence, and say they depart from the guidelines or variance or whatever, don't focus on say 3553(a) punishment or general deterrents. They just say, well, I've considered those sentencing factors, boom. You can't review in my view on appeal a sentence in which the judge has not articulated the purpose for the action that the judge took.

Now, I've gone on too long, but one of the things that the Commission can do -- first of all, the judicial branch in my view, there needs to be a lot of education. And when it comes to the defense side, the Judicial Conference Committee that oversees the public defenders and panel attorneys, somebody has got to educate these lawyers as to what their job is in defending and representing a defendant in a case. And the prosecutors have to understand also that if they want a more severe sentence than the guidelines call for, they got to focus on punishment or general deterrents or something and present a good solid argument to the court.

And the Commission in promulgating guidelines -- now you're in the amendment mode basically -- the Commission ought to say this amendment deals with punishment and general deterrence or just general deterrence, say. And

so we are setting the offense level at a certain point in order to account for that, and that's telling judges that the Commission has already made a policy determination about the severity of the penalty and that it's for general deterrence, say, or maybe for punishment purposes or maybe for both. The same thing is true with regard to the categories of the defendant. So that's one thing I think the Commission needs to do.

One of the problems that judges have both at the district court and court of appeals has to do with 5K1.1 departure, especially in drug cases. The courier doesn't have anything to sell. The guy that's got something to sell is the boss or the financier, and the courier is stuck, at least pre-Booker pretty well. And quantity is a proxy for the two sentencing purposes: punishment and general deterrents. It's not a proxy for anything else. And there is nothing that I see in the literature that explains why a given drug quantity is where it is and for what purpose. The problem in tying the offense level to quantity is very problematic and it's going to cause a lot of mischief in the long run, especially after judges and defense counsel in particular wake up to what Booker has done. That will take another eight or nine years, I hate to say. That's not being very respectful to my colleagues but that's the fact of the matter. The guidelines on amounts of money is not as bad in my judgment as tying drugs to quantity.

I think with that I'll just quit for the moment.

CHAIRMAN HINOJOSA: Thank you very much, Judge. Judge Shedd. The format we are going to follow is each speaker will have ten or so minutes and then there will be questions and answers. I didn't indicate that but that's the format we'll be following all day.

JUDGE SHEDD: I'm sure there are going to be questions. I don't know about the answers part. Let me say, Mr. Chairman, and members of the Commission, good morning. I enjoyed very much Judge Tjoflat's historical perspective on guidelines and on sentence reform. Quite frankly, I don't think your series of nationwide hearings on sentence reform and the guidelines could really have had a more auspicious start than that.

Let me say I'm pleased to be here as the Commission acknowledges and celebrates 25 years of the guideline sentencing concept. I do want to acknowledge the efforts of all the people who have been involved over the past 25 years with that guideline sentencing, and I think back to the ones I knew at the beginning: Senator Thurmond, Senator Kennedy, Vice-President Biden, Judge Billy Wilkins, Justice Breyer, Michael Gelacak, John Steer. Mr. Chairman, you said it and I would certainly endorse what you said. It was a monumental effort and a bipartisan success.

The guidelines and I have sort of grown up together. That 1984 passage of the act and the continuing resolution that led to the Commission, I was a Senate staffer and somewhat involved in that. I don't want to take too much credit but I was involved in some of the procedural matters on adding it to the continuing resolution. So I was there when the idea was really born. I then spent 12 years as a district judge applying the guidelines, and then for six years I've been on the Court of Appeals, and for about half that time I've reviewed guideline sentences pre-Booker and the other half I've been reviewing post-Booker. So I'm friends with the guidelines, but let me say this: Sometimes if an old friend won't tell you the truth, nobody will.

This morning I want to really talk about four general areas. I want to make some general comments on guideline sentencing. I want to offer some specific suggestions for improvement of the process. I want to point out what I consider to be several specific problems with the guidelines. And then perhaps most importantly and finally I want to talk about guideline sentencing and the brave new world it faces.

My general comments are first. I have always supported the concept of guideline sentencing both professionally and personally. I saw that Congress had made a policy cut that they wanted to limit court discretion, and I felt that that certainly was within their authority to do so; however, for years I have felt the guideline sentencing was becoming and I think it now completely too tedious. At times it feels more like some type of apparatchik functioning, technocratic functioning rather than sentencing. I think if the

truth be known, people would be shocked at how few of us involved in sentencing either through the Commission or as judges could actually take an indictment or charge against a defendant and work through that sentencing guideline book and come up with the proper calculation with a great degree of confidence. It's a very difficult task in my opinion.

Now, I do understand the cross currents in jurisprudence and in the courts about sentencing guidelines. And by the way, let me point out I don't suggest any ill intent or bad faith on the part of anybody on any side of these issues, but it does seem clear to me now that we are applying the guidelines as we apply them now at too high a cost of judicial resources. Seems to me we are spending too much time and too many judicial resources making mandatory decisions on advisory matters.

Now, as to specific recommendations -- and, Commissioner Howell, let me say some of these I know are not within your purview, but you invited me to speak so I'm going to talk about all the issues I can think of. First I would recommend, to the extent the Commission would be involved with this, a more uniform presentence report. I've had the occasion probably to review roughly 700 or so presentence reports, and even at that it's my experience now in the Court of Appeals that when I get a presentence report from many districts, I have trouble finding the specific item I want to find in that presentence report, either what the range is or what the statutory limits are. So I think a more uniform form would be helpful.

I also think that we maybe could educate those writers and probation officers with a better understanding and simplifying financial statements that we see in those presentence reports. It doesn't require a master's degree in accounting to do that. You just have to get an accurate, reasonable accounting for the value of assets and the value of liabilities and net one from the other and you get net worth. That could be used to help for restitution purposes, fine purposes, and maybe even for helping to pay the cost of incarceration.

Let me say comments on specific guideline application. Now, these were

problems when I was a district judge. I've seen them occasionally at the Court of Appeals level when I review sentences. Some of them may have been overtaken by events. I did my best to look through the guidelines this weekend. I don't think that they have so I'll mention them to you now.

Section 1B1.8, this has to do with what information can be used against a criminal defendant. I've always thought it odd, in fact I thought it was unfair, that a criminal defendant who wants to come forward at the moment of arrest or soon thereafter and share with the government everything he or she knows can have that information used as relative conduct against him in sentencing; whereas, a person who gets a lawyer and then does the same thing by way of proffer is insulated and protected from having that information be used against him. I think that is something that should be addressed.

I think this comes from an interplay between 2B3.1 and 3D1.4. I'm not positive, but I'll make the point, and that is I don't believe there is any incremental punishment for bank robbery after the fifth bank robbery. It seems to me a person who robs 20 banks ought to be facing a little bit more than a person who robs five. It looks to me that's just a policy cut that was made along the road at some point, and I would just suggest that that really isn't the right cut on that. Let me also say this to you: Cross-referencing can be difficult and arcane but to me grouping is extraordinarily difficult in this calculus.

Now, finally I want to turn to address what I consider the brave new world of guideline sentencing. It seems to me that perhaps every reference point regarding guideline relevance has now shifted. It seems to me we are now in a Copernican guideline universe. By that I mean no longer are uniformity and consistency at the center of that sentencing universe but instead we now have a guideline or sentencing universe that is centered around individualized sentences and some form of subjective reasonableness. Now, that subjective reasonableness to me is still of course being played out in the courts, but it doesn't look like it's any kind of reasonable person standard. It looks like more a decision for which a reason has been given.

The big question to me and I would think maybe to the Commission is how do we make the guidelines actually relevant in this new universe. It seems to me the Commission has two starkly different routes before it.

And by the way, Commissioner Sessions, you mentioned it is a great opportunity and [inaudible] what do we do. Let me take a moment to mention to you I think at one point we had a mutual friend in Judge Parker who was a great friend of mine. It was a tragic loss to the court.

COMMISSIONER SESSIONS: My predecessor.

JUDGE SHEDD: I thought so. He was a very, very fine man. I'll tell you at some point when you have a moment about when he and I got hijacked on a bus ride to a judicial conference meeting. We were in the desert and the bus driver pulled off and demanded that we give him another $25 to take us from Santa Fe to our destination, which we did. We got back on the bus and Judge Parker looked at me and we both agreed that must have been what robbing stage coaches was like in the old west. He was a very fine man, though.

You made the point that we're looking at what could be a tremendous opportunity in sentencing. There are two options I think the Commission faces. The Commission could certainly continue on as if nothing much has changed and continue working within the system, but I think that's going to use scarce and valuable judicial resources as you try to give maybe some kind of artificial value to the guidelines. Or else we can sort of try to make them really usable in today's sentencing.

I understand the difficulty, and that is, as the court is making its way through the guideline sentencing issues too, we have a two-tier guideline sentencing process. You first have to figure for procedural correctness: were the guidelines figured properly and then you have to look then after that at the reasonableness of the sentence. It strikes me we are oftentimes treating that first calculus as if nothing has changed. At least in the Court of Appeals where I sit we are still having the same arguments about the enhancements, was it proper in this case or not, and we take all that time to

make those decision on what then becomes an advisory function for the district court. How do you do that? I'm not quite sure. Maybe we go to broad bands and eliminate some of the arcane matter in the guidelines. Maybe we change the directives in the guidelines where it says increase three levels, add five levels, decrease three levels, and make those suggestive, the district court may do that. Because it strikes me every time we have a directive, that presents a reviewable issue. I'd like the most deferential standard of review that we can have for the district courts. In fact, if you were to ask me my preference, I would say no review by the appellate courts, if possible. I find it hard to reconcile the mandatory guideline directives with limited or no review by the appeals court.

Now, I think the Commission could also take a look at and encourage alternate sentencing as the 11th Circuit has done in Keen, which I think would allow a deemphasis on the mandatory calculations under the guidelines. In fact, in an about face maybe the Commission could consider encouraging mandatory minimums, because that may be one of the only ways there is some kind of uniformity in sentencing on some accounts.

It strikes me, and I've seen comments that there still is a very narrow or more narrow range of sentencing to suggest we are still going to have uniform sentences. I would suggest that that is largely or at least in part informed by the fact that the judges who are now sentencing -- Judge Tjoflat sort of mentioned this -- they are used to sentencing under the mandatory guidelines and they are not quite sure what to make of the new posture of the advisory guidelines. So I think they still have a tendency to want to really anchor what they do to those guidelines. I think when we get fresh, new judges on the court who are not informed by the history of mandatory sentencing, I expect there to be more disparity.

I'll tip you off to something that may not be known that well. I think Judge Tjoflat won't mind if I say it, but judges can be right clever. I think they are going to figure a way around some of these problems. I would say this: It strikes me, and I've just puzzled over this, that a sentencing

judge might well decide to shift all of his or her decisions in one favor, say pro defendant, on any guideline calculus. Not depart, but then go to a variance to get to the sentence that the judge wants to get to, and that variance might likely be reviewed by a lesser standard or more deferential standard of review.

Let me say my point is in all this I think really there should be no more business as usual sort of tinkering with the guideline provisions. I think the times call for a broad, fresh, new approach to guideline sentencing and to your job, and I think this really is an opportunity not to be lost. You as Commissioners can do greatness. You are in a position to truly influence and historically impact the next 25 years of sentencing in the courts and I believe you are up to that challenge. Thank you very much.

CHAIRMAN HINOJOSA: Thank you, Judge Shedd. At this point I will open it for questions that any Commissioner might have.

COMMISSIONER SESSIONS: Well, I'd like to talk about Judge Parker and ask you a question. If I was ever to be kidnapped in the desert, I would want to be kidnapped with Judge Fred Parker because he was about six four and he weighed 250 pounds, and I'd hide behind him if anything violent ever occurred.

JUDGE SHEDD: But he was a tremendously gentle man.

COMMISSIONER SESSIONS: Very gentle.

CHAIRMAN HINOJOSA: Actually $25 is a pretty cheap ransom.

JUDGE SHEDD: Not only that, I think actually he was not only that big a man but he was that big intellect, because I think when there was some question of danger he pushed me out front.

COMMISSIONER SESSIONS: You said a number of things which were striking, both of you did. I find this an incredibly interesting discussion, to make the guidelines relevant in the post-Booker era, and you are

suggesting a number of things. And I'm interested in your reaction to this generally discussed topic about making the guidelines more simple, simplifying it, which generally means that you take the number of offense levels as an example and you reduce them from 43 to, I don't know, eight or ten, and you expand the ranges so that there would be inherently, if you eliminate the 25 percent rule, you inherently provide a little bit more leeway and flexibility within the guideline system. Would that have the side benefit of creating a guideline system which is more relevant in the post-Booker era do you think? Do you think that's a wise thing to do or not?

JUDGE SHEDD: That was exactly what I was trying to get after when I said broad ranges. I quite frankly am just not enough up on the literature on this. I didn't know anybody else was having that thought. That's been my thought, just to have broad ranges for punishment and somehow tie -- so you could actually have sentencing almost at the time the verdict came in or the guilty plea. You could look at those broad ranges, three or four broad ranges, and look at a rap sheet, and then -- my idea has always been too, let me say -- I've sentenced a lot of people to a lot of harsh sentences under the guidelines when I was a district judge, quite frankly. I've often thought that if you could do it, the first thing you do with anybody would be to try to put him in the prison for about a year. If they didn't learn that lesson and if they liked that lifestyle and that year in prison, then they might be introduced to a longer stay down the road. I haven't thought through this, quite frankly, but a range perhaps of the first sentencing of zero to a year, year to five years, five to 15, 15 to 25, 25 to life, something like that. You just look at the offense taking into account mandatory minimums.

In other words, for some crimes Congress has said we are not going to leave discretion with you, Judge, for this kind of crime, say robbery of a bank with a gun or with a gun when you injure somebody. That's going to carry a minimum of 10 or 15 years, and I think it would. It also would serve the purpose in my mind of reducing the amount of time spent on reviewing that. It would just be a very simple review of did the sentencing court put

the person at the right level, and that would not take very many judicial resources on appellate review.

COMMISSIONER SESSIONS: I'll ask a follow-up question. You made a really interesting observation about how district court judges being relatively smart could say, well, we'll make all the decisions consistent with let's say the presentence report on departure issues because, of course, the review process is different on departure issues, and then we'll adjust or vary. Do you find that happening a lot, that that is in fact what judges are doing, so they essentially adjust the sentence but they use variances rather than departures because the review process is different?

JUDGE SHEDD: I don't want to speak out of school. I don't think we see much of anything yet. I just suggest that that's what's going to happen. I haven't seen that that I can think of, but I just think in thinking about the process, Judge, and where we are, it seems to me, without giving out any in-house secrets, that might be a way the courts figure out to take some of these guideline issues off the table, just always rule in -- you have an idea after reading the presentence report and understanding what the law is, what an appropriate sentence is. You know that, subject to some changes, the sentencing judge. It strikes me the judge might go into the sentencing knowing that and then maybe rule in a way that would protect him or her on appeal because the person who might want to appeal those gets all those decisions. "I'm not going to enhance you for that. I am going to give you acceptance of responsibility." But still look at it and then on the other factors decide to vary it and might well insulate. I haven't seen it yet but I'm wondering if we'll get there.

JUDGE TJOFLAT: Can I add something to what Judge Shedd has said? The Commission at this stage of the game is involved in norm setting. When the Commission drew these guidelines to begin with, it was reacting. It was setting norms but it was reacting. It looked at 10,000 or however many presentence reports involving nonguideline cases and tried to figure out what judges were doing, and then that was reflected in the norm setting. The

problem now is we are in a different era now. The Commission has far more criminal justice information available than it ever had before because of the way statistics are kept. The drug cases are a third of the docket. Congress has always set norms with mandatory minimums, but the fact that Congress has set those norms, they are just arbitrary. They are not based on anything empirical But the Commission has access to a lot of empirical information.

What Judge Shedd is saying I think is go ahead and set norms. The range doesn't to me doesn't mean much. If you are setting an offense level for just plain drug cases, put aside the special characteristics, guns and the like, you're just setting a norm, and then the Commission ought to tell judges, ought to tell the world when they set the norm, here is why we are setting the norm and tie the setting to one of the sentencing factors in 3553(a). If the Commission did that, then judges would say, well, they have all this data, and punishment to this extent is required in this kind of offense because of its predomination in the community or whatever the case may be, or for general deterrence purposes, because too many crimes, the sentences are not deterring activity. But just having a number, it is a norm but it doesn't explain the underpinning of the norm.

And so that's what you are doing now. To me the 25 percent for just take a bare line offense level doesn't tell me anything. I'd just as soon have just a flat norm. So now the sentencing judge, when they are looking at punishment and general deterrence for whatever the offense level is, is either going to buy that norm for the reason the Commission sets out, the empirical data that it's got. If there is a departure, then you better have some evidence for the departure.

Your problem is norm setting. The judiciary's problem is explaining, is reviewing sentences. Unless there is some rationale for reviewing sentences, the law, sentencing law is not going to evolve. In the common law in England all appellate sentences, trial judge and appellate judges, explain why in this particular case this sentence is appropriate. And that is how that sentencing law has evolved in the common law system. We have a common

law system too to the extent that you are setting norms and explaining them and then district judges are applying them. If they are going to deviate from them, they are explaining. The courts of appeal, because there is an appeal based on that fact finding by the district judge, is going to articulate decisions. That's how a common law of sentencing is going to evolve in the federal system. And we are a long way from doing that. The reason we are a long way from doing that is because everybody has been looking at this whole thing as just too mechanical.

COMMISSIONER HOWELL: Can I follow up on that? I think the setting of norms is a very good way of describing particularly the advisory guideline system. But when the Commission sets the guidelines and sets these norms to guide judges in individual cases, we are not just basing that on what we perceive is the norms based on our research but what Congress has also decided should be the norm. This leads me to one of the issues --

JUDGE TJOFLAT: What Congress has decided where?

COMMISSIONER HOWELL: In setting either a maximum penalty, a minimum penalty, and particularly with mandatory minimums.

JUDGE TJOFLAT: But most of those are ancient.

COMMISSIONER HOWELL: Yes, but I think the first Commission, when it was setting out to set the guidelines, looked at the recently passed, for example, mandatory minimums in some cases and said we have a dictate, a mandate under the Sentencing Reform Act that tells us that we should sentence similarly situated defendants convicted of similar crimes similarly, which has evolved into a rule of proportionality that we as the Commission look at with every guideline amendment, every new offense that's passed, every directive to reexamine guidelines. We look at proportionality.

In the sentencing of drug defendants, for example, the original Commission, which is a proportionality policy that I think every Commission since then has adhered to, has looked at the mandatory minimums as a norm given by Congress and set sentences for drug defendants upwards and downwards

based on that mandatory minimum, in part to ensure proportionality for those drug defendants, which is also part of the fairness, and to avoid cliffs so that a defendant with only a small difference in offense conduct doesn't fall off the cliff or have to climb a cliff, so to speak, because of the triggering of a mandatory minimum penalty.

We do have a great opportunity here, and we have been urged by a number of different critics of the guidelines, echoing your remarks that drug quantity doesn't make any sense. It may not but it was part of our proportionality policy, which I think does make sense, that guided the Commission to use drug quantity in setting the guidelines. I mean, do you think that the proportionality should continue to play a role in our setting of advisory guidelines or that our concern over these cliffs have been no longer, shouldn't be a concern of ours? Do you have a view about --

JUDGE TJOFLAT: I understand the mandatory minimum problem. The statutory problem is ancient, as I say. I mean, bank robbery was something to something, maximum minimum set Eons ago, and you couldn't -- why it was set that way is anybody's guess. But I think the law would just say it's arbitrary. Mandatory minimums are almost that arbitrary but you are tied to them. The Commission couldn't come out with a regime that departs from mandatory minimums or you'd be doing what judges were doing way back yonder when they were sentencing around Parole Commission guidelines. The Commission would be setting norms around mandatory minimums.

COMMISSIONER HOWELL: I think that's what the Commission decided to do because --

JUDGE TJOFLAT: I understand that.

COMMISSIONER HOWELL: -- ignore mandatory minimums, set the guidelines, and then if a mandatory minimum applies in a particular case, the judge --

JUDGE TJOFLAT: Judges know that the mandatory minimums and the maximum and the minimum otherwise buried in the statute are just arbitrary. They know that. There is no empirical justification anywhere in support. So the

extent to which the Commission, even when the guideline is consistent with statute mandatory minimum, to the extent the Commission can explain here is why this level is where it is, it's to serve this purpose of sentencing or this purpose of sentencing, would be better than just a flat line. Because I don't think judges have any idea of how these norms are set. They know how they were originally set because the Commission explained all that when they promulgated the guidelines in the first place as part of the introductory presentation. But now that's not known, and I think that's extremely vital. You know more or should know more because of your access to criminal justice information than any judge would know or any prosecutor would know or any defense lawyer would know at a sentencing hearing.

JUDGE SHEDD: Let me say this: I don't want to sound too nihilistic about this, and I don't doubt at all the analysis I've heard about norming. Again, I just raise the point does it really, really matter. Because if a district judge can look -- you may have policy. You may have norming. But when the guideline calls for a hundred to one crack ratio and a district judge by Supreme Court decision is free to ignore that, it seems to me the Supreme Court is saying that guidelines sentencing has turned a corner.

Now, let me say we talk about mandatory minimums. I do understand how people saw mandatory minimums as a problem for the guideline sentencing scheme as it existed pre-Booker. I'm not sure it's a problem now. I think it may be one way to get to some uniform sentencing in some dire cases is what I think. I think maybe the world has flipped on mandatory minimums.

And I also would say this: The Fourth Circuit, we've been having a dialogue with the Supreme Court about sentencing matters. I think it's fair to say some of our cases have tried to preserve some parts of the former system, and I would say the Supreme Court has not been particularly receptive to some of that. I understand what you're saying, Commissioner. I understand what Judge Tjoflat is saying about what the norm is and explain it. But I just wonder in the grand scheme looking at Supreme Court law, and I don't know where it's going to end up, it seems to me the tide is running

that maybe that really doesn't matter much anymore. Because we talk about norming and we talk about how things fit in the guidelines and finally we can argue about whether it's going to fit, yes, you did calculate that right, procedurally you had it right, and then the district judge takes that as not even particularly a tremendously favored factor. It's just a factor. And that's put in the hopper with a lot of other things that he or she considers and articulates, and then you have a sentence which is then reviewed for some form of subjective reasonableness. I think the Supreme Court has indicated that is to be given great deference. So I just wonder in the grand scheme how much that really does matter.

COMMISSIONER CARR: Judge Shedd, unless I misunderstood you in your initial remarks, you said that we should perhaps switch courses and encourage mandatory minimums, which is not what Congress usually hears from us or the judiciary. Could you expand on that a little bit?

JUDGE SHEDD: Yes. By the way, let me say those suggestions, I'm just throwing those out as alternatives. I don't know that I really ought to be in a position to suggest to you. I just want to clarify that.

I'm just trying to make the point that I believe now post-Booker it appears to me that the center of sentencing is no longer uniformity. That's the purpose of the guidelines to eliminate disparity. I call that uniformity. It seems to me that question is now gone as the guidelines are made advisory and not mandatory. That being the case, and as I suggested, I think we will see more disparity. We will see less uniformity in years to come. I would suggest one way you could get to uniformity in some cases would be the encouragement of mandatory minimums. Do you see what I mean? Maybe I'm just not smart enough to think of another way right off the top of my head to get a situation where you can know that for a certain crime in Vermont, that same crime in South Carolina or Florida or somewhere else, that defendant absolutely similarly situated will absolutely get the same sentence other than mandatory minimum. I know it is a change of course. I understand that.

JUDGE TJOFLAT: Nobody has mentioned here the role of the prosecutor. One of the problems with mandatory minimums is the prosecutor becomes the sentencer in many cases.

COMMISSIONER CASTILLO: We'll get to that, Judge Tjoflat.

JUDGE TJOFLAT: That was one of the problems the Commission initially had was there was no revision of the substantive law and there was no revision of the sentencing parameters. I'll put it that way. And that led to relevant conduct and all those other things to sort of avoid the problem of preguideline sentencing, which was the prosecutor just presented a plate to the district judge, you got X number of counts or I don't have X number of counts, this case deserves a ten-year sentence but the trouble is there is no charge that brings more than a five-year sentence.

COMMISSIONER CASTILLO: I share your same concerns. Let me just start out by thanking you both. I think this has been a great panel to start our hearings. Both of you have really lived the sentencing guidelines, the enactment of the sentencing guidelines and federal sentencing laws over the last 20 years.

Where my concern comes in is the issue of disparity, because it seems to me if I were just to wear my district court hat, which I've been proud to wear for 15 years, what I'm hearing from both of you is that the world has gone full circle from trying to cabin judicial discretion to now at the appellate court level realizing that it is the district court judges who have more paramount importance in sentencing in this post-Booker world. Wearing my Sentencing Commission hat I am concerned about the issue that we were just talking about, which is disparity, how do we control it. I'm concerned, Judge Shedd, that if we just eliminated appellate review, there are some cases where some of my colleagues have been reversed or remanded for going too high, and those are important cases, just as the cases where some of my colleagues have been reversed or remanded for going too low. I think there has to be some type of uniformity.

I will also tell you in almost ten years now in service on the Commission I'm not a big fan of mandatory minimums because, as Judge Tjoflat indicated, it is the prosecutor then that controls the entire sentencing proceedings. So where I would like to see us go to is some form of sentencing guidelines that still would lead to an elimination of unnecessary disparity. I guess it all comes down to what is unnecessary versus what is just necessary because of either regionalism or some other practices.

I'm interested, Judge Tjoflat, in what you said in terms of when we do pass guideline amendments, that we then label them as coming under one section or another of 3553. My only concern is district courts can react to that by saying, well, if this guideline had to do with the seriousness of the offense, I'm now under the umbrella of individualized factors and going to get to where I wanted to go anyway. How do we deal with where the rubber hits the road, this difficult issue of making sure that defendants are treated fairly in courtrooms in 91 federal districts?

JUDGE TJOFLAT: I think stating reasons for sentencing and tying those reasons to 3553(a), the sentencing objectives, here is why I'm imposing the sentence. The guideline says such and such and such and such, and it's a proxy for whatever. And if there is going to be a variance, here is why. Now the Court of Appeals has got something to look at and there is something to argue in the briefs.

The case I mentioned where the prosecutor didn't know anything about sentencing under the guidelines that we heard about four months ago, the whole argument by the government was the sentence is unreasonable. "Why was it unreasonable, Madam Prosecutor?" "It's just unreasonable and you can say it's unreasonable" I said, "You mean the Court of Appeals has de novo resentencing power and doesn't even have to say why?"

So rules and norms and whatnot serve one purpose but they've got to be applied in a given case and you eliminate unwarranted disparity, or at least, let's put it this way, unwarranted disparity disparages the administration of justice. It sends the wrong message to the public that certain things guide

cases. So if there is a variance that leaves the guideline norm whatever it is and there is an explanation why this case is different from this case, then the public can accept that. The law can accept that. The professional can accept that. The academics can accept that. So can the judges. But it's when you just have bang, bang, bang, and you have nothing to look at and no reasoning, which was of course the problem with no appellate review of sentencing under the old regime anyway.

JUDGE SHEDD: Judge, first of all let me say I do believe looking at the current system currently, for a while maybe, but certainly currently, I think the U.S. Attorney does control sentencing, really does control sentencing. Quite frankly, there is some check on that because the Senate does conform U.S. Attorneys, so there is some political check on that. You said you would like to eliminate disparity. I think everybody feels that way, but the point is not just that you want to do it. The question is who gets to make the decision that stands on eliminating that. Looks to me that's shifted to the district court. So then the question becomes how do you cabin the district court. I don't think you do it by guideline ranges. I don't think you do. I don't think the Supreme Court says you can't do that anymore.

I believe if there is any standard or anything that the district court has to do, you're going to have appellate review, because if you have a standard, you have to have appellate review. So there's going to be appellate review. It's just a question of exactly what will the Court of Appeals be reviewing.

Let me tell you -- I'm going to venture a guess on this one. And I hear Judge Tjoflat talking about giving the reasons for the sentence and all that. It seems to me, at least my earlier experience is, they just borrow those catch phrases and say I've looked at the factors and in the interest of justice and that it's individualized sentencing. It just sort of seems to be a rote formula. Whatever formula is accepted by an appeals court for that jurisdiction, I suspect that will then be the formula stated to cover

whatever sentence the judge decides to impose.

I take you to -- and I know you've done it on jury charges. When I was a district judge, as I would read the jury charges sometimes to the jury, I'd be thinking to myself what the heck am I saying to these people. It doesn't seem to make a lot of sense but we all know as district judges why we do that. That's because that charge has been approved by the Court of Appeals and you know that is a charge for that specific count and you know you won't be reversed and that's what everybody uses. People won't spend a lot of time coming up with new ways to give a jury charge because you know some language is safe. I could see that happening in sentencing. But once we get to the point that district judges understand how much of a statement will suffice, that will be the statement you are likely to see 99 times out of a hundred.

MR. WROBLEWSKI: I have a few questions, if I could sort of rattle off a few. Judge Tjoflat, you talked about your vision for the sentencing hearing being like a bench trial. If you could tell us what you see as the role of the probation officer in that type of situation.

JUDGE TJOFLAT: The probation officer drafts the criminal analog to a pretrial stipulation in a civil case, presents the two sides with some information. Then each side meets with the probation officer, I object to this, and I object to that. The probation officer -- this is how we do it in our circuit -- then issues an addendum to the presentence report and the addendum tells the judge in effect here are the factual issues that have to be resolved at the sentencing hearing. So the court now is focusing on the factual disputes at the sentencing hearing and making fact findings.

MR. WROBLEWSKI: In your view is that working well under the procedures as now laid out under Rule 32?

JUDGE TJOFLAT: That works well. The problem is that to the extent the court varies, as Judge Shedd was just saying, if he just says I'm considering all these factors, period, one sentence, doesn't tell you anything on review. If we had a civil case on review, it was a bench trial, and the trial judge

simply said I've considered the law, period, judgment $500,000 for the plaintiff, we'd send it back down because we couldn't review the judgment. Rule 52 requires findings of fact and conclusions of law. So the extent to which the sentencing judge says, for example, there is a greater need for general deterrents -- let's take a cattle rustling case. In Montana that's serious business. It isn't in the Southern District of New York. If you have one norm for cattle rustling, I can see a judge in the Southern District of New York saying, "Yes, out there you need general deterrence. You can't stand cattle rustling. You don't have any policeman around. But it isn't going to occur in New York so general deterrence is out of the picture."

The point I'm making is if the defense counsel was putting that position to the court, that would appear in the addendum and now the judge is going to focus on the need for general deterrence. And there may be a variance because there is no need for general deterrence, and the so-called disparity between the sentence in Montana and the one in the Southern District of New York is different but it's not unwarranted disparity. The statute talks about unwarranted disparity, not just disparity. That's how I think it ought to work. Then on appeal we look to see whether or not the fact finding is clearly erroneous. If it is, then the sentence is unreasonable.

JUDGE SHEDD: Let me say one thing. First of all, this hearkens back to -- Judge Tjoflat is talking about cattle rustling. As I said, out in some places in the southwest there appears to be a problem with judge rustling out there to.

Let me say this about the probation officers. When I was on the district court I treated them almost like law clerks. They were an officer of the court. They worked for the court. And they absolutely, quite frankly, my opinion, if you didn't have the probation officers do the presentence work and write those presentence reports, sentencing guidelines would still be in their infancy because they absolutely are that critical to what they do.

MR. WROBLEWSKI: Could I turn for just a second to the role of the prosecutor? Since the guidelines have been in effect, administrations of both parties have struggled with what the prosecutor should be charging and this question of should the prosecutor have control of the sentencing. All administrations up until now have basically come up with the same formula, which is charge the most serious offense --

JUDGE TJOFLAT: -- that you can find guilt beyond a reasonable doubt. That's part of equal protection of the law.

MR. WROBLEWSKI: Right. There has been criticism suggested here and it's been criticism written many other places about the prosecutor having too much control of the sentencing. Is that the right standard? If not, do you have a suggestion as to what is the right standard for prosecutors in determining --

JUDGE TJOFLAT: I think the prosecutor ought to follow that when you deal with mandatory minimums in the real world, maybe it's a sting or some such thing that we are looking at the mandatory minimum driving at the quantity. So to that extent the prosecutor has a great deal of control.

JUDGE SHEDD: It seems to me it is a fair and proper standard. I think the real question in the real world is: is it applied that way, is it really applied that way, is the person charged that way with the most serious offense that's provable, and does that remain the final charge to the plea agreement, and is there a favoritism in the plea agreement. This is where you face as a district judge, and I know these judges know it, if the U.S. Attorney stands up and tells you, Your Honor, we think he was involved in more stuff but we can't prove it, you have to accept that. We don't have investigators to send out. The probation office largely relies on what they see in the discovery. And so I think it's a proper standard for equal protection and for other reasons. It's just the real question in the real world is: is it applied all the time? That's what you wonder. Did that person get a little better treatment because of his or her lawyer or because of his or her status in the community? That to me is the question.

MR. WROBLEWSKI: And is there a process? You know, typically the process has been in many U.S. Attorneys' offices to have some sort of committees reviewing plea agreements or things like that. Is there some other process you can see to make sure that it is followed in a consistent way.

JUDGE TJOFLAT: I can't speak for U.S. Attorneys' offices but I would dare say that they must have some kind of communication. And the district judge doesn't have to accept what the parties put before the judge on a platter, as it were. There is more power now under the guideline sentencing for a district judge to reject, quote, deals, unquote, than there ever was under the old system.

JUDGE SHEDD: The judge doesn't have to accept a guilty plea. You have no Constitutional right to enter a guilty plea. The lawyers argued that to me repeatedly but I keep pointing the law to them that it's not the case. I don't know about the internal practices of any U.S. Attorney's office. I don't know that. Sometimes I would have a colloquy with a U.S. Attorney and point out cases that seem to be similar to this one but were treated differently. I figure that's all I could do is just make it public.

Other than that, when I was on the district court, and I can't think of an exception, if I did not think that the plea deal reflected what was charged in the indictment, I just as a matter of course would not take it. I would say, again turning to the question of political responsibility in a larger sense, I would go people can't replace me easily. It's kind of hard to do it and I don't want anybody to think too long about it. The President gets elected and chooses an Attorney General. That's who helps pick the U.S. Attorneys. They are responsible to the executive branch. If people don't like the way they are prosecuted under the law, there is a way to take care of that. You talk about changing the President. I would say I am not going to take a plea that reflects lesser conduct than I can see in the indictment. I will take the plea but you'll have to go back, and repeatedly would come back with an information that was suited to the plea agreement. That's how I

would deal with it. Internal workings, I don't know about that.

CHAIRMAN HINOJOSA: It was clear from both of your opening statements that both of you were there and had a lot to do with the passage of the Sentencing Reform Act of 1984, and both of you mentioned that one of the reasons for the passage of the Act was the concern about unwarranted disparities, that individuals who commit similar crimes with similar backgrounds in different parts of the country might be receiving different sentences and sometimes even in the same courthouse. And you made some suggestions, one of them being, Judge Shedd, your suggestion that the ranges become much broader, which of course would require statutory changes because of the 25 percent rule, and then that enhancements or mitigating factors be suggested as may, as opposed to an advisory guidelines system that says you proceed with the enhancement or the mitigating factor. And then the fall-back decision being that if none of this works with unwarranted disparities, then we go to mandatory minimums as a possibility.

My question is when we talked about these broader concepts and broader spectrums and putting a lot of mays in with regards to the guideline system, there is always the question of doesn't that increase unwarranted disparity. A lot of those factors that are in the guideline system, for those of us who were in the system before the guidelines, for example, I did sentencing for five years, are factors that I normally considered with regards to whether I went to a lower sentence or higher sentence. Those were not necessarily viewed the same way by other judges and sometimes other judges in the same courthouse. And so do we increase disparity by doing that? And does that put us in a situation where we go to mandatory minimums in the suggestion of some? Or is there some other thing that we can do rather than those situations as possibilities? It is one of the seven factors. Unwarranted disparity is in 3553(a). It has to mean something. It's part of the statutes. So how do you cabin us district judges to make sure we consider that as one of the factors?

JUDGE TJOFLAT: I think findings and explanations are worth millions.

