COMMISSIONERS PRESENT:

Chair: Judge William K. Sessions, III
Vice Chairs: William B. Carr, Jr.
Judge Ruben Castillo
Commissioners: Dabney Friedrich
Judge Ricardo H. Hinojosa
Beryl A. Howell
Jonathan J. Wroblewski

STAFF PRESENT:

Judith W. Sheon, Staff Director
Brent Newton, Deputy Staff Director
CHAIR SESSIONS: Good morning, and welcome to our sixth of seven regional hearings. We've been going around the country listening and listening and listening to various stakeholders give us advice about the status of the guidelines and sentencing policy for the country. It's a pleasure to be here for this two-day public hearing. I'd like to thank, first, our former chair, who actually arranged for all of these regional hearings, Ricardo Hinojosa, who now, I think officially, has taken over as chief judge of the Southern District of Texas. Is that right?

COMMISSIONER HINOJOSA: On Friday, November 13th.

CHAIR SESSIONS: That's a very auspicious day to begin as chief judge.

I also want to thank those at the University of Texas who have invited us today. First, Dean Sager, I just met outside, thank you for making this facility, this beautiful facility, available to us; also Ms. Leugers, the assistant director of internal events; Alejandro “Alex” Martinez, assistant to Dean Sager, and Evan DeWandler, the director of media services. Thanks to all of you for all of the hard work that's been required to host our hearings.

Again, the hearings are about listening.
Federal sentencing policy is just extraordinarily complicated. It involves all three branches of government, the Judicial branch, the Legislative branch and the Executive branch. Essentially, each of those branches of government has a vested interest in the sentencing policy of the United States. Judges and the Judiciary clearly have a vested interest in making sure that the sentences that they impose are fair and just, protect the public, as well as provide justice for individual defendants. The Legislature or Congress also has a clear vested interest in sentencing policies. It's their responsibility to establish the laws and to set general penalties for those offenses, and they have a clear stake in sentencing policy. And of course, the third branch, the Executive branch, also has a clear responsibility in terms of sentencing policy. They are required to enforce the laws. And what happens is that all three branches, at some times, have a sense that their role in the sentencing process should be, in fact, the dominant one. The Sentencing Commission, the U.S. Sentencing Commission, is right at the intersection of all three branches of government. Obviously, we are selected by the President. We're confirmed by the Senate. All of the input that we receive come from all three branches of government, and it's our
responsibility, frankly, to set sentencing policy in light of the input of all of the branches of government.

Now, we hold our last hearing in Phoenix in January, but also, we intend to supplement what we hear from the various witnesses across the country with a survey of all federal district court judges throughout the country beginning in January. That survey will supplement the information we already have learned during the last year of regional hearings, and help us meet our statutory mission to ensure the goals of sentencing policy are being met.

This is just an extraordinarily exciting time to be on the Sentencing Commission. I've been on it now for ten years. This is clearly the most exciting time that I've experienced to be a member of this Commission. We're very excited by the commitment that everyone appears to be making in the criminal justice community to review sentencing policy, and we're ready to take a very active leadership role in shaping policy that remains fair and certain, that protects and promotes public safety, and ensures equal justice for everyone involved in the process.

Ultimately, the Commission is in the best position to work with other policymakers on a comprehensive review of federal sentencing. Congress
has directed the Commission to thoroughly review statutory mandatory minimum penalties and their role in the system. Congress has also recognized our very important role by including us in pending legislation creating blue ribbon panels to review the criminal justice system. We are also closely working with the Department of Justice as it also conducts a comprehensive review of its role in the sentencing process.

We're using all of our resources to encourage Congress to end the current sentencing disparity between crack and powder cocaine. For over a decade, the Commission has called upon policymakers to act in this area. The Commission is pleased that its data and reports are informing the debate, and it stands ready to act the moment Congress does act on this very critical issue.

So on behalf of the Commission, I'd like to thank all of the panelists for sharing their wisdom and their time over the next two days, and we look forward to hearing from all of you.

So first, this is my first opportunity, having just been confirmed as chair, to introduce the other members of the Commission. No, that's actually not right. I did introduce the other members of the
Commission, but at one of these regional hearings.

To my left is Judge Ruben Castillo, who served as vice chair of the Commission since 1999. He served as a U.S. district judge for the Northern District of Illinois. He has been a regional counselor for the Mexican American Legal Defense Fund, and served as a U.S. attorney. He graduated from Loyola and Northwestern University School of Law. And despite his tender youthful appearance, he has been on the Commission for ten years.

Next, to my right is Will Carr. He served as vice chair of this Commission since December of 2008. He served as an assistant U.S. attorney in the Eastern District of Pennsylvania from 1981 until his retirement in 2004. That is he actually retired. Looking at his youthful appearance, one would be shocked, but in fact, he has retired, although he now is an adjunct professor at Widener Law School in Wilmington, Delaware, and he did attend college and law school. Oh, he actually attended Swarthmore and Cornell, is it?

VICE CHAIR CARR: Yes.

CHAIR SESSIONS: Okay. Next, Judge Ricardo Hinojosa served as chair of this Commission for five years, from 2004 to 2009. All of us on the
Commission have respected tremendously the leadership and vision that he has contributed to his position. Again, he became chief judge of the U.S. District Court for the Southern District of Texas on Friday the 13th, having served on that court since 1983. He actually is a graduate of the University of Texas, and also attended law school at Harvard, graduating in 1975.

Next, to my left is Beryl Howell. She's served on the Commission since 2004. She served as executive managing director and general counsel with Stroz Friedberg, which is an international consulting and technical service, services firm, as former general counsel of the Senate Committee on the Judiciary, and has been an assistant U.S. attorney in the Eastern District of New York. She received her degree from Bryn Mawr and Columbia Law School.

Dabney Friedrich, to the far left, served as the associate counsel at the White House until her appointment to the Sentencing Commission in December of 2006. She was previously counsel to Chairman Orrin Hatch of the U.S. Senate Judiciary Committee. She served as a U.S., an assistant U.S. attorney in the Southern District of California, and also the Eastern District of Virginia. She received her bachelor's from Trinity University in San Antonio, is it not?
COMMISSIONER FRIEDRICH: (Moved her head up and down.)

CHAIR SESSIONS: San Antonio. Her diploma in legal studies at Oxford, and her law degree from Yale.

And finally, Jonathan Wroblewski, recently designated an ex-officio member of the U.S. Sentencing Commission, representing the Attorney General of the United States, serves as director of the Office of Policy and Legislation in the Criminal Division of the Department of Justice. He served as a trial attorney with the Civil Rights Division, deputy general counsel and director of legislative and public affairs for the Sentencing Commission. He received his degree from Duke and his law degree from Stanford.

Now, before I introduce the panelists, I turn to other members of the Commission for any additional comments that you would like to make.

Now, this doesn't portend we will not ask you questions at the end of your testimony, but let me introduce the panelists first. We're very honored to have the three of you testify before us.

First, Robin Cauthron is a U.S. district judge in the Western District of Oklahoma since 1991, serving as chief judge in the district from 2001 to
2008. She previously served as a federal and as a special district judge for Oklahoma's 17th Judicial District, and a staff attorney for Legal Services of Eastern Oklahoma. She received her bachelor of arts degree and law degree from the University of Oklahoma. She also holds a Master of Education from Central State University.

Next, Jay Zainey has been U.S. district judge in the Eastern District of Louisiana since 2002. Prior to that, he was engaged in private practice of law. Judge Zainey received his Bachelor of Science degree from the University of New Orleans and his law degree from LSU.

Now — Oh, I'm sorry. And then also Keith Starrett, I skipped over you, has been U.S. district judge in the Southern District of Mississippi since 2004. Previously he served as a circuit court judge for the 14th Circuit Court District of Mississippi, and practiced privately from 1975 to 1992. Judge Starrett earned his bachelor's degree at Mississippi State University, and his law degree at the University of Mississippi School of Law.

Again, thank you all for attending. Who wishes to go first? Judge Cauthron, is that you?

JUDGE CAUTHRON: Well, if we're going
alphabetically, I suppose it makes sense. I suppose somebody will tell me if I need to move the microphone closer.

I want to thank you for taking the time to hear our views on the sentencing guidelines, after 25 years of experience under the Sentencing Reform Act, and particularly for letting me be on this panel.

I'll start out by telling you, I am a complete wreck. I left my glasses at home, so I am able to read with these, but I can't really see. So forgive me if I appear a little addled.

VICE CHAIR CARR: Did you leave your OU season tickets?

JUDGE CAUTHRON: No. In fact, appearing in front of the star is a little intimidating.

COMMISSIONER HINOJOSA: Most of us wear glasses. Would you be more comfortable if we removed ours?

JUDGE CAUTHRON: I don't think so. In preparation for this panel, I have polled all of the district judges in the State of Oklahoma, federal district in the State of Oklahoma, and all of the magistrate judges in my district, and there is really an amazing consensus of views about the guidelines.

I think I can say what was wrong with the
guidelines, and so difficult for sentencing judges to
live with, has been fixed by Booker. We now have the
ability to vary from the guidelines in the appropriate
case, while still having a baseline or a national
average against which to compare our sentences. I think
this results in the best of both possible worlds. We
have consistency in sentencing and a clear statement of
the facts and circumstances to take into consideration,
cooer with the ability to find additional facts and
circumstances which might suggest a different sentence.
I think the present system enhances the perception of
fairness in sentencing from the viewpoint of all
participants.

The analysis to be undertaken by
sentencing judges is clearly set out in § 3553,
and it works. Calculate the guidelines and consider
other factors as listed by statute. It seems to me that
offense characteristics, more often than not, are
sufficiently taken into account in the guideline
calculation. For me, it's usually offender
characteristics, which would not have justified a
guidelines departure, but which lead me to vary. As an
example, I sentenced a 23-year-old young man, not long
ago, who was considered a career offender based on three
felonies which were relatively minor, but still
felonies. They had all been committed before he reached age 18, but he was certified as an adult, and he received a sentence of probation on all three prior felonies. He appeared before me, 23 years old, in a drug conspiracy, for which, as a career offender, he faced a minimum of 183 months. I had previously sentenced the leader and organizer of that same conspiracy to a 90-month sentence. The ability to vary from the guidelines in his case gave me the opportunity to consider his age, the over-representation of his criminal history, the fact he had received no prior imprisonment, and also to avoid sentence disparities.

In my experience, the guidelines adequately cover the majority of crimes and offenders, but where, in cases where offender characteristics might suggest a different result, it is far preferable to give the judge discretion, rather than to make an attempt to cover all contingencies in the guidelines themselves. There are simply too many variables to make this work.

The recent Supreme Court cases regarding the standard of appellate review have, in my view, reached a proper result, which is considerable deference to the sentencing judge's determination. That deference seems wholly appropriate. Part of what I have to do, as a sentencing judge, is look into the eyes of each
defendant and try to determine, given a number of variables, whether his assurances that he's learned his lesson are any good. This is more than just a credibility determination. It's partly a matter of predicting the future, which, on my best day, is not much more than a shot in the dark, but I think I have a better ability to do it than the appellate judges. There's nothing wrong with expecting me to articulate the reasons for what I have done, but I'm certainly in a better position to make that determination than an appellate panel.

One benefit of the Booker change that may not be fully appreciated by the judiciary is the opportunity for effective advocacy on the part of defense counsel. The chance to actually influence the sentencing judge, which has been virtually absent for the last 25 years, is bringing a renewed energy to the defense bar and hopefully will result in a more frequent and a more enthusiastic participation on our CJA panels. A recent Oklahoma Bar Journal article is directed specifically at effective advocacy in federal sentencing hearings, which would have been far too esoteric for publication prior to Booker.

My suggestions for change, or at least further thought, are these: First, is a departure under
the guidelines an anachronism, at least apart from
5K1.1? Given the different standard of review for
departures and variances, does any sentencing judge
actually depart now, instead of vary.

Second, I urge you to continue to work
for fewer statutory minimums. Besides those cases in
which they are excessive, too often the discretion is
given to the prosecutor to charge bargain these away,
while the sentencing judge has no such ability.

Third, the guideline sentences for child
pornography cases are often too harsh where the
defendant's crime is solely possession, unaccompanied by
any indication of acting out behavior on the part of the
defendant. It's too often the case that a defendant
appears to be a social misfit looking at dirty pictures
in the privacy of his own home, without any real
prospect of touching or doing anything to any other
person as a result of it. As foul as child porn is, I
am not persuaded that a direct link has been shown
between viewing child porn and molesting children. I
have two specific suggestions. First, keep the
guidelines in this area flexible, recognizing that a
broad range of conduct is encompassed within them, some
of which is truly evil deserving of great punishment,
and some is less so. Second, consider whether the
enhancement for use of a computer makes sense. As widespread as computer use is now, enhancing for use of a computer is a little like penalizing for speeding, but increasing that if you're using a car.

Similarly, the guideline for manufacturing methamphetamine includes an enhancement for unlawful release into the environment of a hazardous substance, which is a necessary part of the manufacturing process. This, too, seems redundant.

Fifth, I expect you've heard a lot about this, or will hear. I am often taken aback at the relatively low offense levels for fraud and financial crimes as compared to drug offenses. For years, I thought the fraud guidelines were too low. I think now the drug levels are too high. Either way, I think they're out of whack when compared to each other. You may not think they can be compared to each other. I have some reasons for that, which I hope somebody will ask me a question about.

And finally, from my magistrate judges, particularly the one in Fort Sill who is, who sentences 300 Class A misdemeanors a year, he says make the guidelines for misdemeanors less complicated and consider eliminating them for assimilated crimes.

Those are my comments. I'm happy to be
here, and happy to respond to questions.

CHAIR SESSIONS: Thank you, Judge.

Judge Starrett, do you want to go next?

JUDGE STARRETT: I will. First of all, I'd like to thank the Commission for inviting me. It's an honor to be here and present testimony before you.

I'd like to give you a little background, also. For 12 and a half years, I served as a state court judge in Mississippi. Over the course of my career, I have sentenced in excess of 10,000 people to state penitentiaries, and have continued doing that in the federal system, certainly not that number, but have a lot of, a lot of felony offender appear before me in the five years I've sat on the federal bench. I've listened to hundreds of victims and I've listened to thousands of defendants speak for advocating one way or the other.

Over the course of my career, I've spent a great deal of time studying the psychology of corrections. This is very interesting and intriguing. I have a daughter that's a psychologist and a wife that's a psychologist, and I'm sure I get evaluated a lot, also. But I've studied and looked at the different reasons people offend, the way that rehabilitation occurs. There's a lot of sick people and sick minds out
there, unfortunately. But, and as a sentencing judge, I have had to face many of them, and mete out punishment to them.

I've also, as a state judge, witnessed the gross disparities in sentencing. In Mississippi, where there is just – most crimes have open-ended sentences – I've seen defendants in the same district, different judges in the same district get sentences, one may get probation or a year or two in prison, and the other one may get 20 or 30 years, literally 20 or 30 years to serve for identical behavior, and disparities like that are terrible, and are continuing, unfortunately, in some of our state courts. What I've – when I became a federal judge, I obviously was indoctrinated to the guidelines, and I have sentenced under the guidelines for five years. Sentencing is much simpler under the guidelines. I think it's fair. I think what the Commission has been charged to do has been, has been accomplished, but there are some things I would like to suggest.

The guidelines are thorough, and they're well thought out. Lots of research has been put into them, and they accomplish the purpose which they were intended for, consistent fair sentencing around the country.
But as my years as a judge have progressed, I've become more discouraged with the entire criminal justice system. I've seen things that have not worked. I've seen a nation, we've become a nation that incarcerates almost a million, over a million people, and up to one percent of our adult population is incarcerated today. In some demographic groups, it's higher than one percent. Most states have recidivism rates of up to 75 percent. So obviously, ladies and gentlemen, what we're doing in corrections is not working. There needs to be a change in the paradigm. We need to change the way that we think.

Out of a sense of frustration, it's pretty ironic that this, almost as an epiphany, came to me about a drug court, but it was 12 years ago in the same room I was in this past, this week, in New Orleans, where I learned about a drug court, learned what one was, and it was strange that I would be there the day before yesterday, and I would be here today talking about what I've learned as a drug court judge. I started drug court in state court in 1999. In Mississippi, it was the first one, and there was no book to follow. There was no statutory authority. There was no guidelines. And I looked to the national organizations, and patterned my program based on the
research that I could come up with. I did this out of a
sense, as I said, of frustration. I had watched, over
my career. I'd sentence people to the penitentiary.
They'd go off. They'd come back to the community. They
would recidivate. They would go back again. They would
come back. It was a revolving door. People coming back
into the community. I would ratchet up the punishment,
but it was to no avail. The offenders would go and come
back. Most of the offenders were drug addicted. They
were, in state court, about 90 percent of the offenders
had some sort of alcohol or drug problem, and I really
believe that that was the genesis of the, of the crime.

This program was run in addition to my
regular docket, I have a significant trial docket, civil
and criminal, and I watched as the dynamic of what I was
doing changed the people's lives. The program changed
people's lives. I saw the recidivism rate flip. It
went from about 75 percent to about 25 percent, based on
the people's completion of this program in state court.

When I started the program, as I said,
there was no book to go by, other than the national
organizations, and I followed it to a T. And what I
have seen is that if you base your sentence and conduct
your program on what has been proven to work, that it
works. Follow the research that's out there. There's
now, that was 11 years ago, ten, 11 years ago, and there
is a lot more research out there today that shows us
what works in the criminal justice system.

We need to change the way we do business
in the criminal justice system. A lot is currently
going on around the country — evidence based practice. In
fact, it's a lot more than I realized. A huge push has
been made for these programs to be implemented in
district courts. For several years, in most district
judge trainings, there has been a program on evidence
based practices, or what we call, in the federal system,
reentry programs. Evidence based practices simply means
practices that have been shown by the evidence to work
and to reduce recidivism.

We are good at punishment. The criminal
justice system is good at punishment. We need to change
our focus, though. It needs to be changed from
punishment to reducing recidivism. Punishment is part
of that. Punishment needs to occur. It's one of the
reasons that we have a criminal justice system is to
punish wrongdoers. But we need to change what our goal
is. Our goal should be to reduce recidivism. If the
programs, these reentry programs, are properly
administrated and follow the guidelines, they will be,
they will reduce recidivism. I've had a program up in
Hattiesburg, up and running in Hattiesburg for about three and a half years. I did not know there were reentry programs at the federal system when I started it. It was started because I knew it was something that would work, that this type of program would work. We began it without any sanctions. I thought it was better to ask for forgiveness then permission, and went ahead with it, and it's up and running. And it's working. We have about 60 participants. A lot of the people who come back from prison come into our reentry program. They're admitted by one of two ways. One, if they have a high RPI. We don't cherrypick, but the offenders that you would think that would be successful, we take the drug addicts, the ones who have the serious abuse problems, we take the child pornographers, which is, in my opinion, a very serious crime, and we, we put them all in the program.

We've seen a dramatic improvement in our probation revocation petitions. They have decreased. And the other reason that people come into the program is if they have violated. If there's a violation, maybe not a violation worthy of penitentiary time, but some sort of technical violation or something that they're not doing, they are brought into the program.

The Criminal Law Committee has
recommended some form of evidence based practices. I know there's a lot of controversy out there. There is — it's not unanimous. I've talked to several members of the committee, and the jury is still out as to whether or not the evidence based practices will succeed. I will tell the Commission from my experience from, what I have seen, and I've, I've done this not in a willy-nilly way, but in the way that I, from a serious studious way, I've tried to study the criminal justice system. I've studied what will work. I've tried every program. As a state judge, I've tried every program that was available. I found some that would work, some that wouldn't work, but I've never found anything that works as well as judicial intervention with a defendant's success, and that's what a reentry program or drug court or evidence based practices, whatever you want to call it, that's what it does. You have judicial supervision or judicial intervention, and it produces a dynamic. Why it works, I just don't know. I can't tell you why it works, but I can tell you, from my experience over a number of years, that it does work.

Now, what it, what this will do for you as a Sentencing Commission, what you would consider, one, reentry programs are primarily for the back end of sentences. People have been to the penitentiary.
They've come back. They've come into the reentry programs. There should be something considered on the front end. There should be some consideration for credit for time served, if someone, if a defendant would come back into a qualified certified reentry program, one that follows the evidence, and I know that there's not a — there's just not a model program there. There have been model programs. They're being studied. The AO is trying to come up with a model program now that will say this is what's shown by the evidence will work, this is what we recommend to the district judges, and if you implement it like this, you're doing did it the right way. Hopefully that will come down soon. But if an offender comes back into a program that has been proven to work, then there should be some credit, some reason, some reduction in his or her sentence because of the time they would spend in the reentry program.

Also, the Sentencing Commission should consider some form of front end program. I don't know exactly what the, what I could suggest, but there are instances when the guidelines do not meet the needs of a particular defendant. All of you know that there are, as Judge Cauthron has said, everybody is not the same. You have different circumstances that you need to address as a sentencing judge. We look at, we look at
the person's record and their history, we look into
their eyes, and we try to determine what is fair, what
is reasonable, what serves the needs of the, of the
community, what will make the community safer, but yet
what will reduce recidivism, what will get this person
back on the right track, and we'll not see them back in
our courtroom and see them in our prisons again.

            With the technologies that are available,
GPS technology is amazing. You can, you know, day
before yesterday I had a case where this person was
tracked by GPS technology going to somewhere where she
wouldn't or shouldn't have gone, and she was revoked and
sent to prison because of that. There are technologies
that should be taken into consideration by the
Sentencing Commission. Some credit or some time should
be considered because of, if someone is on some kind of
monitoring by the, by some GPS technology. Some
consideration of a front end, an allowance to put judges
into a reentry program or a, whatever you want to call
it, evidenced based practice program on the front end,
prior to going to the penitentiary, should be
considered.

            Our ultimate goal in sentencing, yours,
mine, everyone that's in this room, our ultimate goal is
a safer community. We want the community to be safer.
If there's less recidivism, then the community will be safer. It won't have as many defendants, but more importantly, we won't have as many victims. Evidence based practices will work. They do work if they're probably implemented. And I urge the Commission to consider some form of evidence based practices in the guidelines. And I would look forward to any questions that you may have.

CHAIR SESSIONS: All right. Thank you, Judge Starrett.

Judge Zainey.

JUDGE ZAINEY: Thank you, Judge Sessions. And like my colleagues, I'd like to thank you for the important role that you play in the system, as well. There's advantages and disadvantages of having the last name of Zainey. Usually, with the last name of Zainey, I go last. The advantage, of course, of that is I get to listen to my esteemed colleagues and hear all of their wonderful ideas, and of course, I would love to take credit for those ideas, but of course, they take a lot of the things I'm about ready to say and they say them a lot more eloquently than me. I am going to repeat some of the issues that my two colleagues have stated, and I plan to go into some others as well, but thank you for this
I'd like to share with you, in our post-Booker lives, some statistics. Being involved now in the federal judiciary for close to eight years, we get so much statistics to orient us. For the year 2008, for example, I wanted to see, I was very curious, in preparing for today, the percentage of sentencings that are within the guideline range on a national basis, and also the percentage of sentencings within the guideline range, as well as above and below, in the Eastern District of Louisiana where I preside.

Nationally, now this is for the year 2008, sentences imposed within the guideline range nationally are 59.4 percent; in the Eastern District, 76.6 percent. So we tend in New Orleans, or in the Eastern District of Louisiana, to rely, a lot more to sentence people a lot more within the range. Nationally, sentences imposed above the guideline range, and this would, of course, include not only departures, but variances, as well, and for variances, as well, nationally, the sentences imposed above the guideline range is approximately one and a half percent. In the Eastern District of Louisiana, we are at 3.9 percent. So again, we're above the national range there. I guess we are a very conservative court. In looking at the
sentences imposed below the guideline range, nationally, it was 13.4 percent. In the Eastern District it was 6.9 percent. So again, in the, for above the guideline range, the Eastern District of Louisiana is higher than the national norm, 3.9 percent versus 1.5 and below the guideline range, we're lower than the national norm of 13.4 nationally, whereas we're at 6.9. I just found those very interesting, that even though we are in the post-Booker era, nationally, there's still more than 50 percent of the time the guidelines certainly are, must be taken into consideration in imposing what is considered to be a reasonable sentence, but I was just intrigued by some of these figures.

I would like for you to consider, in the realm of the statutory minimums, making a recommendation to Congress to eliminate them. We all agree that there is a need for sentences to be as uniform as possible. Again, that's why we have the guidelines, that's why the guidelines play such an important role, and that's why, again, guidelines should certainly always remain to be the baseline for our consideration. But I believe that, you know, it is our role as district court judges, as sentencing judges, in which, as Judge Cauthron had stated, that we are in the best position. We're in a better position than Congress on a national basis.
We're in a better position than appellate courts. We're in the best position possible to, on a local basis, you know, to look the defendant in the eye, to inquire of a probation officer, to really delve into the person's background, but as well as delve into the crime itself as it relates to the victim.

Quite candidly, sometimes I don't think that enough attention is paid to the victim, and to the impact to the victim. Of course, certainly there is, on presentence reports, the victim impact. But what I find so amazing is that when you look at the criminal history of the defendant and you look at just the family history of the defendant, it can go on for two or three pages, and I dare say that I've rarely seen more than one paragraph discussed of the victim. And again, I feel that we, as the sentencing judges, are in the best position to do that.

When we're dealing with statutory minimum sentences, you know, obviously, we are bound under the law to follow those. However, the only time we, as sentencing judges, can go below the statutory minimum is when? When the government allows us to do so. And we're very fortunate in the Eastern District of Louisiana, we have a fantastic office in the U.S. Attorney's Office. The U.S. Attorney for the Eastern
District — and I'm a former criminal defense lawyer. I was a criminal defense lawyer for 25 years before I was appointed by President Bush. But we have a wonderful United States attorney, and we have very wonderful and dedicated assistant U.S. attorneys. But it seems to me — and Judge Sessions, at the beginning you said everyone wants to have it their way, be it the Judicial branch, the Legislative branch or the Executive branch. It seems to me, though, that it is the role of the court, of the Judicial branch, to take suggestions of everybody into consideration, be it the guideline range, on the one hand, any suggestions, comments made by the government, but it should not be the ultimate responsibility or power of the government to let, to allow us or to enable us to go below the statutory minimum. It just doesn't seem right. As we know, the only way that we can go below the statutory minimum is either if the government files a 5K motion or also, of course, we must take into consideration any recommendation made by the government by way of a safety valve. But if we are truly an independent branch of government, and if Congress, if the President has thought enough of the district court judges to nominate us, with the advice and consent of the Senate, I think we should be given more authority to go ahead and not
have to live with statutory minimums.

The risk of unfairness associated with mandatory minimums has been recognized by Justice Breyer, in particular. I'd just like to make a couple of quotes of what he has said in various cases. Justice Breyer feels that these type of statutes in which there's minimum mandatory, mandatory minimum sentences, that they generally deny the sentencing judge the discretion to depart downward, regardless of any special circumstances that might call for leniency. He also stated, these sentences rarely reflect an effort to achieve sentencing proportionality, which is crucial to fairness in sentencing. He's also stated that mandatory minimum sentences transferred sentencing power to prosecutors, while also encouraging subterfuge, thereby making them a comparatively ineffective means of guaranteeing tough sentences.

And as I said, given that Congress has, authorizes us to impose a sentence now below the statutory minimum, of course because of Booker, Congress should have enough confidence in us to forego a statutory minimum, not require us, not require the law to have a statutory minimum, and allow us to have the discretion in imposing a sentence that is reasonable.

I'd like to give you a couple of
examples, and these examples have already been alluded
to by my colleagues as it relates to drug issues and as it relates to child pornography issues. As it relates to drug issues, of course, we're all very familiar with the ongoing debates between the crack versus powder. And even U.S. Supreme Court has acknowledged in the *Kimbrough* case that it is reasonable, in reviewing or considering the 3553 factors, to take that into consideration. And this is pending before Congress now, and who knows what's going to happen. We all have a sense for what's going to happen, but what do we do in the meantime? So the problem for the sentencing judge is not necessarily a downward variance, possibly even an upward variance on that issue, but if it is appropriate to downward, have a downward, impose a downward variance, yet our hands are tied because in many of these cases there's a statutory minimum, and it just doesn't seem fair. If we are allowed, now, to go below the guidelines in a particular case, take into consideration the history of the defendant, take into consideration, if it's child pornography, it's impact to the victim. If we're allowed to do that, if we're given the authority and responsibility to do that, our authority and responsibility is stymied, quite candidly, by the fact that there are going to be certain cases
that would, justice could dictate to go below the statutory minimum. We can't do that now, of course. So again I implore you to follow the suggestion and to make a recommendation with that.

Let's talk about child pornography. There, of course, is absolutely no excuse for child pornography, and of course, should be absolutely no tolerance for child pornographers. However, there's a difference, in my humble opinion, between the user, slash, viewer, and the person who actually exploits children. Now, of course, the argument, and it is a very good argument, that if you dry up the viewer, if you dry up the user, there's not going to be any exploitation, or reduced exploitation, and I tend to agree with that. However, that same argument is used in narcotics. If you, if there's no market for the user of drugs, then there's not going to be the market for the distributor of drugs. Yet there's no, that I'm aware of, there's no statutory minimum for possession of narcotics. So if there's no statutory minimum for that, for the user, then why should there be a statutory minimum for the user of pornography. Again, I'm not defending that whatsoever.

And actually what I'll do is, if we're not faced with the statutory minimum on child
pornography cases, after I read one, if I'm inclined to
go below, to impose a sentence below the guideline
range, to be quite candid with you, I call in the
prosecutor and I ask the prosecutor. I'm reading this
report. It seems to me, by reading the presentence
report, that this person is not merely, okay, because
that's not, but, you know, if it's solely a user, solely
a viewer, is this person solely a viewer or do you have
any information that has not been made a part of the
presentence report which might indicate that he's ever
tried to exploit children, that he's ever tried to
distribute this harmful material, or is it in your file,
in, you know, everything that you know about the
investigation of this case, is this person solely a
user. And they'll tell me. And they'll tell me.
Because, in my humble opinion, there is a great
difference between a person — if I have a 70-year-old
defendant, for example, who's never been in trouble
before, a lonely old man, not justifying what he does at
all, but if I have to impose upon him a mandatory
minimum of five years or ten years, that could in and of
itself be a life sentence. Now, some people might think
that people who have used child pornography or viewed
child pornography should have life sentences, but I
truly believe that there has to be, if we're to do our
jobs the proper way, our hands cannot be bound, and we have to look at each defendant on a case by case basis. That's what our obligation is.

I'd like to talk a little bit about, also, the alternatives to incarceration. Judge Starrett has talked quite extensively about the reentry program, which I believe is an incredible program. As I stated, I look upon my job again now, I mean post-Booker world especially, as imposing a sentence in which the punishment must fit the crime. Now, of course this takes on many forms. Of course, incarceration and recommendations being made to the Bureau of Prisons. In other words, if I have to sentence somebody, a 23-year-old young man who has to go because of perhaps a statutory minimum or just because even under the guidelines his case warrants incarceration of five or ten years, what I tell every offender who appears before me is, you know, for the next five or ten years you can do one of two things: You can hate me, you can think your lawyer did a bad job, you can be angry with the government, or you can do something to rehabilitate yourself. And I say that the federal system, unlike the state systems, unfortunately, does provide the resources in which offenders, if they take advantage of the resources, can, can actually receive vocational
training, can receive, of course, drug rehabilitation and
welfare treatment, mental health treatment and everything
else, so I think that's very good. As I understand, the
only way a person can be released from imprisonment
besides good time, before his time, is, before he serves
his full time and before he would be released on good
time, the only one instance would be under the 500-hour
intensive drug rehabilitation program. There might be
others. If there are others, I don't know about it, I'm
embarrassed to say. I think that should be expanded,
and I think what we should do, and this goes into the
part of rehabilitation, if a person is in jail, he needs
to have some incentive that when he gets out of jail he
will be a better citizen. And whether his motives, when
he gets into a program, are honorable or not honorable,
if he gets enrolled in the programs and if he can
Successfully complete these programs, he might very well
become a better, a better member of society when he gets
out. So I'd like for the Sentencing Commission to
consider making a recommendation that would allow
offenders who are incarcerated to be able to not only be
enrolled in these programs, because they already are,
but to give them some incentives that while in these
programs, if they successfully complete the programs,
such as in the 500-hour intensive drug treatment
program, that they be allowed to earn some credit so they can possibly get out earlier.

We do not yet have a formal reentry program in the Eastern District of Louisiana. Where I first met Judge Castillo was in a conference, I believe in California, in which I learned for the first time about the reentry program. What we are doing now, Judge, former Chief Judge Ginger [Berrigan] and I are, although not to the level that we'd like to be at this point, we will meet with offenders once they get out of jail, and when they have their first meeting with the probation office, we'll generally meet with them, and no longer come to them as big brother constantly looking over their shoulder, but letting them know that we'd rather speak with them now. They've paid their dues. We'd rather now speak with them, and let them know that before they have to come see us on a formal basis by way of a rule to revoke their supervised release, that we address any issues that they feel need to be addressed up front, and that seems to have been, worked out quite well.

I'd like to now turn to the topic of relevant conduct. One of the most frustrating things for me, when I was practicing criminal defense work, is, and then more frustrating for me, but more frustrating
for the defendant, quite candidly, if a defendant is in
state court, by in large he or she knows what their
sentence is going to be before they plead guilty. Of
course, in the federal system it is not that way at all,
and there's many good reasons for that. And the only
way that one would have an idea of what their sentence
is going to be is if they enter into 11(c)(1)(C) guilty
plea. Of course that is still nonbinding on the court,
but they can get out of the plea, can withdraw from the
plea, as can the government, in the event the court does
not go along with it. A problem, I believe, you might
hear this this afternoon by criminal defense lawyers,
but this isn't a liberal approach or even a conservative
approach, because for a plea to work, there has to be
negotiations between the government and the defense
attorney, and the defendant, of course.

The problem with relevant conduct is if a
minor player in a conspiracy is involved, and he or she
might think that they are going to be at one level, but
then, you know, a week or two before sentencing they
receive the presentence report, and the probation
officer feels justified in the relevant conduct aspect
on it, which would completely change, you know, it could
increase three or four or five-fold what the guidelines
would be, and the problem with that is, and it's a
problem, as I said, for both the government and the
defense, there is a way to get around that, but the way
to get around that could lead to fact bargain by the
parties. In other words, you can have the government,
you can have the defense attorney agree on a factual
basis that the government is able to prove only X, okay,
and quite candidly, if I had that in front of me when
I'm sentencing, if I see in the factual basis that the
parties agree that the government can only prove X, if a
probation officer, in the presentence report, comes up
with Y, which is, you know, what they consider to be
relevant conduct, generally that's a lot greater than
the X, to be quite candid with you, I go with the X.
Now, is that considered fact bargaining? It very well
could be. But the problem is that, or then the down
side of that, though, of course, is would the
government, you know, would defense lawyers perhaps
engage in something that might very well be inaccurate
information to the court so that they can get a plea,
and that's not right either. So fact bargaining is
really not the way to go. I think the way to go for
that would be possibly to, you know, to avoid surprise
to the defendant at the time of sentencing, and to avoid
the fact bargaining, which I don't really think is
appropriate, I would think that the best way to approach
that would be to include this type of bargain as part of
the 11(c)(1)(C) plea agreement.

I'd like just to talk, finally, and I
know there just isn't any answers to this, Judge
Starrett, a state court judge, talked a little bit about
this, the sentencing guidelines, and you all have done
an incredible job in minimizing disparity among
sentencings by federal courts across the nation. That's
a very good thing. What's very frustrating to me, and
I'm not saying that we have any answers, but what's
frustrating to me is the disparity between the state and
the federal court. Let me just give you three examples.