Let me tell you what a sentencing institute in the old days used to be like. They had a bunch of judges sitting around and we'd have let's say bank robbery. We'd have three cases on bank robbery. The first case on bank robbery the defendant was single. Boom, 15 years or whatever. These are in the blind, stiff sentences. Second case, same bank robbery. The defendant has got two small children. Some probation. So that circumstance drove the entire sentence. Third case, there is a bank robbery with a gun. Boom, put them underneath the jail. Okay. Bank robbery with a gun and he's got two small children, still going under jail, not quite as far, because there is a gun involved. So in a regime in which nobody ever explained anything and the sentencing commissions looked at bank robberies when they were framing guidelines, you'd have to set aside all the cases in which the defendant's mother is dying of cancer, there is small children or personal problems, do them in one pile because they are unrealistic in terms of setting an offense level. Then if you took the next category of cases in which there were no circumstances like those driving the sentence, you'd put them in a pile and moderate them because they were overreactive.

You are going to have sentencing disparity in my judgment no matter what the Commission does. Doesn't matter how many guidelines you draw. Doesn't matter how fine-tuned they are. Doesn't matter anything. Unless there is reasons stated for sentences and appellate judges review sentences like they review civil cases that are tried at the bench, you are going to have unwarranted disparity. Oh, I considered all the 3553(a) factors, boom. And the sentences, there is a variance up or down, whatever.

JUDGE SHEDD: Let me say this: I'm reminded of one of my law school classes when the professor asked this very difficult question, at least it was difficult to me, and then to my surprise he called on me to answer and I spoke for about 15 or 20 minutes. He finally stopped me and said, "Mr. Shedd, do you at least understand there is a problem there somewhere?" I said, "I certainly do and I was glad to be passed over."

Let me say I'm fairly confident that I see what the problem is. I'm

certainly less confident of all my suggestions, approaches to solving it. I just throw those out. By the way, when I mentioned those ranges, Mr, Chairman, I wasn't so much there talking about addressing uniformity. I was talking about the better or more efficient use of judicial resources. That's what I was talking about there.

But I do think this: We can talk about uniformity, and maybe this is one approach to get some uniformity back in the system, but I don't think uniformity is the touchstone of sentencing anymore. I just think the Supreme Court -- let me also give another caveat. I know that the law on sentencing is still in flux. We are getting new cases almost every day as appellate courts. District courts first work through them. I guess really start with defendants, their lawyers, U.S. Attorneys, and probation officers try to make some sentence out of it. They pass it on to district judges, pass it on to Court of Appeals, pass it on to the Supreme Court. We're all trying to figure out exactly what we're doing now in this new world. But it's fairly clear to me -- I think I see this -- that uniformity is no longer the touchstone. We can talk about it. I applaud it. I'm for it. I'm wondering how do we get there under the current scheme. That's what I wonder. Strikes me that it is more discretion, which seems to me more discretion naturally means less uniformity. And it seems even if you have articulated reasons you still are going to have less uniformity than with mandatory guidelines, and it's just a question of how that fits together and how we make the guidelines relevant and how we make them relevant and worth the while for the judicial resources we expend on them. That's the problem.

All those answers I suggested, I want to make it very clear I'm not sure -- I don't want to be the headline tomorrow morning in the Atlanta Constitution Judge Shedd comes before the Commission and says scrap sentencing and all mandatory guidelines. But I do think that is at least one way in some cases. And I suspect when it's all said and done that Congress may turn back to that at some point. They will be driven by some horrific case, and to address that circumstance there will be a mandatory minimum. I suspect that will be coming at some point.

COMMISSIONER SESSIONS: Just a quick question. Judge Tjoflat, you said at the very beginning that now judges want the Commission to tell them what to do. I mean, for us judges that was a shocker. So do you really think that's the case?

JUDGE TJOFLAT: Oh, yes. I'm not saying every judge, because I think judges see disparate cases coming along, especially when the courier doesn't have anything to sell and the head guy gets underneath the mandatory minimum, that kind of stuff. There are a lot of judges who'd as soon not be burdened with the discretion to impose really some catastrophic sentences, 300, 400 months, that sort of stuff, and like to be told by the guidelines here is what you got to do. That's not a uniform thought. It's a reverse of the other side of the coin.

I'll say one last thing and then quit. The uniformity and unwarranted disparity are not opposite sides of a coin. Unwarranted disparity is founded on the equal protection component of the Fifth Amendment. Uniformity is something else. I relate that to school desegregation cases. People used to say those are cases for compelling integration. That wasn't the idea, compelling integration. The idea was dismantling segregated schools, not necessarily compelling integrated classrooms but dismantling some. You are never going to have, quote, uniformity. I don't know what that is.

JUDGE SHEDD: I don't know this but I suspect many new federal judges will be completely satisfied not having the Commission tell them what to do, is my guess. I think some are still tied to the concept we're used to being told so we kind of expect it. But I can see that many new judges who are not used to mandatory guideline sentencing won't be upset at all if they are not being told what to do. You want some comfort in the job, but I think they'll probably be able to figure it out on their own is my assessment of it.

I want to mention one other very small point. We didn't have an appropriate point to say this, but I do want to mention this since I said I was going to talk about everything possible. And this is under 18 U.S.C., I think it's 3552(d) where it says the probation officers give the presentence

report to the defendant. That has been a bit of a problem because if that defendant is incarcerated and has a presentence report which includes lots of information about who is telling on him and others in the conspiracy, that has been known to cause great disruption and threats of harm. So there is at least a struggle in some districts I know about to what extent does the defendant get to see that pretrial report, what extent does he get to keep it, and do you keep it out of institutions. I know it's not within your bailiwick but it's something to consider because you are responsible for those reports actually being done up.

CHAIRMAN HINOJOSA: Thank you all very much. It's been very helpful and we certainly appreciate both of you taking the time to come here. We'll break until 11:00 and then we'll have a panel of probation officers.

(Recess taken.)

CHAIRMAN HINOJOSA: We are going to go ahead and get started with the probation officers who came well equipped with a batch of peanut brittle for all of us. It's greatly appreciated. We do have three probation officers who are obviously not only very involved in their own districts but also at the national level and have shown leadership with regards to issues of the federal criminal justice system. We have Ms. Ellen Moore who is the Chief Probation Officer for the Middle District of Georgia. She has been a federal probation officer since 1989 and has served as a supervising probation officer and sentencing guideline specialist. She has been the chair and the 11th Circuit representative on the Commission's Probation Officers Advisory Group, which is a group that provides excellent advice to the Commission and has done so for many, many years.

Mr. Greg Forest is the Chief Probation Officer for the Western District of North Carolina. He actually, before serving as the Chief Probation Officer, was actually the U.S. Marshal for the Western District of North Carolina. He formed the Offender Work Force Development Team in his district and has served as chair of the multidistrict work force development working group promoting employment and vocational programs for offenders, and so he

has done this for a period of time at the national level with regards to these particular issues.

Mr. Thomas Bishop is the Chief Probation Officer of the Northern District of Georgia. Beginning in 1988 he served as the State Probation Officer in Waycross, Georgia, and he became a federal probation officer in 1988, assuming both supervision and presentence duties. And in 2005 he became the Chief Probation Officer for his district. He obviously has provided location and national training on various issues involving the criminal justice system.

I will say that being a probation officer can be a difficult job; being the chief probation officer can even be a more difficult job, so we appreciate your taking time off from your duties. And we'll start with Ms. Moore.

MS. MOORE: Thank you. It is a privilege to be here today to sit in front of you and talk to you about federal sentencing guidelines, your role in that process, as well as a practitioner and in our role.

Immediately following the Booker decision the criminal justice community was buzzing in conversation about sentences now were going to be way below the minimum of the guideline range, but what really has proved out in the last two years is that that really hasn't come to fruition. Booker has impacted sentences above and below the guideline range, albeit the percentage above has been significantly less than the percentage below. And likewise the community was buzzing about now since Booker, what are the probation officers going to do. We were really asked that question. Our response was that the courts still need presentence reports to be completed in order to have a component that is vital in the sentencing process.

We now will have, we will soon have three years of statistics post-Booker decision. Although the fiscal year 2008 statistics aren't available, what we do have are the 2006 and 2007. I read an article that Judge Victoria Roberts wrote. She is a judge in the Eastern District of Michigan, and she

looked at what was happening in her district. So that's what I did in preparation for coming to talk to you. I looked at what's happening in the Middle District of Georgia as compared to the two sister districts in this state as well as the 11th Circuit and also on the national level.

What I found was not really eye-opening or earthquaking news or related statistics to that, but it did give me pause to look a little bit further because within the Middle District of Georgia the total cases impacted by Booker in 2006 were just 31 and in 2007 were 19. Comparing that to our sister districts, in the Northern District of Georgia in 2006, 92 cases, and 73 in 2007, and then in the Southern District 40 cases and then 32 in 2007. Relatively speaking we have to proportionalize that with the number of cases sentenced, but still the percentages that you formulate from looking at that were quite eye-opening. And so I said what is really happening here, because in talking with the judges in the district, they are very much inclined and very much in favor of the sentencing process and the sentencing policies post-Booker.

What I did find astonishing was that in the Middle District of Georgia our 5K1.1 motion departure rate far exceeds the national level. Does that mean that we have more people cooperating in the Middle District of Georgia than any other district? I don't think so. But then again, what I think is critical to look at is that when we look at statistics in making decisions and in making informed decisions, we need to be concerned that the judges are imposing departures based on 5K1.1 motions and because that door is opened they are also considering the additional factors at 3553(a). Their sentencing transcripts reflect that they are considering those additional factors, but when we tabulate those into the statistics tables, if you look at our federal sentencing resource sentencing statistics book, you see that what's really captured as being impacted by Booker is what's above the guideline range in conjunction with Booker, what's above the guideline range with just pure Booker, what's below the guideline range in conjunction with Booker, and what's below the guideline range just Booker. But yet 5K1.1 motions in consideration with the 3553(a) factors is not really considered in

the equation of being impacted by Booker. And I say that it is.

Another thing that I looked at that was quite astonishing was that the statistical information reflected in the publications is gathered by the Sentencing Commission from the probation offices across the nation who submit this information. What is not captured is the historical and political culture of a region and its potential impact that it has on sentencing. So I looked at what cases are generally sentenced in the 11th Circuit, and in particular in the Middle District of Georgia, and then in the sister districts as compared to the national. What I found was that the top three offenses for the Middle, Northern, and Southern Districts of Georgia was drug trafficking, firearms, and fraud, albeit not so different from the top four at the national level, immigration being number two on the national level. But if you take out the immigration component of the four for the national you, still have the top three, which is the drug trafficking, and fraud, and farms.

My comments are based on experience, involvement, and observations with sentencing practices. And with respect to the filing of 5K1.1 special assistance motions, my concern was if a motion had not been filed, would there have been a stronger argument presented at the sentencing hearing for a variance sentence, and if so, how would that have played out. If this is occurring in the Middle District of Georgia, my concern is that it's probably happening elsewhere. With the Commission's intent to look at the impact of Booker and formulate a proposal what we have heard in the field as a booker fix, it is recommended that the Commission use caution when looking at the statistics, as I believe the statistics are not pure and true in practice.

Judge Tjoflat and Judge Shedd both made comments earlier about education being a strong component of the sentencing process. Prior to the implementation of the guidelines there was a huge thrust of education poured out into the criminal justice community about educating people on the guidelines. The probation officers took a vital role in bringing to local districts, their local districts, educational forums, so to speak. In our

particular district the chief and the deputy chief actually went around the district and held educational venues, so to speak, for the practitioners. That was defense counsel as well as anyone else who wanted to attend, even members of the Department of Justice. They were well received, and in some aspects I think that probably put us ahead of the game, so to speak, when we had our very first sentencing hearing under the guideline regime, so to speak.

What I see that we failed to do in light of the Booker decision is what also Judge Tjoflat and Judge Shedd echoed a few minutes ago, that everyone was scurrying around trying to figure out just how did Booker apply, what were its parameters, its latitude that was given, and you had various districts making certain determinations, and processes, procedures were being implemented based on those particular situations. But then we've had the appellate review which has given us some sort of parameters to work in.

What I have found in working with the judges in my district is that all of the judges seated today were seated prior to the Booker decision, and in talking with them post-Booker they prefer the post-Booker, post-Booker venue, so to speak, in sentencing policy.

We will soon -- I would say soon is a relative term there, but there is a vacancy and another federal judge, Article 3 judge, will be seated for the Middle District of Georgia. In our district the probation office plays a vital role in orienting the judges to the federal sentencing process that takes place in the Middle District of Georgia with our local operating policies and procedures. I would imagine that we will have to revamp our orientation for sentencing, explain to them the guidelines, et cetera, because things are different. That to me is going to be critical in not only our role as probation officers in the sentencing world but also in facilitating the court in their understanding of practicing on the federal bench.

One of the things that I think is extremely important is that we have heard that when you look at the statistics that are available right now,

judges are still giving great deference to that guideline range, and the majority of sentences imposed are still within that sentencing guideline range. I believe there is some type of comfort, so to speak, found with going with the guideline range. When a variance is either identified by the probation officer in the presentence report or argued by defense counsel, there is to me a sense of hesitation somewhat to go there. So I believe education is critical and is needed.

I would like to respond to a comment made by Judge Shedd earlier when he said that in his review of presentence reports he saw a plethora of different types of presentence reports and he felt there was a need for a uniform presentence report. I'd like for the Commission and Judge Shedd to understand we do have a model presentence report to go by but it is at our district court's urging to make adjustments to the format of that presentencing report that we do so. So that is why you see different reports in certain different areas that the sentencing guideline range may appear, or the cover sheet looks different from another district's cover sheet.

I'd like to now address my comments with respect to question two on the scenario that was sent out to us for us to consider in expressing our opinions, and that is: What should be the role of the federal sentencing guidelines in federal sentencing? And what if any changes should be made to the federal sentencing guidelines? To some extent I've answered that in my previous remarks, but there are several things that I think are important to note.

Federal sentencing guidelines are a component of sentencing in the post-Booker world. And I think that is vital to understand for everyone. It is just one component of the sentencing factors that are to be considered.

I kind of took a different approach and I looked at what's good about the sentencing guidelines. I know you are going to hear a lot of things from a lot of people about what's bad. I'd like to offer you some support and say what's good about them. The federal sentencing guidelines are fluid in nature. Amendments are made on changes in law, societal demands, and

guidelines that have proven to be problematic. They are responsive. That's a good thing. Terrorism, biohazards, air piracy, cyber crime, crack amendment, those things weren't in the very first federal sentencing guidelines manual, but as society was impacted, Congress made new laws, the guidelines responded. The first edition of the guidelines manual did not include even Chapter 2 guidelines with respect to some of those offenses and additionally specific offense characteristics have been added.

The United States Sentencing Commission has an abundance of resources available to them in assisting in formulating these guidelines and in modernizing others. Special groups to include the Probation Officers Advisory Group, I know I may be a little partial but I think that is a group that is very instrumental that you can reach out and touch to, as well as the Practitioners Advisory Group, the Chiefs Advisory Group, other federal defenders organizations and special interest groups. They offer a grass-roots interpretation and application to a variety of issues that the guidelines address.

I'd like to give you just a brief example of this. Several years ago there was a change made to the career offender guideline where if the defendant was convicted of a 924(c) offense, which is the armed career criminal, and they also happened to qualify to career offender, then the Commission was trying to make sure that that range reflected what Congress's intent was for that penalty to be to get it into that norm, so to speak. I along with several other members of the Probation Officers Advisory Group were presented several drafts of this revised amendment to look at and to apply. And it gave us great pause, and in particular I went up to Commissioner John Steer at the time and I said, "We are really having problems with this." He said, "What's the problem? I said, "If you will allow me to come back and bring cases to you, real live cases, so to speak, we can work through them and I will show you."

So several of us met with him. We took our cases from our districts that were career offenders and armed career criminals that met that thing and

we sat down and we tried to work through the proposed guideline amendment and we showed him where the burden was in interpretation and application. In essence what we found, and I think what the Commission found there was very instrumental and vital to the final product that rolled out because you rarely had a question then of how to interpret and how to apply that guideline, at least not from the probation officers. If the judge had a question about it, most likely they reached out to their law clerk or to their probation officers for interpreting the application.

I would encourage the Sentencing Commission to maintain advisory groups, all advisory groups, and utilize the field expertise the members of these groups can provide. I hope that they have been as valuable in the past as you have been to us when we've had the opportunity to meet and talk with you. Thank you.

CHAIRMAN HINOJOSA: Thank you, Ms. Moore. Mr. Forest.

MR. FOREST: Good morning. First I'd like to applaud the Commission for holding these hearings; and secondly, thank you for asking me for my view as a married man and father of two young children that doesn't get asked very much. So I'll try to get through this statement here.

As many of you already know, the Judicial Conference of the United States initially opposed the establishment of the United States Sentencing Commission and the federal sentencing guidelines it promulgated. When confronted with a bill that would establish an independent five-person Sentencing Commission within the Judicial Branch, which would promulgate a set of sentencing guidelines, the Conference opposed the measure, indicating that a straightforward review of the sentences, either by appellate review or by a three-judge panel, would be preferable to legislation.

Later, commenting on legislative provisions that culminated with the passage of the Sentencing Reform Act, the Conference suggested that, "If the integrity of the principle of separation of powers is to be maintained, another needless and expensive entity should not be created which would in

many ways only duplicate the services currently performed effectively and efficiently by the Administrative Office of the United States Courts and the Federal Judicial Center." This view was echoed in subsequent meetings of the Judicial Conference.

The newly-promulgated federal sentencing guidelines were initially attacked in hundreds of constitutional challenges. The Judicial Conference remained wary of them, as well. After the guidelines were upheld in Mistretta V. United States, however, the Judicial Conference accepted their validity. In 1990, for example, the Conference voted to take no action on several proposals to seek fundamental reconsideration of the guidelines system.

Individual judges came to accept the legitimacy of the guidelines system as well. Between 1991 and the Supreme Court's 2005 decision in United States v. Booker, between 81.3 and 92.5 percent of federal sentences were either within guidelines ranges or reflected substantial assistance departures made upon the motion of the government. Only .6 percent to 1.7 percent of sentences were above guidelines range, and only 5.8 to 18.1 percent were below guidelines ranges for other reasons, including government-initiated downward departures for reasons other than substantial assistance, such as 5K3.1 early disposition programs.

Even after the Supreme Court's remedial opinion in Booker rendered the guidelines advisory, judges have continued to apply and many have continued to follow the guidelines. Since Booker approximately 85 to 86 percent of sentences have been within guidelines ranges or reflected downward departures made upon the government's motion.

Despite concern by some that Blakely and Booker would fundamentally disrupt guideline sentencing, within-guidelines sentences remain the rule, not the exception, in the federal courts. The federal criminal justice system is still a system of sentencing guidelines. Indeed, the Supreme Court's decision in Booker explicitly states that district judges must calculate the guidelines and consider them when sentencing.

Judges are affected by this obligation, obviously, but prosecutors and defense counsel think in terms of sentencing by the guidelines as well. Although Booker opened sentencing to the full panoply of sentencing factors enumerated at 18 U.S.C. 3553(a), old habits die hard. Many contemporary plea negotiations are still structured in terms of offense levels, criminal history, and viable departures. Only when a desired outcome appears elusive under the guidelines do federal practitioners reach for a variance, appealing to the abstract principle of 3553(a).

United States probation officers also remain deeply enmeshed in the application of sentencing guidelines. In most districts it is the probation officer who calculates the guidelines and who incorporates the result into the sentencing recommendation of the presentence report. It is often the probation officer who completes the statement of reasons, the form designated by the Judicial Conference to record the judge's rationale for sentencing. Indeed, the U.S. probation officer plays such a central role in guideline sentencing that they have been called the, quote, guardians of the guidelines.

There is a great deal about sentencing under the federal guidelines that is laudable. The last 20 years have demonstrated that sentencing guidelines have accomplished the first and foremost goal of the SRA, which is reducing unwarranted sentencing disparity. We have come a long way from the, quote, judicial lawlessness, end quote, condemned by District Judge Marvin Frankel in 1972. Judge Frankel wrote: "The scope of what we call discretion permits imprisonment for anything from a day to 1, 5, 10, 20 or more years. All would presumably join in denouncing a statute that said the judge may impose any sentence he pleases. Given the morality of men, the power to set a man free or confine him for up to 30 years is not sharply distinguishable."

King and Klein note that horror stories about identical offenders before different judges, one who received a sentence of probation while the other was sentenced to imprisonment, were not the exception before promulgation of the guidelines, but the rule. Appellate review was virtually

nonexistent. This has changed under the guidelines.

The federal sentencing guidelines also accomplished several other goals of the SRA. They made federal sentencing significantly more rational, more certain, and more transparent. The Sentencing Commission has suggested that sentencing now may be the most transparent part of the entire federal criminal justice system. Because of the guidelines, punishment has become far more predictable. Now, confronted with an offense level of 21 and a criminal history score of two, a defendant knows that he is facing 46 to 57 months in prison and can make informed decisions about accepting responsibility, providing assistance to prosecutors, or accepting a plea bargain.

Despite these laudable achievements, the federal sentencing guidelines have been excoriated by many commentators. Critics of the federal guidelines frequently complain that they are too complicated, too rigid, and too Draconian. Even Supreme Court Justice Anthony Kennedy has complained that our punishments are too severe and our current sentences are too long. The severity of the guidelines is exacerbated by the Commission's efforts to reconcile the guidelines against Congressionally-enacted mandatory minimum sentences. Under the binding federal guidelines pre-Booker it was said that judges had been transformed into automatons, into calculators, compelled to enforce a system in which they did not believe. When judges did dare to deviate from the guidelines, they were overturned on appeal, or worse.

I do not wish to join this litany of criticism, nor do I wish to prescribe specific recommendations to improve the implementation of the SRA. Many others, both individuals and organizations, have already done so. At the time of Blakely dozens of academics and advocacy groups published thoughtful recommendations for sentencing reform. The Judicial Conference, the policy-making body for the federal judiciary, regularly articulates its views on behalf of the courts and the probation and pretrial services system. More recently, in anticipation of a new Presidential administration, a second volley of criminal justice recommendations has appeared in policy-making

circles. Many of those making recommendations have identified the same problems and have suggested similar solutions, e.g., guideline simplification or repeal of some or all mandatory minimum penalties. Accordingly, I encourage the Sentencing Commission to consider the extant body of policy proposals, not just the testimony submitted for its own regional hearings, when assessing the implementation of the SRA.

Instead of criticizing or enumerating desirable amendments to the guidelines, I want to focus the Commission's attention on the importance of data and research. Because the guidelines are not advisory and because the guidelines cannot be treated as presumptively reasonable, the guidelines themselves are less important than they were pre-Booker. Gone are the days when a district judge would be summarily reversed for departing below the guidelines by giving weight to a disfavored factor. Today it is the district judge who sentences within the guidelines without explaining why who is likely to be reversed. For this reason the data collected by the Sentencing Commission may be equally important or more important than the guidelines it promulgates.

Sentencing data and data integrity are perhaps more important now than they have ever been. Given President Obama's announcement that, "The question we ask today is not whether our government is too big or too small but whether it works," the Commission along with judges, prosecutors, defenders, and probation officers must appreciate the significance that data may soon play in the setting of policy.

In 2004 the Criminal Law Committee of the Judicial Conference endorsed a strategic approach that the probation and pretrial services system be organized, staffed, and funded in ways to promote mission-critical outcomes and that the capacity be developed to empirically measure the results. Following up on this commitment to measurable results, the Criminal Law Committee has embraced the use of evidence-based practices in the supervision of defendants and offenders and in formulating its budget requests and in making programmatic decisions.

To this end, the Office of Probation and Pretrial Services at the Administrative Office of the United States Courts has distributed grant funding to 18 offices in 16 districts to implement evidence-based supervision practices. These districts have introduced programs such as risk/needs assessment, motivational interviewing, cognitive-behavioral techniques, offender workforce development, and reentry programs based on drug court models. Other districts within the probation and pretrial system are employing these interventions as well.

While the impact of these interventions on federal recidivism data is not yet known, a cost-benefit analysis conducted by the Washington State Institute for Public Policy suggests that a number of these initiatives not only reduce recidivism at the state and local level but curb reoffending by such a margin that even more expensive programs are sometimes cost effective. Thus, intensive treatment-oriented supervision programs cost $7,000 more than alternative programs; however, they reduce recidivism by 16.7 percent, according to 11 different studies, and thereby save victims over $9,000 as well. The net effect is that programs of this kind appear to save a net of $11,000. Other such programs such as surveillance-oriented intensive supervision have no significant effect on recidivism and impose additional costs.

Although the Criminal Law Committee has not endorsed the Washington State study or the correctional interventions evaluated therein, it has repeatedly endorsed the use of evidence-based practices. Accordingly, probation and pretrial services officers across the country are trying to use social research to better supervise defendants and offenders. A national risk/needs tool is already in development and will allow probation officers to tailor evidence-based interventions to the specific criminogenic risks and treatment needs of each individual offender. Having reliable data about sentencing and recidivism would enable judges to impose evidence-based ntences and would enable probation officers to implement those sentences in a way that maximizes their effectiveness interestingly, many of the evidence-based initiatives being implemented by probation and pretrial services

offices share common goals and methodologies with the initiatives explored by the Sentencing Commission at its 2008 Symposium on Alternatives to Incarceration. As alternatives to incarceration are studied by the Sentencing Commission, the Executive Branch, and the Congress, meaningful sentencing data will be essential to these efforts as well.

I hope that the Sentencing Commission uses the 25th anniversary of the SRA to reflect on the sentencing guidelines and ways that they can be improved to guide judges after Booker, but I also hope that the Commission remains attentive to the essential role that data will play in the criminal justice system as government agencies look for interventions that work and that use resources in a thoughtful and effective manner.

CHAIRMAN HINOJOSA: Thank you, Mr. Forest. Mr. Bishop.

MR. BISHOP: Good morning. I am honored to have the opportunity to appear before the U.S. Sentencing Commission in recognition of the 25th anniversary of the passage of the Sentencing Reform Act of 1984. As someone with 21 years of experience with U.S. probation, I've had the opportunity to complete pre-guideline presentences, guideline presentences, and as chief have seen the arrival of Booker. Our role as U.S. probation officers throughout these changes has been and will continue to be to serve the court in the fair administration of justice.

In preparation for my testimony today I spoke with several of our presentence investigators and their supervisors in an effort to provide an overall view from our probation office. In discussing the guidelines, the impact of Booker, and any suggestions regarding changes, their response was varied from officer to officer, sometimes depending on the judge they served. Overall officers feel that the guidelines provide a solid framework in which judges can rely on to sentence defendants. Most favor the wider discretion the judges have now under Booker in their ability to consider offender characteristics including rehabilitation in determining appropriate sentences. Officers who have those variances, use it to a small degree, and use it to the best for the defendant. Some officers did express concern that

these variances have somewhat diminished the certainty and uniformity of sentencing which contradicts the sole purpose for which the guidelines were initially created. The certainty and uniformity of sentencing could be further eroded in some of the recent Supreme Court decisions which have indicated that the sentencing courts can no longer make a basic presumption that the guidelines are even reasonable. With these decisions, the broader discretion under Booker, and now taking things into consideration such as offender rehabilitation, one would have to wonder are we moving full circle to where sentencing was prior to the Sentencing Reform Act?

The probation officer's role since Booker really hasn't changed dramatically. We continue to apply the guidelines as set forth but recognize the increased support that Part C offender characteristics now play. Verifying information in Part C which subsequently could lead to a variance could be critical and at times challenging for the officers, especially when the variance requested is given with little or no notice. One recommendation would be that a requirement be established that all probation officers receive prior notice of a variance request, thus allowing the officer time to verify and provide follow-up information to the court prior to sentencing. The notice of a variance request could be contained in the government's or defense counsel's response and/or objections to the presentence report.

Regarding change to the guidelines, some officers mentioned the need to continue to address the sentencing disparity between crack and cocaine offenses. If you read some of the Supreme Court's decisions, maybe it's moving in that direction.

I know earlier today I heard discussion about the mandatory minimums and whether they are good or bad or which route we should go. One officer did comment that further consideration should be given towards possibly lowering the mandatory minimum sentences for drug offenses, which we recognize would involve Congress. This is not to take away from the harm the illegal drugs cause in our community, which is great, but more toward providing a more proportionate sentence in compared to other crimes. Many

times the guidelines for drug offenses fall below the mandatory minimums, but absent the defendant qualifying for the safety valve or 5K departure, little can be done in the way of court's discretion in considering such factors outlined under 3553.

Several officers recommended the guidelines be increased for fraud-related offense. Fraudulent activity is continuing to escalate in our district and for the first time in our history has surpassed all other crimes over a 12-month period. Only now has the public started to realize the tremendous harm caused to society by these type of offenses. Fraud and theft from financial institutions can no longer be viewed as, quote, victimless crimes. Although the media has not focused on how fraud effects contribute to the current economic crisis that we now face, those of us who work in probation just know how rampant fraud is in our communities, especially mortgage and loan fraud.

It's ironic this past Saturday in the Atlanta Journal Constitution there was an article entitled "First Bank is the Sixth to Fail." And it says, "The bank failures keep piling up in Georgia. Federal and state regulators on Friday seized First Bank Financial Services of McDonough. It is the sixth bank to fail in the past six months." The article then goes on to state that at the end of the third quarter, the most recent data available, First Bank reported $53 million in loans 90 or more days late and they charged off another $8 million in loans as not collected. Of course, the first thing I think of is how many are attributed to offenders in our community.

I went on to look at some statistics from the FBI, and this is from fiscal year 2008, and this is just for mortgage fraud. Estimated annual losses this past year, fiscal year, $4 to $6 billion; total mortgage fraud suspicious activity reports, 62,494; pending mortgage fraud investigations at the end of the fiscal year, 1,569. Of course, they go on to list the top ten states where fraudulent activity is most prevalent. Coming in at number six: the state of Georgia. And the $4 to $6 billion, that's just mortgage fraud.

That doesn't take into consideration other types of fraud such as credit card fraud, bank fraud, Social Security fraud. Of course, the list goes on and on.

Many offenders convicted of these type of offenses receive light sentences, pay only a fraction of the restitution, and despite the best efforts of our officers, continue their criminal activity when they are released from prison. In fact, several continue their criminal fraud activity while they're in prison and while they're in our federal halfway houses. During the past year there were three particular cases that we found out they were involved, and then a few months after being released searches were conducted on these individuals and we uncovered large amounts of credit card fraud and corporate identity fraud in the hundreds of thousands. Greater emphasis should be placed on stiffer penalties to protect the community from these types of offenses.

Last I'd like to discuss the American Bar Association's recent recommendation regarding Rule 32 of the Federal Rules of Criminal Procedure. Their proposal would require a probation officer to provide all documentation received in connection with a presentence investigation to the opposing party unless excused by the court for good cause shown. The ABA is also proposing a presentence writer who receives oral information, other than through an interview with a defendant unless excused by the court, provide a written summary to all parties.

First, the investigator file maintained by the probation officer is the court's record and that would be confidential. To release the investigating material would not only affect the free flow of information but possibly subject the victims and witnesses to additional harm or threats. The second part, requiring officers to provide a written summary of all information, would create the same concerns and would also add an enormous burden on our already heavy schedules. During the course of a presentence investigation probation officers interview family members, case agents, Assistant U.S. Attorneys, employers, drug handlers. The list goes on and on. To require

them to come back and provide a written summary to all parties would possibly double their workload and eventually lead to requesting numerous extensions in the disclosure of their presentence reports. It should also be noted that probation officers do provide a summary of the information they receive. It's contained in the presentence report. The defense counsel and the government can challenge these summaries or comments through objections. And if there are objections, the probation officer can provide supporting documentation and/or oral testimony as directed by the court.

In closing I want to thank you for the opportunity to share the opinions and suggestions from our probation office, the Northern District of Georgia. I think it says something about our country and our judicial system, and particularly the U.S. Sentencing Commission, that after 25 years we are still doing all that we can to ensure the fair administration of justice. Thank you.

CHAIRMAN HINOJOSA: Thank you, Mr. Bishop. We are open for questions.

COMMISSIONER CASTILLO: Let me thank you because I know it's thankless work to be a probation officer, let alone to be a probation officer supervisor. I thank you for taking time out of your busy days to come here.

I heard for the first time last week in all my time in the federal criminal justice system at a defender's program a criticism that PSRs were not complete post-Booker because they did not follow the 3553 factors, they didn't track them. Do you think that PSRs should be revised in light of the Booker decision and all of the decisions that have come thereafter to more closely reflect the 3553 factors? That's a question to all three of you.

MS. MOORE: Well, the format of the presentence report has been modified to where you can include the section, I believe it's entitled Part F now, which we are charged with as probation officers of identifying factors influenced or that can be influenced by 3553(a) factors. And we are going through the systematic analysis of looking at each one of those factors. If we identify something, we put it in the presentence report.

COMMISSIONER CASTILLO: Right. This criticism, just to be more pointed with my question, wasn't that there wasn't that Part F section, which a lot of defense attorneys just felt like it was sort of routine service to say we've considered all the 3553 factors and there is no special reason here that would justify a variance, but it was more like should we take the PSRs and using the 3553(a) factors, all seven of them, use them to sort of create the subheadings for the PSR and in that way frame a more pointed discussion. Mr. Forest, do you want to say anything on that?

MR. FOREST: That's always a possibility as far as taking each one of them and laying it out. I just see that opening the door to more objections, because they are still not going to like what we have to say a lot of times. I'm not sure that a sentencing memorandum by defense doesn't accomplish the same thing.

CHAIRMAN HINOJOSA: Isn't it true that at least you have the restitution section, which is one of the seven factors; you have the sentences available, which is another one of the seven factors because you have a whole section on that in the present format; then on more to disparity, which is going to be left up to the individual judge as to what decisions to make; and then you've got the guideline determinations and suggested grounds for departure; and then the (a)(2) factors which Identify other potential reasons. So I guess some of these headings are already there as headings. Wouldn't that be true?

MS. MOORE: That would be correct. To include offender characteristics such as need for education, need for rehabilitation, et cetera, all that is in Part C.

COMMISSIONER SESSIONS: Mr. Forest, this is a question to all three of you. You mentioned transparency. One of the criticisms of the system is that it's no longer transparent because essentially the prosecutor and the defense lawyer get together and they bargain. They bargain over enhancements. They bargain about disclosure of facts both to the court as well as to the probation officer. And I wonder to what extent in your own

individual districts that is the case or that's a problem.

MR. BISHOP: I would say that happens quite frequently in our district. In talking with some of the officers, it does sometimes put the presentence writer in an adversarial role where everything has been hammered out and the probation officer comes in as the presentence writer as the bad guy because they have applied the guidelines as set forth, which obviously differs from what they've all negotiated. And it kind of puts the court in an awkward situation. That does happen and it does create some problems.

COMMISSIONER SESSIONS: How prevalent is it do you think across the country, if you know?

MR. FOREST: Speaking for our district it happens fairly often where you'll have the deal worked out and the presentence report will come in and I won't say blow up the deal but definitely the judges will then ask a lot more pointed questions in court than they were anticipating. So it does put us in an adversarial position and it's frequent.

COMMISSIONER SESSIONS: Isn't there a further problem because you've got to do a background investigation and you may not be given the facts? Are you given the facts by the government?

MR. FOREST: Most of the time we are. There have been occasions where certain things have been withheld from us in discovery, but most of the time we have open file.

MR. WROBLEWSKI: Could you describe for just a second the process in each of your districts about getting information from the government on what happened in the case, and then also to whom is that information shared besides you, if anybody.

MR. FOREST: Speaking for us, it's open file. We go to the U.S. Attorney's office and discovery is on a disk. We get the disk, we go through the disk, talk to the USA, talk to the case agent. Like I said, most of the time we get all the information. There are times we do not get all of it

because it's a complex case and the deal has already been worked out, so we're given what they want us to get. But a lot of times the officer will take it a step further and find that through the case agent.

MS. MOORE: I would like to respond to the first question by Judge Sessions. In the Middle District of Georgia we rarely run into that situation. There have been occasions to where once a plea agreement has been entered and everything and the probation officer has looked at the entire case, we have gone on record, we've put everybody on notice that we are going to approach the court and suggest to the court that he or she consider not accepting that plea and plea agreement because it is not truly reflective of the crime. The very few occasions that we have approached the court to do that, the majority of the time the court has concurred and those cases have gone to trial. But for the Middle District of Georgia -- and again, I think here what we are looking at is the differences in the prosecutorial offices and their administration and how they put together plea agreements. In our district the U.S. Attorney's office does have the chief of the criminal division and her assistant review the plea agreement before they come to the court to enter the plea.