Convicted felon with a firearm, under the
federal system, as we know, the statutory maximum is ten
years. In Louisiana, the — if you're talking about
the statutory maximum ten years, sometimes the
sentencing guidelines are as little as 18 to 24 months
in federal prison. In Louisiana, you're looking at a
minimum of ten years, without benefit of parole,
probation or suspension of sentence, and a maximum of 15
years. For the same crime that a person would get a
minimum of ten years with no parole, in the federal
system that person could get as little as 18 months,
maybe even less with the downward variance. I don't
think that that's fair. I don't know what to do about
it, but I just would like to express that with you.

Two other examples, armed bank robbery.

Under the federal system, it's a maximum of 25 years,
again with the flexibility, of course, with the
guidelines to even go below the guideline range.

Louisiana, it's from ten to 99 years, without the
benefit of parole, probation or suspension of sentence.

But a case closer to home. When I was a
criminal defense lawyer, I represented somebody for
distribution of heroin. I was appointed by the federal
court to do so. The law then in Louisiana was even for
a small amount of heroin which had been distributed,
mandatory life imprisonment. My client, in the federal
system, received 18 months. So if my client was in the
state system, he would have received 99 years, but in
the federal system he was only receiving 18 months.

I don't know what we can do about it. We
certainly can't be the federal government looking over
the state. But when we talk about disparity, I think
the picture has to be a broader picture. And again I
wish I had more answers than, you know, problems I'm
presenting to you, but I would, I do appreciate the
opportunity to be able to discuss those with you.

CHAIR SESSIONS: Thank you, Judge Zainey.

So let's open up for questions. Mr. Wroblewski.
COMMISSIONER WROBLEWSKI: Thank you, Judge Sessions. And thank you all for being here. I appreciate everything that you said. I've written down lots and lots of questions. I'm going to try to limit myself to one for each of you.

First of all, Judge Zainey, on relevant conduct that you talk about in your testimony, and you just spoke about the concern about surprise to the defendant, but at the same time you also testified, and you've talked about the need for more information about the victim, for more information about the defendant. We've heard over and over again during these hearings how much richer the sentencing conversation is now that we're hearing much more about the crime, the defendant, the victim, and of course, there being much more discretion to the judges. Isn't a surprise the natural byproduct of all of that, of more information being presented?

For Judge Cauthron, you said you had something to tell us about fraud offenses versus drug offenses. I'd love to hear it.

And finally, for Judge Starrett, I want to take advantage of your experience and interest in psychology. What you described in your testimony was really a reengineering of the federal sentencing and
correction system, going from a system that focused on
punishment, for the last 20 years or so, to a system
that focuses somewhat on punishment, but also somewhat
on reducing reoffending or reducing recidivism.

To make that kind of systemic change in a
country as large as ours would mean changing the role of
the courts, district courts, the appellate courts, the
sentencing commission. It would require cooperation
from judges, Congress, prosecutors, et cetera. And I
think right now there is a great opportunity to do the
kind of reengineering that you're talking about, to
change the focus, but it means that there's compromise.
So there are people in Congress and there are people in
the justice department who think something of mandatory
sentencing, despite the fact that there are many
district judges who don't think much of mandatory
sentencing. And there are varying points of view all
across the government and across the public about these
issues. How do we bring these groups together to find
some sort of compromise so that the vision that you have
may not be the vision that's ultimately enacted, but
that it's moving in that direction, and there is some
sort of compromise from all the people? How do we, how
do we bring that about, as opposed to having a panel of
judges who said, you know, there should be a mandatory
minimum, we should lower this, we should lower this, we
should have a panel of defense attorneys who will say
their point of view, we'll have a panel of prosecutors
who will say their point of view? So those of my
questions.

JUDGE STARRETT: Who do you want to
answer first?

COMMISSIONER WROBLEWSKI: In whatever order.

JUDGE ZAINEY: The first shall be last.

The last shall be first. Two things, number one —

CHAIR SESSIONS: You've had to deal with
this all of your life. You've always gone last.

JUDGE ZAINEY: It's been very beneficial
to have had to go last, quite honestly. I'd like to —
two things. One thing that I forgot to mention, I would
like to see 3553 factors, there be a specific subsection
on victim impact, because I think that's very important.
And I think, again, a lot more time could very well be
spent on that.

But I think the element of surprise can
be handled very simply. And again, this wouldn't
necessarily be anything, you know, that you all can do,
but on a local basis, there be a, and I used to do this,
again as a defense lawyer, I would ask to set up a
meeting with the probation officer and with the U.S.,
assistant United States attorney handling my case before a plea, again, and — but I just don't see that happening a lot, okay, but before a plea, so that we could sort of talk about it so that I would have a better understanding so that I could explain to my client exactly what that relevant conduct may or may not be.

The only other thing I would recommend that would assist, as I appreciate the law, notice must be given if there is going to be a downward departure. However, there is no requirement that I'm aware of that notice must be given before there is being considered by the court either an upward or downward variance. I don't believe that is required. I do that as a matter of course. Perhaps, also, to avoid the element of surprise as much as possible, if, if the requirement notice be expanded so that it also include variances, as opposed to solely departures.

COMMISSIONER WROBLEWSKI: But the Judiciary has been resisting that for the past, you know, three years. I don't know how happy —

JUDGE ZAINEY: I'm on record now, obviously, of being in favor of it, so. It's just fair, in my opinion.

JUDGE CAUTHRON: I assume I'm next, if...
we're going in the order of your questions.

My problem with the financial crime offense levels started out being that I thought they were too low, as I said earlier, and then I decided they're not too low, drug offenses are too high, and I'm now at a place where I can finally look at these and say how can you compare the two. You can't compare financial fraud and drug offenses.

Well, here's why it bothers me so much to sentence the one so high and the other so low. And these are in no particular order of importance, but in drug offenses, the sentence can be manipulated as early as the investigative agents, and certainly by the prosecutor, depending on the charging decision. You really can't do that in financial fraud claims. When it's discovered, whoever it is is usually shipped out or fired or arrested or whatever. And in drug offenses, those agents can keep making hand to hand buys until they've got their one kilo. Now, maybe I'm cynical, but you can't tell me that that doesn't happen sometimes.

So I think that the drug amounts can be manipulated, and sometimes are. You can't do that in fraud crimes.

The second reason is that in financial fraud crimes, you almost always have a victim, usually in the courtroom wanting to testify. Now, we call drug
offenses victimless offenses in the presentence report. We all know they are not. There are multiple many horrible victims, but there are no faces to those victims, and financial crimes we have faces to look at when we're sentencing.

And finally, and perhaps the most important to me is it ends up being a racial distinction. My drug offenders are mostly Black and Latino, and my financial fraud offenders are mostly mid-30s White women who work at banks, and end up getting no time under the guidelines, and I just don't think it's right.

JUDGE STARRETT: All right. My turn. I have been taught by my, the women in my immediate family who are psychologists that insanity is doing the same thing over and over and over, expecting to get a different result, and it doesn't happen. You, if you do the same thing over and over and over to get a, and get a bad result every time, you need to change.

What we're doing in the criminal justice system is not working. Seventy-five percent, or it's even higher in some crimes, some type crimes, drug crimes especially, a 75 percent recidivism or 50 percent recidivism rate is horrible, and if — you said bring all the players to the table. You've got Congress,
you've got the prosecutors, you've got defense attorneys, you've got the communities. Everybody should be at the table with one goal, safer communities. That should be everybody's goal. If you're doing something and it's not working, we're incarcerating, I don't know what the numbers are, up to, upwards of 2,000,000 people a year, in jails or prisons now in the country. It's a staggering number of people. It's a staggering cost. And you're sending the same people back on the street to reoffend, and you've got a new generation of criminals coming up, unfortunately, out of the social programs or whatever else that has contributed to our crime problem. If your goal is safer communities, everybody is at the table, hopefully you've got the same goal, you see the same things that you've been doing not working, you've got to come up with something different.

COMMISSIONER WROBLEWSKI: This is sad. When you get all those people to the table, they're not all going to say that what we're doing is not working. There are some people who are going to say that we have the lowest crime rate now in generations, and something that we have been doing has been working. Can we agree on that, or not?

JUDGE STARRETT: I disagree. They need to come sit in my courtroom or courtrooms, many
courtrooms around the country. They look at the
statistics. I think some of the — your statistics may
be right, but my suspicion is that there are many crimes
that are unreported, that in some cities, even in
Mississippi, where it doesn't do any good to report it
because nothing is going to be done. There's still —
if there's any crime it's too much, but there's still a
tremendous amount out there, and if they disagree with
that, I would say they're absolutely wrong. There's too
much crime out there. I don't think that what we're
doing is working. I would beg to differ with those,
whoever would say that.

The goal is to have success. As a judge,
I want to be successful in what I do. Everybody wants
to be successful. You-all want to do a good job in what
you do. But if you can literally vision and see and
watch the successes come through these programs, like I
have, dramatic successes, you want it to be expanded.
You want to see it work on a national scale. You hope
that everybody is at the table with the same goal. You
hope they want safer communities. You look at ways to
bring that about. What works? You go to the evidence.

There are scads of studies and reports
and statistics that are out there that show that the
reentry programs and that type of program reduces
recidivism, not just recidivism of the, the low hanging
fruit, the ones who are probably not going to recidivate
anyway, but this is one thing that I learned is that if
you have a drug addict and you want to bring him into a
drug court program, the worse that person's addiction
is, the better his or her chance of success is in a drug
court. That's amazing. That's amazing. You have these
horrible walking dead gutter crack addicts or
methamphetamine addicts, those people will have a better
chance of success than the housewife that's forging
hydrocodone prescriptions.

So the players are at the table. We
hopefully will have the same goal, safer communities.
You look for what works. Punishment is part of it. I
don't – I've seen people in the penitentiary almost
weekly, and have sent a lot of people to the
penitentiary, and some people need to go and go forever.
I don't have a problem with that. But 95 percent of the
people we send away are coming back to your community
and to my community, and I want them to be as good as
they can be when they come back, and stay good. These
programs not just ensure that they're doing okay when
they come back, but they ensure long-term success,
because when has accountability and responsibility ever
been bad? That's not liberal. That's not conservative.
That's just common sense.

These programs, the name of my program, AAA-1, "Attitude, Accountability and Action One Day at a Time." You know, change your attitude. We hold them accountable, and we require that they take the right actions. I don't think that's — I think that's what we all, all of our goals should be. I'm sorry. I didn't mean to get so longwinded.

CHAIR SESSIONS: Judge Hinojosa.

COMMISSIONER HINOJOSA: I have one question for Judge Cauthron, and then one for all three of the judges.

All right. Judge Cauthron, you mentioned that you had seen an energy with regards to the arguments of the defense bar post-Booker. My question is do you see that same energy with regards to prosecutors? Obviously, we have an adversarial system in the courtroom, and my question is are you seeing the same kind of energy to try to convince you to go higher than the guidelines or to explain to you why a particular sentence is appropriate?

JUDGE CAUTHRON: No, sir.

COMMISSIONER HINOJOSA: What do you attribute that to?

JUDGE CAUTHRON: I don't think they've
caught up yet, quite frankly. I don't think they — I
should point out, I sound, I guess, like a wild-eyed
liberal varying in every sentence in my remarks. I
assume that this Commission knows that the Western
District of Oklahoma, indeed all districts of Oklahoma,
almost never vary and almost never departed before. I'm
just talking about those two sentences where we can do
now what we couldn't do before, and I think because of
that, prosecutors — our district, actually, has a long
history of the prosecutors saying nothing. They don't
recommend a sentence. They never have. Until recently,
they wouldn't even attempt to do a plea bargain, an
11(c)(1)(C) plea bargain because they knew it would be
reCome rejected. So they really have not been brought up in
our district to be advocates for a sentence. They are
certainly very good advocates after that point, but I
would think that out of fear of the judges, they don't
go very far in sentencing advocacy.

COMMISSIONER HINOJOSA: The next question
is to all three. One of the things we have heard from
some, as we've gone across the country, is that the
district court judge, for the most part, is in the best
place to make a determination as to what the appropriate
sentence should be, and some say more so than an appellate
judge, more so than Congress or the Executive branch, and
some of us live in states where the juries make the
decisions as to what the sentence should be. And my
question to you is: If you compare this trial court
judge, you know, one of the things I've heard from you all
is that the trial court judge is the best equipped to
determine what the appropriate sentence is, what do you
think about the trial court judge, as opposed to a jury,
making the determination as to what the appropriate
sentence should be? Is your view the same as opposed to
an appellate court judge or Congress, who has written
the laws, or the Executive [branch] who's familiar with
the prosecution?

JUDGE CAUTHRON: Well, like my colleague
in Oklahoma, the difference between state and federal
sentencing is huge, and I think the reason is that the
jury does the sentencing in state court. When you let
juries sentence, you give up all hope of consistency,
and I think the guidelines are great for their
consistency and their attempt to reach it, and I think
jury sentencing is just, is just abandoning all of that.

COMMISSIONER HINOJOSA: What about those
who say that once you give up any opportunity that you
have, as trial court judges, that you give up all sorts of
opportunity for consistency?

JUDGE CAUTHRON: Well, you do give up
some. It's not as strictly consistent as it was
pre-Booker. But I'll tell you, as a state court judge
before I was appointed to the federal bench, I also
sentenced many people. I had the opportunity, as a
federal judge, to sentence in pre-guidelines cases. So
I had some experience in the use and abuse of discretion
before the guidelines took over. And frankly, I thought
the worst part about the guidelines was that they took
away my conscience searching in sentencing decisions. I
didn't have to worry about it anymore. I didn't have to
sit in my office and look at all the facts and think
what is the proper sentence. I waltzed into the
courtroom and said you get 180 months, and I'll see you
later. I mean obviously I'm exaggerating, but after 15
years of not having to sweat out those sentencing
decisions, I felt like I'd had my sole returned when
I — after Booker. So I don't think that I'm varying
wildly, but I feel like when I need to I can, and so I
don't know what you all are finding about consistency
nationwide among the judges, but it seems to me we're
pretty much doing what we were doing before.

JUDGE STARRETT: Well, I've had very
little experience with jury sentencing in Mississippi as
a state judge. There were only very limited crimes that
the jury could pass a sentence. In most of the cases in
my career, the sentence has been done by the judge. We're given the title of judge, and we're supposed to come and we're supposed to be dispassionate about what we do. We look at the facts, look at the circumstances and pass what, under 3553, is determined to be a fair sentence, certainly as, in district court, taking the guidelines for what they are.

The judge is the best person. The judge can be much more objective than most juries, and certainly judges aren't always right all the time either, but can be more objective than juries. Most federal felonies are plea bargains, so that the judge is going to be the one passing the sentence.

The guidelines, I sentence, most of the sentences that I pass are within guidelines, at least 70, 60 or 70 percent, even today with after Booker. But I'm able to have some discretion. I am able, in the right circumstances, to do a variance, a significant variance, to take advantage of what I see as the real facts in that particular case, and to do not the guideline sentence, but the right thing, based on what my conscious tells me is the right thing.

JUDGE ZAINEY: I agree that that is the role of the judge. Again, if one of the things that we're mainly interested in is to minimize disparity,
we're the only ones who are going to be consistent, because you have different juries in different cases who aren't going to necessarily be consistent. Jurors are the triers of fact, obviously, and we're the triers — you know, we're the ones that must impose a sentence that is reasonable under the law. So, you know, and we're supposed to do that without any emotion, we're supposed to do that, you know, in a fair and impartial way. Once the jury has decided, based on the facts, the innocence or guilt, if they find the person guilty, it is definitely our responsibility to sentence the defendant.

CHAIR SESSIONS: Commissioner Howell.

COMMISSIONER HOWELL: Yes. I appreciate all of your comments, and you gave us a lot of food for thought for a number of issues that we're considering, including issues on our priority list for the big research areas and specific guideline revision areas that we're looking at.

One of the areas on our priority list is looking at the departure provisions that are set forth in the Guidelines Manual, and taking a re-examination of those to see whether they should be up to the Federal Public Defender, or just to eliminate the modification, the departure provided in Chapter Five, or something
short of elimination, revise them in some way.

So Judge Cauthron, I was very interested in your comment of [giving] the different standard of review for departures and variances, does any sentencing judge depart, rather than vary. And I just want to sort of turn that question around a little bit to all three of you, to see if — you know, there are some discrepancies in Louisiana, as you pointed out, Judge Zainey, that, where the judges, you know, are following the manual quite closely, I think also in Oklahoma, and in our minds, you know, the manual is a tool that we want to be useful for the judges, the sentencing judges who are turning to it. But do you think that this is a worthwhile exercise for us, given the question that you posed so bluntly, to revise the departure provisions in the manual, or is this going to be an exercise that though interesting for us, and judges can relook at the manual, it's not going to be, those departures are really not going to be used, because judges who want to sentence either outside the guidelines, either upwards or downwards, are going to use variances anyway? So I just pose that question to you, as we ourselves are struggling to figure out what to do about the departures in the manual. Is this a useful exercise or not?

JUDGE CAUTHRON: Well, you know, we're
instructed to figure the guideline sentence, including
the departures, before we go to the 3553(a) chapter, so
I do that. In situations where five years ago maybe I
would have tried to figure out a way to make something
fit into a departure and say enough that it would pass
muster on appeal, I'm not doing that now. I'm just
varying. So I don't really know what to tell you. I
don't think I would use it.

COMMISSIONER HOWELL: Judge Zainey.

JUDGE ZAINEY: In talking to — quite
candidly, you're less likely to be reversed on appeal by
giving a variance as opposed to a departure. We all
know that. So therefore, the tendency is going to be to
give a variance. I think the guidelines, though, and
the reasons for departure are incredibly useful, because
I will even give, and I tend to go more with a variance
than a departure, okay, but I will always use it as a
grounds in increasing, or going above or below the
guidelines, I will also include some of those, some of
those reasons for a departure, although my legal reason
is, or my legal basis would be the variance, but I will
include those in my 3553(a) factors, as well.

COMMISSIONER HOWELL: And Judge Starrett,
I just, I'd like to just interject something before,
because I want to hear your answer —
JUDGE ZAINEY: Sure.

COMMISSIONER HOWELL: — but it is very interesting statistically that the length of departures, or particularly downward departures is what I've looked at more closely, the length of the downward departures are bigger if a judge depends on both the manual departure and the variance than if they just depend on either a departure alone or a variance alone. So it's interesting that psychologically that's what you are, that you feel most emboldened by, because that's what the statistics are showing. I just wanted to say that.