Now, when probation officers prepare the presentence reports, they are going to the prosecutor and they have pretty much open reign to looking into the evidence and the interviews and transcripts and everything. We review that. We do not stop there. We go to the lead investigator or several investigators in the case. But it doesn't stop there. We talk to the defendant, and we ask the defendant. And I know that defense counsel has a hard time with this sometimes when we ask them what was your involvement, tell us about the offense. But if we are going to provide the presentence report that is truly reflective of all sides, we need to hear from the defendant. And so we work with our defense counsel and with the federal defender's office in the Middle District of Georgia in saying this is not -- we are an extension of the court and we need to provide the court a full 360-degree picture that involves all of the players in order for an informed decision to be made about the sentence to be imposed.

COMMISSIONER CARR: Mr. Forest, I want to thank and compliment you for the comprehensive, well documented and up-to-date nature of your written submission. I wanted to know if you wanted to be any more specific about the kinds of data and research that you would like to see us doing going forward.

MR. FOREST: It's going to take the combined effort from everybody involved in the system to put the proper data together, but talking about data, one of the things is recidivism sentences. We'll put the [inaudible] on programs on the front end that individuals are offered, and part of what we are talking about with risk assessments is something that the Office of Probation and Pretrial Services is looking at, is doing a risk assessment in the presentence stage. In that risk assessment the judges will be given information to let the judges know a little bit about that individual to make a better informed decision at sentencing, not only about the riskiness of that individual but also about whatever programs, be it vocational or strictly educational programs that individual would need. Then we'd have to track that from, if they participate in these programs, through release to see if that further reduced recidivism.

This is not a short-term -- data collection is not a short-term fix. It's more a long-term fix. But it's going to require a total paradigm shift. With defense counsel's thinking, talking to them a while ago about that, they are thinking about letting an assessment be done or agreeing for an ssessment to be done in the presentence stage to be included in the presentence report. I think it would benefit the court immensely.

COMMISSIONER CARR: Would that be like the risk prediction index that is done when someone is about to be released from prison, do one like that up front at sentencing time?

MR. FOREST: Yes. It will totally replace the RPI you were just speaking of. It will be much more comprehensive than the risk prediction index.

COMMISSION FRIEDRICH: I have a short question for Mr. Bishop. One of

your recommendations is that the parties be required to provide notice to you of their intent to seek a variance. A couple of questions relating to that. One, how significant a problem is this? Are you seeing a lot of sandbagging on the day of sentencing, a number of arguments being raised that really have not been addressed either in the paper filed by the parties or the PSR? And two, would your recommendation extend I assume to the parties receiving notice of one another's intents to seek a variance? In other words, you're not the only one who receives notice but the opposing party does as well.

MR. BISHOP: That's correct. I had several officers bring that up. They didn't give me a time frame as far as how late of notice. Sometimes it's occurring at sentencing where they'll bring up a variance request, defense counsel may, and there is nothing in the presentence report to refute or support that. And sometimes sentencing is delayed; sometimes the court goes ahead and sentences without enough information. Our position is: why do that? Let's make sure the court has all the information available to make the appropriate sentence. Once again, usually it's occurring at sentencing. I can't say for sure how frequently it's happening, but I know several officers did mention that's an issue.

MS. MOORE: I would like to add that was actually happening in our district quite frequently, and we agreed to a local operating procedure to where any objections, any issues had to be submitted 14 days prior to the sentence day. Because the sentencing reports go to the judge seven days prior to the sentence day in our district, and so he or she needs all of the information to prepare for that sentencing hearing at that time. If you wait until the sentencing date to start filing or bringing up additional issues, you kind of catch everybody off guard. And so what we are doing is they are filing through CMECF so that all parties get notified that something's been filed, and it's worked real well for us.

COMMISSIONER FRIEDRICH: Are the judges in your district willing to grant continuances when new facts come to light that perhaps weren't apparent 14 days before sentencing?

MS. MOORE: Yes, ma'am.

COMMISSIONER HOWELL: Commissioner Carr asked one of my questions but I had a two-prong question so I'll go to the second prong.

CHAIRMAN HINOJOSA: And this will be the last question.

COMMISSIONER HOWELL: It stems from a conversation I had with a federal judge who basically raised the question of why the Sentencing Commission is continuing to issue quarterly reports about what's happening post-Booker across federal courts and whether or not it's at all relevant anymore how many courts are sentencing within guidelines, outside of guidelines, how many 5K1.1 motions are being issued in districts and accounting for below guideline range sentences and so on. So it was interesting to see that you, Ms. Moore, actually looked at some of those statistics in evaluating what was happening in your own district compared to nationally.

But in specific cases I was curious whether you ever, when you are calculating not just the guideline ranges you are required to by the Supreme Court in preparing a PSR, but in evaluating whether or not there are possible grounds for a variance, whether you ever look at some of those statistics to see if in similar kinds of cases there are courts around the country going above the guidelines or below the guidelines. Do you ever look at them as individual cases?

MR. BISHOP: In my opinion that's probably not occurring.

MS. MOORE: I would say that it's probably not occurring because we really don't have access to that particular like case to compare apples to apples. The Northern District of Georgia may have a higher variance rate but we don't have the cases that comprise that variance rate. The Sentencing Commission does. And I'm sure that with the appropriate requests and latitude or whatever we could, or even I could pick up the phone and call Mr. Bishop and ask him in your district do you have variance with respect to fraud cases, and if so, can you give me some indicators of what was the reason for the fraud. That's great that we have that camaraderie and we can

share the information, but you raise a good point.

CHAIRMAN HINOJOSA: Thank you all for your time. It's been very informative. And we'll have our break for lunch now and we'll be back at 1:30, but thank you all very much for taking your time to be with us.

(Lunch recess taken.)

CHAIRMAN HINOJOSA: Good afternoon. Our first panel this afternoon is composed of a view from sentencing practitioners. We have Ms. Nicole Kaplan who is an assistant federal public defender in the Northern District of Georgia. Ms. Kaplan is a former law clerk for the Honorable Stanley Birch of the 11th Circuit Court of Appeals and Master Judge Christopher Hayden for the Northern District of Georgia.

We have Mr. Lyle Yurko, a private attorney in Charlotte, North Carolina. He was a member of the North Carolina Sentencing Commission from 1993 to the year 2007, and he has also served as a member of the Practitioners Advisory Group to the United States Sentencing Commission since 1990.

We also have Mr. David O. Markus, a private attorney and Criminal Justice Panel representative in the Southern District of Florida. He is the Past President of the Florida Association of Criminal Defense Lawyers, Miami Chapter, and the Federal Bar Association South Florida Chapter, and he is currently the Vice-Chair of the National Association of Criminal Defense Lawyers Amicus Committee.

We have Mr. Alan Dubois who is a senior appellate attorney and federal public defender in the Eastern District of North Carolina. He previously was a staff law clerk for the 4th Circuit Court of Appeals, and he also has served as a visiting federal defender in the United States Sentencing Commission and a visiting attorney for the Office of Defender Services in Washington.

And we have Ms. Amy Levin Weil who is a private defense attorney in the

Weil Law Firm in Atlanta. She served for 25 years as a federal prosecutor in the U.S. Attorney's Office in the Northern District of Georgia, serving as Chief of the Appellate Division for eight years, and on the Attorney General's Appellate Chief's Working Group for five years. And she is currently the Chair-elect of the Appellate Practice Section of the State Bar of Georgia. And we'll start with Ms. Kaplan.

MS. KAPLAN: Good afternoon, Mr. Chair, and Commissioners. Thank you for this opportunity to appear in front of you today. This moment I think offers a tremendous opportunity for the Commission, the courts, and other institutional actors to engage in a meaningful dialogue and work towards accomplishing the goals of the Sentencing Reform Act. The Sentencing Reform Act held great promise but to a large extent that promise is still unfulfilled, and I respectfully urge the Commission to seize this moment in using what I think is your unique research expertise and ability to mine the data that the Commission has collected and engage with the feedback being provided by the courts since Booker to revise the guidelines in a number of ways that will reduce prison overcrowding, achieve sentences that are sufficient but not greater than necessary, and reflect empirical research on the recidivism and other sentencing factors.

I found this morning's sessions to be fascinating. I planned to start by speaking about Section 1B1.8 but I think Judge Shedd has addressed that much more eloquently than I could. I would note that it has always seemed to be a problem to me that a defendant who comes in and cooperates in my district upon arrest and provides information not only about himself but even others that ultimately leads to the prosecution of those individuals is not protected; whereas, if he had kept his mouth shut and waited for a lawyer he would have received the benefit of 1B1.8 protection. So I second Judge Shedd's comments and hope the Commission will look at that.

Looking forward, I note that most judges most of the time continue to sentence within the guidelines, and this is true across defense types and criminal history category. In my district, while our variance rate is

slightly above average, the guidelines still have great gravitational weight and there are judges who continue to expressly apply de-facto mandatory guidelines saying they will follow the guidelines and impose a guideline sentence absent an extraordinary circumstance.

So that sentencing practices become more consistent and the guidelines are treated as advisory under Kimbrough, Gall, Rita, Spears, and Nelson, I ask that the Commission amend the guidelines manual to remove references to Section 3553(b) where they appear, amend Section 1A2 to more accurately reflect all of the 3553(a) factors and the Supreme Court's recent decisions. And I would also recommend that Section 5H and 5K2 regarding appropriate grounds for departure be excised, because those sections address things that were prohibited but are now permissible to be considered under Section 3553(a) in determining a reasonable sentence.

Turning to what has come to be known as the in/out question, I urge the Commission to recommend that judges sincerely and intensely focus on the in/out question at the outset in every case in which prison is not statutorily required. I read a recently released report on alternative sentencing in the federal criminal justice system, and the statistics were very interesting to me. 66.4 percent of those persons in criminal history category one receive a straight prison sentence. And given the Commission's work on what we call true first offenders who fall into category one and their likelihood of recidivism, I think there is a great deal of work that could be done there to reduce that incarceration rate. Given the overcrowding of our system and the massive financial and societal cause that goes hand in hand with large scale incarceration, we must acknowledge that continued incarceration of low-risk, nonviolent offenders is counterproductive and counter to the research on the risk that they pose.

There has been a discussion of a lot of big ideas this morning but my plan is to focus on a few distinct guidelines and then deal with larger issues perhaps in the question period.

Turning to the fraud guideline, there was some discussion this morning

of drug quantity, but I think also overemphasis on loss amount and multiple overlapping enhancements have dramatically increased the sentences of nonviolent offenders, including first offenders, and yet loss amount and other enhancements that determine the sentence now often bear little relationship to relative culpability, same conspiracy, or future risk to the public.

As an example, in a recent healthcare fraud case I had a 68-year-old first offender client who had allegedly billed under the wrong code for the healthcare services that were provided. The government contended that he used the wrong code because he knew the procedure was not covered by insurance. There was no allegation that the services were not performed or they were not medically necessary. My client was sentenced to a multiple year prison term, the same sentence he would have received if he had made up patients or billed for procedures not performed. The loss amount was what drove the sentence and he was sent to prison despite the fact that his culpability can be distinguished from the culpability of those types of offenders and no one believed that he was a future threat or would ever recidivate given a number of factors including not only his age.

Similarly in a tax fraud case a first offender tax preparer was sentenced to prison time solely because of the loss amount involved. This tax preparer charged only a market rate fee to prepare returns and the deductions were inflated so the clients would receive bigger refunds. She did not take a share of those refunds or submit returns for ghost filers or some of the other things that we often see in tax cases, but there were no reductions for that comparative lower culpability. Her guideline range was the same as another client in our office who has pocketed all or a portion of the refunds for herself.

My point in those examples is to say that while loss is a number that needs to be known and is an important number, it is not necessarily the guidepost for culpability that we've been looking for. Focus on loss amount can obscure other relevant factors related to culpability including role in

the offense. The probation office in my district rarely applies the mitigating role guideline of its own accord outside of the drug conspiracy context. When arguing to the probation officer that a role reduction is appropriate, it is sometimes added in but the burden is often on the defense to raise the issue of a role reduction. It does not occur to the probation officer in the first instance most of the time. In a fraud case with what we call in my office a low-level runner, someone who deposited or cashed the fake checks, even if a role reduction is awarded, it is often dwarfed by the enhancement for loss amount which in our district is liberally construed against the defendant. It's I would submit roughly equivalent to a should-have-known standard. If my client who is a low-level runner is aware of at least one other member of the conspiracy doing the same thing, the entire loss is attributed as legally foreseeable whether or not the facts of the case actually bear that out from a practical perspective.

In drug courier cases we still struggle to convince judges to award a role reduction to couriers despite the commentary to the guideline, and some of our judges have an expressed policy that they will not give a role reduction to a mule who is sentenced solely for the drug weight they carried. This is due in large part to the perception that anyone whose conduct was integral to the offense should not be eligible for a role reduction. While the courier is integral to the offense, I think, as Judge Tjoflat mentioned this morning, they don't have the information to trade for cooperation and they are easily replaceable. So my suggestion is that the mitigating role guideline should be amended to invite its use. The commentary should make clear that drug couriers are eligible instead of not precluded from such a reduction.

Furthermore, I think it would be extremely helpful for examples of mitigating role adjustments for fraud and robbery cases to be provided. We see examples of multiple defendant robberies where maybe someone was the get-away driver or stood by the door and was not a planner. Examples I think would be extremely helpful in inviting the use of that guideline more significantly.

Turning to child pornography, the child pornography guideline deals sentencing ranges that are in many instances above the statutory maximum for the covered offenses. This is one case in which the statute does not inform the norm set by the guideline. And indeed, in looking at state statutes for another matter it came to our attention the guideline ranges for child pornography are often higher than the penalties for many state crimes involving sexual assault of a child. The current enhancements can lead to a level [43] life sentence for a first offender charged with distribution for sending even one image to another person, usually an agent. The overly severe guideline combined with charging decisions made in my district means that more and more of these cases are going to trial. The prosecution refuses to dismiss distribution and receipt counts in order to ensure a mandatory minimum sentence, and when a first offender faces a guideline sentence of 30 to life after reduction for acceptance of responsibility, there is no incentive to plea. As a result more clients are choosing to go to trial and more juries are being exposed to the images. Prosecutors in our district refuse to stipulate or old-chief, if you will, the pornography, so the images are put up on the courtroom wall six feet high.

The courts are providing detailed written reasons for why they continue to vary below the guidelines in pornography cases. This feedback provides the opportunity for the dialogue that I mentioned between the Commission and the courts that was envisioned by the SRA and adjustments to the guidelines so that judges would become more likely to sentence within it. After Kimbrough the law states that the judges are free to examine the policy behind that guideline and determine whether or not it has been based on past practices and empirical research of the Commission. The Department of Justice itself has issued a study in the past indicating that the risk of recidivism for sex offenders is often quite low. And so I would urge the Commission to look at the data and amend that guideline accordingly.

Turning to career offender, the criticisms of the career offender guideline by the federal defenders is well documented, so without reiterating those in detail I would simply report to you that my own experience is that

many clients that are categorized as career offenders are very young, very poor, and have never been to prison. In my district the vast majority of gun and drug cases come from the Atlanta Police Department, which is in Fulton County. The large majority of predicate convictions that qualify clients for career offender enhancements were also imposed in the Fulton County system. The jail has been in receivership for several years as a result of federal court-appointed expert evaluations of safety and sanitation. The jail is chronically overcrowded and understaffed. The medical staff do not have escorts to provide medicine to patients with severe illnesses like hepatitis and HIV. Clients don't get out of booking cells there and into housing for extended periods of time. Kitchen problems, laundry problems, the list goes on and on. These are the conditions in which these clients make the decision to plea to go home in Fulton County.

Requiring only two predicates to qualify as a career offender in the federal system in our district drastically increases the sentences for clients in many cases who have never served a day in prison or only served a very brief time. It is quite common in Fulton County for a client to be sentenced to probation more than once for possession with intent to distribute small quantities of drugs or receive a sentence of one year, commuted to time already served in the county jail waiting to get to court.

I don't recall if it was Judge Shedd or Judge Tjoflat this morning who said it's difficult to impose these very high sentences without some kind of spend a year in jail, and if you don't get it then, then we'll see. I have two sons. They go to time out and then they go to their room. And we escalate from there until they get the message. The way the career offender guideline in my district interacts with my clients' experience in the state system does not accomplish that goal. They go from zero to 60 in the blink of an eye. So I would suggest that the career offender guidelines should be amended to either increase the number of prior convictions required -- there are a number of other ideas proposed in my written testimony, and I would urge the Commission to look at that seriously.

On immigration, the disparity between those districts with and without fast track programs is well known. 11th Circuit law currently prohibits the district court from considering lack of fast track for departure or variance. The problem in my district is that my clients are housed in a private contract facility in mixed population with inmates being transferred from around the country by the United States Marshal Service, so they know long before they have to plead or go to trial that the sentence they get in Georgia is not the sentence they get in a fast track district. This disparity promotes lack of respect for the law because the law is perceived as arbitrary. North Dakota has a fast track program. We do not. And that difference is not based on caseload or per capita levels of immigration cases.

Turning to acceptance of responsibility, I strongly urge the Commission to recommend to Congress that Section 3E1.1 be amended to remove the requirement that the government move for the third point for acceptance. In my district this change has been used inappropriately as a weapon by prosecutors who have tried on many occasions to demand appeal waivers in exchange for the third point or withdrawal of motions to suppress or waivers of suppression hearings. These demands undermine the adversary system and interfere with my clients' Sixth Amendment right to effective assistance of counsel. By making these demands prosecutors are asking me to advise my clients to plead guilty without the benefit of review of witness statements or the opportunity to explore a possible viable departure issue. The prosecutor, who has access to the agents and witness statements, informs me the motion to suppress would be frivolous. I'm obligated by my ethical rules not to accept their word for that, and threats to withhold the third point for this reason are inappropriate on their face. So far my office has held the line on this issue but some panel lawyers have not. This use of the authority granted by Section 3E1.1 in my opinion is an abuse of power and I would recommend that the Commission recommend to Congress that that be changed.

Turning to the issue of the defender ex-officio, I would strongly

encourage the Commission to support legislation to establish a defender ex-officio position to balance that of the Department of Justice's member. The history of the guidelines is the history of a one-way upward ratchet of sentences. Throughout its history the Department of Justice has been present for closed-door working sessions of the Commission and regularly proposed specific guideline increases. The Department's ex-officio member has access to Commission staff and data and can request that certain statistics be calculated using the Commission's data sets. The DJ ex-officio has access to internal documents of the Commission. This unequal access creates at best an appearance of impropriety in what is supposed to be a balanced system. Furthermore, the Department of Justice brings but one point of view to the Commission. A defender ex-officio would eliminate the appearance of impropriety and bring balance to the viewpoint being presented during internal debate. The Judicial Conference has introduced legislation suggesting a defender ex-officio be appointed, and we would ask you to support that.

In conclusion, this is an exciting time when the Commission has the opportunity to bring its research expertise to bear, review the guidelines and the feedback that is being received from the courts, and engage in the evolutionary process envisioned by the Sentencing Reform Act. I look forward to continuing to learn about the work the Commission has begun with alternatives to incarceration and the positive impact that can have on prison overcrowding and incarceration of nonviolent offenders. I thank you for your time and the opportunity to speak with you today. There has been a lot of discussion this morning of disparity and unwanted disparity. What I ask you to consider as we move forward in considering various changes is that predictability is not the equivalent of justice. The statute says unwarranted disparity is impermissible, but so is unwarranted severity. And sometimes disparity is necessary to achieve fairness in the justice system. Thank you.

CHAIRMAN HINOJOSA: Thank you, Ms. Kaplan. Mr. Yurko.

MR. YURKO: It indeed is a great honor to be asked to provide this testimony before this Commission on the 25th anniversary of sentencing reform in America. I consider my involvement in sentencing reform both in North Carolina as a commissioner and as an active member of the Practitioners Advisory Group to this Commission as one of the highlights of my career.

Our creation of structured sentencing in North Carolina received the Excellence in Government Award from the Kennedy School and the Ford Foundation. We created a financially responsible and rational sentencing system for North Carolina and have continued reform since 1994. I sincerely believe that this Commission's work has made substantial progress toward reform in the federal system but the journey is not complete. The road continues.

By far the most significant Reform Act change was truth in sentencing. The parole system that existed prior to 1987 was complex, unevenly applied, and vague. No one could tell what portion of any sentence would be actually served, and judges had an incentive to calculate in secret because when they spoke, they were reversed. Abolishing this system was true reform. Now in federal court all parties, including most importantly the public, knows exactly what a given sentence actually means, and respect for justice and deterrents have therefore improved.

Strength was also shown in the establishment of a rational, comprehensive, systematic approach to sentencing based on the theoretical dynamic that egregious conduct requires strong punishment while mitigated conduct does not. And this rationale still defines the heartland, but the relevant conduct portion of the guidelines needs further reform. Relevant conduct is complex and therefore sometimes unevenly applied. The attempt to capture uncharged and even acquitted conduct should be abolished. Although it will be costly and time consuming to charge for relevant conduct in an indictment or information, it is not impossible, and that was the approach that many districts took to Blakely and Aprendi before Booker. Acquitted conduct should never be used to increase one's sentence.

I think the most significant post Reform Act improvement in the guidelines occurred in the economic crime arena. It was the judges who first pointed out that the scope of punishment for economic crime originally in 1987 was too narrow, and after careful deliberation the Commission acted. And what emerged in 2000 was a far more comprehensive punishment scheme for economic offenses which provides severe penalties for egregious economic crime. The Commission's work should be lauded. It was unfortunate that these changes were not more greatly publicized. But it's not too late.

As the economic crisis of 2008 is more closely scrutinized, it is likely some prosecutions will occur. If in fact one billion of TARP money was somehow connected to a fraud and many shareholders were in fact defrauded and it was an international scope and put in jeopardy the banking system, the penalty starts at level 44. And the public is totally unaware of that fact. The street says you can steal more money with a briefcase than a gun and get away with it, and that's no longer the case. So I think this is a golden opportunity for the Commission, judges, and practitioners to educate the public about what is now available in the economic crimes arena and how egregious conduct is seriously punished. This would promote deterrence and respect for justice. There are times -- I agree with the defender -- when there are so many specific characteristics that they overlap, and I think many times the Booker decision can account for that.

So truth in sentencing, rational sentencing, and reform of the economic crime calculus I believe are the highlights of the Sentencing Reform Act and Commission's work.

The most serious flaw in sentencing in federal court occurs in the tension that exists between two coexisting systems of sentencing in federal court: mandatory minimums and the far more comprehensive and rational guidelines. Mandatories are flawed because they only examine one or two sentencing factors to reach a sentencing result. The guidelines are multidimensional and systematic. The drug mandatories have especially skewed the guidelines because they rely on quantity and criminal history while the

guidelines are far more comprehensive. Playing an important role ought to be violence; weapons possession; international narco trafficking; degrees of organization; distributions to minors; use of minors, pregnant women, and the challenged. They should play a much more significant role in sentencing, and so should mitigating factors. Indeed, if an offender has two prior drug felonies and crosses the quantity threshold, the system encourages him to engage in as egregious conduct as necessary to avoid detection because he goes to prison for life whether he aggravates his conduct or not, and that is an irrational result. I think the greatest task for this Commission is to continue its effort begun in 1991 by Judge Wilkins and others to persuade Congress to abolish the mandatories, but such persuasion can be punctuated by the Commission by drawing up alternative guidelines that would be in place if the mandatories did not exist, thus making abolition more compatible with politics.

I've talked in my written testimony about crack/powder equalization, making fast track universal to avoid equal protection, reforming 5K, the area where the most disparity continues to exist because different districts treat the 5K cap rule as different, and balancing the Commission by making a practitioner ex-officio member. These are all areas where improvements can be made.

I also know personally the daunting task anyone in public service takes on when accepting a Commission appointment for I served as a commissioner in North Carolina while practicing law and serving as a very active member of the PAG in Washington. It's often tempting to streamline the process of reform out of public view. There are times when national security and other reasons require closed meetings, but transparency remains a key component of public policy. The fact that our 28-member commission held only one private meeting in 13 years made our work far more cumbersome. I urge this Commission to open its doors as often as is practical.

Booker. I testified in 2005 at Justice Breyer's creation of a true guideline system. It was a substantial improvement for it provided guidance

while impeding the irrational results which occasionally occur in any mandatory system. I believe that the careful post-Booker research done by this Commission monitoring the conduct of participants supports my earlier testimony. The bench varies sentences in a very small minority of cases but the vast majority of those variances are closely tied to 3553(a). It would not be reform to resurrect mandatory guidelines now that Booker, the Marbary vs. Madison [of] sentencing reform, is working so functionally.

I believe that all participants are acting in good faith. I don't believe, as we said earlier, that judges are looking for clever ways to avoid the heartland when it is appropriate. What they are looking for is justice, and they find it in having discretion to avoid the kinds of irrational results that the defender talked about. The hallmark of this Commission's work has been its balanced, diligent efforts to create true reform. The journey is not yet complete but I know progress will endure. Thank you.

CHAIRMAN HINOJOSA: Thank you, Mr. Yurko. Mr. Markus.

MR. MARKUS: I just wanted to start by thanking you all for having these hearings. I know my district is very excited and they are watching, and I know the Internet community and the blogs, everybody is very excited about this. So thank you for having these hearings.

For 25 years we've seen an explosion, more prosecutors, more probation officers, more prosecutions, more jails, more defendants, more public defenders, and more lengthy sentences. The one thing we haven't seen more of is trials. Trials are way, way down. Back when the Sentencing Reform Act was passed there were about 30,000 defendants and 6500 trials, or about 18 percent of cases went to trial 25 years ago. Now, there is three times as many cases, about 90,000 defendants, and only 3400 trials or about 3.7 percent of cases go to trial. A huge difference. As everything else is moving up, we see trials moving down, and it's a huge area of concern. One district judge said that the reason is because if you go to trial as opposed to plea and cooperate, you will get the trial penalty of 500 percent difference. Think about what that means, 500 percent increase if you go to

trial and lose versus pleading and cooperating. This trial penalty should cause all of us that practice criminal justice real concern because trials are so important. They expose and discourage abuse of law enforcement practices. They help develop the law. They deter the filing of weak cases in gray areas of prosecution. And trials allow for our citizens to observe and participate in our democracy. So when we are losing these trials, we need to take note of what is happening and what the problems is. I think there are a number of reasons why we are losing these trials and why trials are disappearing.

First, and we've heard about this I think throughout the day, that the sentencing guidelines, especially when they were mandatory, shifted sentencing power away from judges and to prosecutors and probation officers. The whole idea of sentencing guidelines was that they were premised on real offense conduct. The problem is that this real offense has become a bargaining chip for prosecutors. Judicial discretion has been replaced by prosecutorial discretion. And what happens now is prosecutors and defense lawyers engage in fact and charge bargaining to solve cases which result in disparate rules. There are inconsistent standards about the country for 5K, as we've heard about, for fast track departures in immigration cases, minor role reductions for couriers, as we've heard, and so on. And judicial application of the guidelines is unequal throughout the country. So the true goal of the sentencing guidelines, to have sentences based on real offense conduct, I don't think has been accomplished, so I think we need to look at that.

Second, the guidelines are oftentimes determined on what we call evidence or testimony that isn't tested but is at best hearsay or at worst uncharged or acquitted conduct. If you tell civil lawyers or nonlawyers that you can be sentenced based on something a jury found you not guilty of or based on something not even charged in an indictment, they look at you like you must be nuts, that you are not telling them the truth. It's a very odd thing in the criminal justice world that you can be sentenced based on acquitted or uncharged conduct, and we need to address that.

I think part of the problem is probation officers are simply not equipped to do offense summaries or guideline calculations, because what happens in practice is the probation officer goes to the AUSA and gets everything from the AUSA, the offense conduct, the guideline calculations, and puts that into a probation report. To use an extreme example, probation officers simply should not be called upon to determine a market capitalization loss caused by a sophisticated financing transaction on a publicly traded company. So what happens is -- and this isn't their fault -- probation officers will just parrot back what the prosecutor tells them.

The next issue that we've heard a lot about throughout the day and through critiques as well is that the guidelines are just too harsh, especially for first-time nonviolent offenders who proceed to trial. Former President George Bush recognized how severe the guidelines are for first-time nonviolent offenders, and of course we know he commuted Scooter Libby's 30-month sentence and said it was excessive. He said, quote, Mr. Libby was a first-time offender with years of exceptional public service and he was handed a harsh sentence based in part on allegations never presented to a jury. I think oftentimes what happens is people who don't practice with the guidelines or don't see them, when they are confronted with how they work are oftentimes in shock. I think that's what happened with the former President when he saw how Mr. Libby was handled.

I give other examples of first-time nonviolent offenders and their sentence after trial versus their boss, for example, who might cooperate and charge bargain or fact bargain and then cooperate down. The incentives of pleading and cooperating versus going to trial, as we discussed, 500 percent.

Another problem: Many district judges still mechanistically follow the guidelines, and the Supreme Court has repeatedly told us in Booker and Gall and the recent cases that no, you should not just blindly follow the guidelines. The problem is that for 25 years judges have felt legally and psychologically tied to the sentencing guidelines. And I think Judge Tjoflat mentioned that this morning. It's going to take eight or nine years, he

said, to sort of loosen that tie to the guidelines. The Supreme Court keeps telling us, most recently in Spears on January 21st, that district judges can just disagree with the guidelines and give an alternate sentence. In Nelson on January 26 of this year the Supreme Court reversed the 4th Circuit and said the guidelines are not only not mandatory on sentencing courts, they are also not to be presumed reasonable. And the Supreme Court I think keeps repeating this over and over. And so what can be done? What can be done about district judges rotely following these guidelines?

And I have a couple suggestions. I think one problem off the bat is that the Department of Justice, at least in my district, has a policy, and I think this is a nationwide policy, saying that the guidelines are reasonable, the guidelines are presumptively reasonable. That needs to change. The Department of Justice needs to follow 3553 and recognize that the guidelines should not be followed in every case. And the probation office in my district, and I think this is true around the country as well, issues a PSI and at the very end says there are no 3553 factors which warrant a sentence below the guidelines. It just cannot be true that every case warrants a sentence within the guidelines. We know that from the Supreme Court. I think the Department of Justice and the probation office need to take a close look at what the Supreme Court is saying.

What else can we do? First, the Commission can reduce the harshness of the guidelines, especially for first-time nonviolent offenders. The Commission should encourage district courts to issue downward variances if there is a finding that the offender is a first-time nonviolent offender. There are so many great reports and statistical studies coming out of the Commission that discuss recidivism rates. These should be incorporated into the guidelines. We know that first-time nonviolent offenders are not likely to recidivate. We also know that [for] those over the age of 40, those who are married, with a college education, who aren't drug users, there is a whole list of factors. When you add all those factors together the chance of recidivism is under three percent. These findings should be discussed and we should encourage district judges to take a look at them.

Next, we should incorporate 3553 factors into the guidelines to really breathe life into Booker's promise and Booker's guarantee that each sentence be tailored to the individual. We should incorporate what Booker and Gall and 3553 says.

Another recommendation is of course to simplify the guidelines. We've heard this throughout the morning, throughout the day. The fraud guidelines, understand that there are going to be some really high sentences, but to get through those guidelines, just 16 pages of application, it's very difficult. When you are sitting across from your client trying to explain how those sentencing guidelines work, the fraud guidelines, it's very, very difficult. Explaining the possible range of sentences, explaining someone's exposure should not be that hard.

We should attempt to eliminate the penalty for proceeding to trial. The United States Supreme Court in Booker explained now important our trial rights are. We should not be getting 500 percent more by proceeding to trial.

One recommendation I know the Commission has asked is what can we recommend to Congress about rule changes. One is I think we should inform juries about the minimum and maximum sentences for a crime. Judge Weinstein out of the Eastern District of New York just wrote a 288-page opinion in United States vs. Polizzi explaining why that is so important and tying that back to the original intent, that juries should know the potential penalties and we shouldn't keep that from juries. They should know that in a lot of cases judges don't have discretion; there are mandatory minimum sentences.

And finally, my last suggestion is that we should use probation officers for what they are really good at, and that is doing a background on the defendant, but not calculating the offense and not calculating the guidelines. Probation officers for the most part aren't lawyers. The adversary system should be allowed to work. Let the prosecution and defense argue about the offense and about the guidelines; and if there is an agreement, let them propose that agreement to the court, and the probation

office can do backgrounds on the defendant.

Again, I'd like to thank everyone for allowing me here and inviting me to speak and I really appreciate it. I appreciate the opportunity. Thank you.

CHAIRMAN HINOJOSA: Thank you, Mr. Markus. Mr. Dubois.

MR. DUBOIS: Thank you. I would like to echo the others' thoughts and thank the Commission for inviting me here today. I'm especially gratified to be here because it gives me a chance to reconnect with so many of my good friends and dedicated talented professionals whom I worked with at the Commission during 2005, which was we all remember a very exciting time to be at the Commission and remains a highlight of my professional life. So I'm extremely pleased to be here.

I suppose it's an inevitable hazard of being the fourth speaker on a panel of five very intelligent, talented lawyers. I feel like most of my thunder has been stolen and I do want to reserve time for questions at the end so I will try to not repeat the points some of the other panelists have made in a way far more articulate than I probably could have. I can't promise I will be totally successful but I will try to.

I'm here to report that the sentencing guidelines are alive and well and living in the Eastern District of North Carolina. Sentencing practice there has changed very little in the aftermath of Blakely, Booker, Kimbrough, and Gall. In my district the guidelines remain far and away the most important determinate of a defendant's sentence. In the aftermath of Booker various commentators predicted, some with regret, some with gleeful anticipation, that once they lost their mandatory status the guidelines would slowly recede into relative disuse and that post-Booker sentencing battles would be fought at the level of broad principle and individualized circumstance rather than mechanical calculation. This has not proven to be the case, especially in my district. In my district and in many others across the country the guidelines remain preeminent. Indeed, in the Eastern

District of North Carolina only 6.9 percent of cases involve judge-generated sentences. It's little exaggeration to say that in my district you either get a 5K motion or you get a guideline sentence. Even in crack cases the guidelines are followed routinely. This is of course very much the way it's been for the last 25 years.

So that's all just an introductory way of saying the guidelines, especially in my district and others like it, and the Commission remain of vital importance. Nicole Kaplan spoke a little bit about the dialogue that needs to take place. The point I would like to make is that what Booker and its progeny provide is not a detour around the guidelines. It's not a means to confine them to the dustbin of history, but rather it provides opportunity for them to finally fulfill their promise by creating this opportunity for providing space for a long overdue conversation, a dialogue between the Commission, the judges, Congress, and all other stakeholders. By stripping the guidelines of their mandatory status and thereby increasing the freedom of action of judges, Booker allows for the possibility of a real feedback in which judges through their opinion in sentencing decisions can let the Commission see where the guidelines work and where they don't, where they are too severe and where they are not. And the Commission can incorporate this information into meaningful change where needed and in so doing end the one-way ratchet of ever-increasing punishment that was the hallmark of the mandatory guidelines era but which is simply unsustainable in a time of strained resources and universally acknowledged overincarceration.

But just as importantly and something that I don't think is recognized as often as it should be, the Commission can inform and enhance the judges' work through its unsurpassed expertise in data collection and analysis. I saw it firsthand when I worked there, the incredible ability of the Commission to come up with superb reports, superb research. And the Commission's work on recidivism, on crack/powder issues, and more recently on escape, provide an irreplaceable context of empirical guidance for judges trying to do justice in an individual case and should be models for future Commission efforts.

Something I think bears repeating is Nicole Kaplan's call for an ex-officio position for defenders on the Commission. Defenders represent a large constituency with a valuable perspective and an expertise that should be reflected on the Commission. Without it the Commission's work and legitimacy have suffered, frankly.

So it's also important to note that this evolution, this conversation, this feedback can only occur as long as the guidelines are advisory, as long as courts have the freedom to respond to the guidelines and indeed to disagree with them in the appropriate case. I think historically what we've learned in the last 20 years is that mandatory guidelines forwarded the evolution of the guidelines despite statutory commands that this evolution take place. It simply wasn't possible when judges' decision-making was so hamstrung by the mandatory guidelines. I think an advisory component is an absolutely essential part of the future evolution of the guidelines.

So I know various stakeholders might disagree about the content of a particular guideline but I think we agree with the principle that the guidelines should incorporate the collective wisdom of the judges, reflect the lessons of empirical study and research, and be supported in every case by rational justification and considered judgment. And again, the Commission's welcome role is to rationalize the crack guidelines, provide a model for this evidence-based approach.

So with this standard in mind there are some other areas crying out for immediate and careful review, areas where we believe the guidelines are not working or working at cross-purposes to the purposes of sentencing found at 18 U.S.C. 3553.

A common refrain throughout this morning, throughout this afternoon is that the guidelines are too complex, and they are. The criminal history rules, multiple count rules, undischarged sentence rules are all daunting and complicated and contain frightening tracks for the unwary and frankly sometimes for the wary as well. Part of the guidelines' overcomplexity is due to an unrealistic desire for precision and a quixotic effort to attempt

to capture and quantify far too many variables. I believe Justice Breyer has made that observation.

What I don't think has been discussed quite as much this morning is that this overcomplexity has a number of baleful effects, some obvious and some less so. First, this desire to capture every niggling detail about an offense is at least partially responsible I think for the narrow punishment ranges found in the guidelines, apart from the 25 percent rule, and these ranges are generally not found in any other state guideline system, which invariably feature many fewer enhancements and adjustments and consequently have broader and simpler punishment ranges. The state system in North Carolina is a model in this regard, and I'm sure Mr. Yurko could talk about that.

Also, it's sort of contrary to the original intent of the guidelines. I note still in the guideline book today it says, "The relationship between punishment and multiple harms is not simply additive. The relation varies depending on how much harm has occurred, thus it would not be proper to assign points for each kind of harm and simply add them up irrespective of context and total amounts."

So the framers of the original guidelines understood that we shouldn't just have a tote board, a laundry list of enhancements that add up to the final sentence, but rather they should all be there for a purpose, they should not overlap, and they should all make sense individually, but it's not simply an accumulation of various enhancements that matter.

The second problem created by the overcomplexity of the guidelines is that it strains the fact-finding ability of the courts. Sentencings too frequently turn into mini trials except without any of the procedural and evidentiary protections a defendant would actually enjoy at trial. Courts in my district pressed for time and resources have come to rely heavily -- many defendants would say too heavily -- on the information contained in the PSR even if that evidence is based on multilevel hearsay and other sources of dubious reliability. Many of these battles could be averted and the quality

of fact finding could be improved if a number of enhancements and adjustments were simplified and reduced.

Again, we've spoken this morning about the danger, the problems created by using drug quantity and loss amount calculations as proxies for culpability. I think this will prove ultimately to be an idea that failed and that in many ways a defendant's role at the offense, the extent and breadth of his involvement, is generally a better measure of relative culpability than artificial and easily manipulated loss and quantity calculations. While the guidelines do contain role adjustments, their effect is often swamped by the quantity-based adjustments, and at least in the case of mitigating adjustments they are very infrequently applied. I would echo Nicole Kaplan's statement. I can count on one hand the number of times a mitigating role adjustment has been included in an original draft of a presentence report in my district. I think that's in part because they've been too narrowly construed by the courts but also because I think they've been made too cumbersome and confusing to apply by the Commission. And I think that's an area of improvement that is needed.

Deemphasizing the quantities calculations would also mitigate though not eliminate another critical guideline problem, which is the problem of relevant conduct. Problems with relevant conduct are well documented and I don't need to go over them again, but too often they are the tail that wags the dog of sentencing and does so even in cases where the evidence supporting it is of questionable reliability. Of course, the role of conduct comes to bear most heavily and most frequently in quantity-based, loss-based determinations. That's where the rubber really meets the road for the role of conduct. If we deemphasize those components of the quidelines, the role of conduct problems become concomitantly less important.

Finally, let me address some of the issues that I think came up earlier this morning in questioning the other participants because they are also issues that are of great concern to us as defenders.

First, the question of unwarranted disparity. In many ways, at least

it occurs to me, that this is a problem that may rear its head in the future. It is not currently a problem. Commissioner Howell mentioned whether we look at the sentencing data that comes up quarterly. I find it invaluable. I would hate for the Commission to discontinue quarterly reports. In fact, I think there is many ways that it could be even more useful. But I think it's just a very strong benchmark for where our district stands in relation to other districts, where we stand in relation to national norms, where we as defenders are not doing a good job, where we are dropping the ball. But I think the picture presented by these statistics is that there is really no evidence that disparity is increasing. Certainly if you cut out the post-(unintelligible) Act, post-PROTECT Act and [inaudible], the guideline ranges are very similar to what they were in the years prior to that, and the out-of-guideline ranges are very similar to that. First of all, I would hesitate to do anything about unwarranted disparity before we understand that there is even a problem with unwarranted disparity.

The second issue, though, is that we believe that unwarranted severity in guidelines is a source of unwarranted disparity. Statistics show that judges go down from the guidelines much more frequently than they go up. That's a signal, though, that the guidelines are too high. Disparity occurs when judges randomly -- where their decisions are randomly distributed across the range and are not predictable. If a judge in California is giving a sentence too high and a judge in Florida is giving a sentence too low, in the scatter plot there is no pattern, then we would say disparity is a problem. If we see that the judges' decisions nationwide are clustered around certain areas, that's not really unwarranted disparity. That's a signal to the Commission that the guidelines need to evolve in one direction or the other. And so I think rates below guideline sentences or out-of-guideline sentences are not prima-facie evidence of disparity in many cases but simply a signal to the Commission that the guideline may not be working as intended.

Finally and most importantly, if we are worried about the 6 or 13 percent of below-guideline sentences generated by the judges and we are not giving equal if not greater attention to the sources of disparity created by

prosecutorial decisions which are not transparent, which are unreviewable, and which greatly dwarf any disparity caused by these very small percentage of judge-generated departures, I think we really are missing the ball in this area.

The experience of the last three or four years shows that the advisory guidelines hold great promise and the Commission has made fantastic steps in the post-Booker era to address them, and I and all the other defenders look forward to working with the Commission in the future to see that ultimately this promise is fulfilled. Thank you.

CHAIRMAN HINOJOSA: Thank you, Mr. Dubois. Ms. Weil.

MS. WEIL: Thank you. Good afternoon and welcome to Atlanta. I want to thank you all for inviting me to come speak to you today. I am not going to speak long because I'm interested in your questions. I do want you to know that I have had much experience as a federal prosecutor. I was in the U.S. Attorneys's office in the '80s and I was prosecuting criminal cases starting in 1987. So my experience was with cases pre-guidelines during the mandatory guideline era and after during the Booker era. I've prosecuted cases and then supervised the appeals on those cases for the past 20 odd years.

I understand the Department of Justice is not here, there is not a representative. I can certainly provide some sort of background information, if you're interested, but I can tell you that having gone into private practice since last September, your point of view can change drastically, depending on who your client is. And my point of view certainly has changed drastically with respect to just one guideline I want to point out to you that in my experience was the most significant guideline in terms of defendants being sentenced post-Booker, pre-Booker, and then substantial assistance.

Whenever a defendant would approach a prosecutor in terms of what can I do to have a lower sentence, it's always substantial assistance. That's

really the only thing that's going to get a defendant substantially less time than he would under the guidelines, pre- or post-Booker. The substantial assistance departure gets you below a minimum mandatory, but that's statutory. At least in terms of the guidelines it will do more than anything else, more than a two-level acceptance of responsibility, a three-level acceptance of responsibility, which you're going to get anyway if you cooperate. But my point of view has changed in terms of whether that should be backed up by a motion requirement.

When I was with the Department of Justice I thought that made a lot of sense. You want to have 5K1.1 be held in the palm of the prosecutor because that's an important tool the prosecutor can use in terms of getting cooperation in their cases prosecuting other people and managing their prosecutions. That makes a lot of sense unless you're looking at it from the defendant's point of view.

The very first case that I got, my first client, was the lowest level person in a 14-defendant drug case. He was a purchaser for personal use. He shared with somebody else and that made him a distributor. The people who ran the cocaine and crack organization got less time by half than he did. He got 240 months for sharing powder cocaine. He cooperated from the beginning. He told probation everything that had happened to him. He did everything he could but nobody offered him a substantial assistance departure. He entered into a plea agreement where he wasn't offered a substantial assistance departure. He wasn't asked if he wanted to testify in the co-defendants' cases. The daughter of the leader of the group, who would have been exponentially higher in the hill of responsibility in terms of what happened in that organization, was sentenced to tens of months after she cooperated, as did three other co-defendants who cooperated. My client got 240 months. The next highest person got 190 months. That's purely because he had no way of cooperating. The motion was in the hands of the prosecutor. He wanted to cooperate. He could have done it.

There was another case somebody came into my office the other day and

was telling me about that they had -- an attorney was telling me there was a defendant who did cooperate, did everything he possibly could, but the government messed up and his cooperation wasn't able to be completed. The person who he was doing an undercover with, a buy, found out what was going on because the government had made a mistake and the call-back number was to a government office. So he didn't get to complete his cooperation. Even though he risked his life and did everything he possibly could, when it came time for sentencing he didn't get the 5K.

So I would just urge the Commission to reconsider the requirement for a motion backing up a 5K1.1 substantial assistance departure. It would still be a tool. The prosecutor could say he'd recommend it and he'd tell the court what the cooperation was of the defendant, but to have it be within the hands of the government to decide whether or not that motion could be filed or whether the defendant could get anything for his substantial assistance, which leads me to my next point, which is variances under Booker.

I don't believe that we have totally come to understand in the courts, either the prosecutors or defense attorneys, or particularly the courts, the difference between a departure and a variance. And judges just aren't varying for substantial assistance because they believe that's departure ground, and if you don't qualify and the government doesn't make the motion, you can't get it. I'm certain that in this room there might be disagreement over whether you can get a variance, but I think just the whole understanding of the difference between departures and variances and when you get them and when you don't, I don't think the courts understand. I still read transcripts where judges are calling variances departures and they are not quite sure what they're doing because I'm not quite sure they know in their mind what they're doing. I think they're sometimes looking at the guidelines and saying if I don't see it in the guidelines, I don't think I can do anything about that. Other judges are thinking I don't care what the guidelines say, I can vary for whatever reason I want. I think you are finding a lot of disparity there but I think it would behoove the Commission to help the judges, the courts, and the parties to understand the difference

between variances and departures and how they apply in the federal sentencing scheme. Thank you very much for having me here.

CHAIRMAN HINOJOSA: Thank you, Ms. Weil, and we'll open it up for questions.

COMMISSIONER HOWELL: Thank you all for your comments. I think you've given us a lot of food for thought in all of your presentations. And this is a question I want to ask all of you but I'll sort of start with Mr. Dubois. Because, I mean, you mentioned very eloquently all the factors that you think should go into informing guidelines, from the dialogue with the judges, empirical research. The one thing you left out, which I was waiting to see whether you were going to say, is what about Congress, what about the statutes. And this brings me back to some of the questions I know you heard this morning about proportionality and the Sentencing Commission's proportionality policy, which really is highlighted when there are mandatory minimum penalties and the Commission follows the statutory mandates that we are under in 28 U.S.C. 991(b)(a)(B) that says the guidelines must authorize appropriately different sentences for criminal conduct of significantly different severity, which the Commission from the beginning has always interpreted as part of its proportionality analysis.

And so I'm interested in the group's views on whether you think the Commission's concern for proportionality and the avoidance of sentencing cliffs are well founded. And if you think they are not -- because when you talk about, for example, drug quantity and ignoring drug quantity, which means in some ways ignoring our proportionality policy application of the mandatory minimum in drug cases, what should guide the Commission when it promulgates guidelines for offenses with mandatory minimum penalties? There are some commentators who suggested that the drug guidelines place too much reliance on the type and quantity of drugs involved in the offense, and we do have, not just the statutory penalty I mentioned, but also in 28 U.S.C. Section 994, a provision that directs that the Commission issue guidelines that are consistent with all pertinent provisions of any federal statute. So

how should the Commission be dealing with proportionality?

MR. DUBOIS: I think it's a difficult question and I think it's probably one that there's probably not even a consensus of opinion among the defenders.

COMMISSIONER HOWELL: I have to say the Supreme Court hasn't helped on this. The Supreme Court's focus on empirical research has totally ignored these other statutory provisions to the Commission to consider proportionality and how that's affected by mandatory minimums. I'm sorry.

MR. DUBOIS: No, no. Absolutely. Let me just spit out one possibility. But just as obviously as the Commission must listen to Congress, the Commission also has a chance to talk back to Congress by the guidelines that it promulgates and the research that it does. And certainly one option would be for the Commission to make the best guideline table that it makes based on the available data, what happens in state practice, what happens based on the Commission's various studies on recidivism, first offenders, and so forth, and simply calibrate the table without regard to a mandatory minimum. And if it happens that a mandatory minimum interposes in a particular case, that mandatory minimum will apply and the guidelines won't, maybe Congress will look at that and say there's a disconnect, there's a disjunct here, the Commission is the expert body, they are the ones that really study, really know this stuff, this is where they have calibrated it and we need to revisit where we've put our mandatory minimums.

Really we are not talking so much about cliffs as we're talking about someone who -- we're overpunishing people who fall just below the cliff rather than underpunishing people at the cliff, if you follow my meaning. I mean, the need to have like this smooth curve, you're not doing any favors to the guy with 4.9 grams of crack to put him just under the five-year mandatory minimum. He would much prefer, regardless if it creates an unpretty chart, to have a sentence that the Commission thinks is sufficient but bigger than necessary to serve the purposes of punishment. And if the Commission thinks that a five-year sentence for five grams of crack is too much, it certainly

can say that in its table and say that four grams you'd only be looking at two years or less.

So I guess what I'm saying is I'm not sure that the principle of proportionality should be the guiding principle of the Commission in this post-Booker environment where things are in such a state of flux and we are trying to have a conversation between all stakeholders including Congress. And I don't know what would happen but I think that would certainly be something that I would advocate to at least explore.

COMMISSIONER HOWELL: Anybody else want to answer?

MR. YURKO: Yes. I think the Commission needs to do a very thorough study of drugs in general. Look at levels of addiction, look at which drugs are truly dangerous, which drugs are more likely to be organized, which drugs are linked to violence, which drugs are internationally trafficked, and come up with a much more systematic, comprehensive approach that captures all of the behaviors and leaves room to deter aggravated conduct. And then with a scientifically-based studied approach that has been arrived at with due deliberation, as I said in my earlier remarks, present that to Congress and say this is what would be available if the mandatories were abolished.

The President campaigned on abolishing mandatory minimums and equalizing crack and powder. There's bills pending in the House right now to abolish mandatory minimums. To make that politically feasible the Congress needs to know what would replace that. I believe it was said earlier in the day by one of the judges we have no idea why Congress chose this mandatory for this sentence. It wasn't based on any kind of systematic study of addiction files, perpetration, international connections. It was probably based on crime of the week.

COMMISSIONER HOWELL: One of the judges this morning did call it arbitrary. But whether Congress was arbitrary, it did make this policy determination about what quantity of drugs would trigger a mandatory minimum penalty in its judgment. I think what the Commission did was not arbitrary.

It used a very diligent proportionality and also does enfold the guidelines in setting the guidelines up and down.

But let me just ask one more question, and it has to do with Ms. Kaplan's comments about the unwarranted disparity. I think that's one of the things that the Commission has been experimenting with, sort of how do we talk about in our statistical analysis how we break down those statistics to explain what's going on and obey that, make sense of them. So after the Protect Act we started breaking down our statistics to show how many outside guideline ranges were due to 5K1.1's or government sponsored motions, and we have experimented also with showing some of the reasons for outside guideline sentences to sort of help illuminate what's going on across the country.

Do you have any suggestions on how we can present some of those statistics to show the disparity that is being shown within or outside guideline sentences is warranted or not warranted? I mean, just to sort of help answer that question, is the disparity that we're seeing across districts, across regions of the country, is it truly unwarranted and what's the difference?

MS. KAPLAN: Let me start by saying that this class in political science statistics is why I went to law school, so I may not be the best person to answer this. It drove me away.

I think one of the questions that has been of interest to me is that the statistics that I see are statistics about the rate of variance but not about the degree of variance. And there is a big difference between a judge going three to six months under the guideline and a judge going five to ten years under the guideline. There is a lot of information that I would love to know if I could come and put questions into your computer, and I doubt I can summarize them all here, but I think around which guidelines are variances clustering, in a meaningful way what are the reasons why variances are clustering around those guidelines, what are the variance reasons that are clustering -- I'm sure statistics professors would be recoiling in horror at what I'm saying, but what are the reasons for variance that are clustering

around offender characteristics.

The Commission has a lot of data about who does and does not recidivate and what are the rates of recidivism. We've already talked about people who are married, people who have a college education, people who are of certain age, people who are first offenders. But it would be a lot more helpful to me going into a sentencing trying to get to a meaningful place if I could say to the judge this is a first offender in a low-level fraud case who has the following personal characteristics, and around the country these are the rates of variances for a defendant. It's never going to be a perfect fit. I understand that. I know it would take infinite resources to do that. But there is a lot of specific information like that where the variance rate could be broken down into degree and by guideline and by characteristic with good descriptors of the reasons for those variances.

I think the issue that I see with that is that we don't always get a detailed statement of reasons from the court. And this goes back to the complexity of the guidelines, not to get too far off track, but the 11th Circuit has said in its cases that if the judge calculates the guidelines but then says I would impose the same sentence anyway as a reasonable sentence, that's a way to sort of eliminate issues with calculating the guidelines. So I think we see in some cases a lack of detailed explanation for the decision that the judge is making, particularly within the guideline range but also sometimes outside, although I do think the judges try to do a better job of providing more detailed reasons when they do go below or above the range.

MR. MARKUS: Just to echo what Ms. Kaplan said, I think those sorts of statistics would be excellent. I think one problem is, and the statistic that's almost impossible to get is when the parties engage in fact and charge bargaining to avoid the guidelines. I'm not sure how we could get those statistics, but if we could I think it would also show when the guidelines are too severe, too harsh, and when either of the parties do something to avoid it or the judge does something to avoid it.

CHAIRMAN HINOJOSA: There were some specific examples that were used by

some of you. Sometimes those leave an impression and I'm trying to correct my impression here. Ms. Weil, you used your client in that powder cocaine case that received a 240-month sentence, you described it as personal use amount. But how did personal use amount get to the guideline range of 240 months?

MS. WEIL: He was sharing it with somebody else. He had a prior record and his prior record was two prior drug trafficking.

CHAIRMAN HINOJOSA: So this became a career offender.

MS. WEIL: Excuse me?

CHAIRMAN HINOJOSA: This became a career offender.

MS. WEIL: He became a career offender. He wasn't -- he was a career offender. He was responsible for only the amount that he was getting, which was ounces, quarter ounces. The most he ever got I think was an ounce at a time.

CHAIRMAN HINOJOSA: Was he distributing to someone else?

MS. WEIL: He and a friend of his would share it. There was no evidence he ever turned around and sold it. It just wasn't enough. The only evidence was and the court pretty much accepted he was a user.

CHAIRMAN HINOJOSA: Ms. Kaplan, you used the issue -- and this is the kind of tough questions that the sentencing judges sometimes face -- the issue of the person that was a tax preparer and in her case or his case wasn't keeping the money for herself, I believe, as opposed to another client who was keeping the money for herself. But the question then becomes, when you are dealing with the public that in this case is the victim, I don't know that they care who kept the money, but the loss is what's important to them because $100,000 was stolen from them and it doesn't matter much who ended up with the money, that was the amount of loss that was taken from them. It's hard to explain to a victim that you have to consider who may have ended up

with the money as opposed to who caused the loss. I'm just saying that sometimes people look at things differently.

MS. KAPLAN: I guess my point with that example was that you can have two defendants who from truly a loss amount perspective look identical, and yet, if you look beyond loss amount to other --

CHAIRMAN HINOJOSA: I guess my suggestion is to use another example, because that one really doesn't tear out your heart as much as another one might. Because in the end they still have $100,000 loss to the same victims, which is what the public hears.

MS. KAPLAN: Although I think you need some facts that I left out of that case that might move you a little more. These are interesting cases to me because the individual tax preparees who benefit from this do not get prosecuted. It's just the tax preparer who did not profit. And so it's a very interesting dynamic. Whereas we have other clients who are creating false people and stealing from the government and the government is never going to get that money back and they are being punished exactly the same although -- I don't think this will be a particularly sympathetic argument, but for lack of a better term I sort of thought she should get a Robin Hood deduction. There is nothing in the guidelines to deal with the fact she did not have, while she technically had specific intent, she didn't have ill intent.

COMMISSIONER CASTILLO: I want to get back to Ms. Weil's point about substantial assistance. To set this up I need to tell you that a probation officer this morning testified about how her district's percentage of substantial assistance differed even within the 5th Circuit. So my question to you, to all of you, would be should we be concerned as a Sentencing Commission that when I look at the percentages of substantial assistance, it varies greatly nationwide, depending on where you're going? It can vary within one circuit. Is that something to be concerned about or not? Because it's a big area of sentencing disparity. Obviously once the 5K1.1 motion is filed a judge can do as he or she pleases to do.

MS. WEIL: It varied within our office. We had the defense bar approach our office about ten years ago saying your drug division is giving out 5K's but your fraud division won't. We had to get within our office an integration of thought about it.

COMMISSIONER CASTILLO: So how do we deal with that given that it's a function of the Attorney General and Department of Justice?

MS. WEIL: There is not always a complete understanding of what the Attorney General's situation is on it either because prosecutors are required to charge the most serious offense and then you're only supposed to get substantial assistance under certain circumstances. It's going to vary wildly and widely among offices, among prosecutors within the same office, which is a problem which is particularly bad when you have maybe an agreement on when you should give substantial assistance but no agreement when it actually is completed.

One example of that is a prosecutor who would say you did everything you can, you came to us, you gave us all your information, we tried, it's not your fault that because of forces beyond your control you weren't able to complete the buy or whatever and therefore we weren't able to prosecute the other people, we're going to give you the substantial assistance reduction. Sometimes they give a substantial assistance reduction, make a motion if the defendant just cooperates by talking and that gives leads. So you can't get uniformity among --

COMMISSIONER CASTILLO: Your proposal would be that we have some language in the guidelines that would encourage judges to consider assistance as a factor in arriving at a total and complete sentence under 3553.

MS. WEIL: And that it not be hinging on -- much like the third point on 3E. Why hold that up, put a hammer over a defendant's head? If he's entitled to it, he's entitled to it. It shouldn't be based on the judgment of a particular prosecutor but the judgment of the court. And then you get to the understanding of, well, he doesn't quite qualify under anybody's

judgment; what about a variance, where does that fit.

So I think the government motion part of it will go a long way toward eliminating disparity if the courts can just look and see what a defendant did. It's impossible to have guidelines within the prosecutors' minds through --

MR. YURKO: I would take the lead for what you did in that other crime too. I would reform 5K with much more real action, much more complexity, and then continue to have a dialogue with the Justice Department and find out just exactly what's going on when one district departs on 5K's .007 percent and another district departs it 48 percent. The goal of uniformity isn't just the Commission's. It ought to be all of the participants, and doing away with the government initiated motion would be.

MS. KAPLAN: I would second the last point that removing the requirement of the government motion and allowing the court to evaluate whether or not meaningful cooperation took place would go a long way. My understanding in talking to other defenders around the country is that our district is a particular difficult one in which to get a 5K. Most of the time in order to get even two levels you had to testify. In New York you can get a third to 50 percent just by showing up for a debriefing. And again, our clients are a mixed population and I can't explain that. Moving it from the prosecution to the court makes it transparent, makes it reviewable, and provides an opportunity for an evaluation to be made. I can't challenge the prosecutor who simply says it's not enough. I have no way to challenge that. If the court is making that decision, we can have witnesses and testimony at the sentencing hearing about what happened, what went wrong. And I think in Ms. Weil's example where the client has done everything he can and it's a government snafu that prevents it from being completed, the court is going to give him the benefit of the doubt where now that won't happen.

COMMISSIONER CARR: I'd like to start with Mr. Markus and let anybody else who wants to kick in. One of the grounds you give for disparity is charge bargaining or fact bargaining by the prosecution. To what extent do

you find the U.S. Attorney is only too willing to charge bargain or fact bargain?

MR. MARKUS: I think it happens every day all the time, and I think that's why we see the decrease in trials. And I guess the underlying reason that the parties fact and charge bargain is because they try to avoid the harshness of a guideline sentence if you go to trial and lose. The prosecutors will come up to you and say, "You saw what happened to the guy last week who went to trial and lost. He got 25 years. I'm offering you a 371 plea where you're capped at five." Innocent people take that plea.

MR. WROBLEWSKI: Can I follow up with a question? Because I'm hearing sort of cross currents on the charging. On the one hand there is a sense there is inconsistency and that's a problem. On the other hand, Mr. Markus, you indicated that you think there is something wrong with prosecutors always asking for the guideline sentence and that they should be looking at 3553(a) factors. Are you suggesting that each individual prosecutor make the same judgment that the judge is supposed to be making? Should there be consistency? If there is consistency, what should the charging policy be? I asked this of the judges early this morning. Since the guidelines it was charge the most serious, readily provable offense. If that's not the right answer, what's the right answer?

MR. MARKUS: I'd love to make the charging decisions for the U.S. Attorney's office and the Department of Justice, but I don't think I get to do that.

MR. WROBLEWSKI: I'm serious about asking that. If that's not the right answer, what is the right answer?

MR. MARKUS: I think the problem is the Department of Justice has a policy that you must, the line assistants must ask for a guideline sentence. I think that directly contravenes 3553. So I think what has to happen is there have to be guidelines for prosecutors to look at: Here is when you can ask for a variance, here are certain factors you should look at. And

prosecutors should be trained on it. They know there's nothing and it's just blindly ask for the guidelines.

MR. WROBLEWSKI: I hear what you're saying. And are you suggesting that the Justice Department should have its own set of -- here we have the U.S. sentencing guidelines. Should we have our own sentencing guidelines that we believe are right? And if you think that's actually correct, because you're nodding your head yes, doesn't that completely undermine the whole purpose of having the Sentencing Commission?

MR. MARKUS: I think the prosecutor should of course do what 3553 says, and that is consider the guidelines as one factor for an appropriate sentence, but also consider all the factors. And so they should be making, prosecutors should be making recommendations to judges not just follow one of the 3553(a) factors in the guidelines but here are all the other things we've learned about this defendant from our investigation, and here is why a sentence of X is appropriate. Right now we have nothing like that, at least in my district. What we have is prosecutors going in and a judge will say to the prosecutor, "What do you think an appropriate sentence is in this case?" "The guidelines." "Well, why?" "That's the policy that I've been told to ask for." That's not a meaningful answer or meaningful sentencing hearing.

MR. DUBOIS: And it's not even realistic in practice. If you have a client who is terminally ill, say, the government attorney is going to come in and he's not going to ask for a guideline. He will agree to cut your time because that's as it should be. To have an inflexible policy that you must always ask for the guidelines sentence is unworkable because no one will tolerate it in reality. It gets followed many times when it shouldn't be but it just doesn't get followed.

I think the same is true of charging decisions in general. I mean, to have a blanket policy you always must charge the most serious, readily provable offense acts as if that's always a very clear and cut and dry determination. It's not. What the prosecutor may think is a readily provable offense his supervisor may not, or I may not, or the judge may not.

And so there is always going to be an element of human discretion involved in that act, and there has to be a rule of reason. If you can charge a guy with five 924(c)'s if it will get him life in prison, should you charge him with five 924(c)'s when it's clear that one would do the job? I don't think that's a policy the Department of Justice would want, and I don't think, even if that's what is written, that's not usually what's followed. So there has to be a little more nuance. I can't tell you what that nuance is but the cut and dried we must always charge the most serious offense, cut and dried we must always ask for the guideline sentence, that's not how the world works.

COMMISSIONER CARR: Those are two very different things, what we have to charge and what we have to ask for at sentencing. And obviously the charging policy came from the fact that quite understandably judges and defense attorneys were very concerned when the guidelines were coming in that all of the discretion would be transferred to the prosecution. So from the original Thornburg memo, the rule that came down from the U.S. Attorney's office, I practiced in one that I think was pretty faithful to our charging requirements that you get uniform charging requirements and pleading requirements in terms of what a defendant would be required to plead to so it would still be the judge making the call as to what the sentence would be. The recommendation that comes in from the prosecution is something else that the charging and pleading decisions has set the stage for. And if you are routinely finding prosecutors are willing to say you can just take the conspiracy count because it will be less than the guideline maximum might even be, or we'll pretend there wasn't a gun or I'll let you plead to a misdemeanor, then there is arguably a problem with the way the prosecutors are acting, not that it's your job to –

MR. DUBOIS: I'm not sure how universal the problem is. We do not have the same problem with charge bargaining, to the extent it's a problem. Yes, they may only make you plead to one 924(c) instead of two or three, but nobody is giving away the store. Nobody is lying to the court. Nobody is telling fairy tales. The government gives only what it wants to give, and it gives it usually for very good reasons, either because it's sufficient or

they have problems with their case or they want the guy's cooperation. It's very rare that you get thrown a bone out of the goodness of the prosecutor's heart, and that's probably as it should be. Then we go fight about it in court and the judge does what's right. So I think that type of give and take can work in a system that doesn't shackle the prosecutor's hands to do the right thing in the right case.

MS. KAPLAN: I think what you have in my district is you have the strictest compliance with the Ashcroft memo I think of anywhere in the country, and we have sometimes absurd results and prosecutors are not allowed to use their own judgment about rational even if it exceeds a life sentence. We have a defender in our office -- and that makes no sense on any level. First of all, we do not have the problem of charge bargaining and hiding information from the court. That simply does not occur, in large part because we are not offered anything. But we have someone who is proceeding to trial next week on a case where it's well over I think six 924(c)'s. I can't remember how many. It's going to trial because there is no offer that will result in anything less than a life sentence because of strict compliance with that Ashcroft memo. And as a result our trials are going up. Resources are being -- there is no question of guilt in that case. It's a waste of everyone's resources. So control of sentencing is still in my district solely in the hands of the prosecution except in cases where no mandatory minimum applies.

The confluence of mandatory minimums and strict compliance with the Ashcroft memo and very restrictive 5K policy means in a great majority of our cases there is nothing left for the judge to do but tote up the mandatory minimum and sentence, which is why we ask that 5K authority be removed from the prosecution requiring that motion, why we ask that acceptance of responsibility and discretion be transferred from the prosecution, if possible, back to the court, because at least if it's in the hands of the court, it's transparent, it's reviewable. There can be a hearing where we can air these things in open court and litigate and try to come to a just and fair result that's based on facts and supported by the evidence.

CHAIRMAN HINOJOSA: Both the one extra point and substantial assistance are the subject of statutory measures to some extent, and so I think Congress has made some decisions there.

I guess my last question goes to Mr. Markus, your 500 percent increase with regards to trial choice, the example that you gave in response to Commissioner Carr's question.

MR. MARKUS: I got the 500 percent from Judge Young out of the District of Massachusetts in a case called Berthoff versus United States.

CHAIRMAN HINOJOSA: Is this one specific case? Because I have to say in all the years I've been using the guideline system going to trial I don't know I've seen an increase of 500 percent with regards to a sentence because somebody went to trial.

MR. MARKUS: What happens is, at least I see this in my district, and I think Judge Young discussed it, is it's 500 percent of people. The 500 percent increase is for people who plead and cooperate versus going to trial.

CHAIRMAN HINOJOSA: Cooperation means substantial assistance reduction.

MR. MARKUS: Absolutely.

CHAIRMAN HINOJOSA: That's not a guideline issue. That's a statutory, gets you below the mandatory minimum issue.

MR. MARKUS: It gets you below the mandatory minimum but it also -- and this is in my district.

CHAIRMAN HINOJOSA: I'll just say that's another example; you could probably pick a better one than that. If you're going to make that statement for purposes of being I guess convincing, you probably should use another example rather than one where somebody cooperates and, of course, they're going to be much lower. That's not a question of going to trial choice versus not cooperating, not going to trial. It's a question of do you even vary below the mandatory minimum because of the statute.

MR. DUBOIS: Your Honor, one example that doesn't involve cooperation that does happen frequently in our district is whether or not the government will file the 851 enhancement, pleading versus going to trial, which can have a significant impact.

CHAIRMAN HINOJOSA: Or the enhancement or whether there is a charge of firearm or other things.

MR. DUBOIS: Exactly, and those are all weapons in the prosecutorial arsenal.

CHAIRMAN HINOJOSA: They were weapons before the guideline system. These are issues that have always been at the discretion of the prosecution with regards to what charges to bring. And those were present, I have to tell you, before there was a guideline system as to plea bargains that were entered into between the prosecution and defense as to if you go to trial, this is what we are going to do here.

MR. DUBOIS: But I think the point is the guidelines can mitigate, at least, if not eliminate some of that trial penalty. Maybe the Commission doesn't want to totally eliminate a trial penalty, but I think certainly most people can say that the trial penalty now is too harsh.

CHAIRMAN HINOJOSA: I think the use of the trial penalty for acceptance is not a good use. I always use the example of when you are younger and you tell your mother if I tell you I did something, will the punishment be less than if I don't tell you and I did something really bad. It's a question of how we view acceptance of responsibility from the standpoint of rehabilitation and acceptance of you did something wrong and you're sorry for it. But I'll let Judge Sessions have the last comment.

COMMISSIONER SESSIONS: I just want to make a last observation. I'll start right with what you said at the very beginning when you walked in. You had heard the discussion this morning, and we talked about more global issues. In fact, Mr. Yurko said this may be an interesting opportunity at this point with perhaps a new administration taking different points of view,

in a sense a suggestion this morning that we might want to review things top to bottom, not just the guidelines but the context in which the guidelines apply, that is, the sentencing structure of the United States.

And I really appreciate the comments you've made today which are all directed to individual problems with the guidelines, but I just would like to say just for a matter of record that if there is to be progress made on changing the sentencing structure within the country, it requires the input, the constructive input of every stakeholder in the process. I for one think that the input of the defense bar, as well as the Attorney General, as well as the various other stakeholders are extraordinarily important. And I know that it is difficult for the defense bar to get together and develop a consistent position in regard to such global sentencing issues as mandatory minimum sentences versus a mandatory guideline system versus a modified mandatory guideline system, et cetera, but those may very well be matters of discussion. And I just want to say, since we had talked about it this morning, that the defense bar as a stakeholder needs to figure out how to help in a constructive way.

One of the things I found really distressing is that I've heard various members of the defense bar say the system is perfect now, we have an advisory system based upon Booker, and don't mess with the advisory system. I for one think that's extraordinarily short-sighted and destructive. And I just hope that the defense lawyers -- I'm not asking you. You are practitioners. But the bar, you get together and you figure out how to be a constructive voice as the debate begins to evolve regarding mandatory minimum sentences, guideline structure, which may be mandatory or nonmandatory, et cetera. That's all.

CHAIRMAN HINOJOSA: Yes, ma'am, you get the last word.

MS. WEIL: Even though I've only been in private practice for four months, I feel confident I can speak on behalf of probably all defense attorneys that we as a group believe mandatory sentences are unfair, mandatory minimums and any kind of mandatory sentence imposed upon conviction

for an offense, statutory mandatory sentence. And it's particularly becoming more obviously unfair with the Booker advisory guideline system. Under a mandatory system of the guidelines before when the only variance was in departure, that was built into the system. A departure was one that was authorized by the Sentencing Commission. So the sentences that were imposed, if there was a cliff between the mandatory sentence and the guideline sentence, then probably it was less of a cliff because you'all had taken into consideration what the statutory sentence was going to be and you tried to alleviate the disparity between the cliff. And with this new Booker system where you are up, you are down, based on virtually almost anything, that exacerbates or enhances those cliffs.

I think the Commission could present to Congress the fact that those cliffs have gone a long way toward giving a sense of unfairness in sentencing where people are standing side by side and might be very, very similar but something made one guy up there. Maybe it was an ounce more of a drug. And he doesn't have a chance of getting a sentence anything like the guy he was with who got half or a third or a fourth of the sentence that he got. So I would just say that I do think that's one thing that there is uniform agreement with in the defense bar.

CHAIRMAN HINOJOSA: With that, and we realize, as I've often said, that the system can't operate either in the courtroom or outside without the defense input. We thank you all for taking your time from your schedules and work that you do every day to meet with us today. Thank very much.

Now we will hear from law enforcement. We have Mr. William Shepherd who is the Statewide Prosecutor in the Office of Statewide Prosecution in Tallahassee, Florida. He leads approximately 35 U.S. Attorneys who prosecute state crimes in eight Florida cities, and he serves as a legal advisor to the statewide grand jury and is a member of Florida's Violent Crime and Drug Control Counsel and is Vice-Chair at-large for the ABA's criminal law section.