Judge Starrett.

JUDGE STARRETT: I do the same thing Judge Zainey does. It's a lot easier to do a variance than it is to do a departure.

CHAIR SESSIONS: Just to follow up on your question that when you look at the 5H factors, some are discouraged, family circumstances, et cetera, and of course, when we go to the 3553(a), some would say that those are not discouraged but should be considered, and I mean really, the task is to try to figure out whether, in fact, those criteria, those discouraged factors should be reviewed in light of the fact that many of the judges are going to 3553(a).

Now, all of you have said that you
actually consider departures. Would it be helpful, essentially, to have a criteria within the guideline manual which is relatively consistent or more consistent with the 3553(a) factors, so that essentially you're sort of blending, in some ways you're blending 3553(a) variances and departures? I mean that's, I think that's ultimately the question that we're dealing with. Do you think it would be helpful if, in fact, there were consideration of those factors?

JUDGE CAUTHRON: Are you looking at me?

I can't see your eyes.

CHAIR SESSIONS: I do have a pair of glasses here, but this is actually the 25 cent glasses.

JUDGE CAUTHRON: Yeah, I got those.

CHAIR SESSIONS: Yeah, right.

JUDGE CAUTHRON: I can't see at a distance.

CHAIR SESSIONS: No. Actually I looked at all three of you, at one particular point, but I am, at this time, looking at you, Judge Cauthron, so.

JUDGE CAUTHRON: I don't want to be first every time, so somebody else go.

JUDGE ZAINNEY: Yes, absolutely. I do that anyway. I think, again, they're both, they're both the law, you know, [Chapter] Five and the 3553(a), and I
think I try to take the best of both worlds.
You all have given us a lot of guidance.
The guidelines give us a lot of guidance on the
departures, okay, so if we're going to impose a sentence
that is reasonable under the law, not only, in my humble
opinion, should we take into consideration the
guidelines or the reasons for considering an upward or
downward departure, that I think that definitely should
be included in consideration, and I do so, at this
point, include that in my 3553(a) factors.

JUDGE STARRETT: In 75 percent of the
sentences I pass, the guidelines fit right, and they're
dead on what we need to do. But I think, just like
Judge Zainey and Judge Cauthron said, that's what we do
most of the time anyway. We combine some of the
different factors for departure and some for variance,
and come up with our reasons to hopefully pass appellate
court muster.

JUDGE CAUTHRON: And my response would be
it could be very helpful, it could not be. I'm trying
to envision it. If it ended up being a way to try to
corral the judges back into uniformity and consistency
where this is what you consider, and we expect you to
consider nothing else, then I think no, it wouldn't be
very helpful. But if it was a general statement on
which all of us could kind of compare our sentences with, for consistency and the amount of variance, for example, I don't know. I think, though, that you're getting, if you start doing that, you're getting into trying to take every variable offender characteristic into account in the guidelines, and I don't think you can do that. So my answer would be maybe yes, maybe no.

CHAIR SESSIONS: Okay.

VICE CHAIR CARR: Judge Cauthron, I think it's not surprising that the prosecutors in your district are not up to speed on 3553(a). All three of your districts, for the last fiscal year, I think were imposing guideline sentences in 70 to 80 percent of the cases. My home district of the Eastern District of Pennsylvania, last year, guideline sentences were imposed in 43.3 percent of the cases. In that district, the prosecutors are getting way up to speed. So again, this not only points out the kind of disparity there is around the country in terms of what judges are doing, but how prosecutors are going to react differently to it, and my guess is that if your numbers started to dip, the prosecutors would get up to speed.

Judge Starrett, I wanted to say something. I'm a person who's interested in whether or not evidence based practices, in your experience with
reentry programs, can be moved to the front stage of sentencing. The district courts around the country that have been using reentry courts have been setting them up on an ad hoc basis. Some of them are just drug courts. Some are them are not just drug courts. Some of them participation is voluntary. Sometimes it's not. And while there's some very encouraging results coming from them, the District of Oregon, for example, the study found that the people who were in the reentry program actually had some worse outcomes than people who were not. You all may be aware that the probation arm of the Administrative Office is rolling out a new risk assessment tool, which I believe will be used informally around the country beginning in April, and while that risk assessment tool starts getting used uniformly around the country, some of the programs and vendors that the Administrative Office will have to engage around the country will not yet have been put in place and I'm, I think they predict it's probably going to be at least three years until we know what the recidivism results are around the country for a uniformly used reentry tool that is specifically designed for federal defendants and for all federal courts. So while I'm one of those people who's interested in seeing what we can do, in terms of the experience and research that will be
most valuable to us, it may be a while before we know what that is.

JUDGE STARRETT: Charles Robinson, I don't know if you know Charles, was the AO in Washington, is working, is one that has worked on this tool, the assessment tool, and he has been helping—well, let me give you a little background. In the Fifth Circuit, we're trying to come up with, and hopefully it will be proposed to the Fifth Circuit counsel in the next month or two, a set of minimum standards for reentry programs. There are only three in the Fifth Circuit now that are up and running, that I know about. And they're, we're trying to draft a set of minimum standards that are based on what we know to be the evidence, what works and what doesn't work. And I would suspect that the reentry programs, and I don't know all of the facts, but the ones that are following the evidence based practices, I would dare say that their statistics are good. The ones that are not following the evidence based practices, you may get a different result.

Charles is, Charles Robinson, and some people with the FJC, are working with this task force in the Fifth Circuit, coming up with our minimum standards. And I forwarded to Charles a copy of a letter with the
way we were going to draft, or we were assigning tasks
as to who was going to draft what part of the minimum
standards, to the different judges who are working on
this thing, and he called me the next day, and he said,
Judge, don't worry about this tool. We've got it.
We're going to roll it out in a few months. Wonderful.
We're going to use it. That's going to be part of our,
of the backbone of the guidelines in the, in the Fifth
Circuit, hopefully, if the counsel chooses to approve
it.

But we need a baseline standard for
reentry programs. This baseline needs to follow the
research. It needs to be based on what works. There's
a lot, the AO has wonderful people who are doing great
research, but it largely goes unnoticed, unfortunately.
People have to come to the table, bring it, put it into
the backbone for a model program, and that the programs
must meet minimum standards, in my opinion, the programs
around the country. You can't tell an individual judge
how to run his or her individual program, plus there are
different populations. You have a heroin problem in one
district. You have a crack cocaine problem in another
district. A crystal meth problem, as in my area. You
have different, different populations. You have urban.
You have rural. Mine is a rural area. It's not the
same as Philadelphia, where there's one of the major
programs, or Boston, where another one is running.

You have to have the ability to vary
these programs for the particular population, but you've
got, for everyone, in my opinion, nationwide, you have
to have minimum standards that follow the evidence
completely. And in addition to that, you have to have
evaluations, and if judges aren't passing muster and are
not following the guidelines and following the evidence,
then there has to be some modification, however you
choose to do that, but if you vary the least bit from
what has been proven to work, you reduce your
effectiveness of your program. You've got to -
it's just a very thin path you have to follow. If you
follow that path, it's going to work. Evidence has
shown that if you get off the path, you're going to get
lost and you're going to hurt your results.

CHAIR SESSIONS: I'm just aware of a
number of districts that are actually trying this
reentry concept presentence. It's just beginning to
develop in a number of -

JUDGE STARRETT: Presentence?

CHAIR SESSIONS: Presentence.

JUDGE STARRETT: I don't know. Maybe

presentence, but in my opinion, certainly not pre-plea.
It would be a disaster to do a, some sort of a reentry or diversion or whatever pre-plea. That's full of all potential, all kinds of potential problems, especially for people who don't make it. You give advantages to those that do make it, but for those that don't make it, you've got the witnesses gone, you've got case files, prosecutors moved on. Pre-plea, it would be a disaster.

CHAIR SESSIONS: And it's also quite complex when you're talking about waiver of Fifth Amendment rights, as well, to participate in the program in the first place. But they're being explored in various parts of the country.

JUDGE STARRETT: Well, part of what the guidelines need to have would be a, some sort of a contract regarding the ability of a judge to ex parte talk with the prosecutor or the defender, or in a meeting to discuss the defendant. There are things like that, nuances that need to be addressed, waiving your Fifth Amendment rights, that kind of — waiving Sixth Amendment rights to counsel, because all the time the attorneys don't appear, or most of the time, in my experience, the attorneys don't show up, and the judge still takes action, or should be able to take some action. But those things, they can be addressed. They may take a, some, I think some of the states have
modified their rules of conduct, the judicial conduct rules, to allow for special purpose courts, and I think that may be something that's one of the things that you're talking about that needs to be addressed.

CHAIR SESSIONS: Any further questions?

Well, this has been most informative. I really appreciate your coming. We all really appreciate you coming, and thank you for engaging in a rigorous discussion.

So let's take a recess. We are just slightly behind schedule, so let's go for ten minutes, and then start again.

(Recess taken from 10:17 to 10:25.)

CHAIR SESSIONS: All right. Good morning. Welcome, you all, on behalf of the Commission, to our sixth national seminar. We have had some discussion about alternatives, but I, for one, am really looking forward to the discussion of alternatives to incarceration, very much a central part of our focus this year, and also reentry programs, and the community impact of those programs. So I welcome you all.

First let me introduce, is it Diana DiNitto?

PROFESSOR DI NITTO: DiNitto.

CHAIR SESSIONS: DiNitto. Okay. She's
the Cullen Trust Centennial Professor in Alcohol Studies at the University of Texas at Austin's School of Social Work. She previously served on the faculty of Florida State University School of Social Work, for the Apalachee Community Mental Health Services, Tallahassee, Florida in its detoxification, halfway house and outpatient programs for individuals with alcohol and drug problems. She currently serves in a number of other capacities, including on the Commission on Educational Policy of the Council on Social Work Education, and the Board of Directors of the Texas Research Society on Alcoholism. She's earned her bachelor's degree at Barry College in Florida, and holds a master's degree and a Ph.D. from Florida State University. Thank you.

Adam Gelb directs Pew's Public Safety Performance Project, which works with states to advance fiscally sound, data-driven policies in sentencing and corrections. Previously, Mr. Gelb served as vice President for programs at the Georgia Council on Substance Abuse, overseeing drug prevention and juvenile offender reentry initiatives, as the executive director of the Georgia Commission on Certainty in Sentencing, as a policy director for the Maryland Lieutenant Governor Kathleen Kennedy Townsend, and as professional staff for Senator Joseph Biden on the Senate Judiciary Committee.
Mr. Gelb holds a bachelor's degree in history and government from the University of Virginia, and a master's degree in public policy from Harvard's John F. Kennedy School of Government. Welcome.

MR. GELB: Thank you.

CHAIR SESSIONS: Next, Eric Miller is an associate professor of law at the St. Louis University School of Law. His recent studies have focused on the ways in which criminal law, including the distinctive policing practices associated with the war on drugs, affects urban communities. He's argued for reforms that operate and divert, to divert addicts from prison and supervise their recovery, including the development of drug courts. Professor Miller earned a Bachelor of Laws at the University of Edinburgh, an LLM from Harvard Law School, and is a candidate for a Doctor of Philosophy from Oxford University, Brasenose, is it Brasenose College?

PROFESSOR MILLER: Brasenose College, yeah.

CHAIR SESSIONS: Brasenose College. Welcome.

PROFESSOR MILLER: Thank you.

CHAIR SESSIONS: And finally, Craig Watkins has been the criminal district attorney for
Dallas County District Attorney's Office in Dallas since the year 2007. Prior to his election to that position, he was a criminal defense attorney at the firm he founded. Mr. Watkins earned a Bachelor of Arts in political science from Prairie View A&M University, and a Juris Doctorate from Texas Wesleyan University School of Law. And thank you, Mr. Watkins, for coming today.

MR. WATKINS: Thank you.

CHAIR SESSIONS: So let us begin with Ms. DiNitto.

PROFESSOR DINITTO: Thank you very much for the invitation to testify at today's hearing. I am not an expert on the sentencing guidelines, and I haven't worked in the federal correctional system, but I have worked in the field of alcohol and drug problems for 35 years, starting off in treatment, and now doing research and teaching about these problems.

Though alcohol remains the primary drug of abuse and dependence in the U.S., illicit drug use and dependence also pose serious problems for millions of Americans and substantial numbers of people, of course, have both alcohol and drug disorders. Unfortunately, at least as far as back as the Harrison Act of 1914, U.S. laws have been conflating drug addiction and drug crime, creating an underclass of
people who, because they have a drug addiction, or as
the American Psychiatric Association calls it, are
dependent on drugs, are labeled criminals, and often
become mired in the criminal justice system. Congress,
the U.S. Congress, state legislatures, the criminal
justice system, and groups like the Sentencing
Commission can do much to untangle these problems and
return drug abuse and dependence to the category of
public health problems that are best addressed by
health, substance abuse and mental health professionals.

I've grouped my remarks today under four
headings that represent action steps that I think that
we can all work to take to improve the situation. One,
of course, is to treat offenders in prison and upon
release, using, as you previously heard, evidence based
practices, and to divert as many individuals with drug
problems as possible from prison into treatment and
other needed services. End discrimination against
people with drug problems, including drug offenders,
both during and after their involvement with the
criminal justice system, and increase community based
treatment and social welfare services as a means of
reducing drug use and drug related crime.

First let me talk about treatment in
prisons and upon release. We know that, from the Bureau
of Justice Statistics and other sources, that drug use and drug problems are pervasive among those involved in the criminal justice system. For example, in 2004, 46 percent of those in federal prison for drug possession, and 59 percent for drug trafficking, had used drugs in the month before their offense, and large numbers were also using at the time of the crime. Most drug offenders in federal prisons, as you know, are there for trafficking, and the figures I just cited indicate that people that are involved in trafficking are even more likely than those who are incarcerated for possession to have, to be drug users, recent drug users. In addition, 18 percent of all federal inmates, and one-quarter of those imprisoned for drug offenses, said they committed the crime to get money for drugs. And more important for my remarks today, of all federal prisoners, regardless of their offense, 64 percent were regular drug users, and that was up from 57 percent in 1997, and 45 percent met the criteria for drug abuse or dependence, with the majority of 29 percent meeting the criteria for the more serious diagnosis of dependence. These figures are astonishing, given that according to the Substance Abuse and Mental Health Services Administration, less than three percent of Americans age 12 and older met the criteria for drug abuse or
dependence in 2008.

Clearly the federal system is dealing with many people who have drug problems, and either convicted of drug crimes or other crimes. Excuse me.

Two primary reasons, of course, that we're concerned about this issue are that federal inmates who meet the criteria for abuse or dependence are more likely to have a prior criminal history, 75 percent, than other federal inmates, 57 percent, and offenders who do not receive appropriate treatment are more likely to reoffend.

Virtually all federal prisons report having some kind of substance abuse services, but this does not mean that all incarcerated individuals in need get substance abuse services, or that they get the type and intensity of services they need. The number of federal inmates who had used drugs in the month prior to their offense, and participated in some type of drug abuse program while in prison, has increased slowly from 39 percent in 1997, to 45 percent in 2004. And most of these people got self-help group participation, peer counseling, drug abuse education, and some got treatment by a qualified professional. However, the number that were treated by a qualified professional remained at 15 percent over this time period. Of those who met the criteria for abuse or dependence, 49 percent
participated in some type of service, but again, only 17 percent received treatment from a qualified professional. Thus, in 2004, less than half the federal prisoners who may have needed treatment received any help, and less than one-fifth received professional help. Of course, I hope these numbers have increased substantially since the 2004 data, but that was the last major report, it seems, on some of these issues.

Again, no single treatment modality will be effective for all people with drug abuse disorders. Combinations of evidence based psychosocial treatments outlined by organizations such as the National Institute on Drug Abuse may be necessary. The incorporation of various medications can also be very important or helpful in treatment. Methadone, buprenorphine, for opioid addiction, or medications that have different types of actions like naltrexone and acamprosate, that may reduce alcohol cravings or prevent people from continuing alcohol or drug use after they initiate use, should also be considered. But most people don't get this kind of help. As evidence based treatment approaches such as motivational interviewing also tell us, and as social work practitioners also know, patient involvement in choice in the types of interventions to be used is also important.
Through education and self-help groups, we can certainly help people with alcohol and drug problems, and other low intensity services, but qualified professional treatment may also be necessary. I know the Federal Bureau of Prisons revised its residential drug abuse treatment program based on evidence of a cognitive behavioral therapy treatment model. The National Institute on Drug Abuse gives us lots of advice through publications called *Principles of Addiction Treatment*, and *Principles of Drug Abuse Treatment for Criminal Justice Populations* on how best to treat people who are involved in the criminal justice system, and also have alcohol or drug problems.

But despite substantial information on treatments that can help individuals recover, many incarcerated individuals do not get the help that they need. The National Criminal Justice Treatment Practices survey reinforces this point, saying that nationally, about half of the offenders have drug problems, but less than ten percent of adults and 20 percent of juveniles with substance abuse problems in the nation's jails, prisons and probation programs can receive treatment on a given day.

In addition to increased availability of treatment for incarcerated individuals, I think we all
recognize, too, the critical role of substance abuse treatment services for those inmates that make the transition from prison to the community upon release. Across local, state and federal correctional systems, much more must be done to reach incarcerated individuals, and to continue to assist them upon release. And just give a quote from Nora Volkow, Dr. Nora Volkow, who heads the National Institute on Drug Abuse, on this point, "Addiction is a chronic disease. Epidemiological evidence clearly shows that while science-based treatments are effective, many patients receive long-lasting recovery only after years of therapy, often including multiple treatment episodes. Continuity of care is key. Without it, patients are less likely to accumulate the sequential gains that ultimately result in long-term stable control over their condition."

Chemical dependency professionals also refer to a very well known article by Tom McLellan, who is now with the Office of National Drug Control Policy, and his colleagues, about the chronic nature of drug problems and how they are very much like other problems, medical problems, that have genetic and environmental factors, such as type two diabetes, hypertension and asthma, where relapse is common, and nonadherence to
treatment and spells of illness occur quite frequently.