We also have Mr. John Timoney who has been the Chief of the Miami

Police Department since 2003. He joined the New York City police force immediately after high school, rising through the ranks as a narcotics specialist to become chief of the department. And he also serves as President of the Police Executive Research Forum, a national membership of police executives from the nation's largest cities whose goal is to improve policing through research and involvement in public policy issues.

And we have Captain Larry Casterline, who is the Commander of Major Crimes Deterrence and Prevention of the High Point Police Department in High Point, North Carolina.

We know you're busy and we appreciate your being here, and we'll start with Mr. Shepherd.

MR. SHEPHERD: Thank you very much, Judge, and thank you, members of the Commission. I appreciate the opportunity to be here this afternoon. I have prepared written remarks that I submitted in advance, but let me begin my just telling you a little bit about the sentencing guideline structure in the state of Florida. Like our federal counterparts, we too have a sentencing guideline structure that is mandatory on the courts; however, I would say that it is--perhaps as a practitioner for me--it's easier for us to use. We have a tremendous volume in our state courts. We have 100,000 inmates in our state prison system. A typical line assistant in the felony division may have 400 cases assigned to that person that would be trial cases, not just arraignment cases. So they will go through literally hundreds of cases a week when you consider arraignments, violation of probation. Each one gets a sentencing guideline score sheet. I provided a sample of our sentencing guideline score sheets to the Commission.

Our guidelines provide only a basement sentencing. The statutory maximum is the ceiling. We have various opportunities for the court to assess multipliers that will raise that bottom; for example, what I would mainly discuss today would be the gang cases that we prosecute. And there is in fact a gang multiplier 1.5 times the base sentence that the score sheet would tabulate. And again, very similar to your own, it's criminal history

based on the primary offense. Multiply those two up, throw it into the equation, kick out a number, and that's your bottom for sentencing. Statutory max is the top.

But within that statutory max oftentimes there is a tremendous, tremendous range. A gang defendant charged with racketeering and conspiracy to commit racketeering, if you assume he has no prior criminal history, would be looking at about seven and half years at the bottom of his guidelines, but would face 60 years at the top. So the court could come anywhere in that range. An inmate in the Florida prison system will serve 85 percent of his time, and in Florida life is life. We do not have a parole system anymore, although we still have some inmates who are on parole, but that's from a historic standpoint.

We have great discretion within our charging. As I sat here and listened to the panel before, and through my work and in my former life as a recent law school grad, when I started I was a federal law clerk, so I have some exposure to your system. But we are oftentimes involved in negotiating the exact sentence that the defendant will serve, such that when the defendant enters a plea of guilty, he knows that he is going to be sentenced to five years or seven years or whatever it is. There is no hearing then that follows that up other than to make sure it's a knowing and intelligent waiver of his rights and acceptance of his plea.

The other side of that is oftentimes we do get involved in what you might refer to as charge bargaining, but that's going to come really frankly from the outset. If we have a defendant who is going to cooperate early on in the process, we will agree to charge at a much lower rate for a whole variety of reasons. But then also because we can enter into a specific agreement, it doesn't really matter what the charges are because we can go below the guidelines. That's one of the mitigative reasons. So it provides that safety valve for both parties. When they enter into cooperation agreements, they know what's going to happen.

Also, unlike your system, in Florida a defendant may come in and plead

to the minimum mandatory sentence up front, then his cooperation will take place, and then he comes in and is sentenced to a number that is fixed by the prosecutor and confirmed by the judge. So it's a little bit different in the timeline in how those things are done.

But I was asked really to come and talk to you today about the work that we are doing in gang prosecutions. Florida has had a tremendous uptick in gang violence, as certainly the chief from the city of Miami, one of our largest cities, can also attest to that. We convened a statewide grand jury 18 months ago that just expired on Friday of last week, and with that grand jury issued a number of indictments around the state and also issued several presentments which are formal documents that the legislature used to change some of the laws related to gang prosecutions and sentencing guidelines related to those and a variety of other definitions we use in defining gang members.

The typical state prosecution in Florida is one defendant or perhaps two defendants. Our strategy to go after the gangs has really been to use the racketeering statute and sweep up 10 or 15 defendants after several months of investigation, some historic, some proactive. Historic is such an important component to gang prosecutions, frankly, because of the witness intimidation factor that we have to consider all the time. So we like to marry historic convictions the defendant has as RICO predicates with a few proactive things to give the jury a flavor of more recent activity. That then gives the jury the full perspective and also gives the sentencing judge the full history not only at sentencing but also really at an equally important time for us [when] the case is at bond, and to give the judge a full picture of the entire operation of the organization at the time we set bond for the defendants.

So within the last 18 months we have had eight different indictments that we've handed down. Our cases do not progress through our system as quickly as yours do. We have depositions. All of our state witnesses may be deposed in Florida criminal practice. And that actually triggers a whole

other line of discussion about plea bargaining, and it was brought up in an earlier panel that perhaps there are various weapons that prosecutors use. And that is a factor, that if the defendant wants to take the deposition, for example, of a minor child in a rape case, that that would impact the plea regardless of how the deposition goes or those sorts of things. But because of our deposition system it slows down the process. And so although many of these cases would have been resolved in the federal system, we have resolved at this point generally the lower level cooperators who have agreed to sentences with us provide the sworn testimony and are now listed witnesses and they are now going through the process of being deposed against the higher-ups in the gang. Some of these defendants have gone to trial. We have gotten convictions on all those that have gone to trial. And just as an example of some of the sentencing ranges, there was a group in Orlando. One defendant in that case was sentenced to 45 years in state prison, another to 25 years. In both cases their guidelines were roughly ten years to the top of 60. So within that broad range the judge had the discretion to sentences she felt appropriate.

And, frankly, the results that we've seen as a result, frankly, of just the arrests and the early convictions have been very dramatic, and I've included a few statistics in some of my material, but I'll cite just a few. In Manatee County where we have indicted, three separate gangs, the Brown Pride Locos Gang, Third Shift, and Sur 13, which are three very violent gangs in that county, we've seen violent crime go down 14 percent since we started this effort. Perhaps the most startling statistic is the Robbery statistic in a small town called Plant City. Robbery there is down 36 percent since the time we made the arrests of a group there that referred to themselves as the Black Mob.

So the strategy we think from a law enforcement perspective is having a big impact. We are trying now to couple that also through Attorney General Bill McCollum's efforts with prevention, intervention, programs that we are very involved in in cooperation with the Boys and Girls Clubs, Urban League, faith-based groups, trying to bring everyone together. We've set up regional

task forces almost in a weed-and-seed model where we take these groups out. We then have the programming groups available [and] ready to go. We don't tell them where they are going to go before the arrest, obviously. But once that happens, then we say we need you to devote as many resources as you can to this particular school and these particular kids. And sometimes we identify individual kids at particular high risk that they need to focus on.

The lesson was really brought home to me in a search warrant that we conducted after a homicide and we took a Tech 9 assault weapon from the home that belonged to the middle brother. The oldest brother had been shot and killed the week before, which led to the search warrant. The middle brother had the Tech 9, and there was a nine-year-old little boy who lived there too. He in his little-boy handwriting had very proudly written his name, Oscar, on a toy gun, and it said, "Oscar's gat."

So that's really the sole focus of this. We can put a whole bunch of guys in prison, but unless we really help the Oscars of the world to come up with better things to do for themselves, we are going to make a lot more business for sentencing commissions like yours and groups like mine. So that's what we're doing. I appreciate the opportunity to be here and I'm glad to answer any questions you might have.

CHAIRMAN HINOJOSA: Thank you, Mr. Shepherd. Chief Timoney.

CHIEF TIMONEY: Good afternoon and thank you for the opportunity to speak before the Commission today. One of the advantages of being old and having been in this business 40 years is you get to see things at its inception and then see how they work out. It's called hindsight. The panel before that spoke I listened with great intensity, and I don't envy your job because I heard some people that I agree with, some I totally disagreed with, and others I was conflicted about and they seem to conflict themselves in some cases.

It seemed like the most appealing, and certainly I feel this way, the whole notion of nonviolent first offender is appealing, but I remind you

there are lots of nonviolent first offenders, whether it's Scooter Libby or Bernie Madoff, who will become a nonviolent first offender. While that seems to play in the rarified air of Washington, it doesn't play out on the streets. I can remember during the Nixon debacle when he was let go and pardoned that, as you arrested people on the street in South Bronx, they would throw Nixon in your face. And so any time you had white-collar first-time nonviolent offenders going scot-free, don't think that that just stays in the courtroom in some kind of sealed deal, that it does trickle down and onto the streets, and it does breed a certain amount of cynicism of those who may be engaged in much more serious crime nonetheless feel they are not getting a fair share.

The reason I am here today, I am here for a variety of reasons and obviously to answer any questions, but there are two things that interest me particularly in the last couple of years. I'm affiliated with the Brennan Center for Social Justice up at the NYU Law School. And one of the issues we've dealt with is restoration of a felon's rights to vote. I come from -- with Joe Hines, by the way, who sits on that board. I come from a completely different perspective, the notion that you do a crime, you pay your time, when you get out you should have all your rights restored. The notion in America varies from state to state. In some states that right is removed the rest of your life. I just don't think, one, it's fair. Two, it gives those who are going back onto the street kind of an excuse not to join normal America or to mainstream. They have another excuse, that the man won't let them join with full rights in society.

The second issue is actually much more pernicious, and that's the whole dichotomy of the crack versus powder cocaine. That is a difference without a distinction as far as I'm concerned. That would be bad enough. The impact, though, the racial disparate impact of that distinction should not go unnoticed and it hasn't and it needs to be addressed. There is no law anywhere in America that should ever wind up at the end of the day having a predictable racial impact. I think that really needs to be addressed obviously at the national level, but at the local level, and you see it from

state to state.

The other interesting thing from the last panel, they complained -- I use the word complained in quotations. They were pointing out disparities within what I think is a pretty good system you all have set up from state to state and from district to district. That's nothing. At least you have a unified system in the federal system. If you look at the states -- I have now had the pleasure, if you want to call it that, of working in three large cities, New York, Philadelphia, and now Miami, and they couldn't be more different from a court system. As Bill pointed out before, there is no such thing as getting depositions from witnesses and certainly not of an eight- or ten-year-old rape victim who gets to be questioned by her accuser. That just wouldn't happen in New York except if it actually went to court itself. In Florida it's at the beginning of the process and not at the very end in the court system. You wonder why the system in Miami and all over Florida is really bogged down and why the system can't seem to handle the numbers that come in because you get so much bogged down in process.

The other thing -- let me just back up. I'm trying to begin the notion of being around a long time seeing the end results of things that happen. There was an editorial yesterday in the New York Times regarding the welcoming of the final goodbye for the so-called Rockefeller laws. I was a young cop in the South Bronx when those laws were passed. And like most laws, there was good intent initially, and there was a reason. In the late '60s and early '70s it just appeared crime was getting out of control, and the legislature being first and foremost politicians reacted to that with the enactment of the Rockefeller laws. It would seem to make sense, well intended, but the result was a system that's overloaded with nonviolent, maybe not first offenders, but nonviolent offenders, users and things of that nature. You'd see the same thing if you looked in the New York Times today, not that I'm selling their paper. Just I was reading on the plane coming up. A three-judge panel in California has ordered the State of California to reduce the prison population there by 55,000 people over the next three or four years. My sense is that overcrowding is largely a result of three

strikes you're out.

So there may be issues at the federal level but I find the federal level much more satisfactory to the disparities at the local level, that they are less susceptible, not completely, but less susceptible to political whims of whatever new crime is in vogue that there isn't always a knee-jerk reaction on the federal level.

Finally, there is also an issue, and I'm sure it will come up in questioning. I was asked to address it and I have like the panel before me conflicting opinions on it, the whole notion of when we have a commission of a crime, that the crime both by state statute and federal statute, where does it properly reside. Of course, the right answer is at the state level. Then the question is tell me why do you bring so many federally. And I guess we'll address that answer in the question-and-answer period. Because there are quite a few federal judges that I know that have got theirselves worked up over this federalization of what they consider low-level crime, not low-level crime but crimes that properly belong at the state level, whether it's narcotics or gun possession or things of that nature.

So I'm going to stop there. I'm sure we won't go as long as the last panel, but in case you do, I had to change my travel arrangements so I have to leave at 4:30. So thank you very much for your indulgence.

CHAIRMAN HINOJOSA: Thank you, Chief. Captain Casterline.

CAPTAIN CASTERLINE: I too would like to thank the panel for the invitation. We in High Point are actually very humbled that we were thought of and invited to come and participate.

The City of High Point certainly is not a New York City or Miami but there are far many more High Points in the country than there are cities the size of New York and Miami. The City of High Point is about 100,000 people. We are somewhat unique in the way that we border [inaudible] Greensboro and have Winston-Salem, North Carolina as neighbors, and there are approximately 1.5 million people in the triad.

I've been involved in the implementation of focused deterrence since about 1997 with High Point. I've been involved in a number of federal investigations in a number of ways from federal gun violations to historical drug conspiracies. My agency's work in the area of focused deterrence has involved collaborative efforts with Department of Justice assistance and the North Carolina Governor's Crime Commission, to mention just a few.

The High Point Police Department's crime reduction work has been showcased as best practice by the aforementioned. We are also part of the Project Safe Neighborhood. In my view, and again this is the view of a low-level practitioner, not a chief from a large city, the federal sentencing system is operating in a fair and effective manner. I believe the current system meets the purpose of sentencing. It provides certainty, which is important to us, and most importantly avoids unwarranted sentencing disparities among defendants with similar criminal histories who have been found guilty of similar conduct.

Again, I'm not a lawyer but my understanding of Booker -- and let me preface this that prior to 2005 I experienced a few cases where upward departure from federal sentencing guidelines was enacted. In the cases where upward departures were granted, the offender involved had committed murder, a number of federal gun violations, and other violent crimes prior to the crime he was being sentenced to. The upward departure in that case was obviously warranted. This decision seems to have provided judges with the ability to move outside the structure when the situation warrants.

I've also personally been involved in a case prior to United States v. Booker where six individuals sentenced in a gang drug conspiracy were all given very different sentences based on their records and the level of involvement within the conspiracy. I would say this is a case that exemplifies an appropriate balance between judicial discretion and certainty of sentencing within the current sentencing structure.

It's clear that many are concerned about the disproportionate number of poor and minority citizens serving sentences under the Sentencing Reform Act

guidelines. We are concerned as well. It's my personal experience that many of the violent offenders that we encounter in High Point in the triad are from poor and minority communities. While this causes many of us great concern, I do not believe a reduction or change in the federal sentencing guidelines to be an answer.

In High Point, North Carolina we engage the poor and minority communities in an open and transparent manner. We invite them to participate with us to address such disparities and become part of the solution. We use crime data to identify crime trends, locations, and individuals responsible for drug and violence in drug crime. We use focused deterrence on the majority of the identified offenders and work with the community providers to give offenders alternatives to crime. Face-to-face meetings with offenders, community, and law enforcement strip away the anonymity offenders once acted under. As a result, the community's moral voice, which is important, and rational choices for offenders rules the day.

In High Point federal prosecution is reserved for those who choose not to join the community. Subsequently the majority of offenders we send for federal detention deserve it. The most prolific offenders are the ones prosecuted in the federal system where we are from. The community sees this as being both transparent and fair. They recognize that our efforts have focused on the truly bad players in the community and offer the chance for redemption for the majority of the other offenders. In return we gain trust and community capital. Federal sentences and the guidelines offenders face become the choice they make. The prolific offenders and the sentences they receive very importantly become the benchmark of what not to become or what not to get. Subsequently the current federal sentencing system becomes the most effective tool we have to deter repeat and serious drug offenders. Since we've become more transparent and open to the community, the community recognizes the current structure is fair and appropriate for the prolific offenders.

I believe the current federal sentencing system demonstrates that

offenders -- and this is important -- are drinking from the same cup. I feel that in High Point, North Carolina we've done a good job of marketing the system by explaining it to offenders and the community. We have demonstrated we can be judicial in the way we target or go after offenders. As a result, the community trusts us to bring the worst offenders to the federal system for the right reasons.

We trust the federal sentencing system will continue to ensure the same certainty and avoidance of unwarranted disparities that it has since 1984, and really we don't believe at this time there should be any major changes in the system. And I'm open to obviously any questions.

CHAIRMAN HINOJOSA: Thank you, Captain Casterline.

COMMISSIONER HOWELL: Thank you, all three of you, very much for your testimony today. You're the last panel of the day, so thank you for your patience while you were waiting.

One of the witnesses we are going to hear from tomorrow makes a fairly interesting suggestion about the Sentencing Commission refocusing some of its research attention on looking at state sentencing systems and looking at the disparities not just within the federal system but disparities between sentences given in the state and federal system, which is something that the Commission does informally when we are looking at new statutes and we are trying to find analogs at the state level. And periodically we do look at a survey of different states to see how states are handling certain crimes and criminal conduct. But we haven't sort of done a massive research project. What's interesting to hear from you is that probably anecdotally at the state level for investigating law enforcement agencies you guys know very well what the differences are between the state and federal levels and what the sentences for specific crimes are and probably -- and I'll ask you does that play a role in whether you are deciding to take a case federally or to the state, number one? And number two, would you find that an interesting analysis to see on a state level, if not all 50 states, some select states with a sampling of metropolitan areas, rural areas, how state systems are

handling sentences for specific conduct compared to the federal level?

CHIEF TIMONEY: Let me say I wouldn't want to be the staff worker for you.

COMMISSIONER HOWELL: We have a great staff.

CHIEF TIMONEY: That's a huge task. My sense is, which I mentioned earlier, the pleasing part of the federal system is it's a unified system and it seems to make sense and it's swift and it's certain, unlike the state system. And so in Miami, just like High Point, on the really egregious cases, the very violent drug gang cases, we take them federally. That's how you get their attention. It's no accident that bank robberies have been skyrocketing over the last two or three years, because the FBI has stepped back. Don't underestimate the power of the FBI, the feds are coming after you, the FBI is coming after you, to dissuade people from engaging in robbing banks. The same thing applies in the really violent drug gangs. If they know in Miami they are going to take them federally, you'll see those gangs move to other cities outside of Miami, North Miami Beach and places like that. We see it all the time.

In my six years there I've had major gangs that we've taken out federally, taken federally, significant numbers, lots of guns, lots of drugs confiscated, and the bottom drops out of the homicides for the next year and a half, two years, because if they know you're taking them federally, they're out of the system. The state system is overcrowded. It's overwhelmed. It's unpredictable. It's a flip of the coin. It's not as swift and certain as taking them federally. So while they may be able to be taken locally, the best way on the real serious egregious cases is to take them federally.

Is there a disparity? My sense is there probably is from state to state, similar to the felon's restoration. If you looked at the felon's right to vote, it will shock you. There are some states you're forbidden the rest of your life. For others, the day you get out of jail you get it. Then the rest of them are somewhere in-between. My sense is, because this is the

nature of the federal system, the state system, that you're to have these disparities. Whether it's desirable to even out those disparities, I don't know. People get to choose where they live for a whole variety of reasons, and they go in with eyes open. For example, in New York City where I grew up and was a police officer, jaywalking is a right of passage. That's what you do. You jaywalk everywhere. If you do the same thing in California, you will be cited. I don't care who you are. You could be the King or Queen of England. If you jaywalk in Los Angeles, they will cite you. People understand that going in. And you get those type of disparities not just in sentencings but in enforcement.

CHAIRMAN HINOJOSA: I gather what you are saying, though, is if one were to look at the sentences in the federal system and some drug trafficking cases, you in all likelihood are going to have higher sentences than you would in the state system because there has been culling at least from the state law enforcement officials of the cases in taking smaller cases, cases where the drug trafficking organization is in the state system, and taking the bigger ones to the federal system.

CHIEF TIMONEY: I'm not sure if -- you're looking at the macro where we do take serious drug gangs, violent drug gangs federally. The numbers are still relatively small if you look at prosecutions in Miami that we took from local to federal. Like, for example, guns, I believe it was 300 last year, but we did thousands of guns statewide.

CHAIRMAN HINOJOSA: You wouldn't take your smaller gun cases to the federal system. You would still keep some of the big gun cases, obviously large numbers of the big gun cases in the state system, but the ones you would take to the federal system tend to be from the big group as opposed to smaller gun cases.

CHIEF TIMONEY: That would be correct.

CAPTAIN CASTERLINE: If I can expand on that, that's really exactly what we do in the High Point. And to illustrate that, most recently we had

an uptick in armed robberies and did quite a bit of research and found that it was kids 18 years and younger and most of them had gang affiliation. So in order that we stand somebody up or a particular gang up for them to look at to use as a deterrent, we had a gang by the name of the Nine Trey Bloods, and they were the most prolific gang in the city. We quickly look at who is on probation, who has pending cases, who has outstanding cases, who has warrants for arrest, and who is in the street dealing drugs. And ultimately one or two people in that group are the higher-ups who have some federal exposure, so that is who we would typically go after. And by doing that we can call in members of the other gangs that we've identified in the city of people that are on probation and sit them down and make them the messenger. And in this way we can use a federal prosecution and hopefully a minimum amount of federal prosecutions to say to the rest of the gang members if you don't stop the violence, this is what we are going to do to you. And since criminal records are a very good predictor of what people are going to do in the future, we can say to these folks this is your record, it looks just like this guy's record, we took him federal, we can do the same thing to you.

Now, when you sit folks down in front of the community and the federal agencies and tell them that, they take notes. Now, clearly if we told them we were going to put them in the state system, we wouldn't get their attention because we know and it's been our experience in North Carolina that the state system is a revolving door. And in fact, when you look at a lot of these prolific offenders, they have records that are ten pages long where they've been through the state system time and time and time and time again. They are the ones that are setting themselves up to fall into the federal system. So that's pretty much exactly the way we look at it.

COMMISSIONER CARR: Captain Casterline, a couple of things. I find your program to be fascinating and laudable. My first question is who did you have the hardest time selling it to? Who was the least comfortable with initiating it? The local prosecutors or who?

CAPTAIN CASTERLINE: Everybody, especially law enforcement. When I

went into narcotics -- because we implemented this in many ways including street level narcotics and we've also come up with a new word because we don't want to felonize a lot of our kids that are dealing dope in the community. We don't want them to get to this level. I told the gentleman that worked in vice for me when I was a lieutenant there, if I asked you to stand on your head for 15 minutes in that courtroom and you could reduce violent crime by 10 percent, would you do it, and they said sure. I said what I'm going to ask you to do is not as stupid as that. It takes -- there are several people out there, and I'm sure some of you know David Kennedy -- but it takes actually sitting down with the community and bringing someone in like Kennedy. And we also have a prosecutor in the Middle District by the name of Rob Lang, folks that really understand this stuff and can explain it in such great detail and sell it. And I think that once you implement this focused deterrence you can see how powerful it is and the changes that it can make.

It's hard to break the mold with law enforcement folks. It's hard to get rid of the mentality of lock you people up and throwing away the key is going to make a difference. And I would argue that in the 19 years I've been in the business, and maybe the Chief will agree with me or not, that's not going to change things. I think by sitting down and talking with the community and talking about the narratives and having people available to describe how it works in great detail, while it's a hard sell, there are many of us in the country that have been doing it that can show how it works.

COMMISSIONER CARR: My second question I guess is more like an observation. Unlike most of the people we've been hearing from today, it sounds like this is an endorsement of stiff drug and violent crime sentences and mandatory minimums because you make use of their deterrent impact.

CAPTAIN CASTERLINE: Correct, absolutely.

MR. SHEPHERD: And we do that on the state side. I don't want the impression to be frankly that the only way you can get a good result is to take it across the street to federal court, because part of the reason that

federal agents bring their cases to my office is because with federal cases come federal beaurocracy. And although it takes longer to get a resolution on the back end, we'll work quickly to make an arrest and build the case.

We are a customer-service driven office, frankly. We are entrepreneurial. Nobody has to bring their case to my office. The local district attorney, state attorneys can handle all the cases. The local federal prosecutor can handle all those cases. They have to come to our office because they see value added to it. So really, although, yes, there is a tremendous revolving door in local state courts, that's frankly a resource issue.

The reason big drug cases go to federal court oftentimes -- I sit on one of the HITA boards in Florida -- is because there's money to support those cases. If I could get the same overtime dollars for the sheriff's deputies who are working as cross-warrant federal agents to work for months on the wire on those cases to bring them to state court, you'd see the same results in state court. And you do. In my office we did over 80 wire taps last year. I just filled out the report, 80 wire spins and extensions. That's a significant number for a group of 30 lawyers. And so really I think it's not as much that the system is built differently; it's the volume.

And to go to your question, Commissioner, about disparity between the states, again I would point to volume. You are going to get a different sentence and a different way the case is handled in Ocala, Florida or Stewart than you will in Miami. And it's not because the community values are different. It's just because that prosecutor has 80 cases set for trial on Monday. He's got to resolve these because he's got eight people with speedy trial problems and he can only try one at a time.

And it's not just the prosecutors who are involved in that. It is routine practice in state court for the judge to make a counteroffer to the prosecutor that will be significantly lower and will say, "If you take a plea today, Defendant, I've reviewed your score sheet here. The prosecutor has offered you five years. I'll offer you three. I'm going to take a five-

minute break. I'm offering you three, you six, you twelve, and when I come back in ten minutes tell me if you want a trial." And those will all be done over the state's objection but that's the regular course of doing business.

COMMISSIONER CASTILLO: Just following up on the value of large penalties as deterrents. Do you think the word is out on the street that the penalties for federal drug crimes, armed career criminal offenses, firearm offenses, are relatively high? Do you think actually defendants know that, that if they are going to end up in federal court --

CHIEF TIMONEY: I don't think it has anything to do with the sentences being high. I don't think it has anything to do with mandatory sentences. It has to do with certainty, if you are guilty you are certainly going to go away, whether it's for a year or five years; whereas, in state court that's not the case. I love the state attorney, but I am telling you it's difficult when you see sheet after sheet. I mean, 60, 80, 100 priors is nothing. That's kind of disheartening.

MR. SHEPHERD: We had a juvenile recently with 50 arrests in his history and he was 16 years old. That's another issue very difficult for you to deal with because you don't generally deal with juveniles, but a significant amount of the violent crime is committed by juveniles, and those go to state courts.

CAPTAIN CASTERLINE: I think in our case it is both. It's the certainty, and they know that if they have a gun and five grams, they know if they have a felony conviction and a gun, they understand all this. We create an environment where they hear it. And we do that by using the system to identify who those offenders are who are at that level. And rather than focusing on them with investigations, the majority of them are on probation and they have all this exposure. So we have a hook to bring them in and sit them down. So those offenders in our community who are about to be the most prolific offenders are being told to their face by clergy, by family, by community, and by our task force, which is all the federal agencies and state and local, that you look just like this single offender that we did in

federal court. If you have a gun or if you have five grams or, depending on the situation, this is what we can do to you.

Now, of course, on top of that we have this huge community effort where we are providing services and plugging in this one-stop system created through the City of High Point where there is a resource coordinator who is hooked to all these local service providers. But, in fact, quarterly we are calling in these offenders who are about to be prolific offenders, and we are using that one individual, and they do understand that this is what their record is and this is what the gun and dope will get them.

COMMISSIONER SESSIONS: Chief, can I ask about your comments about the crack/powder disparity? To what extent are people in the community in Miami, or Philadelphia or New York, for that matter, aware of the disparity? What reaction do they have to the disparity? How does that impact their judgment with regard to the criminal justice system?

CHIEF TIMONEY: I probably abbreviated my remarks. Enough has been written about it, obviously. But the notion that you have passed a law knowing that there is particular racial disparity impact I think just by virtue of the fact we live in America shouldn't be passed to begin with. Number two, having been old and gone through all this, whether it was angel dust when I was a sergeant in Harlem back in the early '80s and then the crack cocaine in '86, '87, you see particularly with the media and the stories they cover that they make them out to be monsters that the only way you're going to deal with -- bottom line is whether it's some guy in a club putting it up his nose or some kid smoking it out of a pipe, the substance is the same and the sentences should be the same. Whether there is a realization at the grass-roots level, that I'm not sure about. You get some of it at community meetings, but that's not the point. The point is there shouldn't be disparate impact, and that's the whole idea.

CHAIRMAN HINOJOSA: Does anybody else have any questions? Chief, we are going to get you out of here by 4:30. Again, thank you all very much. We realize what an important role you all play in the system and how busy all

three of you are and we thank you for being here.

We'll adjourn until tomorrow morning at 8:30.

(Hearing adjourned at 4:15)

CHAIRMAN HINOJOSA: Good morning. Our panel this morning -- we thank them for being present because we realize they all have busy schedules -- is a view from the district court bench, the judges that actually do the sentencing. The distinguished panel this morning includes the Honorable Robert Conrad, Jr., who is the Chief Judge of the Western District of North Carolina. Judge Conrad was appointed to the court in 2005 and became the Chief Judge in 2006, one short year after being appointed. I won't become Chief Judge until this year, after 25 and a half years. Previously he was in private practice and served as an Assistant U.S. Attorney and was the U.S. Attorney for the Western District of North Carolina.

The Honorable Gregory Presnell is a district court judge in the Middle District of Georgia. He was appointed to the bench in the year 2000. He was previously engaged in private practice for 34 years and was a member of the U.S. Army Reserve.

The Honorable Robert Hinkle is the Chief Judge of the Northern District of Florida. Judge Hinkle was appointed to the court in 1996 and has served as Chief Judge since the year 2004. Previously he served as a law clerk to the Honorable Irving Goldberg at the 5th Circuit Court of Appeals and he was previously engaged in private practice.

The Honorable William Moore, Jr. is the Chief Judge of the Southern District of Georgia. Judge Moore was appointed to the bench in the year 1994 and has served as Chief Judge since 2004. He was engaged in private practice in Savannah for 13 years and was the U.S. Attorney for the Southern District of Georgia for four years before returning to private practice and then his appointment to the bench. And he is a current member of the Criminal Law Committee of the Judicial Conference of the United States.

So we thank you all for taking time off from your schedules and we'll start with Judge Conrad. Of course, our format is a statement from each one of the judges and then questions and answers.

JUDGE CONRAD: Thank you, Judge Hinojosa, members of the Commission. With respect to being Chief Judge only after a year on the bench, I have since then referred to myself as being statutorily qualified if in no other way.

January 21st of this year the Supreme Court issued what may be its most recent proclamation on federal sentencing. I did not check Westlaw this morning before coming here to see what else has changed, but it appears the United States Supreme Court summarily reversed the 8th Circuit Court of Appeals and held that a district court judge is entitled to reject and vary categorically on the crack cocaine guidelines based on the sentencing judge's personal policy preference regarding the appropriate ratio between crack and powder cocaine offenses. Chief Justice Roberts appeared galled by the bitter medicine of summary reversal and wrote that, "Apprendi, Booker, Rita, Gall, and Kimbrough have given the lower courts a good deal to digest over a relatively short period. We should give them some time to address the nuances of precedence before adding new ones. As has been said, a plant cannot grow if you constantly yank it out of the ground to see if the roots are healthy." The epicurean majority dished back the culinary metaphor. The dissent said that, "Apprendi, Booker, Rita, Gall, and Kimbrough have given the lower courts a great to digest over a relatively short period, true enough, and we should therefore promptly remove from the menu the 8th Circuit's offering, a smuggled in dish that is indigestible."

If the United States Sentencing Commission guidelines can cause this much heartburn at the highest court, who am I to judge if an inferior court can serve up my own critique. I sit slightly easier at the table joined in spirit with the erudite Judge Michael McConnell of the 10th Circuit who, when placed in the same predicament loosely wrote, "That seems a presumptuous thing for an inferior court judge to say about the product of his superiors.

I take comfort in the fact that eight of the nine justices agree with me that either the 6th Amendment holding in Booker or the remedial holding is wrong and that the two do not fit together."

The Sentencing Reform Act of 1984 and I began our legal careers at roughly the same time. Shortly after graduating from the University of Virginia School of Law in 1983 I began representing criminal defendants in state and federal court as part of my legal practice. January of 1989 I moved over to the prosecution table serving for 12 years as an Assistant United States Attorney and for three years as United States Attorney. June of 2005 I began sitting in the judge's chair in Federal District Court, and from that vantage point have presided over more than 700 felony sentencing hearings. I also stand at the professor's lectern teaching a sentencing law course at the Wake Forest University School of Law as an adjunct professor. I'm indebted to Dean Blake Morant and Associate Dean Ronald Wright for the privilege of trying to explain the intricacies of the federal sentencing guidelines and the legal reasoning behind them to very talented law students. I note that Professor Wright is on the panel from academia following this panel.

The apparent gut churning in the Supreme Court evidenced by the cases already mentioned evokes a memory of Dr. Peter Venkman, the eminent paranormal scientist played brilliantly by Bill Murray in the movie "Ghostbusters." He had been pursuing a beautiful woman throughout the movie, but his moment of opportunity came only after an evil spirit possessed her. Face-to-face with the enigma of desiring what he knew he could not have, he reconsidered saying, "I make it a rule never to get involved with possessed people. Actually it's more like a guideline than a rule."

It seems like the guidelines which used to be more like rules are becoming more like guidelines all the time. Of course, the allusion to possessed people is in no way intended to be descriptive of the Sentencing Commission. The Apprendi, Booker, Rita, Gall, Kimbrough decisions have indeed given us all a good deal to digest. Out of my experience of sitting

in different chairs in the federal courtroom let me make a few brief observations regarding the Supreme Court's recent interpretation of the guidelines.

First, I applaud the Sentencing Commission for giving prosecutors, defense attorneys, probation officers, and judges an empirically-based heartland from which to start the sentencing process. I have found that the most difficult task for me as a judge is to sentence other human beings. Human tragedy is reflected in each hearing, and the responsibility to judge wisely and compassionately while balancing the need to protect society and deter crime and provide just punishment and aid the effort at rehabilitation weighs heavily on the heart. I would feel at a loss in those tough moments of decision if I only had my own idiosyncratic preferences or anecdotal experience to follow. Instead, for the past 25 years judges have had the beneficial resource to consult which reflects for the most part the sentencing practices of colleagues across the country and across the years. Thus I differ from the fellow judge on my district bench who once said publicly that the guidelines would gag a maggot. No such animal cruelty has occurred.

The systematic approach provided by the guideline system has brought order, consistency, and rationality to federal sentencing law. Combined with the appropriate exercise of judicial discretion recognizing Booker, courts are equipped and empowered to render reasoned sentencing decisions grounded in past practice and statutory purposes achieving just sentences in particular cases.

Given the potential benefits of the guidelines, it is healthy to ask whether their goals of transparency, uniformity, and proportionality are being achieved. Here again, the Commission and Congress are to be commended for achieving the goal of transparency rather significantly. The elimination of parole has provided honesty in sentencing which is criticallly important to crime victims and the public. Procedural safeguards, including the preparation of presentence reports, the opportunity to object to information

included in them, and full hearings, can give defendants greater confidence in the fairness of the sentencing process. Much of the arbitrariness, idiosyncracy and hiddenness inherent in an indeterminate sentencing scheme has been replaced by an ordered and transparent system.

The goals of uniformity and proportionality, often in tension with each other and the achievement of them, has been complicated largely by the obligation to impose mandatory minimum sentences in certain cases. Statutory mandatory minimum punishments and the guidelines written to implement them achieve the goals of uniformity at the cost of sometimes unjust sentences. This is so because the most common mandatory minimums are triggered solely by drug type and quantity and/or criminal history. Such a myopic focus excludes other important sentencing factors normally taken into view by the guidelines and deemed relevant by the Commission, such as role in the offense, use of violence, and use of special skill. The inability to tailor sentences based on these and other factors results in similar sentences for defendants whose actual conduct was dramatically different and disparate sentences for defendants who are actually similarly situated.

The guidelines themselves are marred by the obligation to impose mandatory minimum sentences. Typically guideline ranges increase proportionally with factors in criminal history. Guideline ranges influenced by statutory mandatory minimums, however, contain large jumps in sentence lengths or cliffs based on small differences in offense conduct or a defendant's criminal record. In too many cases a sledgehammer is the only tool available to dispatch a fly. Sentencing decisions are always difficult but the required application of mandatory minimums in cases where they are not warranted is repugnant.

Last year I was forced to impose a life sentence on a low-level drug conspirator in a large-scale drug trafficking ring. The individual's role was essentially that of a chauffeur for a major drug dealer who cooperated and received a reduced sentence. The chauffeur, however, with little opportunity to cooperate, had two prior state drug convictions for

transactions occurring close in time for relatively insignificant amounts resulting in little or no actual jail time. Since this was his third offense, I had to impose the applicable statutory mandatory minimum of life imprisonment. The sentence was not just and served no statutory purpose. I can tell you that I did not sleep well the night before the sentencing hearing knowing what was coming. Afterwards I did not feel that I had contributed to the furtherance of a just society.

Mandatory minimums have the most potential for disproportionate sentencing in the stacking of Title 18 U.S.C. Section 924(c) charges. The statute requires mandatory minimum sentences to be served consecutively to all other terms of imprisonment, and the minimum increases from five to 25 years for a second or subsequent violation. For example, if a low-level conspirator brought a firearm to a series of three undercover deals, he would face 55 years in jail for possessing the gun regardless of whether it was actively used and regardless of the drug charges. Understandably mandatory minimums are created by Congress, not the Sentencing Commission; nonetheless the Commission's decision to depart from empirical data to cluster guideline ranges around statutory minimums make them less reliable as a sentencing guide. Ultimately the goal of uniformity must yield to the imperative of doing justice in the individual case.

I'll speak a moment about reentry programs. Justice in individual cases is being aided by new techniques and programs being utilized in supervising offenders. My colleague and friend, Greg Forest, the Chief United States Probation Officer for the Western District of North Carolina, said yesterday efforts are being made by probation offices to promote empirical measures such as the use of evidence-based practices in the supervision of defendants and offenders. To this end the Office of Probation and Pretrial Services at the Administration Office of the United States Courts should be encouraged to continue grant funding to implement evidence-based supervision practices. Programs such as risk/needs assessment, motivational interviewing, cognitive behavior techniques, offender workforce development, and reentry programs based on drug court models hold out hope

for decreasing recidivism. Therefore they should be promoted by Congress, the Commission, and by the Administrative Office of the Courts and considered by sentencing judges.

I welcome such attention as that recently given by the Commission to alternative sentencing in the federal criminal justice system through its 2008 symposium and publication on the same topic. Effective alternative sanctions are important options in the federal criminal justice system. For appropriate offenders alternatives to incarceration provide a substitute for costly confinement. Ideally alternatives also provide those offenders opportunities by diverting them from prison, or reducing time spent in prison and these programs provide the life skills and treatment necessary for becoming law-abiding, productive members of society. Efforts to assist felons assimilate productively into society under the auspices of second chance efforts, workforce development initiatives, and reentry programs should be encouraged.

An unfortunate biproduct of the guideline system has been the diminution of passionate sentencing advocacy by defense and government attorneys. In its place a hypertechnical accounting practice has arisen focusing battles on subsections and application notes, straining out issues such as minor versus minimal participant, organized versus manager, and the like. I often wonder what a criminal defendant and his family, the victim, or the public thinks when exposed to such legal proceedings, as if there were not already enough lawyer jokes.

What should not have been lost and what I hope will be regained following Booker and its progeny is a focus on the statutory purposes of sentencing, just punishment, deterrence, and incapacitation and rehabilitation, and how the guidelines achieve them or not in individual cases. The inferior courts have been instructed to first get the guideline calculations right, which means devoting substantial amounts of time to that effort. Next we have been instructed to consider departures under the guidelines followed by variances outside the guidelines, all the while

tasting the soup at each stage to see if a sufficient but not greater than necessary sentence has been crafted.

Adding to this complexity of this multicourse meal are new appellate recipes directing the cooking that is already underway in the kitchen. We must be mindful that district courts are not quaint bistros. A large number of patrons have legitimate expectations of speedy service, and we are already operating on a waiting list. Of course, McJustice, a pragmatic, formula-based approach to sentencing without individual consideration is not a suitable alternative if the goal of proportionality is to be achieved. The last few years have been a time of tremendous change in federal sentencing practice and maybe we do need a little time to digest. Thank you.

CHAIRMAN HINOJOSA: Thank you, Judge Conrad. Judge Presnell.

JUDGE PRESNELL: Thank you, Mr. Chairman. I would first like to say I appreciate the opportunity to be here this morning. It looks like I'm the only ordinary judge here among my fellow colleagues here who are chief judges.

COMMISSIONER HINOJOSA: We have two ordinary judges up here and one chief judge.

JUDGE PRESNELL: As you know, I come from the Middle District of Florida, which encompasses almost half the population of the state. I suspect I was asked to come here by our chief judge because I believe I've been the most active district judge in our district in writing about federal sentencing issues. And for those of you who have read my opinions, it's no secret I've been a vocal critic of the sentencing guidelines.

My objections have been two-fold. First, under the mandatory guidelines system the role of the judiciary was minimized to the point that it threatened judicial independence, in my view, and reduced district judges to a mere figurehead, rubber-stamping its imprimatur on the predetermined sentence chosen by the government. In essence, the court became irrelevant in our criminal justice system. I know that is a bold statement, but as the

other judges here know, 95 percent of the criminal defendants plead, so we have no -- in essence the district judges' most significant role in our criminal justice system is that of sentencing. And under the mandatory guidelines in my view district judges had very little discretion to dispense justice and instead merely confirm the calculation by probation of what the predetermined sentence was. I believe I was the first judge in the south to offer the opinion that the guidelines were unconstitutional and suggested the remedy that was ultimately adopted by the Supreme Court in Booker.

My second objection, which is now the more important issue, I believe, is that the guidelines score often produces arbitrary and grossly unjust sentences. The lesson from Booker, Kimbrough, and now Spears is that trial judges now have discretion in the sentencing process and that 3553(a) factors are in essence essentially subjective factors. We as judges as human beings have to impose sentence upon other human beings, and like Judge Conrad I've sentenced more than 700 people in my brief judicial career and it's the hardest thing I have to do. From the Commission's standpoint I believe the lesson or the issue now that we face is that district judges are free to consider the weight or effect to be given to a particular guideline based on the court's view of the guideline's vitality. And it's now the Sentencing Commission in my opinion which may be on its path to becoming irrelevant if it continues to promulgate and promote sentencing formuli which the judiciary disregard because of their perceived arbitrariness and lack of empirical foundation. In my written comments I provide three examples. I'm sure you are aware of them without me reminding you of them.

The crack/powder cocaine disparity of course is a longstanding issue, and the sentencing variance between these two substances which are chemically identical and which adversely affects a racial minority defies logic and promotes disrespect for the law, in my opinion, contrary to the mandate of 18 U.S.C. 3553(a), and amendment 706 does little to correct this imbalance. I recognize that the Commission's guidelines in that regard are driven by the mandatory minimums but I question the wisdom of promoting guidelines that follow that bad policy and which cause district judges to either impose what

they view to be unjust sentences or to comply with the guideline which they know produces an unjust sentence.

Another area that I think needs to be reexamined is the illegal reentry under guideline 2L1.2. The enhancements for prior criminal conduct which range from four to 16 points based on arbitrary steps of prior criminal conduct often produce grossly unjust results. And I have written about this issue as well. It would be far better in my opinion to simply apply an enhancement range, say if you want to use between two and 16 levels based on the court's assessment of the seriousness of the prior criminal conduct and give the district judge true discretion to determine the prior culpability and criminal conduct of the illegal alien in calculating a guideline score that would produce a fair range of sentencing options.

And third, the most recent guideline to receive significant criticism by scholars as well as district judges is the child pornography guideline under 2G2.2. This guideline has been the subject of much recent criticism because it is not based on any empirical data or institutional analysis. My experience with this guideline is that the people on the lowest rung of culpability, that is, people who download and view child pornography in private, people who I think can truly be said to have an illness but who do not distribute or otherwise actively engage in this conduct, often under this guideline end up toward the statutory maximum. And there is something wrong with the guideline that does that. And many district judges have recently within the last year expressed their disagreement with that guideline and are substantially varying from it. And I've cited a list of cases in my written submission to the Commission on that point.

In conclusion, in my view the common law of federal sentencing must be allowed to evolve. And the Commission, if it is to maintain its relevance, must observe and take into account what trial judges are doing and saying. After all, it is the district bench that's on the front line of these issues. We are the ones who have to make the daily hard decisions that affect people and society as a whole in our sentencing decisions. Judges in my view want

guidance. No one wants to return to the preguideline free-for-all which produced vastly different sentences for the same criminal conduct, but the guidance must be based on the collected wisdom of the actual sentencing process and not simply a mandate derived from the Commission's notion of sentencing policy or the desire to placate the apparent will of Congress.

CHAIRMAN HINOJOSA: Thank you, Judge Presnell. Judge Hinkle.

JUDGE HINKLE: Judge Hinojosa and members of the Commission, thank you for inviting district judges to provide comments this morning. With the press of business, we who are involved in federal sentencing on a day-to-day basis rarely have occasion to step back and reflect on the overall process. The 25th anniversary of the Sentencing Reform Act provides an occasion for a long view, and I commend the commission for taking that on.

When I was asked to testify, I was reluctant, because it has been my practice never to comment publicly on the wisdom of the guidelines or of congressional or Sentencing Commission actions affecting sentencing. I like it when the Congress and the Commission do not comment on particular decisions of mine, and I try to return the courtesy. But you of course won't know how the guidelines are really working in the hinterlands unless we tell you, and so I accepted the invitation.

The views I express are mine alone, and I should add that for the most part these views have no effect on my sentencing decisions.

I suspect if you put to a vote the question whether we should retain the guidelines or go back to judicial discretion as it existed prior to 1984, most prosecutors would vote to keep the guidelines but most defense attorneys would not. If you divided every guideline range by ten, so that a range of 121 to 151 months became instead 12 to 15, I think the vote would flip. Most defense lawyers but few prosecutors would vote to keep the guidelines. As prosecutors or defense lawyers comment in favor of or in opposition to the guidelines, I suspect the motivating force will most often be the length of sentences, not the wisdom of having guidelines.

For myself, I would retain the guidelines, though not without some reservations. I think the state of guideline sentencing is better since Booker. My reasoning for saying I would keep the guidelines departs somewhat from that usually offered by guideline advocates.

The most common theme trumpeted by guideline advocates is the need to eliminate unwarranted sentence disparity. One hears often that in the old days there were substantial unwarranted disparities from district to district and even from judge to judge within the same courthouse. The guidelines have reduced the disparity but much disparity remains, and it did even before Booker. There is disparity that your statistics do not and cannot measure. By happenstance, one defendant provides information to the prosecutor first and benefits from Section 1B1.8, but a codefendant comes in later and thus faces a markedly higher offense level. In one district a defendant is tagged only with the drugs involved in a specific transaction; in another the concept of relevant conduct is applied more broadly, and the offense level skyrockets. In one district the government files a notice of the defendant's prior convictions under 21 U.S.C. Section 851 and the defendant thus faces a long minimum mandatory sentence; in another district the government chooses not to file the notice. A thousand other examples could be given. Your statistics showing the number of sentences within the guideline range do not pick up these disparities because they are disparities in the calculation of the guideline range.

I suggest, though, that too much attention is given to the issue of disparity. What we should be talking about is not how to reduce disparity but how to improve the quality, the justice, and wisdom of a given sentence. It is better to have five good sentences and five bad ones than to have ten bad but consistent sentences. And it would be better still to have ten good sentences even if they could be explained only as the considered judgment of a good and honest and experienced district judge whose goal was to get it right, and even if that explanation could not be fit into the grids on a guideline chart.

The guidelines contribute to the quality, the justice, and wisdom of sentences not primarily because they reduce unwarranted disparity, but because they provide a good starting point and a good reality check. My mother used to tell me to proceed cautiously when everyone seemed out of step but me. It was advice I didn't always heed, and I don't always heed it now. But when my initial view on a sentence is out of step with the guidelines, I think twice, as well I should. It makes for better sentencing.

To be sure, there are hundreds of district judges, and there are some among us who didn't have my mother's wise counsel. A few may pay little attention to the guidelines. Most of us, however, find the guidelines useful. It would be a mistake to govern for the outliers, to design a sentencing system to rein in a few judges at the margins rather than to make the system work well for the vast majority.

In my written statement I addressed some more specific issues. I said the level of craftsmanship is excellent, that you ought not to extrapolate unnecessarily from Congressional policy decisions, and Judges Conrad and Presnell had referred to some of those. The drug structure, as the Commission has itself recognized, probably extrapolates from the minimum mandatory policy decisions more than necessary.

And I also said in my written statement that all of us, Congress, the Commission, and the courts, should keep in mind always the proper institutional roles of the various participants in the sentencing process. We have sometimes given prosecutors the role that properly rests with judges. I gave some examples of that.

I won't repeat here what I said in more detail in the written statement. I'll simply conclude by saying that sentencing is the hardest thing I do. I am less confident that I have gotten it right when I choose a sentence than when I make a decision of any other kind. The district judges I know take sentencing very seriously, as I do, and they work hard at it, as I do. We sometimes have different perspectives and sometimes impose disparate sentences, but a scheme cannot be devised that determines a proper

sentence by objective criteria articulated in advance. Taking the judge and judicial discretion out of the process would be a bad idea. The guidelines are best when they are guidelines and when they give us an idea of a reasonable sentence in a given set of circumstances. We ought not ask the guidelines to do more. I thank the Commission for its good work.

CHAIRMEN HINOJOSA: Thank you, Judge Hinkle. Judge Moore.

JUDGE MOORE: Mr. Chairman, members of the Commission, I thank you for your invitation extended to me to testify before this hearing marking the 25th anniversary of the passage of the Sentencing Reform Act of 1984. I appear before you today as the Chief Judge of the Southern District of Georgia; however, my comments today represent the collective opinions of our three active judges and our three senior judges on our court. I asked all of these judges to give me their written opinions before preparing my written remarks and appearing before you today. So most of what I will testify about today is a collective effort from the judges in the Southern District.

The advisory sentencing guideline model in our opinion is working very well. The advisory nature of the guidelines provides a fair balance of both consistency and flexibility to our court. Most defendants convicted of similar offenses and who have similar situated criminal records fall within the same advisory guideline range. This allows courts across the country to impose fair and consistent sentences. The majority of the defendants sentenced in our district receive a sentence within the advisory guideline range notwithstanding departures based on substantial assistance filed by the government. Some cases, however, involve circumstances concerning the offense or the defendant that the Sentencing Commission has failed to consider or adequately address. These cases, which are in the minority, allow the court to either depart from the applicable guideline range or to totally abandon the guideline system via a variance and impose a sentence based solely on the factors listed in 18 United States Code Section 3553(a). Overall it appears that the advisory nature of the guidelines and the reliance on the Section 3553(a) factors allows the court to more fully take

into account the personal characteristics and personal backgrounds of defendants in ways that cannot be taken into account strictly by offense level or criminal history computation. When the guidelines were mandatory it was more difficult for courts to account for these factors in their sentencing decisions and sometimes it was downright impossible.

The guidelines serve as a model taking into consideration the relevant factors that should influence sentencing. Our court likes them as they are. Four of our six judges have experienced preguideline sentencing in federal court, and we would dislike going back to the preguideline era. We believe that the advisory guidelines are rational, creative, and help to ensure some uniformity among the judiciary of all 50 states in sentencing people similarly situated. The guidelines should be maintained in our opinion in their present form with little or no alteration.

The present federal sentencing system offers the court an appropriate balance. If the court does not wish to impose a sentence within the advisory guideline range, departure or variance provides the court with discretion to impose an appropriate sentence. In our opinion this strikes the appropriate balance between judicial discretion and uniformity and certainty of sentence.

From my part, and I know from my discussion with my colleagues, I agree with the comments of the other judges here today regarding sentencing decision. The sentencing decision is undoubtedly the most difficult decision that district judges are called upon to make.

The offense and offender characteristics are adequately considered in our current system. If a case is seen as typical, a sentence within the advisory guideline range is usually imposed. If there is something atypical about the offense or the defendant, the court has the discretion to impose a sentence outside the advisory guideline range.

As I've said, our court would like to see very little change in federal sentencing. There are, however, some members of our court who believe that armed robbery and specifically armed bank robbery should be judged more

severely and sentenced accordingly than the present guidelines call for. Consistent with the current practice, sentencing factors set forth in 18 United States Code Section 3553(a) should be thoroughly considered in all cases. If the advisory guideline range adequately addresses all of the 3553(a) factors, a sentence within the advisory guideline range should be imposed. However, if the range does not adequately address one or more of the 3553(a) factors, a sentence outside the advisory guideline range should be imposed. We are of the view that the overwhelming number of sentences should be within the guideline range. Judges are not infallible, and the public and Congress would have far more confidence in federal sentencing that is fairly consistent throughout the 50 states.

Our court is generally not aware of appellate statistics, at least in terms of whether more appeals have been filed since Booker than before. It is apparent, however, from our review of appellate decisions, that appellate courts are looking for sentencing courts to fully articulate their reasons for imposing sentences within or without the guideline range. There is a view among some judges that the right of appellate review of sentences that fall within the guidelines based upon a plea of guilty should be abolished. There is a belief that appeals in these cases are a waste of time and take up too much of the district court and the appellate court's time.

Personally I am not comfortable with plea agreements that contain waivers of appeal. I believe that I am the only judge in the Southern District that will not accept a plea agreement that contains a waiver of appeal. The reason is thus: In the great majority of cases, maybe 90 percent or more, the defendant is represented by a CJA-appointed counsel. Many of these appointed lawyers are not familiar with our system. They are more state practitioners than federal practitioners. And more particularly they are totally unfamiliar with filing appeals in the 11th Circuit Court of Appeals, and they don't want to have to file an appeal after the sentencing is over. I am not comfortable with the fact that in these cases that the defendant always gets the best advice as to whether he or she should waive the right of appeal in the case. It's not that I am totally opposed to

appropriate cases having appeal waivers in them, but the majority of appeal waivers that I see fall within the category I think of inexperienced CJA lawyers who do not want to go through with an appeal process and therefore probably advised their client to enter into a plea agreement with a waiver appeal.

We do not have any recommendations to the Commission regarding the Federal Rules of Criminal Procedure. Change usually makes for less confidence in the criminal justice system. There is a view among some judges that statutory penalties should be increased, including the enhancement of mandatory minimums in cases involving repeat fraud/theft type offenses. Our district has sentenced several repeat fraud offenders whose advisory guidelines did not adequately address the harm caused by their actions and the seriousness of their criminal history or the likelihood that they would continue in such criminal acts. Several of these defendants had prior convictions for similar offenses where they received slap-on-the-wrist state court sentences.

Let me say that for my part personally I do not favor more mandatory minimum sentences. I think the Commission can devise a better way to deal with that perceived problem than the creation of more mandatory minimum sentences in that area. Also, as I previously indicated, there is opinion among some judges that a prisoner should not have a right to file an appeal after pleading guilty and receiving a sentence within the advisory guidelines. Post-sentencing appeals should be examined, and too many motions and nonmeritorious litigation post-sentencing is a burden on the system.

Pursuant to United States Code Section 5K3.1, upon motion of the government the court may depart downward not more than four levels pursuant to an early disposition program authorized by the Attorney General of the United States and the United States Attorney for the district in which the court resides. In my personal opinion defendants prosecuted in districts which do not have the so-called fast track program should be eligible for the same downward departure as like defendants in bordering districts that do

have a fast track program. The fast track program creates a disparity in sentencing between defendants who commit the same offense but in a different state. In my opinion it should make no difference in what state you committed the offense. It should be what offense the defendant committed compared to the offense committed by other defendants within a state that has a fast track program. This fast track program creates a built-in disparity in sentencing that the guidelines were designed to eliminate.

Finally, I want to echo what my colleague Judge Presnell said regarding the difficulty the district judges find themselves in in child pornography cases. The sentencing in these cases in the last several years to me personally have been the most troubling sentences. The typical defendant that I see in a child pornography case is over 60 years of age, retired or either forced to retire because of some health reason, is generally sitting at home most of the time spending time on the computer. They get some ad that comes in on their computer to a porn Web site that they access. Many of these people have an illness in this regard. The majority that I see have no prior criminal history. They are not classified by any experts or people who have examined them as pedophiles. They just get hooked on looking at this stuff on the Internet.

I had a sentencing the day before I came here involving 62-year-old man. He was an Army veteran. He had retired from the United States Postal Service after more than 20 years, married to the same woman for over 20 years, two adult children, no prior criminal history, but because of the calculation of the number of images involved in his offense, the bottom end of his guideline range was 78 months. This was driven by the images that were in what was called the unallocated space in his computer. The government expert could not tell the court whether or not the images that were in the unallocated space of the computer had ever been viewed by the defendant -- they had not been printed out in any way -- or whether there had just been a click and they had been sent to the unallocated space.

The defendant had a computer forensic investigator testify as an expert

witness. This expert could not tell the court whether the defendant had ever viewed the images that had been sent to the unallocated space of the computer; yet when the computer when seized and the proper equipment was used to retrieve this, the images totaled 1,012 or something to that effect.

When sentencing and district judges are faced with these kind of issues in child porn cases, we don't have the ability to determine when the experts can't even tell you whether these images were viewed by the defendant or not viewed by the defendant, but they were recovered from the unallocated. And that drove the guidelines and drove the guideline range in that case.

This is just one example of some of the problems that we face as district court judges. I thank you for your time. I thank you for the opportunity to appear here today, and more particularly I thank you for your service on the Sentencing Commission. And I have to say to you personally, Judge Hinojosa, having dealt with you as a member of the Criminal Law Committee and seen you over the years, I don't know how you keep up your schedule, sir. I do not know how you can go out of town for the Sentencing Commission as often as you are and still continue to handle your docket, and I compliment you for that.

CHAIRMAN HINOJOSA: Thank you, Judge Moore, and thank each one of you for your statements, and we'll open it up for questions.

COMMISSIONER CARR: Judge Presnell, you mentioned that in order for common law federal sentencing to evolve and indeed for this Commission to remain relevant we have to observe and take into account what district court judges are doing and saying. For us to do that might require district court judges to say more than the Supreme Court requires them to say. To paraphrase what one of our appellate panelists said yesterday, it may be as long as you give a reason that will sustain a sentence as reasonable. Do you think it would be useful if we would encourage or require in some defined fashion district court judges to address more specifically the reasons for the sentences that they are giving, maybe going beyond what they would need to do just to get beyond the Court of Appeals or avoid an appeal so we can

take those things into consideration and kick back the guidance that you say district courts want?

JUDGE PRESNELL: Obviously for my advice to be taken district judges have to take on the responsibility of either in their written opinions or in transcripts setting out their views as to why they think the guideline in this particular case doesn't work. Some judges have more of an interest in that than others. I don't know why I got into it. Probably because I came to the bench with no criminal law experience, and so this was a blank slate for me and I didn't understand it. In trying to understand the sentencing process I felt it was necessary to set forth in writing my views. Obviously the circuit courts can help by imposing that obligation on the district courts. I don't know what the Commission can do other than encourage judges to write opinions on sentencing matters. The problem is -- I assume my colleagues have the same problem -- we can see a dozen people a week and then we are in trial and we just don't have time or we don't take the time to sit down and write sentencing opinions. But at least there might be some way to have the Commission pull transcripts of sentencing hearings in which judges have articulated specific views concerning a guideline application. I recognize that's a problem for you. In imposing guidelines consistent with empirical data you need the data, and just numbers really don't tell the story. What I think you need to have, as I think you recognize, is the reason why district judges are struggling with the child porn guideline application.

COMMISSIONER CARR: You say we pay attention to what you're doing and saying, and there's a difference between what you're doing and whether or not we get what you're saying.

JUDGE PRESNELL: That is correct.

CHAIRMAN HINOJOSA: I guess one of the things we could do, and I know this question wasn't directed at me, is within the statement of reasons form not just filling out the boxes but actually making even if it's a brief statement on the place where you can have your comments. That would be a

good way for us as judges to give the Commission accessible information with regards to why certain guidelines in the view of some judges might not be appropriate. And I realize that people feel that it's just boxes on there, but there are places in there where you can actually express a viewpoint and make your point without having to send a transcript.

JUDGE PRESNELL: If I could briefly comment on that. After Booker, I mean, and I don't know that there is some U.S. Attorneys that still don't believe it after Spears, they view the guidelines as presumptively reasonable. And even the Commission's form says please justify why you have imposed a nonguideline sentence. And I say on there I don't have to justify it. I use the factors set forth in 3553(a). It's as if there is a mindset from the Commission that you want us to justify what we're doing rather than explain it.

CHAIRMAN HINOJOSA: Actually that's not the Commission's form. It's the Judicial Conference form. It comes by statute and it's the statutory response to letting the judges give the information as to why they picked a particular sentence. It isn't a justification. In fact, there is a clearly stated 3553(a) part of it that indicates when you sentence not within the guidelines, which 3553(a) factors would be relied on. I have to tell you that we do closely look at the statement of reasons forms, and that is one way -- even though it might be perceived by some that it's an attempt to justify why you didn't sentence according to the guidelines, quite to the contrary it's an attempt to satisfy the statutory requirement that we as judges express a reason why we picked a particular sentence and at the same time put it in a form where all this can be collected and then the studies would be made with regards to certain sentences. And I'm sorry if anybody has the impression that that's an attempt to put people into a certain box. It's quite to the contrary. It's an attempt to get the information that's necessary. And it's statutorily driven and it's a Judicial Conference form that has to be approved by the Commission according to the statute. But we do work together, and any information with regards to the changes to the form would be helpful.

JUDGE PRESNELL: It's difficult to comply with the form because it asks you what are the reasons and it goes through all the 3553(a) factors, and typically you just check all the factors because you've probably taken all those factors into account as you are supposed to. So I think the form could be improved, at least from my standpoint, if you want to get more informative input from the judges.

COMMISSIONER CASTILLO: What I do want to say just on that score, and then I want to switch to my real question, is I think what's most informative for the Commission is just that open-ended spot in the statement of reasons where a judge can just give a narrative, one paragraph statement as to why they imposed the sentence they did, whatever sentence it is.

First of all, let me just thank all four of you for coming here. I know it's busy for every single district judge, let alone those of you who are chief judges of your district. I think this is a very important dialogue that is going on and in a very important year. We are now in the 25th year of the operation of the sentencing guidelines. We are also -- and here is where I wear my Illinois hat -- we are in the bicentennial of Abraham Lincoln's birthday, so I, as most Americans, have been reading about Lincoln. One of the things that's fascinating about Lincoln, among so many different things, is he just loved to get public opinion. Didn't matter if he talked to a waiter or a general. He just would pump that person for information, and he called them his public opinion baths. So we are in the second day of our public opinion bath here in Atlanta and I look forward to many more. Because whether or not it's the warts, the wrinkles of the sentencing guidelines, we need to hear what the district court judges feel about that. And I just wish from the bottom of my heart that every single district court judge could testify before the Commission but I know that's not doable.

So let me get to my question, which is this: We haven't heard from the U.S. Attorneys, and we will hear from them eventually, but I'm looking at two judges, just to pick at them, Judge Conrad and Judge Moore. Both of you served as U.S. Attorneys in your districts. And while I'm very cognizant

that numbers don't tell the whole story, one of the things I do at the Commission wearing my Commission hat is look at sentencing disparity and look at numbers. And one of the numbers that I've been focusing on over the course of these two days is the number for substantial assistance departure. My question is this: Why is it that the Southern District of Georgia last year would have a substantial assistance 5K1 departure rate of 8.3, but then when you move to the Western District of North Carolina, which isn't that far away, it jumps all the way up to 26 percent, almost three fold. Any explanations you might have based on your prior services, Judges.

JUDGE CONRAD: Speaking from prior service and not as a judge, some of it is dictated by the nature of the case, the cases the office pursues. Drug trafficking cases tend to be multidefendant in nature, providing opportunity for some defendants to cooperate against others. Within that category some types of drug trafficking is more susceptible to that than others. And I think as well some districts pursue historical type criminal activity in ways other districts don't. And as a result those cases are primarily driven by defendant cooperation, so that you would have more opportunity in districts who pursue historical drug conspiracies for substantial assistance than others. So I think that would be a portion of the explanation.

COMMISSIONER CASTILLO: Thank you. Judge Moore?

JUDGE MOORE: In the drug trafficking cases we have, as I told Judge Sessions last night, we have a lot of methamphetamine cases now with people making meth labs in double-wide trailers. And then we have the traditional marijuana cases in the southern part. But we have a lot of the cocaine, crack cocaine cases. And most of those cases, the great majority of those cases where you have multiple defendants, it's going to be the first one in that's going to get the deal, and then they are not going to offer the deal to anybody else. So if you've got a case -- right now I have a case that's got 45 defendants in the same case. Out of that case the government may recommend to the court maybe two 5K1 departures out of all those defendants.

We are overwhelmed with firearms prosecutions. Usually the firearm

prosecution is a single defendant case and the defendant has got a prior record, he's found in possession of a firearm at a traffic stop or whatever, and he has no ability to ask for a 5K or get a 5K. Most of the 5K's that I see in the Southern District of Georgia, they are kind of stingy with them, I think. Or in the multiple defendant drug cases where you maybe only get one out of all the defendants, or in the fraud type cases where you are going to get maybe one person involved in a fraud scheme to cooperate and they are going to give it to that one person and that's all they are going to give it to.

JUDGE HINKLE: I think you need to be a little bit careful if you try to take the disparity out of the 5K practice. My district has a high percentage of 5K's, probably more than Western North Carolina. But my prosecutors always file the 851 notice. They don't do that in other districts. We can back up and talk about how it is we gave the prosecutor the ability to decide whether a minimum mandatory applies. I think it would be very hard to write the Constitutional justification for that. Booker talks about the judge and the jury, but this is the difference between the judge and the prosecutor and we've given that to the prosecutor.

But leaving that aside, there are differences from district to district in how these prosecutions are done. I think they sometimes go hand in glove with the substantial assistance practice. If you always file the notice and have the minimum mandatory, you really need more substantial assistance motions; otherwise, you're going to have the life sentences for people that everybody agrees shouldn't get the life sentence. And so if you go to all the U.S. Attorneys and say you have to standardize the 5K practice, then my concern is you go to a district where they don't file the enhancement notices, their practice is much more reserved in giving out substantial assistance motions, then they bring that practice to my district where they always file the notice and you are not going to make sentencing better. That goes back to my point of let's keep good sentences and not worry quite as much about disparity as we do about the quality of sentence. It all ties together. You have to be careful working with one without affecting the

other.

JUDGE PRESNELL: If I could add to that, I think the biggest disparity I see is the amount of 5K credit that's given. One way to look at it is the number of 5K's or percentage of 5K's each individual district has. But then if you look at the difference in the 5K credit given, the national average for drug trafficking I believe is about 43 percent off the minimum guideline sentence. The recommendation in the Middle District of Florida is usually about 10 percent. I take that into account because I've always thought that one of the reasons for the guidelines is to avoid disparity, and so I look at these national statistics and I say why just because we have a more conservative U.S. Attorney in the Middle District of Florida should I not consider what's going on nationally. They haven't appealed me on that yet. It's one of the few things they haven't appealed me on. I take that into account because those are the kind of national statistics that I think help us. I've asked the U.S. Attorney in the Middle District of Florida to explain to me why you come in here on a 5K motion yet you recommend between two and five levels, what's your policy. Well, they tell me their policy is protected by executive privilege, and I'm supposed to make some kind of determination as to the validity of that recommendation. Very, very difficult.

JUDGE MOORE: Let me add one thing to that. I don't want to occupy too much time here but it does vary between U.S. Attorney's office and U.S. Attorney's office. The 5K's that we get in the Southern District of Georgia don't recommend a term. They say it's significant, exceptional, moderate, minimum. That's what you get. And so you are supposed to figure out how much cut am I going to give, because they are not going to say we think that you ought to depart down four levels or five levels. They just don't do that. And there are some judges that I know who it seems like no matter what the cooperation is they have a view I'm going to give a year off the sentence and that's all I'm going to give. Thank you.

COMMISSIONER SESSIONS: I really appreciate your testimony. All of us

really appreciate your testimony. What struck me from your testimony in general, and that's all four, is a couple of concerns. The first is how to make the guidelines relevant in the future. And there is a real question as to whether the guidelines will continue to be relevant. And the second is how to base the guidelines, couch it in terms of empirical research. In some ways judges, generally speaking, and I'll speak for myself because I agree with 99 percent of what you've all said, they want to make the sentence essentially judiciously oriented. The fact is we are in a much broader world here. For one, it's a world which could change rapidly. We may be at a point in history in which there could be significant changes. But Congress is very much a part of the sentencing process. Even though we try to ignore it, it's true. All of you have talked about mandatory minimums. That's just one way in which Congress is involved. We talk about guideline amendments. No amendments become law unless Congress approves them, essentially. So we talk about changing a process but you know that you are part of a much broader world.

I guess as we think about going into this new era and as we think about how to change a guideline system, we need to think about in broader terms how to change the whole sentencing process. That includes mandatory minimums, obviously, as well as guidelines. You've all said that you agree with the guideline system to give you guidance. If you were to start from the beginning and say this is the kind of system that I would want to set up, would it include mandatory minimums in some cases? Would it include a guideline system that has broader ranges and more inherent flexibility but with some teeth to it? Or would it involve a system just totally advisory and allows judges to impose sentence without any kind of restriction? That's a broad-based question, and I'm really interested in your broad reaction to that.

JUDGE CONRAD: I spoke briefly of what I perceived in the course of my career as a diminution in sentencing passion and sentencing advocacy. When you are talking about statutory purposes of sentencing, it seems like you are getting to the heart of what you are trying to do. But when you are talking

about whether this guideline subsection applies or that guideline subsection applies, seems to me prosecutors and defense attorneys have lost their ability to argue with passion. It's an unintended consequence of a guideline system.

I think any sentencing scheme ought to deal with fundamentals of sentencing, why we are doing what we are doing, what we are trying to accomplish. I think if we get into a situation with the very technical application of the guidelines we'll lose the forest for the trees. I think if I were starting anew my preference would be for broader ranges and less minutia in terms of adjustments under Chapter 2 and Chapter 3. I think the guideline approach with the hypertechnical adjustments leads to difficulties at the district court level where the participants lose sight of purposes of sentencing and adds to a voluminous appellate type of practice which distracts appellate courts from other things. One of the criticisms I would have of the current guidelines scheme is the overattention to little things, for lack of a better word.

COMMISSIONER SESSIONS: To the next question: What about mandatory minimums? And then to the next question: If you set up a guideline system that is broad-based and simplified, which is what you are suggesting, what kind of structure does it have within the sentencing process? Can it take away from some of the mandatory nature of a mandatory minimum so that it could be politically saleable?

JUDGE CONRAD: The criticism I have of the mandatory minimums are that they focus on one or two specific things to the exclusion of other very relevant things: drug quantity, prior conviction. So that when it's applied in a particular case, sometimes it's very appropriate. But in the case that I described, it wasn't. And the application of mandatory minimums to the extent it takes away total discretion of the district court I think has the tendency to lead to an unjust result. So I believe that the approach of a broad range informs the court of past and present practices. It doesn't require specific results in every case. It's just a more humane way of doing

it.

JUDGE PRESNELL: I think obviously mandatory minimums are a problem for the courts as well as the Commission in doing what it does in trying to structure sentencing ranges. I think they are inherently arbitrary but may be necessary, and I recognize that's an issue that has to be resolved by Congress.

In terms of what you do, if I could give an example, would be the prior criminal conduct for an illegal reentry case. Those can present very arbitrary distinctions based on prior criminal conduct that just don't square with reality. It would be far better in my view, instead of trying to explain who gets a two level, who gets a four level, 12 level, 16 level, based on whether it's 13 months or less prior crimes, just to give district judges discretion and say impose an enhancement for prior criminal conduct based on between two and 16 levels. And I think these broader ranges would allow judges to exercise their discretion in their subjective judgment, which is inherently a part of 3553(a), better than trying to calculate these minute steps that may produce arbitrary results.

JUDGE HINKLE: You would know better than I whether the suggestion that Judge Presnell just made would comport with the statute. I'm not sure it would comport with the 25 percent rule that's now in the statute, but I think there is a lot to be said for the concept. If you started over, I think maybe you'd eliminate the 25 percent rule. You'd make broader ranges. You'd eliminate the minutia just like Judge Conrad said. If you focused on the most critical parts of this and gave a broader range, listed some things that the judges should consider in deciding where within the range to put the sentence, and then counted on the judge to have a little judgment and get it right, I think maybe it would be better.

Now, do I say you ought to scrap these guidelines and start over? No. I think that would be like reconvening the Constitutional Convention. The scholars all talk about if we could do that, maybe it would get better. Golly, maybe we'd melt the whole thing down. Maybe it would be a lot worse.

When Blakely came out and the Criminal Rules Committee was looking and there were people thinking about where do we want this thing to play out after Blakely and you kind of saw Booker was coming along, I'm not sure we could have hoped for anything better than where we in fact wound up. I mean, you all remember the time. Congress was there talking about topless guidelines, a low minimum mandatory for everything in the guideline range. It could have been a whole lot worse. It's sort of working now.