Let me just say a little bit about diverting people with drug problems from the criminal justice itself. Legitimate questions can be raised about where we should best treat alcohol and drug abuse and dependence among people who are involved in the criminal justice system. But if we believe that drug dependence has genetic, psychological and environmental origins, and is not by itself a moral failure or crime, then the current approach to imprisoning so many people who have drug problems, and imprisoning them for long lengths of time must be re-examined. The National Survey [on] Drug Use and Health indicates that nearly 47 percent of Americans have used an illicit drug at some point in their lifetime. So given this figure, I think we can say that drug use is more normal, rather than a deviant experience among the American population, and that anyone who has ever tried a drug, of course, has risked committing a crime, has committed a crime and risked arrest.

I'm not sure the - I'm sure the Sentencing Commission doesn't need a review of the statistics on the large increase in the number of people, over the last years, that have been incarcerated for drug crimes, or a review of the statistics of
national arrests, 1.8 million arrests in 2007, and 18 percent of those for sale or manufacturing, 82 percent for possession, and the large numbers of those arrests that are also for marijuana. And continuing in 2007, the most serious crime of more than half the federal inmates continued to be drug offenses.

Given the large numbers of federal prisoners incarcerated for drug crimes and also, of course, many people are incarcerated for nonviolent crimes, it seems that the federal system could do more to divert offenders to community based treatments, rather than prisons. However, according to a recent report of the Sentencing Commission, in 2007, only a very small percentage of U.S. citizens convicted of federal drug crimes were even eligible for an alternative sentence, and only two-thirds of those who were eligible for an alternative sentence received one. Thus, it would take substantial changes in policies and practices to make better use of alternatives to incarceration in the federal system.

And of course, there are many models available, drug courts, diversion programs, pretrial release programs conditional on treatment, and conditional probation with sanctions, so that offenders can participate in community based drug treatment while
under criminal justice supervision. I know the Commission has spent a great deal of time considering these alternatives, and that during the last year's conference on alternatives, that you heard about many of these different models.

The National Institute on Drug Abuse tells us that for every dollar invested in drug addiction treatment, there is a yield of between $4 and $7 in reduced drug related crime, criminal justice costs and theft. When savings relating to health care are included, these savings can increase by a ratio of 12 to one. They're a major savings to the individual and to society that also stem from fewer interpersonal conflicts, greater workplace productivity, and fewer drug related accidents, including overdoses and deaths.

Of course, community-based treatment does more than provide cost benefits. For many reasons, I agree with the Justice Policy Institute that it is better to treat people in the community whenever possible, and that community-based treatment encourages successful return, can encourage a greater incidence of successful returns to the community. In addition to reduced crime, community treatment increases the chances that offenders will pursue gainful employment, will improve or have opportunities, hopefully, to improve
parenting skills, maintain ties with their families, and also, that there will be, in general, better outcomes from things like reduced placement in foster care for children whenever possible.

And I also want to talk about some of the discrimination that occurs against people with drug problems, and I'll just do this briefly, since my time here is short today. But what happens, of course, to a lot of offenders is that their drug crimes have repercussions after they pay the price in the criminal justice system. So in the Temporary Assistance for Needy Families program, in the, what was, in the old system, called the Food Stamp Program, now called the Supplemental Nutrition Assistance Program, people can be barred forever from participating in these programs or receiving benefits from these programs if they have felony drug convictions. So while their children may still be able to get benefits from these, the state has to opt out, and many states have opted out from that, or reduced the number of years that people would be ineligible to participate. But, of course, when this happens, it becomes more difficult for families to support themselves, their children, and also, they then, often times, might not be entitled to services that are associated with these programs or they may face more
barriers to participating. We know that on the
Temporary Assistance to Needy Families program, which
is, of course, the main public assistance or welfare
program for families with children, in that program, the
rolls have been slashed tremendously due to welfare
reform, and many of the people that still remain have
significant barriers to employment and leading respected
lives, and many of those people have alcohol or drug
problems. So that is one instance where people who have
been convicted of drug crimes may find it difficult to
participate in other social welfare programs. And that
causes a lot of problems for their children, as well.

The Higher Education Act singles out
people who have committed drug crimes. That law has
been changed so that if you have a misdemeanor or felony
offense, it only counts against your federal financial
aid if you committed that crime while you were receiving
federal financial aid. And you can reduce the length of
time that you aren't eligible to get financial aid by
participating in a rehabilitation program. But
sometimes it's difficult to enter those kinds of
programs. And again, this is the only criminal offense
that someone can be barred from receiving federal
financial aid. And so that is another issue that
remains.
There have been other erosions of the social welfare system that also pertain to people with alcohol and drug problems, such as in the Supplemental Security Income program and the Social Security Disability Insurance program. These are not related to crimes, but people who have those kinds of disabilities are no longer able to get assistance through those programs. They also, those that were terminated earlier on in the programs, because that was their only disability, lost Medicaid and Medicare, and there are a lot of negative repercussions from that, such as reduced access to treatment for those individuals, reduced participation in treatment. They also were more likely to abuse substances and engage in drug, in crimes.

And finally, you may know, as well, that even people who don't use illegal drugs, but who know people that do, can be punished, by being evicted from public housing if somebody in their family or a caretaker also engages in illicit drug use. So people can be evicted from public housing just for knowing somebody that engages in these activities.

I also just want to talk briefly about increasing community based-treatment and services to reduce drug use and crime. The Justice Policy Institute also notes that states that have more access to drug
treatment send fewer people to prison, and we don't want
to confuse correlation and cause, but I think we would
agree that we could do a better job of serving people in
the community with substance abuse services. So rather
than prosecute and incarcerate first, we should think
more about treating first. However, accessing needed
treatment can be difficult. The Substance Abuse and
Mental Health Services Administration mentions that 37
percent of those who said they wanted treatment for
illicit drug problems, and made an effort to get it, did
not get it and the reasons they attribute to that were
that they had no health insurance or could not afford
treatment.

And effective treatment also not only
requires sometimes substance abuse treatment, but mental
health services. Many people who have drug or alcohol
problems also have mental health problems, and they find
it also difficult to access those services in the mental
health system as well.

So I'm looking at this picture broadly,
in terms of alcohol and drug problems, but we're
engaged, the country is, in a great debate over health
care reform right now. And everyone needs a good health
care plan that includes substance abuse and mental
health services, if we're going to more effectively deal
with alcohol and drug problems, and again, especially in being able to access high quality evidence-based treatment. Medications that can be helpful, as I mentioned, are often out of the reach of people, either because they have no health insurance or because their plan may not include them if they do have health insurance, or they're in a high-cost sharing tier. So oftentimes medications that can be helpful are not available. We have a new health parody law, health insurance parody law, going into effect in January in this country. It's the first one to include substance abuse services. However, because of various loopholes in the law, many people still, even if they have health insurance, might not be covered by substance abuse or mental health services.

I also want to just briefly mention the importance of auxiliary or adjunctive services in the treatment of people with substance use disorders. Oftentimes it's not just a substance use problem they have. They may need family services. In addition to legal problems, they may need help with education, employment, and so adjunctive services are also very important. It's often not just a matter of treating the substance abuse.

I'm also realistic about the barriers to
addressing drug problems, because of stigma,
ambivalence, insufficient funding for treatment, and
what we still need to learn about more effective means
of preventing and treating drug problems, and motivating
people to address drug problems. In addition to lack of
insurance, many people do not get treatment because of
fear of stigma and repercussions, perhaps at work.
Others admit, of course, that they are not ready to stop
using, and many more do not get treatment because they
do not perceive that they have a problem. And of
course, the criminal justice system has helped
tremendously by directing people to treatment. But, as
we also know, only one-third of the federal National
Drug Control budget has as gone to treatment and
prevention. Two-thirds has gone to law enforcement and
interdiction, which by themselves do not help people
address alcohol and drug problems. Treatment is also
needed. And we must do more to help individuals with
drug problems obtain appropriate drug education and
treatment services and the adjunctive services they
need. And we need to encourage, of course, more
scientific testing of alternatives to incarceration that
can better serve these individuals.

In closing, I would just like to say that
the Harrison Act, the Controlled Substances Act of 1970,
the Anti-Drug Abuse Act, these were watershed events in
the U.S. efforts to control drugs that have potential
for abuse or dependence. These laws, however, put in
motion forces that have had severe consequences for
individuals who abuse or are addicted to drugs, their
families and their communities. We need equally
dramatic policies and practices to undo years of
over-incarceration of Americans and under-utilization of
effective treatment and social services. And we need to
move closer to helping the country consider drug abuse
and dependence as health or public health problems, as
opposed to solely criminal justice problems. I ask the
Sentencing Commission to help the criminal justice
system move further to ensure fair and equitable
treatment of those who have drug problems by encouraging
the justice system to provide necessary education,
treatment and alternatives to incarceration, based upon
a clearer understanding of the problems of drug abuse
and dependence, and the most effective methods for
addressing them. Thank you.

CHAIR SESSIONS: All right. Thank you,
Dr. DiNitto.

Mr. Gelb.

MR. GELB: Thank you, Mr. Chairman. Members of
the Commission, I very much appreciate the opportunity
to address you. It's an honor. I very much appreciate
your interest in what's happening at the state level.
That's what we work on. The Public Safety Performance
Project is, part of that is focused on state level, so
that's where the Safety Performance Project is.

So I do also think that it is, I'll try
to talk slower, it is very appropriate for us to be in
Texas, because Texas is a state that obviously
symbolizes law and order in this country, and it also
symbolizes fiscal conservatism, and yet Texas is a state
that has taken very significant and dramatic steps, over
the last couple of years, to control the growth of its
prison population and get taxpayers a better return on
their investment, their significant investments in
corrections. So what's happened here in Texas over the
last couple of years, and what's happening in a number
of states across the country that we're working with,
does, we think, offer some suggestions for what we're
looking to happen at the federal level. So I very much
appreciate the opportunity to talk about that.

And so I'll just sort of do two main
points. I think you have some materials in the
presentation before you. I obviously won't go through
that, but I wanted to pull out two main pieces of that.
The first is just to look at the landscape that we see at the state level, and then second, to pull out some of the main state reforms that are happening that might have some application at the federal level.

So in terms of the landscape, I think there's an assumption that all of this activity at the state level right now is it driven by the economy, it wouldn't be happening if state budgets weren't tight, and that's really not the case. Texas, for instance, the reforms that have happened here, which we'll talk about in some detail in a few minutes, happened in 2007, while the economy was still humming along. Same for Kansas. A number of things happened before, before the economy went south. And so here's what those things are. First and foremost among them is that we know now, a lot better than we did 25 years ago, when we sort of - 25, 30 years ago, when we got on this prison building path, we know what works to reduce recidivism.

We know, through research, that cognitive behavioral treatments, that motivational interviewing and other techniques and treatment tactics work a lot better than people sitting around in a group and sharing their problems and talking about their problems. That treatment sort of characterized much of what happened in
the seventies and eighties.

We know much better what works. We have much better risk assessment tools that have really tightened down on criminogenic factors and the things that drive criminal behavior. It's not just well, I think, you know, self-esteem, low self-esteem is related to recidivism and criminality. We actually know now specifically what those criminal, criminogenic risk factors are. And we have technologies that did not exist even five or ten, 15 years ago, whether it's ignition interlocks or rapid result drug tests so that probation officers don't have to send off to some lab in California and wait three days for that to come back. Now we have very highly accurate real-time drug testing. We have GPS monitors and other things. Grab all these things together, you have what can be, and in some places is, including some places here in Texas, a very robust system of community corrections and alternatives on the front end, as well as the back end of the system. And what it's really done is, I think, is sort of exposed the debate that's gone on in the corrections field between law enforcement, on the one hand, and social work on the other hand. It's sort of a false debate. It's not one or the other, although people still like to have that argument sometimes. It's
both. We get the best results when we combine the care in the state, when we used evidence-based services and supervision strategies. And when we do that, when we do community corrections right, we can get a 20 to 30 percent reduction in recidivism. That's the, I think that's the first and maybe most important point about that, the landscape that's out there.

Second is public opinion. As you're well aware, there are few things on the national agenda right now, and — other than crime and drugs. This issue has fallen off the radar, in terms of what's at the top of people's minds, and that provides an opportunity for states that were already taking, again, were already taking these steps, to move in to this issue and try to, and try to work on it.

There also have been a number of public opinion surveys at the state level, not enough, and our project is going to be doing some more, that, you know, ask people these direct questions about what would they like to see happen with the proverbial nonviolent drug-addicted offender. And not to just keep picking on Texas because we're here, but a couple of years ago there was a survey, actually two different surveys here in Texas, that asked, asked folks here that question, and you have, you know, three-quarters of people in
Texas, and similar findings in Georgia, conservative states, where the public is highly supportive of doing something else with low risk nonviolent offenders, and that actually is a result of cross-party affiliation and other demographic factors.

Third, you have a general trend in government towards managing for results, both at the federal level, of course at the state level as well. But governors, legislatures, particularly agencies, agency heads, are now talking much more about what we can get out the back end, rather than just what we put in.

And finally, there has been this assumption that if we kept building prisons, we would get safer and safer. You know, there's this X that you see in so many graphs of how the incarceration rate has gone up and the crime rate has come down, however that works, sort of etched in people's minds this notion that this would just continue forever. But I think we're seeing, particularly in the last few years, that states can reduce their incarceration rates and crime rates at the same time. Texas is actually one of seven states that, where that has happened over the past ten years, looking at the '97 to '07 numbers, you have those in your materials, and six other states have done it, as well. There's starting to be some questions about
whether or not it is just true, it should just be
accepted that we will necessarily be safer if we
continue to spend more and more taxpayer money on
prisons.

And that is an attitude, I think, that is
not just sort of a researcher piece. We spent a lot of
times in the states speaking with prosecutors, police
chiefs and others, and I want to, I don't want to take
comments away from Mr. Watkins, but there is really a
striking consensus that we find around the country,
among law enforcement and prosecution, that we cannot
build our way out of this problem. They recognize it at
this point, and would like to do something about it, and
that the most, the thing that they want most is credible
front-end alternatives. They say over and over and over
again, if we had credible front-end options, we'd use
them.

And so that is, that's sort of the
landscape, I think, that we see ourselves in. And we
can layer the budget on top of that, the budget
situation. That's why we see this explosion of
activity, I think, in the state, on the state level.

Prisons now account for one in 15 of
state general fund discretionary dollars, doubling what
it was 20 years ago. Corrections has been the second
fastest budget category at the state level, the second fastest growing budget category behind Medicaid, and states, unlike the federal government, have to balance their budgets. You know, they can't, they can't print money. So the push is coming to shove in a lot of ways. So that's the landscape.

What are states, what are states doing? We see activity in three buckets. The first bucket is operating efficiencies. You see prison systems going to low-cost light bulbs, and videoconferencing for parole hearings and things to cut costs in that way, but many of which are sensible, of course, things to do that should be going on at any time, whether or not the economy is bad, but they're not sufficient at all, at this point, to get into the almost double digit cuts that governors are asking their corrections departments and all their departments to submit.

The second bucket is recidivism reduction strategies. As you're all well aware, there's been a lot going on, for the past decade or so, on the reentry front and the Second Chance Act that President Bush signed last year has given that another boost and shot in the arm.

But the, sort of the third bucket piece is the, you know, the policies that directly impact
admissions and length of stay. I'd like to spend a
couple minutes talking about some of the things that
states are doing to pull both of those levers, because
they're obviously the most important ones that the
states have in order to control the size and the cost of
their prison populations.

First, on the admissions side, a number
of states are increasing the use of nonprison sanctions
for lower risk offenders. They're doing this in a
number of ways. First is to expand eligibility for, and
as well as the availability of front-end community
corrections alternatives and drug courts. The drug
courts, for instance, eligibility used to be defined
fairly narrowly in a lot of places, and still is, but
some states, New Jersey is an example, has said you know
what, we can't, we can't just take these first-time soft
folks. We need to interrupt the cycle of recidivism for
a larger group of offenders.

The second piece, and the second piece
I'd like to highlight again is from Texas, is the
increased use of halfway houses on the front end for
shorter sentence offenses. Let me just pause there on
Texas for a second, because in the packet you see the
materials both from Texas and Vermont, and I do just
want to note here, again, that on the front-end piece,
that Texas, two years ago — am I —

COMMISSIONER HINOJOSA: We were just commenting that they're both border states. That's a matter between Judge Sessions and myself.

CHAIR SESSIONS: It's interesting that the states that you picked are well represented on this board.

MR. GELB: That's complete coincidence.

The Texas legislature was facing, in 2007, a request from the TDCJ, the corrections department here, a plan that called for almost a billion dollars more prison spending, I believe it was $904,000,000, and a bipartisan team that was Senator John Whitmire on the Senate side, a Democrat from Houston, and Republican Representative Jerry Madden from Plano, just get together, and with help from our project and particularly the Council of State Governments Justice Center, figure out a different path. And instead of spending $904,000,000 on new prisons, up to eight new prisons, they, to borrow a phrase, they just said no. We're going to spend almost a quarter billion dollars on what has to be, and you can appreciate in your documentation that you have before you, but this has to be the largest one-time investment in community corrections ever, a whole buildout of a network of
community and residential treatment, I think is the
language they used here, treatment and diversion slots.
And it's really, it's really quite impressive, as you
can imagine. It's making, causing quite a stir around
the country for folks looking to see that, you know,
Texas said, of all places, Texas, right, said we're not
going to continue on the same path, we know how to do
things better, we're going to, we're going to try.
There are a lot of folks who were
concerned, in the 2009 legislative session, that those
funds would be cut, but the support for them has been
strong, and actually every penny of that, of that
investment was retained in 2009. Texas overall, the
crime rate is trending downward with the national
average, and the prison population has leveled out here.
So you will see in your packets that when the line
looked like it was going to continue, Texas really took
some steps to intervene, quite successfully so far.
On length of stay, the second lever, a
number of states are moderating the length, the length
of time that offenders are, that inmates are behind the
walls. They're doing this in three ways. They're
incentivizing program completion with modest credits.
Kansas, for instance, again, in 2007, said we'll give
you an additional 60 days if you complete substance
abuse and other, other programs. They are expanding eligibility for programming and the types of programming that is eligible for sentence reduction credits. Nevada is an example there. And then there are a number of states that are just dialing back the percentage, percentage of sentence that's required to be served. In some places this has been dramatic. Mississippi went from 85 percent to 25 percent for certain groups of nonviolent offenders, and all the way at the other end of the spectrum, Georgia has done two things. Their Parole Commission had voluntarily adopted a 90 percent standard for risk of pointed violent crimes. They dialed that back to 85, 75, and 65 for, for certain crimes that were on that list. And then the, the Legislature actually sort of bit into the state's two strikes law. Georgia enacted a two strikes law for which is called the seven deadly sins there, and there was a mandatory ten years for the first offense and a mandatory life for the second, and they just realized it just doesn't make sense to have somebody max out on that ten-year sentence to no supervision whatsoever. There's got to be a transition period. But instead of saying, okay, now we'll make it 11 years and keep them on supervision for a year, they actually bit out the year and just this past session allowed the last year of that
term to be served on supervision in the community. Mind
you, again, these are seven deadly sins offenders, and
this is Georgia.