I occasionally explain to people in the audience that we're focused here in this sentencing hearing on some minutia but don't be fooled. We had a presentence report. We've done a lot of other things. Things that are more important are in the process. It's just not what we've been talking about for the last 45 minutes or hour and a half while we put on testimony. And that really is true. We spend more time on the minutia than the guts of it. I'm not sure I would try to scrap it and start over. I think politically that would be very dangerous.

The other part of the question, mandatory minimum sentences, if you could get rid of those I do think it would be a major improvement. I don't know how you are going to do that. I think they markedly increase disparity in sentencing. I really do. It seems like what could be more uniform than to have a minimum mandatory. Everybody gets the same sentence. But in truth some people get departures, get the substantial assistance motion. Sometimes the prosecutor doesn't charge it. I think you have more disparities because of minimum mandatories, not less.

COMMISSIONER HOWELL: Thank you. I just want to echo my fellow Commissioners' remarks thanking you for your comments and joining us in our exploration of thinking more broadly about how to keep the guidelines relevant and what we can do to improve them.

You weren't here yesterday, but one of my concerns has been the proportionality policy that the Commission has used since the beginning derived from statutory requirements in the SRA included in 28 U.S.C. 991(d)(1)(B) that the guidelines must authorize appropriately different

sentences for criminal conduct of significantly different severity, as well as 28 U.S.C. 994 which requires that the Sentencing Commission issue guidelines that should be consistent with all pertinent provisions of any federal statute.

So with those proportionality directives to the Commission, since the beginning the Commission has always tried to gauge proportionality, and where there are mandatory minimums, of course, try to incorporate those mandatory minutes and avoid the cliffs. And that is the root of some of the criticisms of the guidelines where there are the largest departures. And I agree with you, Judge Hinkle. I think you were the one who said this breeds disrespect for the law because of disparities that people see that are arbitrary or seem unjust.

It would be a big change for the Commission to basically ignore mandatory minimums. It wouldn't require a wholesale changing of the guidelines as proffered by the question of Judge Sessions. But one of the things that I thought about is whether our proportionality analysis and policy we followed where we are affected or informed by Congress's policy decision in the mandatory minimums should in fact be different, particularly after the Supreme Court's decision in Spears, whether we should ignore mandatory minimum penalties when we are setting the guidelines. That would push us back to an empirical approach but it would give the appearance at least of violating some of our statutory mandates to pay attention to what Congress is saying. And I'm just curious about what you think we should do in particular in evaluating proportionality, as we do when we consider every guideline amendment, when we are also dealing with mandatory minimums. Should we just ignore the mandatory minimums?

JUDGE HINKLE: I hate to say yes, ignore them, but I do think the way they've been done is wrong. Let me give you an example. It seems to me Congress says you get the minimum mandatory, let's say if it's two ounces of crack and you've got two prior drug offenses, you get the minimum mandatory, two prior drug felony offenses, if the amount involved is 50 grams or more of

crack and if you don't provide substantial assistance. If you provide substantial assistance, you get the motion, you don't have the minimum mandatory. That's what Congress said.

Well, in our circuit that's not how it works. If you have the 50 grams and the two prior felony offenses, you get a downward departure but it starts at the mandatory life and it can only take into account the assistance, not the other 3553(a) factors. So now I'm imposing a sentence that Congress didn't say mandatory life but I'm supposed to start at life and go down based only on assistance.

I can give you a hypothetical: the worst offender who has been involved in the conspiracy for nine years and he pistol whipped people, a terrible guy; and then there is another offender that just went to Western Union to pick up the payment one day and that was the only involvement in the conspiracy. But the big one assisted more, knew more, provided more information; the other one only assisted by saying the guy sent me down to the Western Union to pick it up. I think under the law of the circuit I'm required to give at least as high a sentence to the one that's obviously less culpable.

Now, every judge in the country would sentence that person to less than the one more culpable, but I think you'd have to violate the law of the 11th to do it. That's because we get so hung up on the minimum mandatory even in cases where Congress didn't say it applies. So if Congress says life if you have two priors and 50 ounces, why when somebody has 47 ounces do you say you ought to get 360 months or whatever it would be? Congress didn't speak to that. So it seems to me -- I know there is a problem with cliffs. Better to have a cliff than to have everybody get an inappropriate sentence. And that goes back to my let's have five good sentences and five bad ones instead of ten bad sentences and say they are all consistent.

COMMISSIONER HOWELL: Except it's interesting talking about cliffs, because we had a federal public defender talk yesterday about how she has clients in illegal reentry cases where in her district there is no EDP, early

disposition program, but they are jailed in places with prisoners from a district where there is an EDP. So her clients actually talk about the unfairness of the system because they see somebody exactly their situation getting the benefit of an EDP downward departure when they are not. That's a similar kind of cliff situation with people's perceptions that that's unfair. So, I mean, I think avoiding these cliffs was a decision made by the original Commission that was not an unreasonable policy decision on their part also because of what we just heard yesterday about the perception of fairness in the system as a whole if you have these dramatic cliffs.

JUDGE CONRAD: That policy decision was made at a time when the guidelines were mandatory, and so it seems to me they made more sense. Now with the advisory nature of the guidelines courts are really looking to the guideline ranges for persuasive information as to where to sentence. And in the trenches the courts really give the empirically-based guideline ranges more credibility. So if you're trying to give credible information to the courts upon which they can make sentencing decisions, seems to me an empirically-based range as opposed to a guideline-driven range is going to have more persuasive effect, more reliance by the district courts. So maybe in the era of an advisory guideline system the emphasis should be more on the empirically driven range than the mandatory minimum driven.

CHAIRMAN HINOJOSA: I guess to follow up a little bit on that, we've talked about 3553(a) factors, and those of us who are sentencing judges are familiar with them. Some of these factors -- and there are seven factors, as we all know: restitution, avoid unwarranted disparity, consider the sentences available. Then we have the guidelines, the policy statements of the guidelines. The first one, then (a)(2) which is basically three about the public and public safety, and then one about provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner, the first three of those four being public safety, basically. Then we have the first one, the nature and circumstances of the offense and the history and characteristics of the defendant.

My question is, as a sentencing judge should I pay attention -- 3553(a) was written by Congress at the time that they were also writing the mandatory guideline system. And so when they wrote these, they gave some guidance to the Commission as to what the history and characteristics of the defendant meant. And they said to the Commission that we should write guidelines that are entirely neutral as to race, sex, national origin, creed and socioeconomic status of the offender. Then they said the guidelines should reflect the general inappropriateness, considering the education, vocational skills, employment record, family ties, and responsibilities, and community ties of the defendant. So when I as a sentencing judge read that knowing that Congress who wrote this made some comments about certain characteristics of a defendant, should I pay any attention to that or is that something that I throw away and then decide I'll use my own judgment as to what this means, or do I read this as I would normally read a statute to try to figure out what does this general comment mean? Do I have any guidance from the people who wrote this as to what it is that I'm supposed to be considering, or do you think somehow Supreme Court decisions have done away with any indication that we have received from Congress with regard to what they meant when they wrote this?

JUDGE PRESNELL: Well, when I sentence I generally concede that the offense conduct and characteristics of the defendant are generally captured by the guidelines, but I think at least in the 11th Circuit we have been told that we have to take an individualized look at each defendant and the circumstances of each crime within the context of the guideline. So I look at those factors. And the extent to which you weigh those varies from case to case. You have some very unusual situations with people. I think the essence of judging sentencing is that you have to try to find justice, and that includes a very subjective element of that person and what he did, or she did.

JUDGE CONRAD: I do think a sentencing judge has the responsibility to consider that, but it appears to me from reading Spears and the other cases that the sentencing judge can disagree with that and impose a sentence that

reflects that disagreement.

CHAIRMAN HINOJOSA: I guess the question is this is not a policy statement of the Commission on crack cocaine; this is the statutory interpretation as to what this means. You think Spears goes that far when they are talking about policy statements of the Commission with regards to crack?

JUDGE CONRAD: Well, the policy statement of the Commission with regard to crack I took as being derivative of the statutory penalties for crack. So I was interpreting it more in line with each other.

CHAIRMAN HINOJOSA: I think part of what the Supreme Court was saying was that the Commission itself has disagreed with regards to the hundred-to-one ratio. I think that's -- when you read the original decision and then Spears.

JUDGE HINKLE: I think, though, my take on it is it's broader than that, and I think if the Commission says you ought to think about this fact and I as a district judge say okay, that's the Commission's view so I have to think about this fact, I think there is at least one and probably more people on the Supreme Court that think when you start giving that kind of effect to a fact found by a judge, not by a jury, you violated the Booker principle. What I think I'm supposed to do now is be aware of the statutes and what the Commission has said and then make my independent assessment. If I think Congress just got it wrong with the hundred-to-one ratio, I don't do it. I think if I just think Congress got it wrong by giving the four points for the fast track only in certain districts and that the fair sentence in view of all the factors is depart down, I think, like Judge Moore did back some time ago -- I would have had a different view then, but I think since Spears and some of the other cases, I think he was right, that I can go down. That's not the law in the circuit so far. So if he does it again tomorrow, I think he'll be reversed and at some point the Supreme Court will get it.

I think that Spears is broader. I don't think it's a crack decision.

I think it's a broader decision.

JUDGE MOORE: Sometimes we set ourselves up to be reversed if we're willing to put our neck in that chopping block and say we are not too proud to be reversed. But then how far that appeal goes, we don't know.

MR. WROBLEWSKI: My name is Jonathan Wroblewski. I work at the Justice Department. We really appreciate you all coming here. We are, as you can imagine, at the very early stages of developing sentencing policy for the new administration. I just have one quick fundamental question following up on something Judge Hinkle said.

My overall take-away from this panel is that what we have now is a hybrid and somewhat incoherent system. First Judge Conrad talked about the two Booker opinions. Then I heard a lot of pleasure in the advisory guidelines but displeasure in mandatory minimum statutes, both which coexist, guidelines penned by Congress versus guidelines penned by the Sentencing Commission, cases where sentences are driven by prosecutorial decisions and cases that are not. My fundamental question is should the Commission ultimately try to reconcile this incoherent system knowing that that means probably involving Congress, or not probably, definitely involving Congress, with the risks that are inherent in that? I take it, Judge Hinkle, your answer is no, leave it alone. And to use Judge Conrad's terms, should we do that or should we just let it all digest for a little while longer?

JUDGE HINKLE: I hate to be giving anybody advice on how to deal with Congress. I'm fairly competent in my own job but I certainly don't know how to get something through Congress. I can tell you, though, I think if you take this whole broad issue back to the Congress it would be like grabbing the garden hose six feet from the end. It's not clear who is going to get sprayed. We may be better than we would be if we did that.

MR. WROBLEWSKI: Judge Conrad, do you agree with that?

JUDGE CONRAD: I do. It does seem like the court system reacts in a more conservative way with the passage of time than some type of radical,

politically charged partisan influenced Congressional response. I think the Booker case is a pretty good example of proceeding cautiously in a certain area. My preference would be for that development in the court system as opposed to a Congressional fix that may or may not cure the problem.

JUDGE PRESNELL: I agree with that despite my criticism of some of the guidelines, which I think is important for the evolution of common law sentencing. I think what we have now is the best we could expect for right now. And with the discretion we now have and with the Commission who is listening to this input, I think that we can continue to improve on what we've got and going back and starting over would be fraught with potential problems.

MR. WROBLEWSKI: And if that means leaving the mandatory minimums where they are and prosecutors with the power to determine 5K1 because that's in the statute and to determine the third point because that's in the statute, and some of the other problems?

JUDGE PRESNELL: I agree with Judge Hinkle. I never lobbied as a lawyer so I wouldn't profess to know how to do that from this side of the table. And I don't know what the Commission's position is in that regard. I just don't know the answer to that.

JUDGE CONRAD: I think very good use of the Commission's time and use of its leverage as a respected player in the whole sentencing process is to continue to do the research and publicize the results in terms of mandatory minimums and disparate impact. I think that steady pressure over time will be effective.

JUDGE MOORE: I do think that it's important to district court judges for the Sentencing Commission to remain relevant; that the Sentencing Commission is -- we as judges, we don't lobby Congress, and I don't know that I've ever had a Congressman or a Senator ask me what I thought about sentencing guidelines, and I probably never will have one ask me. But we need a voice there and our voice is with the Commission and with the Judicial

Conference of the United States and those committees coupled with the Commission. And as I've said earlier in my remarks, as far as my court is concerned we don't think that everything is perfect about the guidelines sentencing and even the advisory guideline system we have now, but we would rather maintain that system than revert back. And we are not happy with mandatory minimums. We are not happy with the disparity depending on how one U.S. Attorney's office decides to do something, how another United States Attorney's office decides to do something, but I think those are matters that are outside of the power or ability of the Sentencing Commission to correct. And I agree with some of my brethren here that the Commission may not want to stick its head into that hole because you don't know what will end up happening.

COMMISSIONER FRIEDRICH: If I could just follow up with all of you or whoever wants to address this, the issue of what Judge Hinojosa was discussing with you, this issue of where you draw the line with respect to policy disagreements with the guidelines. Judge Presnell, I believe in a recent case you drew a distinction between guidelines that are a result of implied Congressional policy and those that are, the words you used were "direct Congressional expression." And I think in that case you were referring to the career offender guideline. I don't think you reached a conclusion but you said there may be a distinction to draw there between when it's appropriate or permissible for a district court judge to disagree with the policy statement in the guidelines. I'm wondering where each of you sees that line and if it's -- some judges we talk to view the Spears case and Kimbrough as really restricted to the crack/powder area where the Commission itself has criticized the guidelines. Others view it as limitless. And if we have a situation where there is varying views across the country, can the guidelines really continue to be relevant? Can we pursue the goals of the Sentencing Reform Act and routinely have some judges rejecting guidelines altogether and others following them? So if you can address where you think that line should be drawn or is this an issue that needs to be worked out in the courts and ultimately in the Supreme Court.

JUDGE PRESNELL: I think that analysis was post-Kimbrough, pre-Spears, and I have not addressed that since Spears, obviously. I do tend to think Spears is broader than just a disagreement with the crack/powder disparity. I think that is going to have to play out and evolve as the common law of federal sentencing takes us. I really haven't thought through the effect of Spears on that issue.

And what was the next part of your question?

COMMISSIONER FRIEDRICH: If ultimately the view of the courts is that sentencing judges can disagree with any policy statement, can the current guideline fulfill the goals of the Sentencing Reform Act? Can we continue to be relevant with the existing guidelines we have?

JUDGE PRESNELL: I think you can but you've got to maintain the confidence of the judges that are using the guidelines for guidance. And if the judges come to the opinion that we're not getting good guidance, then we are not going to use the guidelines. And that's why I mentioned, for example, the child pornography possession guideline. It is structured in such a way that the least culpable person in the spectrum of child pornography gets scored at the top of the statutory maximum because of all these add-ons. It's like somebody sat around in a room and everybody got an enhancement trying to figure out how we can enhance from the base.

COMMISSIONER FRIEDRICH: Congress did.

JUDGE PRESNELL: I'm not being critical of the Commission. I agree it's all part of a common problem that involves Congress, and that gets back to the Justice Department. That's why I'm just a judge.

CHAIRMAN HINOJOSA: Thank you all very much. We do know how busy your schedules are, and we appreciate your taking your time to share your views, and it's greatly appreciated by all of us and it certainly has been helpful. Thank you all very much.

We'll break until 10:30. We are a little late but we'll break until

10:30 for the next panel.

(Recess taken.)

CHAIRMAN HINOJOSA: Our next panel is individuals from academia. We are very fortunate that we have the panel that we have this morning in individuals who have given of their time to be present with us and share their views. We have Professor Ronald Wright, who is the Associate Dean for Academic Affairs and Professor of Law at the Wake Forest School of Law. Professor Wright is the co-author of two widely-used case books on criminal procedure and sentencing and he is a board member of the Prosecution and Racial Justice Project of the Vera Institute of Justice and has been on the board of Families Against Mandatory Minimums.

We also have Dr. Gordon Bazemore who is the Chair Professor of the Department of Criminology at Florida Atlantic University. Dr. Bazemore's research over the past 30 years has focused on juvenile justice, restorative justice, crime victims corrections, and community policing. He has served as a consultant to the Florida Department of Health and Rehabilitative Services, and he is the Director of the Balance and Restorative Justice Project and presented on restorative justice at the Commission's Alternative to Incarceration Symposium last July.

And we have Dr. Rodney Engen who is a professor in the Department of Sociology and Anthropology at North Carolina State University. His research focuses on social, organizational, legal, and cultural forces that affect punishment in the United States. In particular he has studied how sentencing laws are used by judges and prosecutors, plea bargaining practices, and racial, ethnic, and gender disparities in sentencing.

And we appreciate your taking your time and we'll start with Dr. Wright.

DR. WRIGHT: Thank you, Judge Hinojosa, and thanks to all of the members of the Commission for inviting me to talk. It's a very big subject and a very short amount of time, but I am determined to respect the short

amount of time available for us to talk. I don't want to talk about the details of federal sentencing guidelines, I used to practice under the guidelines and I've been observing the guidelines for a long time, and I've put together case books so my law students can think in some detail about the guidelines. But I don't think that's the best use of our time today. Instead of talking about particular guidelines that should change or shouldn't change, I'd like to ask you to reconsider your overall relationship with the federal judiciary and federal judges.

I want to suggest to you that the overall history of the Commission has been one of trying to control the discretion of judges. The central reason for being, the self concept of the Commission has been to both develop guidelines and then to run a guideline amendment process that identifies outlier judicial behavior, identify the judges that are too far from the norm, and to anticipate when judges might become too far from the norm, and then to evaluate those and decide which of those are appropriate and which are not and to take on the job as the Commission of reeling in those outlier judges.

I want to suggest to you today that that's not a very productive role for the Commission at this point in its history. Instead of viewing your role as trying to control the discretion of judges, I believe that you ought to take that as a given. It's going to take care of itself. There are a lot of forces in the system that will account for the outlier judges. And instead, what the Commission ought to spend its energy, more of its energy doing is to become a source of information for judges about judicial behavior, about prosecutor behavior, about the behavior and what one can expect from all the different institutions of sentencing. So that's my overall message to you is to rethink your relationship to judges and to change your self-concept from a regulator of judges to a source of information for judges and for other sentencing actors.

Let me mention first of all why I think this job of controlling discretion will take care of itself even if you don't take it on as your

principal subject. I come to this as somebody who studies the federal sentencing guidelines system as one among many guideline systems. There are, as you know, various states that run these systems. And I think of my specialty to be sort of a comparativist to compare what happens in the federal system to what happens in North Carolina, my home state, or what happens in Virginia or Minnesota or Washington State, and to sort of understand the different features of those systems. And as I look to those, as I put on my comparativist hat and look across systems, one thing I really notice is there is a sort of equilibrium here, that judges leave the normal range of sentencing at roughly the same rate and it doesn't much matter what system you are in. It doesn't much matter what the exact level of appellate review is. The standards of appellate review are remarkably different when you move from Pennsylvania to Minnesota to Washington, and yet the departure numbers or the numbers of sentences outside the norm look quite similar as you move from system to system. So I'm calling this an equilibrium theory of judicial behavior; that even if you are not paying tight attention to the details of a set of guidelines, judges are trained in a system that values consistency. We all go to law school. We all learned the common law system. We all see the value of consistency, and it all seems to work out.

So, for instance, in the Pennsylvania system we have roughly 77 percent of the sentences in any given year that fall within what's designated as the normal range. In North Carolina it's 72 percent fall within what we would call a normal range. The names we give to the noncompliant or nonstandard sentences are different in these different systems. Sometimes they are called departure; sometimes they're called aggravated and mitigated range sentences. But the number of sentences that fall within what we call the normal range is 77 percent for Pennsylvania, 72 percent for North Carolina, 76 percent for Minnesota, 60 for the federal system most recently, but then, as you know, there are lots of different categories of cases that are outside the normal range.

My general point is that there are all kinds of institutional, cultural, social forces that push judges toward some kind of equilibrium.

And it's not just judges but the advocates in front of them and all the other institutions that push those judges toward some kind of equilibrium on applying the rules in a relatively consistent way. So if the Commission were not devoting all of its energy or as much of its energy to managing an effective guideline amendment process that is designed to identify and sort out, evaluate the nonstandard judicial behavior, if you are not doing that, what should you be doing?

I think the most effective role at this point that the Commission can play is as a source of information, a source of systematic information about not only federal sentencing but state sentencing. We are here in Atlanta. This is the home of the Centers for Disease Control, and I think of the CDC as a great model for the Federal Sentencing Commission. The CDC works closely with all 50 public health departments in the states, compiles their statistics. They are completely inconsistent. It's hard to read them if you go from place to place. The CDC does a great job of making the national health picture clear for everyone. So federal health authorities can act on that basis; state health authorities can act on that basis because of the information coordination and collection role of the CDC. I think something similar would be a great contribution from the Federal Sentencing Commission.

I also believe that your strategy should not be so much to think about an effective guideline amendment process but to think about a communications strategy. Always be asking yourself what do judges need, what do they need to see a picture of to do a better job applying the guidelines as they now exist in their advisory form; if I were a judge what would I want to see portrayed about the system. And I would want a lot more detail about what prosecutors are doing. You've already got institutions in place that give us great detail about what judges have been doing. We have a pretty nicely nuanced portrait of what judges do with federal sentencing guideline. We have a lot less detail -- we have a little but a lot less detail about what prosecutors do with federal guidelines and with the various state systems. And I think the power of the Commission to flesh out that would allow all the sentencing actors to stop acting in the dark when it comes to knowing

generally what prosecutors are doing.

And I think I'll just save for the questions other possibilities for this information gathering function and just leave it with the general idea that I would recommend that you think of your role principally as collecting information, not to inform your own guideline amendment process, but collecting and disseminating information to better enable all the various actors to do a better job running a system that is now quite stable and up in place and equilibrium suggests will not be spinning out of control. Thank you.

CHAIRMAN HINOJOSA: Thank you, Professor Wright. Dr. Bazemore.

DR. BAZEMORE: I also want to thank the Commissioners for inviting me here. I enjoyed being in D.C. last year on a special panel on restorative justice, and I enjoyed that because the panel had a lot of practitioners who do this kind of practice every day. I'm just an egghead researcher, so I can't give you the kind of information they gave but it was fun being on the panel.

I want to talk about restorative justice, but I think I always want to say the background to this or the backdrop is sort of what criminologists call an American addiction to punishment. We are rapidly becoming the most punitive country in the world. I'm always quick to say it's more a policy-maker addiction to punishment than it is a citizen addiction to punishment or judge addiction to punishment. It's really about our policy makers. The opinion polls pretty much show that citizens favor alternative sentencing, community-based sentencing, community-based processes like restorative justice. They don't want to put everyone away for life. When we ask the right questions, that's the kind of information we get.

The U.S. wasn't always this way, and I think you guys have talked a lot about the problems in guidelines, determining sentencing generally. I don't have any advice to give you about guidelines because I'm not an expert on guidelines. I do know and most criminologists agree that this punishment

wave that began in the early '70s and now has made us pretty clearly the most punitive country in the world, really was largely about guidelines; it was about well-intended efforts to make sentencing more uniform. Great scholars like Andrew von Hirsch and others really tried to come up with a just desserts model that would more or less equalize punishment. In many ways it had the opposite effect.

It also I think affects more than just sentencing in the criminal justice system. I see it every day where I live in Ft. Lauderdale trying to work with schools around zero tolerance. And we have these zero tolerance codes that look pretty much like determinate sentencing only they are full of outlets for discretion and they are misused and abused daily. I see that at that level and I also see it at the level of felons coming out of prison and having more punishment imposed on them after they get out of prison, more restrictions, not the least of which is the opportunity to vote. I must say that Florida just became -- felons can vote at some point in the state very recently. We were one of three that banned felons from voting for life. But a lot of these things cause problems for us.

I want to talk a little bit about restorative justice. What is restorative justice all about? I think it's important because it gives a new currency of justice, if you will. The current currency of justice is essentially retribution or punishment. The metric for that is some kind of uniformity. Restorative justice gives us a new currency of justice that really says justice needs to use a different lens and look at crime in a different way. From the restorative perspective what we see when we see a crime is harm, harm to victims, harm to communities, harm even to offenders and their families. So the goal of justice then becomes to try to repair that harm in whatever way we can do that. And the metric becomes the extent to which we can repair the harm rather than the extent to which we can punish, even punish fairly and equally.

Now, restorative justice is not new. In fact, it goes back to ancient times and ancient practices. If you happen to be Hispanic, Native American,

you could go back a couple generations and see restorative justice being practiced. Even African Americans can go back two or three generations and see versions of restorative justice.

Punishment is not instinctive. There is no evidence to suggest that we are born to punish. We learn punishment as we go along, especially in this country. But there is a lot of evidence to suggest that, if anything, we are sort of hard-wired to want reciprocity and fairness, and restorative justice is really about that.

I want to say what restorative justice is not because there are a lot of misconceptions. Restorative justice is not soft on crime. It doesn't mean you let everybody out of jail. It's not about that. It really is about victim healing, repairing the harm. Restorative justice is not necessarily about forgiveness. Many victims choose to forgive the offender. They can do that on their own. No one needs to encourage them. Restorative justice doesn't expect forgiveness. If it happens, it's great, but it doesn't expect that. Restorative justice is not inconsistent with other models of justice for the most part. Restorative justice is highly consistent with due process. We don't want the people even in informal justice processes that haven't had their due process rights taken care of.

It's very consistent with rehabilitation. In fact, research shows that although this is not the only goal of restorative justice, restorative justice does a pretty good job reducing recidivism. We now have meta-analyses and a number of studies on restorative justice.

The only conflict with restorative justice is the pure retributive or just desserts model, and there restorative justice says that we should look back at the crime, we should be backward looking as well as forward looking, but we disagree with the point of justice being -- with punishment essentially being the equal of justice or the equivalent of justice.

Restorative justice argues that justice is essentially about accountability. It's about accountability. Offenders can take their

punishment without being accountable. Retributive justice says you take the punishment, we want it to be fair punishment, but you take the punishment. So as John Braithwaite puts it, restorative justice gives us an active rather than passive form of justice. We look for accountability. We look for saying you're sorry. We look for doing something to make it right, regardless of what else may happen to you. For more serious offenders you may still be locked up but you're still responsible. And coming back to communities we think you're more likely to be reintegrated into those communities when you do take responsibility for what you did rather than just taking the punishment.

Restorative justice is guided -- as I said, the currency is repair and healing, but restorative justice is really a principle-based model. It's guided by three principles. The first one is really the principle of repair. Justice requires that we work to heal victims, offenders, and communities that have been injured by crime.

The second major principle is the principle of stakeholder involvement. In courts very seldom do you see victims playing a major role, families, communities, members playing a role. The second principle of restorative justice says victims, offenders, and communities should have the opportunity for maximum and active involvement in the justice process to the greatest extent possible.

The final principle we call the principle of transformation in community and government roles and relationships. That is, we need to sort of rethink the role of community in the justice process. Over the centuries even in recent years we've cut the community out of the process, the communities that surround the victim and the offender.

The great Yogi Bera once said, "You can observe a whole lot just by watching." When I think of that, I think that we can observe, or I should say if we'd been watching what's happened in the justice system in the past 20 or 30 years, what we observed is the justice system taking on more and more responsibility for things that community used to take care of. I work

in juvenile justice a lot. I especially see it there but that's not the only place I see it. More and more schools and other kinds of institutions, families, community groups want to give more responsibility to the juvenile justice system even though they've been criticizing it for the last decade.

There are a lot of examples of restorative justice. I'm not going to talk about a lot of those here. I give you some examples in the paper. We talk about restorative justice from the very front end, at the very front end preventative and intervention level at schools, for examples, and families. We talk about it in countries like New Zealand being used for pretty much every crime with sometimes exceptions of rape and murder. But it's used for virtually every crime. It doesn't mean again that you don't lock people up, but restorative justice is the law of the land there. Many other countries use restorative justice in a presumptive way, that is, for many categories of crime it's presumed you'll have a restorative kind of disposition.

I mentioned restorative justice is used in the schools now as an alternative to zero tolerance. We like to say restorative justice is not for sissies. It's often used with very violent crimes in Rwanda. It was used in the Truth and Reconciliation Commissions. It's used with murderers in Rwanda coming back into some of the very villages where their victims and families of victims are from. It's being used actively in cases where murderers have been locked up pretty much forever and the victim wants to come and meet with them. There is a waiting line for victims to meet with their offenders on death row in certain Texas institutions. I saw a lot of it when I was in Northern Ireland, and what I saw were ex-combatants, particularly on the Republican side, who were starting programs for young people using restorative principles, and finding their way to reconnect back to the community by doing that.

Restorative justice, as I talked about in the panel in Washington, is also used as a form of civic engagement for offenders coming back into their communities. It gives them a way to, as the late Dennis Maloney used to say, earn their redemption back into their communities by showing that they have

something to offer.

Thank you very much.

CHAIRMAN HINOJOSA: Thank you. Dr. Engen.

DR. ENGEN: Thank you. Thank you for inviting me here today. I'm honored to have the opportunity. And I also, like my colleagues, wanted to point out to the Commission that my expertise is not specifically in federal sentencing law. My knowledge of federal sentencing guidelines is as a scholar who studies sentencing laws and practices generally and as a researcher previously with the Washington State Sentencing Guidelines Commission and have done some work with the North Carolina Sentencing Commission. So I know more about the details in those states than the federal system.

In the written comments I submitted I encouraged the Commission in pursuing three broad objectives that in my opinion are essential for achieving the Sentencing Reform Act's purposes and consistent with the Commission's mission of advising Congress and advancing research on sentencing practices. I was able to attend the session yesterday afternoon and a bit this morning, and in light of the testimony I heard there yesterday and this morning, and the comments of my colleagues here today, I think I can make the best use of the Commission's time but only briefly mentioning a couple of those and by focusing more on what we do know about research on prosecutorial discretion and the limits of that knowledge.

So very briefly my first recommendation, like many, was to encourage the repeal of mandatory minimums. I urge the Commission to encourage Congress to repeal the existing mandatory sentencing statutes in favor of the guidelines for all of the reasons that have been mentioned. And largely for the same reasons I also concur with arguments made here yesterday to empower judges to order 5K1 substantial assistance departures without the requirement of government motion.

Second, consistent with my colleague, Professor Bazemore, I encourage

the Commission to pursue as one of its primary goals identifying ways to decrease the federal criminal justice system's reliance on imprisonment and to increase the use of community-based alternatives. In 2007 the U.S. imprisonment rate reached an all-time high of 506 persons in state and federal prisons per 100,000 U.S. residents. For white males the imprisonment rate was nearly double the overall rate at 955 imprisoned per 100,000. For Hispanic males the rate was 1,259 per 100,000, and by comparison there were 3,138 black men in state and federal prisons for every 100,000 in the population. I'm sure the Commission is aware of those numbers so I won't belabor the point. Rather, I wish to encourage the Commission to keep these numbers in mind and consider the full range of consequences of imprisonment rates that high and the levels of racial disproportionality being what they are.

Usually calls to limit or reduce the rate at which offenders, especially nonviolent offenders, are sentenced to federal and state institutions are justified on the basis of the fiscal costs, the burden they place on the criminal justice system, or in terms of general fairness and public safety. I would like to add to that as a sociologist that a growing body of research indicates that the social costs and indirect economic costs of imprisonment are enormous as well. The negative consequences of imprisonment are long term and far reaching and affect not only the individual but also their families, the communities in which they live, and ultimately local, state, and federal governments. Imprisonment significantly reduces an offender's ability to gain employment once released, the quality of jobs they are able to find, and it reduces substantially their long-term earning potential. Imprisonment separates children from parents, dissolves marriages, and reduces the potential for marriage. Imprisonment has significant and negative effects on the offender's physical and mental health, increases exposure to infectious disease such as HIV, hepatitis, and tuberculosis, and generally decreases their long-term physical wellbeing. These are consequences that inevitably fall disproportionately on African-American men, and to a lesser extent Hispanic men, and almost always on

already economically marginalized groups.

Of course, offenders are not the only ones affected by these collateral consequences. Stable employment and marriage are two of the best predictors of whether an offender will reoffend or refrain from crime once they're released. Policies that undermine those stabilizing forces are likely to increase recidivism. Imprisonment also indirectly impacts the wellbeing of families and children, and high rates of imprisonment indirectly affect whole communities, particularly the economically disadvantaged, high minority and urban communities from which a large proportion of the incarcerated population come. The reentry of large numbers of unemployed men into these communities means that all the problems experienced by these offenders and their families are multiplied and concentrated, which is likely to further destabilize those communities and result in even higher crime rates over time than they would have experienced otherwise. Unfortunately, according to the Commission's recent report on alternative sentencing, roughly only 11 percent of the nearly 73,000 offenders sentenced in 2007 were eligible for community-based alternatives without a sentence departure.

And finally, and the point that I would like to focus most of my attention on if time permits, I would encourage the Commission to take Professor Wright's advice in assuming perhaps a more active role as a source of information, not only on judicial behavior but also prosecutorial behavior, and to consider more fully the role of the U.S. Attorneys and Assistant U.S. Attorneys in the sentencing process when you are evaluating the success of the SRA and when contemplating revising sentencing policies, and promote research that examines closely the relationship between plea bargaining and sentencing outcomes and the goals of the SRA.

Legislatures often act as though criminal sentencing is a simple function of the facts of the case, the applicable guidelines, and the thoughtful exercise of discretion by the sentencing judge. If that were the case, then all that's required to regulate punishment is to fine-tune the guidelines and monitor judicial behavior. But we all know it is not that

simple; that the reality of American criminal justice is that sentencing both in states and the U.S. courts is determined to a large extent by what happens in plea negotiations. Ninety-six percent of all federal convictions in 2007 were obtained by guilty pleas. The plea agreement struck by the prosecutor and the defendant is the critical fourth term in that equation. And unless we understand what happens at that stage in the process and why, then knowing the final outcome is not especially meaningful and efforts to regulate punishment by revising sentencing laws may not achieve their goals. Unfortunately from the standpoint of research we know so little about how and why federal prosecutors use their decision-making authority that we cannot conclude much about the decisions they make except to point out that they do exercise their discretion and it does make a difference.

I'd like to take a few minutes to summarize -- and sadly enough I can summarize the vast bulk of this literature in just a few minutes -- to summarize some of the things that we do know. Research by this Commission published in 1991 examined a study sample of 1100 cases that were eligible for drug and firearm mandatory minimum sentences. I'd like to point out that this is the only study that I am aware of that used a study sample and actually examined the case files from the offices of the U.S. Attorney. That study found that in these 1100 cases ultimately only about 60 percent were convicted of crimes requiring the most severe mandatory sentence that would apply based on the facts of the case, and 25 percent were convicted of crimes that did not carry the mandatory sentences. Moreover, prosecutors granted substantial assistance departures in a third of those cases where they did apply the mandatory minimums, negating the mandatory sentence. I've already mentioned I'm not a fan of mandatories. The reason I point that out is to give you some sense of the frequency with which they exercise this discretion.

Other research including a study by the U.S. General Accounting Office concluded, or I should say estimated, that from one-third to half of offenders eligible for mandatory minimums in U.S. courts avoided them. Likewise, a study by Schulhofer and Nagel in 1997 and another in 1992

estimated that federal prosecutors circumvented the guidelines in between 20 percent and 35 percent of cases, most often in cases involving mandatory minimums. They also concluded that in many cases the sentences that resulted were not that different from what would have been applied under the guidelines but they also report huge, and that's a quote, discounts in some jurisdictions. Even more striking this Commission again found in 2002, or I should say in a report published in 2004, federal prosecutors filed firearm enhancements in nearly 20 percent of qualified cases in 2000, and that was down from 45 percent in 1991 to 35 percent in 1995.

Interviews with court actors find that plea negotiations involve an even wider range of considerations. Studies including that by Schulhofer and Nagel, as well as more recent research by a group of researchers at Penn State: John Kramer, Jeff Ulmer, Jim Eisenstein, and I believe Lisa Miller -- and I point out this study specifically because it is the only study I'm aware of by independent outside researchers that was able to include interviews with U.S. Attorneys. Other studies have included interviews with federal judges and defense attorneys, even probation officers. U.S. Attorneys are not usually willing to participate. Those studies find through interviews that plea negotiations involve a wide range of considerations including the seriousness of the charges but also stipulations to relevant conduct such as whether a weapon was used or not, the quantity of drugs involved, the dollar loss amount, the defendant's role in the offense, the existence of prior strikes in the defendant's record, and the defendant's eligibility for 5K1 departures. Research by the Commission and by others also finds that U.S. Attorneys' definitions of what constitutes substantial assistance varies by district, as do practices regarding acceptance of responsibility reductions and the use of federal Rule 35 allowing resentencing. Many of these points were raised by the panelists yesterday and I simply want to confirm that more systematic research reaches the same conclusions.

I'll try to summarize here. Unfortunately as researchers we know very little beyond those very basic descriptives. We have more than 20 years now

of detailed descriptive data and statistical reports from the Commission describing the sentences ordered by federal judges in great detail and how those sentences relate to the guidelines and to the characteristics of offenders and offenses. By comparison we know almost nothing about even the most basic decisions by U.S. Attorneys in applying the same guidelines.

Some might argue that these questions are beyond this Commission's ability or its mission. I disagree. Understanding the role of charging decisions and plea bargaining in the sentencing process is essential to addressing the major questions of interest to this Commission. Have the guidelines achieved proportionality or uniformity of punishment and eliminated unwarranted disparity? Do the guidelines appropriately balance uniformity and discretion? How has Booker affected the process? How can the guidelines be improved? I am of the opinion that answers to any of those questions require careful and thorough consideration and thorough knowledge of how the guidelines are applied by the prosecutors.

In terms of disparity, we know that judges usually follow the guidelines. Research finds some unwarranted disparity. As one of my colleagues recently put it, we know a lot about what happens in the box but we don't know anything about how people move between those boxes. And the movement of charges within the guidelines could have much larger effects on sentencing and disparity than any discretion exercised by judges.

Regarding the effects of Booker, we've heard that not much has changed really. In time perhaps it will. I can't anticipate how that will change or prosecutors will adapt, but I'm fairly confident in predicting from existing research that as judges begin to exercise more of their discretion that's authorized post-Booker, we'll find that prosecutors will change their practices as well. It won't necessarily entirely offset what judges do but they will adapt. So understanding the effects of changes like Booker will require looking at not only what judges do but also what prosecutors do.

And finally, one of the questions the Commission posed was whether the guidelines strike an appropriate balance between judicial discretion and

uniformity in sentencing. I would suggest that an equally important question is whether the guidelines strike the appropriate balance in sentencing authority between federal judges and U.S. prosecutors.

Thank you.

CHAIRMAN HINOJOSA: Thank you, Dr. Engen, and I'll open it up for questions.

COMMISSIONER CARR: Dr. Bazemore, in describing this as the most punitive country in the world, you note that it is policy-maker driven as opposed to driven by the citizenry or by judges. I was wondering if any of you have any views, since a lot of other countries have political systems that are not too dissimilar from ours, why that's the case. Doctor.

DR. BAZEMORE: Could you repeat that question again?

COMMISSIONER CARR: Why do you think we have the most punitive system in the world, describing it, as you do, as policy-maker driven, meaning coming from the government, not coming from the citizens and/or judges. Since other countries have similar political systems. I was just wondering what do you see about our country that you think causes that.

DR. BAZEMORE: One thing right off the top, we are way more politicized in terms of the prosecutors, for example, compared to Canada and several European countries. That's right off the top.

DR. ENGEN: I would concur. There are some competing arguments, speaking now as a sociologist, about why this happens. Some point specifically to the sentencing policies. As a researcher I'm not convinced yet that the policies of hate have specifically been the cause, but there is good reason to think the sentencing policies are. But the politicization of crime policies in the U.S. is something that sets us apart.

Now, there is debate among sociologists as to why that happened, whether it was response simply to fears of crime in the '70s or if it was

something that was more deliberate. Some researchers argue that the politicization of criminal justice policies happened in part as a deliberate attempt by conservative politicians to gain votes, and that they used public fears, perhaps they played upon that to generate support for those policies. Initially the Republican party; ultimately the Democrats learned that if they were going to stay in office they needed to get tough on crime too. So we saw some of the toughest policies passed during the Clinton administration. And now it's sort of conventional wisdom among policy makers and legislators that they have to be tough on crime. Any efforts to reduce the severity of punishment are not well received, largely for fear of angering voters.

DR. WRIGHT: I would give a two-part answer to your question. The first part of the answer is we are in matters of crime more democratic, small "D" democratic, than a number of other nations, and so our system is trying to respond to what we believe that people want. It's interesting that when you survey people and phrase the questions at a high level of generality, they tend to say we want heavier use of prison and more severe sanctions. But then when you say what would you do in case X, your research and the research of a number of other bodies offers a very different portrait of public views when it comes to how to handle specific cases. I think part of the answer as to why the United States is so different is that we have been willing to treat crime policy as a matter of democracy to a greater extent than other countries have.

The other part of my answer has to do with the federalism and fragmented government. It has to do with the fact that the people who are most responsible for applying the criminal laws tend not to have to pay for them. For instance, in state systems the most important spending decisions happen at the local prosecutor's level. The prosecutor has to answer to the county's electorate but the county's electorate, there is a mismatch between the source of accountability and the source of the money for paying for that use of criminal justice. I could give you a lot more examples but the general phenomenon here is that fragmented government, the costs of our current policies are not visible to the people who are applying the policy

because they are operating at different levels of government.

MR. WROBLEWSKI: I have a couple questions. First of all, I would like to thank all of you for coming and participating in this. I've got one question for each of you. Dr. Engen, assume for a second that there is great disparity among prosecutorial charging decisions and use of other prosecutorial tools. The Justice Department since the advent of the sentencing guidelines has tried to regulate that, assume it's been ineffective, using a standard of asking prosecutors to charge the most serious readily provable offense. Is that the right way to regulate it? If it's not, what's the better way to regulate it?

Dr. Bazemore, when I started my career I was in state court, and in municipal and superior court in Oakland just about every crime that's prosecuted there has occurred within a ten-mile radius of that courthouse. In the District of South Carolina the crimes there could have been committed hundreds and hundreds of miles away. If you could talk just a little bit about operationalizing restorative justice in a federal system where your districts have hundreds and hundreds of miles, sometimes even 500, 700, 800 miles.

And Dr. Wright, we've heard during the course of these hearings lots of criticisms of the federal sentencing system, many of them focused on Congressional decisions: mandatory minimums, use of substantial assistance driven by a statute, drug sentences, child pornography sentences. You were suggesting that the role for the Commission is information. I'm assuming that means information to everybody including Congress. Is that it or should we actually engage in trying to change some of these things with the risks that we are going to get into this political arena that you all have pointed out and others have pointed out is fraught with peril?

CHAIRMAN HINOJOSA: We'll start with Dr. Engen because I think the first one was directed at you.

DR. ENGEN: Thank you. That's a difficult question to answer. I would

fall back on my main recommendation, which is that in order to even take initial steps toward regulating prosecutorial discretion we need to know more about how they use it. The fact is we don't know. However, I will point out an example. I am not sure if this is the best way to regulate or not. The State of Washington, when it passed its Sentencing Reform Act in 1981, included in the Reform Act a set of recommendations for prosecutorial discretion. They were not made mandatory. They were advisory, and they were based largely on the guidelines that had been created by the King County prosecutor. They are very similar. Those guidelines have been effective in King County. I have done research in King County in Seattle in how that prosecutor's office works. And it's quite systematic, and the deputy prosecutors there refer to the book, which is about this thick, as the standards. And they follow the standards. I think that obviously acknowledges discretion on the part of the prosecutors. It prioritizes charging decisions. It makes clear what the priorities should be for charge reductions and plea bargaining, and explicitly sets parameters for doing that.

MR. WROBLEWSKI: I'm sorry to interrupt. Is that possible in the federal system where, for example, that book presumably can't be the same in Atlanta or Columbus, Georgia, as it is in New York City or Missoula, Montana?

DR. ENGEN: I don't think it's the same in Tacoma versus Seattle, actually. I don't know if that's possible or not. I think that's up to the Department of Justice to figure out if it's even appropriate. I suggest it, though, for two reasons. One, it does provide the deputy prosecutors some guidance for practices that differ from county to county. Some counties don't follow it at all. Others use it as sort of a guide.

One feature of those recommendations, though, is that they don't direct prosecutors to charge the highest possible charges. They direct the prosecutors to file charges that are commensurate with the gravity of the act, words to that effect. I don't remember the language exactly. And they specifically discourage overcharging. And that may be useful in the federal

system. I'm not sure. I think probably, though, the most effective system would be to start collecting systematic data on charging decisions by prosecutors in the way this Commission collects systematic data on the sentencing decisions of judges. Simply by making the data available, not on an individual basis but at an aggregate level, provides some basis for making judgments about how they are using their authority and it might result in sort of voluntary self-regulation.

CHAIRMAN HINOJOSA: Dr. Bazemore.

DR. BAZEMORE: The first part of the question, some of the early restorative justice experiments were, just as you said, right around the court. There was a community court there. The other movements that kind of support that would be the community justice movement that Todd Cleary and others have written about. To some extent community courts operated that way. Judges just said it shouldn't all be up to me, what do you guys want, let's just have the hearing out in the community. When there was a lot of money around, cities like San Jose and St. Louis chose to put very inexpensive but multiple programs out pretty much in every neighborhood. I can remember one in San Jose in 1999, and it was neighborhood by neighborhood, and you had volunteers with a half-time paid coordinator. Money went away and I'm sure there aren't as many there anymore. But cities like St. Louis, San Jose. Chicago manages to sustain a program called Committee Panels for Youth but not at the level -- I don't know if that answers your question.

CHAIRMAN HINOJOSA: Professor Wright.

PROFESSOR WRIGHT: Mr. Wroblewski, you are asking me should you just inform or should you advocate as well. I think my short answer would be you should advocate selectively. I think there are strong limits to how effective the Commission can be as an advocate, and your effectiveness there grows out of your track record as an informer, as a portrayer of the current system. I know that it's true for state commissions that they selectively advocate, that the state legislature comes to them. And when they say should

we pass mandatory minimum sentences, of course they say no, just as this Commission always says no. And I would encourage you to continue to answer that question no, don't pass any more mandatory minimums. I would suggest to continue to react to that question in the same way. But in the states occasionally the commissions will go to the legislature and say we have been giving you reliable, helpful, informative portrayals of this system for quite a while, and based on that we have an observation about bad stuff that's going to happen, bad stuff that is happening. So that their selected advocacy role grows out of their information portrayal role.

I don't see it's very realistic for the Commission to be able to go to Congress and say it's finally time to completely wipe out all mandatory minimum sentences. We all know it's just not going to happen. But I do believe your information portrayal system is not just a bilateral relationship. It's not just between the Commission and Congress. To the extent that you are giving deep portrayals to a lot of different actors of what's going on in sentencing, you will enable judges to do a better job of improving the system within the current rules. You'll enable prosecutors to do a better job improving the system within current rules. And I could go down the list of all the various actors. And ultimately to the extent the current rules don't allow that, it's not strictly up to the Commission to bring that forward. I think you can act with other parties to bring that forward through your portrayals.

So getting back to my short answer, Yeah, I think limited advocacy is appropriate but it does need to grow out of your credibility that you build on the informational side.

CHAIRMAN HINOJOSA: Do we have another question?

DR. ENGEN: Could I add one comment to my previous answers?

CHAIRMAN HINOJOSA: Sure.

DR. ENGEN: Very briefly. I think encouraging the U.S. Attorneys -- you mentioned the same guidelines wouldn't necessarily apply in one district

versus another. Encouraging the U.S. Attorneys to develop some guidelines and to make those known might be an important step, a useful step that would provide some more transparency and allow for public comments as well.

CHAIRMAN HINOJOSA: Thank you all very much. We appreciate you taking your time. Some of you have shared your views with us before and we certainly appreciate your continued interest in our work and your advice. Thank you all very much.

Our first speaker for the last panel today is Spencer Lawton, District Attorney in Savannah, Georgia from 1981 to the year 2008. In 1983 Mr. Lawton established the first prosecutor-based victim/witness assistance program in the state of Georgia. He also serves on the Georgia Criminal Justice Coordinating Council, a state agency that conducts planning, research, and evaluation activities to improve criminal justice system operations and in coordination operates the state's crime victims compensation program.

We also have Mr. Hector Flores who is of the Cuban American Bar Association and he is currently in private practice specializing in criminal defense in Miami, Florida. For 21 years prior to that he served as an assistant [federal] defender in the Southern District of Florida including 17 years as a supervisor.

And we have Ms. Monica Pratt Raffanel who is the Atlanta-based Project Director for Families Against Mandatory Minimums based, of course, in Washington, D.C., and she is an adjunct scholar with the Mackinaw Center for Public Policy. We'll start with Mr. Lawton.

MR. LAWTON: Thank you, Mr. Chairman, and members of the panel. I appreciate the opportunity to be here. If I may I would like just to amend the description of my work to include the fact that my current affiliation is with the Prosecuting Attorneys Council of Georgia with whom I'm doing consulting work in the area of victims concerns, having retired after 28 years as DA on December 31st. So on January 1st I took up my new charge and have been enjoying it very much. And I appreciate very much the opportunity

to be here which comes to me through the Criminal Justice Coordinating Council. It happens that the PAC and CJCC are just right across the hall from one another. So I received my invitation to appear today from the Criminal Justice Coordinating Council, and I appreciate that very much.

I have been in the state system for 28 years, longer than that actually. I was in private practice for ten years before that. So I know nothing about what it is that you all are thinking about today. I was encouraged however that I might be able to provide something of use to you if I were simply to describe my experience as a prosecutor with victim services in the criminal justice system, and I suppose ultimately with an emphasis on the sentencing function. I don't know whether that's true or not. I hope I can, but that is my intent unless you redirect me in some way now.

What I would like to do in particular is to set out some of what I perceive to be the benefits of a prosecutor-based victim/witness assistance program. From a mechanical point of view, the advantage of a prosecutor-based system in my opinion, as opposed to nonprofit agencies that work in the community, et cetera, or other law enforcement functions, is that the prosecutor's office basically sits at the hub of the wheel so that from the prosecutor's office spokes reach out to virtually everybody else involved with any aspect of the case in which a victim is going to be concerned, to the police, to the sheriff, to the clerks, to the judges, to the press, to obviously the court system and the trial process, and thereafter appeal and probation. So we are the only ones who know the victim from the day that the crime occurred until the day that the bad guy is released on parole.

In a larger sense the advantages of a prosecutor-based system in my opinion are largely to be had by overcoming the effects of the fact that, as we know, victims have been perceived not to have any, quote, rights under the criminal justice system for so long because the victims are not a party to the action. The criminal action is brought by the state against the accused, of course, and the victim has been seen as merely another piece of the evidence. The fact that the district attorney, for instance, represents the

state as his client doesn't mean that he can't treat the victim with that basic minimum of common decency that he would afford to his client if the victim were his client or if he were in private practice representing the client. It occurred to me when I became a DA very shortly that if I had treated my clients in private practice the way that we were treating our victims, I would have been in some other line of work by Thursday. So the imperative of doing something to help victims became immediately apparent to me. I think that it's just simply that it's the right thing to do. That's the beginning point. It is the right thing to do. These are people who from no fault of their own have been caught up in an alien system that they do not understand and of which they are terrified. There just simply is no basis in my opinion for any question of the moral and practical imperative of providing that bit of common decency to victims. It's no particular trick to it. It's very important to do.

The benefits of such a victim assistance program from the point of view of the criminal justice system generally is that our only currency is our credibility and our credibility has to be derived from the public's perception of our integrity and our capacity for and commitment to fair play. I found in my community that when people got the notion that the criminal justice system was institutionally interested in them as individuals, as victims, as human beings, frankly the popularity of that undertaking -- the benefits of that popularity were overwhelming and felt in every corner of the criminal justice system in our community, to have victims and people in the community understand that we are concerned about the role of victims in the justice system and that our job is not to just protect the rights of the accused and be sure he's accorded all of his Constitutional and other procedural and evidentiary rights but also to include the interest of the victims who after all are part of the crime. They weren't off somewhere else while this happened to them, whatever it may be. That we include their interest, and it goes a long way to inculcating that kind of confidence in the criminal justice system among the members of the community.

I know that in the federal system popularity isn't necessarily an

issue. Federal prosecutors and judges don't get elected but the principle is yet the same. The perception of the people of the fairness and integrity of the criminal justice system is equally important whether you are running for office or not.

The value of a prosecutor-based victim/witness assistance program to the prosecutor really is two-fold, in my opinion. One is the obvious fact that it gives you a victim who is not resentful and afraid of the process but rather who is confident and grateful to be a part of the team and understands herself to be a part of a group who is trying to produce something recognizable as justice at the end of the day. And she gets to play a meaningful role in that. Not to say it's easy but she knows that people are on her side.

If I may say from my prosecutor's perspective bringing into view my own personal experience, I will say this, that hounding bad guys can be a quite adequate and satisfying career by itself, I'm sure. Where I feel myself to be particularly lucky though is having got involved with victims' concerns. I get to not only pound deserving bad guys but also vindicate the interest of victims, which is something that in my view humanizes what we do as prosecutors. Otherwise, let's face it, it's an inherently unpleasant job. But when you add to not just the necessity of it but also the gratification that comes from a vindication of victims' interests, it becomes in my personal opinion the best job that any lawyer can have in America.

I'll just close by saying one thing, that I think -- I don't know this. I'm just guessing. I know that in the Southern District where I live, Southern District of Georgia the court has an effective victim assistance program in its own right under the aegis of the court. And while I don't know a great deal about its activities, I can say that in all of our interaction where it has become necessary or desirable, it has been very gratifying. These are people who know what they are doing and they do it well.

Beyond that little glimpse of things I'm not sure what goes on in the

federal system or how victims' interests are construed or enforced. What I can say is if there is any hesitancy anywhere on the part of any judge or any prosecutor to undertake this kind of program and to bring it into the court and into the prosecutor's office and embrace it, I can assure you and them there is no reason for such hesitancy. The judges in my community would mutiny if anything happened to our victim assistance program. They have grown to depend on it for the job that it does, for what it adds to the credibility and integrity of the system.

When I first started this I had only been DA for three years. I could envision that we would rely heavily on volunteer assistance and I could imagine a bunch of red-eyed zealots running up and down the halls of my office fanning the flames of indignation and on a sacred mission to reform the criminal justice system and looking over our shoulder and second-guessing what we are doing. None of that transpired. None of it. You just had to get a person to direct the program who understands how the system works, knows what it's doing, knows what its value is, and wants to assist the system in its working from the victim side. There is nothing to be afraid of. Thank you. That's all I have.

CHAIRMAN HINOJOSA: Thank you, Mr. Lawton. Mr. Flores.

MR. FLORES: Thank you. On behalf of the president of the Cuban-American Bar Association, Roland Sanchez-Medina, I'd like to thank you for the opportunity to address this body. The Cuban-American Bar Association, which is affectionately known in Miami as CABA, was founded in 1974 by 20 Cuban lawyers who were practicing law in a language which was not their first language, who were practicing law in a country that was not their country of birth. Theirs was a support group to help adapt and survive in a foreign culture.

Fast forward to today 35 years later and that tiny insular organization has exploded to a membership of 1300. Instead of an exclusively Cuban organization, CABA has embraced multiculturalism and it is a multiethnic organization with members from every ethnic variation you can imagine. In

Miami and in Florida and nationally CABA is a political force to be reckoned with. Its membership includes elected officials, state trial and appellate court judges at every level, as well as Federal District Court judges.

And as you might imagine, I was very flattered to have been selected by the president of CABA to come and address you. I'm also a little nervous here because I am not a Cuban American. I'm a Mexican-American kid from Gary, Indiana who relocated to Florida 21 years ago. I joined CABA because it's an inclusive organization, not an exclusive organization. In their mission statement CABA includes as their mission providing equal access to and adequate representation of minorities before the courts and increasing the diversity of the judiciary and the legal community. Those are goals that are near and dear to my heart, and that's why I am a proud member of the Cuban-American Bar Association. And they throw great parties too.

I moved to Miami in August 1987, two months before the guidelines went into effect. I had some experience with pre-guideline sentences and lots of experience with post-guideline sentences. I'm probably better suited to have addressed you along with yesterday's group of sentencing practitioners, among whom a very good friend of mine, David Markus, was here. I read his remarks, and his remarks were well thought out. They are remarks that I agree with and that I would endorse and urge the Commission to consider. I won't take the Commission's time by going through those thoughts because the Commission has already heard those.

One thought that has occurred to me is that in certain immigration offenses the defendants are placed in immigration custody for weeks, sometimes months, before formal charges are brought. And upon completion of their sentence they are often in immigration custody for weeks or months before they are deported. The guidelines are silent as to any consideration of credit towards the final sentence someone receives for that time spent in confinement. The immigration jails, as I've seen, are a worst place to be confined. The conditions are more harsh, the liberties are fewer. And so it seems to me that some comment by the Commission on this issue might be

appropriate.

With that, I'll pass the podium.

CHAIRMAN HINOJOSA: Thank you, Mr. Flores. Ms. Raffanel.

MS. RAFFANEL: Thank you, Chairman Hinojosa and the Sentencing Commissioners for inviting me to address you today. It's great to see you all in my hometown of Atlanta, Georgia instead of Washington, D.C. where I'm used to seeing you. Welcome to our city and thanks so much for doing this important work and holding these hearings across the country, and thanks so much for allowing me to be here with you today. If I may I'd also like to just quickly acknowledge any FAMM members that you may have met yesterday or even today. We did invite our members to attend and we will encourage them to attend other hearings across the country. So hopefully you'll have a chance to meet some of those folks and hear a few of their stories.

As the Commissioners I know know, FAMM is a national nonprofit organization that is working for sentences that are individualized, humane, and no greater than necessary to impose just punishment, secure public safety, and support successful rehabilitation and reentry. FAMM does not oppose prison or punishment but we believe the punishment should fit the individual and the offense.

I was born and raised in Georgia and I live now in Lilburn, which is not too far from Atlanta. I began working at FAMM in 1993, spending 13 years in D.C. before moving back to Georgia to raise a family. My job at FAMM is first and foremost to convey the human face of the sentences imposed by mandatory minimums and the guidelines that you write. I have been listening to prisoners and their family members tell me their stories for 15 years. And many of their accounts deeply trouble me because they describe families wrenched apart and lives forever altered by sentences that in many cases are unnecessarily long.

I know the pain caused by that separation and loss because I too have experienced what it is like to have a family member in prison. When I was

seven years old my father was sentenced to a year in state prison for a drug-related offense. My stay-at-home mother struggled to support two young daughters, turning to family and friends for assistance while my father was incarcerated. At the time she thought it was best that she didn't tell me where my father was, that I didn't know that he was incarcerated. She feared the shame and stigmatization I might face from other kids and their parents if they knew that my father was in prison. I remember being very confused and very angry, feeling that my father had abandoned us.

With the help of a lawyer my father was released after serving a few months in prison. I'll never forget walking in the door after school and seeing him sitting at the kitchen table. And this was also in the '70s so it was before mandatory minimums or anything like that. But even that short time in prison had a devastating effect on our family.

I'm sure that my father struggled in prison, but I've always felt that my mother and my sister and I served a far greater sentence than he because it didn't end when he came home. For years after his release we lived in a house without heat. We didn't have running hot water. And we were grateful just to have a roof over our heads. My father's imprisonment barred him from certain jobs and it made it very difficult for him to find steady employment.

When I was 12 my parents' marriage ended and for years I did not speak to my father because of my anger over his incarceration, and I blamed that for all the problems our family suffered. Very thankfully we have a good relationship today but it came at a very high cost.

Working for FAMM and hearing from so many families over the years I realize my family was somewhat lucky because my father only received a year in prison. Prison sentences of five, ten, 20 years and more are commonplace today even for nonviolent, low-level offenders. I want to share with you today two stories about the harm of unduly long sentences on the families of two southern FAMM members.

Stephanie Nodd grew up in Mobile, Alabama. She became pregnant in

ninth grade and dropped out of school to care for her child. Stephanie was barely 20 years old when she met John, a handsome drug dealer new to the city with lots of money. He showered her with compliments and promised to reward her generously if she would help him. Stephanie introduced John to people. She showed him the drug hotspots in the community. She sold crack to customers on the street, and later delivered cocaine and picked up money for him. In return, John gave her cash, money which she as a single mother needed to provide for her four young children. A little over a month after meeting John, Stephanie was arrested, charged and convicted as part of John's crack cocaine operation which operated in the Mobile area for about a year.

According to her sentencing judge, "This defendant is not an organizer. She was not the boss of this organization. She was only a lieutenant, and I feel that because of her young age she was influenced to a great extent by John." So he departed from the life sentence required by the then mandatory guidelines calculated using the relevant conduct guideline. She was held accountable for eight kilograms of crack cocaine handled by the organization. Stephanie had no criminal record. She was 23 and she was pregnant with her fifth child when she was sentenced to 30 years in federal prison a few days before Christmas of 1990.

Stephanie's family has served every day of that sentence. Her five children were raised by different relatives. Her mother cared for two and sometimes three of the eldest boys until her death in 2006. Stephanie's youngest son, William, was taken in by his father's grandmother, and after her death, by his father. Elizabeth, the youngest child, stays with Stephanie's sister. The children can only see Stephanie twice a year. Until her grandmother's funeral, Elizabeth had never seen Stephanie outside of prison walls. Stephanie's long incarceration and the children's separation and dislocation have taken their toll. Her two oldest boys are both incarcerated.

While in prison Stephanie has earned her GED, taken college courses, obtained her forklift license, culinary certification, graduated from

computer programming, and she has completed many other programs. There is no justification for condemning Stephanie and her family to prison for 30 years, but that is the unconscionable consequence of the crack cocaine penalty structure and relevant conduct on this first-time offender. Had she been sentenced as if her crime involved powder cocaine, she would have left prison more than seven years ago. Stephanie has eight more years to serve on her federal sentence.

Another person I'd like to tell you about is Ricky Minor. At the time he was convicted of attempt to manufacture methamphetamines his life was a total mess. He was born and raised in Florida and he began using drugs at the age of 13, and by the time he was 20 he was using cocaine. He sold drugs to support his own addiction and repeatedly got into trouble with the law. Despite his troubles he managed to pull his life together, open a small business, got married in 1994. His wife had two kids from a previous relationship and the two of them have a child of their own. But Ricky continued to suffer with addiction and depression, and he was hospitalized on one occasion after threatening to kill himself. He became addicted to methamphetamine after trying to shake his drug habit in 1998.

In 2000, acting on a tip, police found methamphetamine residue, 1.2 grams of methamphetamine and pseudoephedrine pills in Ricky's home. The D.A. estimated that 191.5 grams of methamphetamine could have been produced with those pills. Ricky pled guilty and, though he had never spent a day in prison, was sentenced by a reluctant Judge Roger Vinson to life in prison as a career offender. His sentence under the guidelines would have reflected a three-level reduction for acceptance of responsibility, resulting in a sentence of 135 to 168 months. Still a lengthy sentence but it would have given him a chance to return. He completed the 500-hour drug abuse program and today he is proudly sober. He has excelled in his prison classes and is a changed person.

His family has fallen apart since his incarceration. He and his wife have divorced. His wife abandoned their daughter. She is now a teenager and

cared for by elderly grandparents. His stepdaughter is unmarried, unemployed, and trying to care for two children. His stepson died of a drug overdose. Ricky writes compellingly to FAMM about the mistakes he made and the clarity he has for the first time in his adult life as a sober person, but he will never leave prison to help his elderly parents or to guide his daughter into adulthood.

Michael Short, whose sentence was commuted by President George Bush last year, testified to the Judiciary Committee Subcommittee on Crime shortly after his commutation and said, "There is a point beyond which the lessons that could be learned and the punishment that could be extracted are well past. They are lost. And beyond that point it makes no sense to warehouse those humans."

We feel he is right. Not only because there is no benefit to keeping people who have been adequately punished locked up, but also because of the harm it causes their children and communities.

American taxpayers spend almost $5.4 billion on federal prisons annually. While some criminologists credit incarceration with 20 to 25 percent of the national crime decline, recent analysis of data by the Sentencing Project shows that certainty of punishment not the severity, is the key contributing factor to deterring crime. Moreover, the destruction to the family carries significant financial and social costs, as illustrated in the stories of Stephanie's and Ricky's children.

In the interest of time I won't read the statistics that I've included in my testimony about the broad impact on children and families, but we have footnoted and included statistics in the testimony that will give you sort of a bigger picture of how incarceration is impacting the families. I'd like, if you don't mind, to take a few minutes and give you our recommendations.

I am here today on behalf of all the families from the southern states with incarcerated spouses and parents in federal prison to urge you to take steps to ensure that the guidelines promote sentences that are, as required

by law, no greater than necessary to comply with the purposes of punishment. We especially ask you to do the following:

Number one, urge Congress in the strongest possible terms to end mandatory minimum sentencing. Ricky is serving life in prison as a career offender under 21 U.S.C. 841. His guideline range would have been 135 to 168 months. Mandatory minimums, as you know, often result in unduly long sentences. They are a chief contributor to the undue length of many guideline sentences indexed to them, and they utterly undermine the mandate of individualized consideration, proportionality and parsimony in 18 U.S.C. 3553(a). The Commission has made a tremendous contribution by making its considered opinion that mandatory minimums do not belong in our criminal justice system known to Congress and the public. You would do all a great service by updating the outstanding report on mandatory minimums that was produced in 1991 and, though well out of date, is still a resource that everyone from advocates like FAMM and other sentencing practitioners refer to on a regular basis. And it's also being looked at on Capitol Hill because there is a renewed interest in mandatory sentencing reform.

Number two, extend the two-level reduction for crack cocaine to all guidelines anchored to mandatory minimums. This is a step you can take now that will lower sentences while maintaining the relationship between statutory minimums and guideline ranges. The founding Commission's decision to correlate the guidelines with the mandatory minimums and index the guideline starting point above the mandatory minimums provided for even longer guideline sentences than those called for by Congress. This twin attack on drug offenses caused the unprecedented and disproportionate incarceration of first-time and low-level drug offenders characterized by the American Bar Association's Kennedy Commission as far beyond historical norms.

Finally, honor the 25th anniversary of the Sentencing Reform Act by complying with its unrealized directives. For example, the Commission should review the guidelines with an eye to lowering those sentencing ranges that have generated continued concern with their undue length and severity of

punishment in certain cases. The Sentencing Reform Act provides a variety of tools that the Commission can use to do this using three statutes that I've described in detail in my testimony.

We look forward to working with the Commission as it considers its work on the guidelines. Thank you so much for the privilege of representing the families and the prisoners at your important hearing today.

CHAIRMAN HINOJOSA: Thank you, Ms. Raffanel, and we'll open it up for questions.

You've left them speechless.

COMMISSIONER SESSIONS: First of all I want to thank you all for being here and being part of this hearing. I only have a question for Mr. Flores but I want to especially thank Mr. Lawton and Ms. Raffanel for representing both victims and offenders, people who often have been forgotten in the past.

Mr. Flores, the question addresses the issue you spoke about about immigration cases. Oftentimes prosecutors and criminal defense lawyers want to resolve the immigration issue at the same time that the criminal issues are being resolved, but there are often others, including immigration lawyers, who feel that may not always be appropriate and that should be left to them, to the immigration processes and administrative immigration processes. Do you have any opinion about that? And if you could talk to reconciling that difference between the criminal defense bar and the immigration bar.

MR. FLORES: In the cases that I've had in my experience, upon entry to this country through Miami at Miami International Airport the person is excluded, so there is no deportation proceedings to follow. They are excluded and then taken to the immigration jail to await charges. Sometimes those charges don't come for a couple of months, so there is no immigration lawyer, there is no immigration proceeding, there is nothing pending in immigration other than a hold based on the prosecutor's intent to charge the case.

COMMISSIONER SESSIONS: And is there concern that the charging process be speeded up in those particular cases?

CHAIRMAN HINOJOSA: I think the concern is because they are in immigration custody rather than in federal custody, federal criminal custody awaiting trial, that there is no credit given for that amount of time they are in immigration custody. They also will be turned over to immigration and there would be no credit at the end with regards to whatever time it takes to get them back to their country. What some judges have done is under Chapter 5K2.0 -- this is a matter that has not been considered by the Commission -- and there are grounds for possibility of departure. And in fact actually in the Fifth Circuit under the mandatory system when you were in state custody, because you had been arrested for something else, there was case law that indicated that could be a grounds for departure even under the mandatory system.

MR. FLORES: I've been successful in convincing some judges to give some sort of credit. It's hard to quantify what's going to happen in the future.

CHAIRMAN HINOJOSA: The difficult part becomes the federal offense starts at the time you were found. I guess if there is a hold and they were actually already found by the time they came to the airport and were turned over to immigration. So you can go back and revert to that.

MR. FLORES: Right. Some judges have declined to grant that variance or departure. So we are left with some sentence disparity in some cases.

CHAIRMAN HINOJOSA: And it might turn also as to whether the Bureau of Prisons goes back to the day you were found When it wasn't credited to any other federal charge. But it's more difficult because they are in immigration custody rather than in the custody of an actual prison.

MR. FLORES: In my experience the Bureau of Prisons does not credit the immigration custody.

JUDGE SESSIONS: There is a broader question, of course, of collateral consequences. There are a number of jurisdictions which were addressing that particular issue. There are consequences affecting people who are not citizens that may differ from others, including the kinds of incarceration, the lack of participation in programs, including the 500-hour drug and alcohol rehabilitation program, and other benefits that citizens may have. I'm wondering whether you've made those kinds of efforts, whether those exist, those kinds of issues exist in the 11th Circuit and how successful those issues have been received.

MR. FLORES: I don't think there is any appellate case law on that point. We do discuss those issues at sentencing before the district court judges. I find that judges who have been on the bench since before the guidelines were in effect are more apt to exercise their discretion and credit a defendant who is going to be in a higher custody security level because of his immigration status who won't be eligible for sentence reduction you get if you complete the drug treatment program. Some judges are sensitive to that and others are not.

CHAIRMAN HINOJOSA: Are there any other --

MR. LAWTON: May I?

CHAIRMAN HINOJOSA: Yes.

MR. LAWTON: There were two things. One is I sat through the very interesting discussion on restorative justice, and it came to my mind as I was listening to that that there may be some seemed like tension between incarceration on the one hand, although the gentleman made it clear that he is not against incarceration but just restoration is important as well, and restorative justice. I don't think there would be any.

I think one of the misapprehensions I had when I started the victim/witness assistance program in my office was that if we did as was our policy to do, and it remains today our policy, to bring victims into the plea bargaining process, not to let them control it by any means, but just to let

them know this is what we are doing and this is the way the talks are going and you need to know about it and you can tell me what you think about it. And I thought that victims would uniformly be after their pound of flesh, and they are just simply not. It's been my overwhelming experience that in the vast majority of cases all they want is to hear that guy have to say, to answer the question are you in fact guilty, saying yes. And of course if they can't get that, if they don't want him to have to admit, then they want it rammed down his throat basically. But their main interest is [inaudible] and very often in rehabilitation of the offender, depending on the circumstances and the relationships. But they are just simply not intent on having somebody drawn and quartered for a burglary offense against them or something like that, somewhat to my surprise.

I think if they are brought into the system, if they are allowed to feel more comfortable with what's going on, if they are confident in you, it helps them I think achieve some confidence in the system itself and they just feel a whole lot better about the whole thing. They want to have been believed and supported, and they want to be taken into account. Very often they don't want to have the final say. That is just too much responsibility. They'll say that's for you, you decide that, here is what I think.

So there is that. I don't think it's anything unreconcilable about an aggressive prosecution with victim participation on the one hand and the alternative of restorative justice on the other. That's what I'm trying to say.

The other point I wanted to make is I went at some length into the benefits as I saw them of a prosecution-based victim assistance program. I should perhaps have commented about the drawbacks. There are none. Thank you.

CHAIRMAN HINOJOSA: Are there any other questions?

I do want to thank everyone who is here and who has been here for the last two days with regards to the advice and comments and the suggestions

that we have received. It has been extremely helpful. We certainly have appreciated the time that has been taken by each one of the witnesses, and we look forward to more hearings across the country.

I also want to thank our staff, Ms. Judy Sheon, our staff director, and every member of the staff who worked so hard to make sure we had panelists present who could give advice and comments and share their knowledge, and certainly with regards to the logistics with regards to the location and everything else that has been done. And I want to thank all the members of the Commission for their participation and hard work with regards to this meeting, and we look forward to the next hearing.

Thank you all very much.

(Hearing adjourned at noon.)