So there are a lot of specific policies
and things that are happening at the state level that
could have, could have some application here in the
federal system, and it's important, but you know,
perhaps most important is a philosophy which, at the
state level, at this point, definitely seems to have,
seems to have turned from one where the goal is simply
to demonstrate that we're tough on crime to a goal of
trying to get taxpayers a better return on their
investments in public safety. And what that, what that
could mean in the federal system is, or how it can
translate could be the elevation of public safety or
recidivism reduction as a, as a goal of sentencing
policy. My understanding is that it is essentially not,
at this point, and yet at the state level, that is the
predominant theme.

In fact, I'm not sure you all are aware,
but there's a conference of Texas judges happening down
the street here this morning, and I was there before
coming over here, and the judge who is the chair of the
Texas Judicial Advisory [Council] to the Texas
corrections department just gave introductory remarks
this morning. And he said that public safety was far
and away the number one reason, number one purpose
behind sentencing, Judge [Gist], and he did not say the
number one purpose is retribution, our job is to lock
people up and put them away, period. Our job is to
provide, is to provide public safety.

So the Bureau of Prisons' six billion
dollar budget may be a drop in the federal bucket, but
that doesn't mean that the federal taxpayers are not due
the same consideration that states are giving state
taxpayers, which is an analysis of the system and
identification of ways that we can get less crime at
lower cost. Thank you.

CHAIR SESSIONS: All right. Thank you,
Mr. Gelb.

Mr. Miller.

PROFESSOR MILLER: Thank you, Mr. Chair,
and thanks to the Commission for inviting me to testify
here.

My testimony addresses the use of drug
and reentry courts, what are commonly referred to as
treatment courts or problem-solving courts, although a
better term is perhaps offender supervision courts. The
various forms of offender supervision courts share the
same core purpose, to channel offenders away from prison
and into some form of support or treatment. They also
share a distinctive methodology, reconstituting the
roles of judge, prosecutor and defense counsel into
partners in a treatment team. The team's goal is to
ensure that the offender stays in court-sponsored
treatment programs throughout the supervision process,
using an expressly therapeutic approach to courtroom
practice.

Offender supervision courts are primarily
interested in behavior modification through an
intervention and regulation of the offender's
lifestyle. My central suggestion is that we refocus
these courts away from a highly interventionist form of
regulation and away from extended indefinite periods of
supervision, and instead encourage them to adopt a more
managerial posture. Accordingly, I recommend that the
Commission support offender supervision courts that
measure, that first measure their effectiveness in
channelling offenders away from incarceration and out of
the criminal justice system altogether; that consider
removal and reentry, rather than only retribution and
incarceration as effects of punishment; that the
Commission recognize responsibility is a two-way street,
one that imposes significant duties on both offender and
government alike; that the Commission emphasize courts
that adopt a managerial, not interventionist model of
court practice, one that is responsive, not directive;
and collaborative, not simply coercive.

The central issue for an
over-incarcerative criminal justice system is how to
screen offenders out of the system, what might be
thought of as a system's exit strategy for offenders.
The exit strategy can operate at the front end, to
ensure that individuals do not become part of the
criminal justice system, and at the back end, to ensure
finality and certainty in the punishment process.

Offender supervision courts are one means of
implementing these exits strategies. However, they pose
the question of whether a court-based model in which
judges play the primary organizing role is preferable to
either, one, a system without judges, or two, a system
in which judges play a subordinate managerial role, and
it's this last that I prefer.

The single great advantage of offender
supervision courts is that they respond to a failure in
the guidelines that Booker does nothing to remedy. The
guidelines presuppose incarceration as the organizing
principle of punishment, to the exclusion of
non-incarcerative sanctions. The guidelines focus the
question of punishment on the moment of sentencing, as
applied to individual offenders, and fail to consider
the direct and collateral consequences of imprisonment
and reentry for both the offender and his, or
increasingly her, family and community. In prison,
offenders become less healthy, less employable, and more
antisocial, through losing family contacts. After
prison, offenders often lose a variety of state and
federal benefits, as Professor DiNitto has pointed out,
as collateral consequences of imprisonment. In
particular, the offender's family suffers devastating
effects, including loss of income, and long-term
psychological damage to the offender's children. These
can be avoided at the front end by channeling offenders
away from incarceration.

Offender supervision courts seek to
challenge the guidelines' overreliance on incarceration
first by emphasizing treatment and behavior modification
as a cure for drug addition, mental health, and other
chronic causes of antisocial behavior; and second, by
claiming to channel offenders out of the criminal
justice system. Their overarching goal is to end the
offender's dependency on drugs, help them find housing,
control their mental health problems, and re-engage with
their community through a variety of court-sponsored
treatment programs. The variety of these problem-solving
courts speaks to the myriad problems faced by offenders that fit uncomfortably, if at all, within an incarcerative system, and are better solved by public health or other social initiatives.

However, the strength of the offender supervision court movement is also its weakness: its insistence that such courts be run by judges using a court-based model. Offender supervision courts predominantly adopt an interventionist approach, premised on intense supervision of the client, aimed at restructuring the defendant's lifestyle. The offender's failure to take responsibility for his or her treatment and get with the program often results in short stints in jail.

The court-based model's emphasis on the offender's responsibility for her success fails to account for the fact that offenders often face significant social and legal obstacles to their health, housing and employment, as Professor DiNitto has explained, that are exacerbated, rather than ameliorated, by intensive scrutiny. Rather than screening offenders out of the criminal justice system, interventionist drug and reentry courts screen offenders back into the system for longer periods of time, resulting in harsher criminal penalties being imposed.
The court model thus, the interventionist court model thus replicates the central failings of the guidelines system because it understands reintegration or reentry as a one-way street in which the offender must take responsibility for his or her socially unacceptable conduct. Offender supervision courts grant the Government a free pass on the various direct and collateral consequences of incarceration that undermine reentry and reintegration of the offender into society. Interventionist courts are a well-meaning, but flawed exit strategy.

My proposals are not to abandon the idea of offender supervision courts, nor to ignore the importance of responsibility for criminal offenders, but to restore the normal hierarchy of probation and parole by removing the judge from the center of the picture. The goal of offender supervision courts should be to use the authority of the judicial office to facilitate and oversee the process of reentry and reintegration.

So as to promote a better matching of offenders to resources, I have six proposals. First, measure the effectiveness of offender supervision courts in channeling offenders away from incarceration and out of the system altogether. There's two issues here. The first addresses a worrisome
feature of the supervisory process. It extends, rather than limits, an offender's contact with the criminal justice system, and does so in a manner that is often quite open-ended. The solution is to provide a clear and officially marked end to the direct consequences and certain collateral consequences of a conviction. The second is that rather than channeling offenders out of the system, offender supervision courts may have a substantial networking effect that channels offenders into the system. As currently constituted, the courts do not measure this net-widening effect. Doing so requires comparing offender populations charged with the same event. In addition, courts should track the ultimate sentences imposed, should the offender relapse out of the rehabilitation system and into the traditional one.

Second, consider removal and reentry, rather than only retribution and incarceration as effects of punishment. Taking a more comprehensive approach to the goals of punishment places incarceration and sentencing decisions in the context of removing the offender from their family and community. A comprehensive approach requires the state to account for the significant social repercussions of incarceration, not only on the offender, but on families that must
survive without the offender's support, and the community that must reintegrate an offender.

Third, recognize responsibility as a two-way street, imposing significant duties on both offender and government alike. There's only a limited amount that offenders can do to ensure the successful completion of the court-sponsored treatment programs. They face significant obstacles and collateral consequences returning from imprisonment, in obtaining health care, welfare assistance, housing, education and job licensing. These individually and collectively virtually guarantee recidivism. Overcoming these obstacles requires courts to adopt, as a primary goal, the task of helping the offender traverse the agencies and officials that stand in the way of reintegrating the offender into the community.

Four, adopt a managerial, not an interventionist approach. The usual means of courtroom standard treatment, tough love, is one, but not the only means, of engaging with a drug user or ex-inmate. It's not clear that the often used one-size-fits-all approach is the best for the multitude of personalities and issues coming before the courts.

Five, courts that are responsive, rather than simply directive. Instead of controlling the
offender's treatment regime, courts should consider empowering individuals taking responsibility for changing their lifestyle to get the help they need. This requires that courts be:

Six, collaborative, not simply coercive.

The goal of the court should be to end, not extend, criminal justice scrutiny of the offender. At the front end, courts should monitor the availability and efficacy of treatment, rather than operate as a source of treatment. So at the state level, drug court judges often see themselves as the primary treatment provider. My suggestion is that they take a back seat, instead of a front seat, in the provision of treatment. At the back end, courts should be available to manage the restoration of social services and legal rights. This entails that the courts are available to those that seek help negotiating administrative and legal obstacles to the reintegration. It also puts a lid on the sort of mandatory supervision imposed at, particularly, the back end of the criminal justice process. If the courts really are to solve problems, rather than simply engage in supervision, it should be available to all that need them, not forced upon every offender charged with drug crimes or exiting incarceration. Imposing lengthy scrutiny and shock therapy penal sanctions on
individuals who would otherwise escape criminal justice supervision is, itself, a recipe for recidivism. Thank you.

CHAIR SESSIONS: Thank you, Mr. Miller.

Mr. Watkins.

MR. WATKINS: Yes. Thank you for having me today. I don't know if there's much left to be said, but I agree with everything they've said. But I'll try to give you an idea of what we do on the local level to try to deal with the effects of incarceration.

I think what we haven't addressed yet deals specifically with the front end of criminal activity, and when I say front end, I mean all of the things that we've talked about are somewhat reactionary. We're reacting to a person that offends. And as a district attorney, the philosophical approach that we're trying to implement, at least in Dallas County, hopefully throughout the State of Texas, is to, is to be proactive, and to try to instill how not to commit certain crimes. And if we look, you know, at the statistics, and look at who is committing these crimes, I think we can really get a grasp of what we probably need to do to prevent it from happening in the first place.

And so if you just take the general
prison population of the State of Texas, you will find
that there are large numbers of individuals that have,
that are uneducated and unskilled, and as stated here,
they have issues with, with drug abuse.

So all of those things, you know, I
believe, are things that should be coupled with the
criminal justice system. We should work hand in hand
with the different socioeconomic agencies and the
educational agencies to ensure that a certain community
may have the resources necessary so we won't see these
individuals enter our system.

But when it does happen, there's, I
think, certain things that we can do to safely have
these individuals come back to our communities equipped
to live and survive, and not be a threat to society
anymore. And unfortunately, we still have a ways to go
as it relates to that.

For example, you know, what we're dealing
with on the local level, and I'm sure throughout the
states in this country, deals specifically with the
resources, and how we're going to best allocate these
resources to get the best results. And at the end of
the day, you know, the result is that, you know, we
have to have public safety, our citizens are safe, and
as it is, I think in most of the penal institutions
throughout Texas and the country, there is less likely of a chance of a person being rehabilitated, as opposed to just being incarcerated.

And when you're talking about a taxpayer getting a return on their investment, we spend so much money in the incarceration arena, you know, that that taxpayer is going to want to get a return on their investment. And so the ideas that we bring deal with, you know, with smart justice, you know, what's smart. And so I think the struggle that we are faced with is the public's sentiment on what it means to dispense justice.

And it's very hard to go and talk to people within our local community and say that we want to help this offender, or educate them, or rehabilitate them, because they're offenders, and the public, you know, they really don't have any sympathy towards those individuals that commit crimes. But the practicality of it is that we do have to use our resources a little bit better than we have, so when those folks come back to our communities, they're equipped to be a productive citizen. And again, at the end of the day, the goal is public safety.

And so some of the things that we've done on the local level, we've instituted some programs, over
the last two and a half years, and one of those programs, we call it the Memo Agreement. And it's specifically designed for low level offenders, nonviolent offenders, misdemeanor offenders, who never committed crimes before. There's an age limit on it. We deal with those individuals from the age of 17 to 25. And we look at, you know, some of the offenses that they may commit. For example, a theft, a possession of marijuana, as a youth, quote, indiscretion. And the reason we do that is really two-fold.

Lack of resources. You know, we're going through, as many states and localities, issues that deal with budget, and we don't have the resources to, you know, really prosecute all the cases that come through our office. And so this program is designed two-fold. It's designed to divert folks out of the system, which will save us money, because we don't have to use the resources to prosecute them, but it's also designed from a rehabilitative standpoint.

You know, if you take a 17-year-old and you take them through the system and convict them, that 17-year-old, at some point, is going to be 25, 26 years old, and face the reality of trying to become employed, and that youthful indiscretion will follow that 17-year-old for the rest of their lives. And so the
idea is to have an intensive program that they go through. They have to meet all the requirements of it. Once they finish that program, then the case is dismissed. It's like it never happened.

And over the last two and a half years, since we've implemented that program, the number of cases that we prosecute has been reduced tremendously and the number of offenders, repeat offenders, it's been reduced because of the intensity of the program.

There's another side to this, also. You know, as always, we have those offenders who, for whatever reason, can't be rehabilitated, and we have to take measures to make sure that we swiftly prosecute those individuals and use our resources wisely to get them incarcerated. And those particular offenders are what we call impact offenders. Impact offenders, you know, on the local level, are those offenders that commit these low level crimes, car burglaries, thefts, and they continue to commit these crimes, and all of the programs that we've provided them, they don't work. And so that at that point, we have to swiftly deal with these individuals.

And so what we did is we got with the different law enforcement agencies, and labeled certain offenders that will come through their municipality as
impact offenders. That impact offender would have been through the court system three, four, five times. And inevitably they will get probation, they go to jail for a couple of days, and that will just repeat itself. And so what we've decided to do was use all the tools that we have available to us by statute to enhance their punishment and to fast track that individual through the court system, be it a trial or a plea. And so that, in itself, provides what we consider adequate public safety.

Now, it's our position in Dallas County that, you know, the district attorney really is the manager of our, I will say the criminal justice system as a whole. We pretty much dictate, you know, how many individuals will be incarcerated within our county jail. And those incarceration rates today and over the last two years hover around 6,500 individuals. And when we're dealing, again, with the practicality of our system, we have to create ways to reduce that number because, you know, it's expensive to our taxpayers, and the resources are not there. And so you know, what we do is we look at these, we look for these innovative programs that will save money, from a budgetary standpoint, and provide adequate public safety, and to ensure that the individuals that we do have to run
through the system at some point never come back. Thank
you.

CHAIR SESSIONS: Thank you, Mr. Watkins.

Well, let's open it up for questioning.

VICE CHAIR CASTILLO: Thank you. It
seems, in view of the Texas success stories, since we
are here in Texas, it would seem to me that all four of
you would support legislation that would expand
community correctional centers in every federal
district, just as a cost saving public safety measure.
Am I wrong about that? That's my question. Isn't that
sort of a no-brainer.

MR. WATKINS: I would tend to agree with
that, that you would have to figure out how to
reallocate your resources from what we're doing now.
And you know, if you look in the system, and it is the
federal system and in the state system, the goal is to
get a return on that investment. And if, if we can
reallocate those resources and have these I guess
probationary types of facilities, it would be great.
But at the same time, you know, I think on the federal
level, you're probably a little bit better than we were
as it relates to the rehabilitative tendencies of your
institutions to not only have these probationary
centers, but also, for those individuals that we do
incarcerate, that they, you know, have the ability to get rehabilitated. The goal is rehabilitation, as opposed to just punishment, and I, you know, I agree with that.

PROFESSOR MILLER: My answer would be yes, but dependent on how they're structured. In other words, what they're trying to do. So the way, one of the ways, with drug courts in particular, problem-solving courts, what I call supervisory courts, is that they have a significant net-widening effect because they make it easier to deal with the large numbers of offenders at one time. So the idea is that if the system puts a squeeze, the traditional system puts a squeeze on the prosecutor to screen out — maybe even the police officer, to screen out low-level offenders, whereas if you make it easier to have, to prosecute, then it looks like the system channels people in that would otherwise be channeled out.

So one thing that might be thought about is finding a way, a simple way, to just think about what sentences individuals would be given for the crime charged, while making sure that the net-widening effect doesn't happen, that low level people still get screened out of the system, and that resources are targeted appropriately at people who need it, people who would be
sentenced for drug use, drug crimes, and who do in fact
benefit from the treatment, rather than people who can
control their addiction, if indeed they are addicted,
and remain, and are not so antisocial that they commit
other types of crime.

MR. GELB: I'd like to say a couple of
things. One, the federal criminal population is
obviously different from the state population. So I
think that's implicit in your question, that the answer
is sort of empirical, based on what the population
looks like in a particular district and, frankly, what
the existing resources are that are there.

Second, I think the point about net
widening, as successful as what's happened here in Texas
has been, in terms of bringing that population down,
there does remain the question about the extent to which
some number of those residential centers are being used
for people who actually don't even need that. There has
been some net widening, and you're going to see that in
any system that you do that has discretion, and there
are going to be people who, you know, would have been on
probation who do need to be in a residential center, as
well as people who would have been going to prison and
would be in a, in a different setting for a shorter
amount of time.
VICE CHAIR CASTILLO: Are you aware of anyone in Congress studying this Texas success story, Mr. Gelb?

MR. GELB: Yes. As a matter of fact, on Monday, if not Tuesday, there was a piece of legislation introduced called the Criminal Justice Reinvestment Act of 2009. It is co-sponsored by Senator Cornyn from here in Texas, as well as Senator Whitehouse from Rhode Island and Senator Lungren, I'm sorry, Representative Lungren and Representative Schiff on the house side, and it's a piece of legislation that sort of acknowledges the growth in the prison population, as well as the growth in the federal probation population, and that there are states like Texas and Kansas that have successfully analyzed their populations, come up with policy options, and successfully implemented them, so that piece of legislation creates, essentially, a federal funding stream to fund the type of work at the state level that the Pew Charitable Trust and several other foundations have been working with the states on for the last few years. It's sort of a two, sort of a two-part process. The first part says the states can apply for funding to do the analysis of their populations and do the policy development piece, and then once that, once that is done, they can come back to
the DOJ and say okay, here's what we've come up with, here's our plan, can we have access to the second pot of funding, which is for implementation, which can pay for things like probation and residential centers, risk assessment, treatment resources and the like. So that's what —

VICE CHAIR CASTILLO: So this is a way to channel money to the states, but it is [not] a federal program.

MR. GELB: It is not a federal program, yes.

CHAIR SESSIONS: Any other questions?

Commissioner Friedrich.

COMMISSIONER FRIEDRICH: Thank you.

Mr. Gelb, I have two questions for you. In your written testimony, you recommended accelerating the transition of prisoners from prison to halfway houses and the Bureau of Prisons has expressed the view, and we'll hear from the director later today, that you really don't need more than three or four months for offenders to get the benefits of reentry in a halfway house, and it can actually be counterproductive to have them, offenders in halfway houses for a longer period of time.

My first question is, is that fear
unfounded, in your view? Do you think that's a
legitimate concern that the Bureau of Prisons has?
And the second question deals with
incentives. You've suggested that it's a good idea to
have modest incentives for individuals who participate
in these programs, whether it's on the front or the back
der. My question is, is does the research guide policy
makers in what those incentives should be? I mean at
least one witness at a hearing has cautioned, you've got
to be careful that the incentives aren't so great that
you have offenders gaming the system. So my question is
how do you, how does a policymaker effectively calibrate
those incentives for the offenders?

MR. GELB: They're great questions. And
the calibration is something that you wish there were
more research on and more experiments that have been out
there with, you know, different lengths of time for
different, different types of programming. So I
wouldn't argue that there's precision, at this point, in
terms of knowing whether, for instance, the Kansas
program that said 60 days additional off for
participation in certain programs is exactly the right
amount of time. There definitely should be more
research to, to establish, if that's what you're asking,
and there's obviously got to be very close and strict
management of these situations to make sure that the
inmates are not gaming the system.

COMMISSIONER FRIEDRICH: But it's a given
that there has to be incentives, in your view, that
simply an offender wanting to help him or herself is not
enough, in your view, to achieve the benefits in terms
of recidivism.

MR. GELB: I think it's, I think that's
part of it, but I also think it's, I also think it's
more than that in a couple of different ways. One is
that there is, there's also great lack of clarity in the
research about the relationship between length of stay
and recidivism. So if you can't justify why getting out
in July, as opposed to, you know, or getting out in July
as opposed to June is a good investment for the
taxpayers, then it's hard to see how a program that
could help reduce recidivism by 25, 30 percent or so
wouldn't be a, wouldn't be a good investment.

And second, let me just sort of shift
gears, if I could, a little bit on this in terms of the
incentives. One of the pieces that you see that we're
suggesting is not just this earned time behind the
walls, but to try to move that concept of earned time
out into the community so the offenders on probation and
parole also have that positive incentive. You want to,
one of the clearest findings in this, in the research is
that, is that positive rewards work better than negative
consequences in terms of shaping behavior. Yet we have
a system that is almost focused exclusively on, you
know, trail them, nail them and jail them, catching
people when they slip up, and not providing positive
incentives. And that's, that's a finding not just in
the criminal justice literature, but that's child
development literature, that's negotiating strategy, the
whole series of, of findings that people just respond
to, to possibilities of rewards than particularly
the sporadic and arbitrary imposition of threats.

And so what we're seeing states start to
to do is to say that people on supervision, not just
people behind the walls, should have incentives. If
they're complying with the terms of their supervision,
they are current in their victim restitution payments,
they're going to treatment, they're testing clean and
they've done that, that they ought to be able to earn
their way off supervision earlier.

CHAIR SESSIONS: Is that term trail them,
name them and jail them a term of art?

COMMISSIONER FRIEDRICH: What about the
second question, in terms of the transition from halfway
houses and the length of time? Is that a valid concern for the Bureau of Prisons that too much time in a halfway house is counterproductive?

MR. GELB: I don't think I can speak directly to that.

CHAIR SESSIONS: Mr. Wroblewski.

COMMISSIONER WROBLEWSKI: Thank you. A couple of quick questions. Thank you all, first of all, for being here.

Mr. Gelb, the legislation that was passed in 2007 here in Texas, was that a piece of legislation that not only provided the funding, on the one hand, but also channeled the funding away from the prisons? I mean was that one piece of legislation that did both and did the reallocation? Were there other components to that? And if we send you an e-mail, could you send us actually a copy of that legislation?

And then finally, for Mr. Watkins, these impact offenders, what are the tools that you have for those people, and what kind of sentences are we talking about?

MR. WATKINS: Well, you know, we have statutes that allow us to hand certain sentences, after you have committed and been charged and convicted of other crimes, like the three strikes you're out. It's
not on that level. These are all very low level, low
level offenders, and so most of them will spend anywhere
from six months to two years in prison, and most of the
crimes that they're committing are misdemeanors, but
they commit so many that they get up to the state jail
felony rates. And practically, because of resources, a
lot of times we wouldn't pursue the state jail felony
crime because we just didn't have the resources to
incarcerate those individuals, but with the impact
offender program, we actually target certain individuals
that we just can't rehabilitate, and the number goes
down as to who we seek these enhancements on, and we get
a quicker result.

MR. GELB: So, of course we can send it
to you, but it's interesting how Texas has accomplished
this, which was through the budget. It's actually not a
statutory change here. So it's budget language that set
out this very extensive array of new programming. And
you know, it's a real credit to the judiciary, as well
as the corrections department here that it has gone as
well [as] it has without additional statutory direction about
you know, who should go into these slots, because of the
fear of net widening, something that's still being
analyzed. And I think I had suggested before that there
were some questions about whether or not some folks who
were making it into these residential beds didn't
necessarily need to be there, and there has been a net
widening.

COMMISSIONER WROBLEWSKI: Can I just follow
up on that a second? And when you're building out, whether
it, whether the program was set in motion to build out
these programs across the state, was the idea to have a
uniform set of, or a model program in each county?
Because if we have a lot – the reason I'm asking is we
have a lot of experimentation going on in the federal
system, and I think one of the questions that we have
here is how do we take it to the next level. Does there
need to be something more uniform? Is there one piece
of legislation that would create something that's more
uniform and also to do with the reallocation? We're
getting now to the sort of nuts and bolts of how to
actually get something done.

MR. GELB: Right, right. So Texas is not
a sentencing guideline state, as you know, and they're,
they don't, there's not a mechanism there that exists,
you know, like there does in the federal system to steer
specific offenders into specific programs that way.
However, my understanding of the way that they are
trying to manage the cases in this, in this case is
through the probation working with judges and using risk
assessment, and more, at more of an administrative level
than a statewide policy that says these, you know,
these beds should be used for specific purposes. So
there's statewide direction, but in this state there's
a significant local control in the courts, and so I
expect that there's a good bit of variation in these
respects.

CHAIR SESSIONS: Well, thank you very
much for really a fabulous panel, and we really
appreciate your dedicating so much time and energy to
your submissions and testimony, and thank you very
much.

MR. GELB: Thank you.

CHAIR SESSIONS: We are just a few
minutes behind schedule, so if we could start again at
ten of 12:00, I think we would be able to finish close
to on time.

(Recess taken from 11:42 to 11:58.)

CHAIR SESSIONS: Okay. I think we're
ready to proceed with the third panel of the day.
Welcome. These are our probation officers. And
frankly, I've been out of probation for a long time now,
ten years now, and some of the most valuable input that
we receive is from POAG, is from the Probation Officers
Advisory Group. We also look forward to the impact.
There's three of you. You are on the ground in sensing how the guidelines are being applied in the real world.

So first, Becky Burks is the chief U.S. probation officer for the Southern District of Texas. I understand that you have a new chief judge.

MS. BURKS: Since Friday the 13th.

CHAIR SESSIONS: Since Friday the 13th.

I think for the next seven years he'll be living under that shadow.

MS. BURKS: We're happy to have him.

CHAIR SESSIONS: In her 22-year career with the district, she served at all levels in the organization. Since being elevated to chief probation officer in 2004, Ms. Burks has served on the Administrative Office's Chiefs' Advisory Group, and is currently a member of the Federal Judicial Center's Training and Education Committee. Ms. Burks graduated magna cum laude from Sam Houston State University in 1981, with a Bachelor of Arts degree in criminology and Spanish. She earned a master's degree in criminal justice management, also from Sam Houston State University in 2001. Welcome.

MS. BURKS: Thank you.

CHAIR SESSIONS: Next, Joe E. Sanchez is chief U.S. probation officer for the Western District of
Texas. He began his federal probation career in 1988 in the Del Rio Division, and has held several positions within the district, including sentencing guidelines specialist, presentence investigation supervisor in Del Rio, assistant deputy chief for the Austin and Waco Divisions, and deputy chief in San Antonio. Prior to joining the Western District of Texas, he was an adult probation officer for Maverick County in Eagle Pass, Texas. He received both a B.A. and a master's in psychology from Texas A&I University in Kingsville, Texas.

And welcome and thanks for both of you appearing here today. So have you decided among or between yourselves who wishes to go first?

MR. SANCHEZ: My mentor.

CHAIR SESSIONS: Your mentor?

MR. SANCHEZ: My mentor, yes.

MS. BURKS: Can you hear me now?

CHAIR SESSIONS: I didn't see that mentor in the introductions, but she is your mentor. Okay.

MS. BURKS: Can you hear me now?

CHAIR SESSIONS: Yes.

MS. BURKS: Okay. Thank you. Of course I've submitted my written comments, and I'll try to paraphrase in the interests of time and hit the
First, obviously, I want to thank you for giving us the opportunity to be here today to provide comment and the view from the probation office. I personally appreciate it. My staff very much appreciates having the opportunity to provide input.

I also want to thank the Sentencing Commission for the support given to the field, through training and guidance, as well as something that's very near and dear to our hearts in the Southern District of Texas, and that is the improvements in the document submission system, the electronic submission that's been developed over the last few years. I've noted in my comments, we submitted 31,157 documents from Southern Texas in fiscal 2008, all electronically, and it's a fabulous success. And so credit goes to Judy and the Commission and the group and her staff for putting all that together and making it work. We very much appreciate it.

As you know, this is the sixth of seven regional hearings, and in preparing to come before you today, I read all of the comments of all of my colleagues that have appeared at the prior hearings, as well as I solicited input from a number of the officers in my district, across my district, that practice in the
guidelines every day.

My colleagues have raised a number of points, talking about things such as a need for the Commission to support a resolution of the disparity between crack and powder cocaine, the need to look at the mandatory minimum sentences, perhaps the elimination of such, the need for sentencing policy to incorporate what research has and is proving to be effective in reducing recidivism, the need to oppose the ABA's proposed amendment to Rule 32 and other areas. I don't see, the information I've gathered in my district doesn't reflect that we differ significantly in those views. However, we do differ quite substantially in the context from which we come to these issues.

So first I'd like to talk to you a little bit about that context, and then address two specific points that we feel pretty strongly about. The Southern District of Texas Probation Office is headquartered in Houston, and we have divisional offices in Galveston, Corpus Christi, Victoria, Brownsville, McAllen and Laredo. Three of those divisions are geographically located in immediate proximity, they sit right on the Texas-Mexico border. In FY 2008, the probation office completed 6,574 presentence investigations and supervised 5,470 offenders in the community. In
addition, the Texas Southern Probation Office is somewhat unique in that we produce all of the judgments in criminal cases and the statement of reasons for all felonies and Class A misdemeanors sentenced in the district. When we look at our cases that were sentenced in 2008, we see that the vast majority were male offenders, 90.6 percent, and were primarily Hispanic by race, 90.1 percent. Relative to the primary offense convictions, immigration comprised 72.5 percent of the cases that we dealt with. Drugs come in second at 18 percent, and firearms and fraud are virtually tied at a very distant third, 2.9 and 2.2 percent. This percentage of immigration cases for our district is the highest percentage of the five border districts, and it is a significant increase over my tenure, the five years I've been chief. In 2004, our percentage was about 58.4 percent immigration cases. And so clearly, we've had a significant increase.

As it pertains to sentencing practices, 57.7 percent of our 2008 cases were sentenced within the guideline range. That's not drastically different from the national rate of 59.4 percent, but it was significantly lower than the Fifth Circuit [rate] of 70.4 percent. This perhaps resulted from higher government sponsored below-range sentences. We do have early
disposition programs in our district. They accounted for 34.8 percent of the total below-range sentences imposed. Non-government sponsored below-range sentences totaled 6.5 percent.

So with that context, not surprisingly, given that description of that sentencing work load in our district, the first area that we urge the Commission to look closely at is one that the Commission has been looking at for several years, and that's simplifying the guidelines specifically in the areas of the definitions of crimes of violence, aggravated felony, violent felony and drug trafficking crimes. That's 72.5 percent immigration cases that equalled 4,700 presentence investigations that we completed in 2008 for immigration offenses, the lion's share of which are illegal reentries. Therefore, simplifying and clarifying that guideline application would result in a significant savings of time and resources for us.

Now, there are those who are unfamiliar with immigration cases, and they might be tempted to minimize the impact of that type of a case. I have heard, overheard statements to the effect, well, they're just immigration cases, when in fact, the Supreme Court and Fifth Circuit case law makes these presentence investigations some of the most laborious to produce and
the most complex of sentencings. The categorical
approach required to establish the classification of a
prior conviction to support the accurate calculation of
the offense level has increased significantly the time
needed to obtain and analyze the supporting
documentation, which is of particular concern to the
probation office. I'll use a statement that was
included in one of the Commission's documents on a prior
immigration round table, "The nature of the categorical
approach often leads to exhaustive individualistic
reviews because of the diversity and multiplicity of
state criminal statutes and the inherently difficult,
inherent difficulty in comparing the widely varying
language of these provisions with a standard definition,
whether that definition is composed from a common sense
approach or otherwise." That, in my view, really
captures how complex and how time consuming making these
determinations [is], and being sure that the prior
conviction that supports the upward adjustment or
enhancement is for the probation office. And in fact,
in Texas Southern, since 2006, the probation office
includes the documentation that supports that prior
condiction that supports the upward adjustment with the
presentence report at disclosure for the majority of
courts, and will provide it if there's an objection to
that prior conviction and apt disclosure for all courts, if it's objected to. That helps our process. That's a sound sense and practice, but it has further increased the burden on the probation office to secure those documents, and we find that, and I'm sure Joe can speak to this, as well, that those prior convictions, prior state convictions occur all over the United States. And in fact, I think it's somewhat curious, it's somewhat of an anecdote, when I travel to other districts for other meetings, when I meet probation officers from those areas, and the first thing they say to me is, “Oh, you're the district that sends us all the collaterals,” a collateral investigation meaning we're asking them to help us obtain those documents, and they really don't have a full understanding of what the importance of those documents are for that review.

This is not a new area for the Commission to look at, and we have, our district has participated in numerous, I think there's been at least two round tables, if I'm not mistaken. I know I spoke on this issue, specifically options that were presented for comments, at the public hearing in San Antonio in 2006. My colleague, the chief in Kansas spoke to this specifically, in his comments at your last regional hearing. The POAG has weighed in on this, and most
recently, I think, in terms of the, in support of the
need to study the issue that was identified in the
Commission's priorities, I believe it was number six for
this amendment cycle. We also support and urge the
Commission to continue its work in this area.

The second area of concern that Texas
Southern probation would like to comment on is the
American Bar Association's proposed amendment to Rule 32
of the Federal Rules of Criminal Procedure, which would
require increased disclosure of probation's
investigative information. It's our recommendation that
no changes be made to the current provisions of Rule 32,
and by reference, we'd like to adopt the 14 points that
were made by our colleague Chris Hansen, chief of
Nevada, in one of your prior hearings, and that's in our
written comments.

There are two primary reasons, in our
view, not to adopt the changes proposed. The results of
the probation officer's presentence investigation are
currently fully disclosed in report form pursuant to
Rule 32, when we disclose that presentence
investigation, and then opportunity is afforded for
scrutiny, challenge and objection to the information
contained in the report, and that's prior to that
presentence report being submitted to the court under
the rule. Now, different districts may have different
practices but in Texas Southern, we follow Rule 32
pretty faithfully. So we disclose the presentence
report to the parties. They're allowed to voice
objections. We may meet and have face-to-face
discussions to attempt to resolve information. We
oftentimes make changes to the presentence investigation
prior to submitting the final version to the court for
sentencing. If the disputes are not resolved at that
level, there's another opportunity, once that final
report is submitted to the court, and any issues that
have not been resolved will be resolved at sentencing,
being addressed by the court. We think that's an
adequate review. If there's additional scrutiny needed,
and there are times when objections are made, we think
the jury – the judge of jurisdiction is in the best
position to make the decision on whether the supporting
documentation should be disclosed. Because we conduct
presentence investigations upon direct order of the
court, and we are employees of the court, we don't
really view it as our decision on whether or not to
disclose the information. It's the judge's decision.
Typically, what happens, we provide the information to
the judge and the judge makes the review and makes the
decision on whether or not it should be disclosed to the
parties, although in some cases some judges order that
certain information automatically be disclosed to both
parties, as a matter of course.

As illustrated in several of the points
that Chief Hansen made, if there's increased disclosure
of source information, if that becomes part of the rule,
sources that currently share information with the court
via the probation office will become unwilling to do so.
In fact, we have law enforcement agencies that right now
only release detailed offense information to us on
promise that we will not redisseminate the information,
and I think that if we went to a routine redissemination
that they would not provide that information any longer.

Secondly, requiring the probation officer
to submit a written summary of any information received
orally, which is part of the proposal, would really
delay the investigative process. We're already
straining under the work load, particularly with 72 and
a half percent of our cases being these immigration
cases requiring that extreme individual review, and if
we have to incorporate extra steps in the process, I
think it's going to be, it will break us, frankly, is my
view.

Finally, in our view, the overall result
of the rule changes, if adopted, would be to diminish
the development of the information that's available to
the court for determining an appropriate sentence, and
also that is used for the safe supervision of the
individual and the community.

That's the bulk of my comments. I think
I have one other that I did not include in my written
comment, and that is that we'd like to see the
Commission look at further training opportunities for
probation officers in the evaluation process for
variances. I remember post-Koon, and maybe I'm dating
myself a long time, but there was a departure roadmap
that was developed, and it really was helpful for
officers, to take them through a step by step process,
and I'd like to see something, assuming possible, I
think that needs to be looked at, but if there could be
something developed in terms of training opportunities
for officers, I think that would be beneficial, as well.
That's pretty much all I want to comment.

CHAIR SESSIONS: Thank you, Mrs. Burks.
I will turn to your advisee, mentee for comments.

Mr. Sanchez.

MR. SANCHEZ: Thank you, Mr. Chair, and
welcome this Commission to Western Texas. I hope Austin
is treating you well.

Because Western Texas and Southern Texas
are very, very similar in the types of cases that are processed, and in fact the size itself, I have very little to add of what, add to what Chief Burks has covered. What I bring on behalf of our district is the urging, and it's noted in my written testimony, is to look at §2L1.2, and try to reword it to make the application simpler, because Chief Burks speaks the truth. The majority of our offenders that are processed through the district, their priors are elsewhere. They're not in Texas. We have to rely on other districts to secure those documents, and sometimes that can be a daunting task.

What we did for the purpose of this hearing was really focus more on post-Booker sentencings. We're very curious to see how our judges were applying the guidelines, now that they're advisory, and not surprisingly, our stats show that there's very minimal change in the way our judges have been doing post-Booker sentencings. We compared the numbers, and pre-Booker, within-guideline sentences, were at 81 to 83 percent. Post-Booker now, are at 78 percent of the guidelines. Shows very little deviation. Of course, we are curious to see where our district stats will be three to five years from now. I must say that our judges do enjoy that flexibility when applying the
advisory guidelines. Again, they do use the guidelines, as noted in my written testimony, as a starting point for the sentence, and then either will deviate or depart.

I do bring some suggestions from the field that we would like for permission to consider, and the first one, and it is noted in my written testimony, is §2B1.1. Our officers feel it is too long and cumbersome, and that the guidelines for economic crimes are too low. It appears the Commission has attempted to include many of the nuances of economic crimes into one guideline for ease. It is suggested that the base offense level should be higher to reflect the harm to society, given the current economic phase we're in. Our courts have expressed frustration with very low guidelines, and expressed that in open court.

This is an interesting one, too. We ask that you consider doing away with the restrictive language in [ ] Zone B and C [of the] Sentencing Table, and consider an all-inclusive zone, say below offense level 10, and all options for sentences could be considered.

I must reiterate what Chief Burks has said about §2L1.2. We hope it is reviewed, reworded, and simplify the application of the adjustments for these prior convictions.
And I believe that's all I have. I do

echo, again, what Chief Burks has covered, because we're
very, very similar districts.

CHAIR SESSIONS: Thank you, Mr. Sanchez.

Let's open it up for questions.

Judge Hinojosa.

COMMISSIONER HINOJOSA: I have a question for Ms. Burks. When you look at the national statistics with regards to the departures versus variances on the below-guideline sentences, for fiscal year 2008, Southern Texas had, like you pointed out, 6.5 percent departure or variance rate below the guidelines, but in Texas, in Southern Texas, 3.5 percent were departures and three percent were either Booker or 3553(a). When you look at Western Texas, it was 2.2 percent departures and 5.4 percent under the 7.6 percent guideline range that were Booker or 3553(a). And when you look at the national statistics, Southern Texas is going contrary to the national statics in relying more heavily on departures versus the variance. Do you have any idea as to what that might be? There seems to be more of a higher percentage of use of actual departure language, as opposed to a variance in Southern Texas.

MS. BURKS: Well, I —

COMMISSIONER HINOJOSA: Even different
from Western Texas. Although they are at 81 percent, at least for fiscal year 2008, were within the guidelines, but they challenged their early disposition programs, they're either very small or nonexistent.

MS. BURKS: Judge, I haven't looked at it specifically, but I suspect, if I understood you correctly, that we have a higher rate of using departures versus variances, and I suspect that comes from perhaps the officers identifying the departure factors pursuant to the guidelines, maybe overrepresentation of the criminal history score, I think that's very common for us, and putting that in the PSI as, you know, to inform the court.

COMMISSIONER HOWELL: Thank you both for taking time out of your busy schedule to come and talk with us today.

I just wanted to talk a little bit about the illegal reentry guidelines that are 2L1.2. This is the guideline that the other commissioners have spent a lot of time looking at. POAG has given us, judges in this, in Texas and other states have obviously given us a lot of good ideas of things that we should consider, given the fairly complicated interplay between the statutory parameters that we have to operate under and directly to the Congress and how we reflect those in the
guidelines. The federal public defenders have given us testimony in connection with this hearing that also has given us a number of, you know, very interesting thoughtful ideas of ways that we should be considering, ideas that we should consider of revision to the guidelines. One of the things, in terms of the experience that you all have, is they've suggested that we add a remoteness cutoff for prior offenses used to increase the offense level, so that really old prior convictions would be ones that I guess we would make a policy determination how old, but wouldn't be included in determining, in determining the offense level at 2L1.2.

Do you find that it is the older convictions and getting the paperwork for those that are more fairly burdensome, so that if we added a remoteness threshold to 2L1.1, that this would be a helpful addition?

MS. BURKS: I, in polling my officers, that issue has not been raised. Our difficulties in obtaining documentation have more to do with resources available to assist with that in other areas, or the documentation that's even just available, you know, abstracts out of California, I don't want to bash California, but there seems to be a common theme that
that's where we have the most difficulty getting
documentation to support that prior conviction. But age
of that prior conviction or remoteness has not been
raised by any of my officers that I've talked to. Now,
that doesn't mean that's not the case, but I would
suspect that it would have come up in our discussions of
difficulty in getting documentations if it was well,
this, if the convictions that are the underlying are so
remote that we can't get the documentation, I'm not
hearing that.

MR. SANCHEZ: Same way here. Surely it
would help, but I believe, just based on the
prosecutorial practices in Western Texas, I would think
that the, I'm taking a guess here, that the, most of the
cases would be, are freshly new. I don't think they're
very dated. That's just based on my experience.

MS. BURKS: You know, what's common in
Texas is that the apprehension is happening in the
detention facility. An immigration officer is
stationed, and therefore, as they're coming in and being
incarcerated on a new arrest.

COMMISSIONER HINOJOSA: You mean at the
county jail, to make it clear?

MS. BURKS: Yes. In fact, in Harris
County, the county employees, the jail employees have
been trained to do the paperwork, and so there's a
fresh, you know, they've got fresh, a new population
coming in constantly, and we're not hearing remoteness
as being an issue on prior convictions.

COMMISSIONER HINOJOSA: Just to follow up
on that, another thing that we're concerned about, and
we're looking into at this point, relates to recent city
and status points, and particularly how those factors
impact the 2L1.2, in fact all of the immigration cases,
illegal reentry cases in particular, though. Do you
think that that's an area of concern that we should
address? Particularly, the reason I ask the question is
if you get a person in a county jail, then of course
it's a continuing crime, is it not, so as a result,
thен, you know, you're going to get [a] fairly significant,
well, three-point increase in most cases. It impacts
these cases more than, aside from 2K2.1, than any other.
Any concern about those points? Are they too many, too
few?

MR. SANCHEZ: We have not heard of any
concern from the field applying the points, but we are
aware that sometimes one conviction can lead, obviously,
to three points, but we have not heard any.

MS. BURKS: To be frank, officers come to
this many times from the standpoint of how difficult is
it to move this volume of work, and the recency adjustment is not difficult to do. What's causing more of an issue is getting the documentation and doing the analysis and following the case law, which is much more dynamic, if you will, than perhaps the case law affecting the computations in the drug guideline, and just keeping up with that, in our circuit, is also a significant challenge.

COMMISSIONER HINOJOSA: I guess the question is more in the line of do you find that adding six points, for example, for the last illegal reentry, instead of three points —

MS. BURKS: Well —

COMMISSIONER HINOJOSA: — not that it's difficult —

MS. BURKS: It's too severe.

COMMISSIONER HINOJOSA: — but do you get comments either from what's reported to you as to what the judges are doing with regards to those points and how they're viewing them, is that too much or —

MS. BURKS: Is it too severe, sure, that's the question. I don't have feedback that it's too severe. Now, that's — I don't have feedback. That's the only answer I can give you.

COMMISSIONER HINOJOSA: All right.
COMMISSIONER FRIEDRICH: Do you in the probation office typically, in those cases, recommend the state provide potential departure grounds? Is that a ground you might give in a case like that, to the overrepresentation?

MS. BURKS: I don't think, in Texas Southern, that we're routinely recommending a departure based on overrepresentation of the criminal history because of those two adjustments.

MR. SANCHEZ: Depending on the condition, yes, we sometimes will put the standard language that this can be. Well, we can alert the court and the parties, we won't recommend it, but we will alert the court and the parties that there should be a departure.

MS. BURKS: Because of the recency factors.

MR. SANCHEZ: Correct, correct.

MS. BURKS: I'm not saying that they don't make, include that information because of an overrepresentation. I just don't have information that it's tied to the recency issue.

MR. SANCHEZ: A perfect example would be, and we see this commonly in the border area, where one of the offenses could be a simple reentry, where he or she was attempting and was taken prisoner. Well, there
was a need. Before you know it, that's what, four, five
points on a entry case. So at some point that would
definitely be identified. So it varies, depending on
the condition itself, the type of offense.

CHAIR SESSIONS: Mr. Sanchez, I was
looking at your statistics and noticed that roughly two
percent of your cases have a fast track. My guess is
that probably — is that right? Because there seems to
be, at least in 2008, a two percent reduction for other
disposition programs, departure, and I'm wondering
whether that suggests that there must be a split among
your courts as to whether some particular division of
the Western District has a fast track and whether one
doesn't, and I just wonder if that is the case, and then
what does that mean for a district-wide, well, view on
fast track? Because if there's a difference as to when
are you going to fast track based upon where you crossed
the border, how does that relate to your concern about
fairness across the district or the circuit?

MR. SANCHEZ: In the Western District, we
don't per se practice the fast track district points.
There are some chambers that do practice the fast track.
What we do have, though, which is, I believe, germane to
Western Texas is, and we call these worksheets, we
process simple immigration cases pretty fast in that we
don't, the judge does not order a full presentence investigation. They rely on us to prepare what you call a worksheet and sentencing script to process the case faster. But it would not come along with a downward departure. So it, we don't do fast tracks, but we do other expediting sentencings throughout the district at this time.

CHAIR SESSIONS: Well, did you say that some judges do that on their own? Is that —

MR. SANCHEZ: It's my understanding in El Paso, that's my understanding, that in El Paso they've done fast track.

MS. BURKS: Well, that would be a presentence waiver. Correct? They're waiving the presentence investigation, and that waiver? I don't know what you mean.

MR. SANCHEZ: You're saying faster, you're saying with a departure. Correct?

CHAIR SESSIONS: Well, right. Yes, that's what I was looking at.

MR. SANCHEZ: No, and that's not commonly practiced. What we do is we just expedite sentences pretty quick, but we don't apply the departure.

CHAIR SESSIONS: But there are some judges in El Paso that do that?
MR. SANCHEZ: Correct.

CHAIR SESSIONS: It varies? Is that the way—

MR. SANCHEZ: It varies, correct.

COMMISSIONER HINOJOSA: There may be a difference in the districts, and I want to ask you if you have this impression. My impression is that some districts in Texas, and certainly in some divisions, illegal reentry cases, we're not talking about transporting illegal aliens, but illegal reentry cases are not brought unless there's a serious prior record or several misdemeanors in the past, that the number of zero-to-six-month sentences is smaller than perhaps when you have operations streamlined where everybody's being brought in, and so my question is in your districts, what is the policy? It seems like in the Southern District of Texas, at least my impression is that there has to be some prior record in order to be brought as a felony.

MS. BURKS: Yes, sir. We don't often see illegal, simple illegal entry. Typically, there is an aggravated felony, looking at a ten-year or 20-year penalty, most often 20-year, because the volume, well, there's just too much to support going to the felony.

MR. SANCHEZ: In Western Texas, Operation
Streamline has had very little impact on our agency because the majority of cases processed are actually petty offenses, the majority of our cases that come in through at the border.

COMMISSIONER HINOJOSA: You mean the majority of Operation Streamline cases.

MR. SANCHEZ: Right, the majority are petty offenses, correct, so it does not impact us. It does not impact our work load.

MS. BURKS: And Texas Southern, as well, although we do provide some assistance to the Laredo Division for the magistrate on the petty offenses for sentencing purposes, but not, we don't do full PSIs. In Texas Southern, we have early disposition programs in Laredo and Brownsville and McAllen on transporting cases, according to the U.S. Attorney's Office. We do not have it in Houston or Corpus Christi.

COMMISSIONER WROBLEWSKI: Just one quick question. As you talked about something just now, there have been a lot of options that have been floated over many years about how detailed 2L1.2, but the same issues come up about criminal action, or about prior criminal convictions. Do you have a preference as to some of those options? We've heard everything from expand the list of crimes that are enumerated to looking at
sentence imposed, time served. Any comments?

MR. SANCHEZ: I recall several years ago we had, they were looking at several options, and I remember our district looking at the options, and what we found most appealing was the one that was pretty simple that applied an adjustment according to the disposition of the prior conviction.

COMMISSIONER WROBLEWSKI: I'm not sure I understand what that means.

CHAIR SESSIONS: The sentence.

MR. SANCHEZ: Correct. It was based on the sentence of the prior conviction, instead of looking at the offensive conviction, but that was, that was just a very simple option.

COMMISSIONER WROBLEWSKI: Yeah. I mean the problem with all these options is they're too broad, and/or too narrow.

MS. BURKS: Exactly. We looked at the same options, I believe that was in 2006 that was for the comments for the public hearing, and we weighed in. I think we ultimately decided on option four, which basically tweaked the definitions to try to make them more similar. Although there was an option five that I believe, if memory serves me, option five was very broad and it just started at a high offense level and then you
subtracted from there, but it really was not adequate to cover all of the possibilities. But frankly, it was pretty attractive to probation officers at the time, because then the burden would be in the opposite, coming from the opposite direction. Offense level would be established high, and then there would have to be justification to come down from it. At the time, I recall 40.1 percent of the cases in the Commission's data, 40.1 percent of the illegal reentries involved the 16 level increase, so there seemed to be some justification, or at least some rationale, to reversing the guideline and starting with a high base offense level and then subtracting from it based on certain factors, versus increasing, but it wasn't fully fleshed out, and it really wasn't totally workable.

And I was just speaking with Commissioner Friedrich before we reconvened, and we don't have an answer, and I recognize how awkward that is. We come and we say give us relief, we need some help, but we don't really know how to do that, but that, I mean we've – it's not an issue that just came up last week. We've all been looking at the struggle for a number of years, but it remains a very important issue because, from my perspective in Texas Southern, you know, a lot of the testimony today has been about evidence based
practices and reentry programs and other things that are
happening in community corrections, and we struggle,
given the responsibility that we have with these
immigration cases and the amount of energy and work
hours that have to go into doing them correctly, it's,
it's difficult, then, to have adequate resources to do
these other things. Now, that's not to say that we're
not doing them. In fact, this week we actually have
evidence based practice training going on in McAllen,
we've done employment specialist training, we have a
number, we have a reentry court program in one of the
divisions. We are doing things. But it's, it's
incredibly difficult to free up resources to look at
those things and implement, because so much is going to
this, and so we had to come to you today and say this
continues to be the primary area, at least from Texas,
my view, probation, Texas Southern.

MR. SANCHEZ: And it's the same for
Western Texas.

CHAIR SESSIONS: All right. Well, thank
you very much. And thank you for your forthrightness.
We really appreciate you spending this valuable time
with us and sharing your views, and thank you very much
for coming. So let's adjourn.

(Recess taken from 12:38 to 2:10.)
CHAIR SESSIONS: Let's call this to order. Again, first of all, to the three of you, I want to apologize for us starting late. I will say that we engaged in a really interesting discussion, and as is my habit, sometimes, I was just looking at the people talking and not looking at the watch, and so I apologize for the delay.

We look forward very much, having read your presentations, to this panel. So let me begin by making introductions.

First, Julia O'Connell is the Federal Public Defender for the Northern and Eastern Districts of Oklahoma. You must do a lot of traveling.

MS. O'CONNELL: Oh, love it, love it.

CHAIR SESSIONS: Prior to her 2007 appointment as Defender, she served as an assistant defender in the same office from 2001 to 2007, and in 1997 she was an assistant public defender in Tulsa County, Oklahoma from 1990 to 1996 and 1998 to 2000. And in 1998 she received a Bachelor of Science degree from the University of North Dakota, in 1980, and her law degree from the University of Tulsa in 1989.

Next, Jason Hawkins is the first assistant federal public defender in the Northern
District of Texas. He previously served, from 1999 to 2001, with the Federal Defender's Office for the District of Arizona. He clerked for the Honorable Royal Furgeson, a good American.

MR. HAWKINS: A great American.

CHAIR SESSIONS: That's what I hear.

That's right. He's a great American.

MR. HAWKINS: Thank you.

CHAIR SESSIONS: Then United States district judge for the Western District of Texas. Now he's a senior judge. And he clerked with him from February of 1997 to May of 1999. Mr. Hawkins received a Bachelor of Arts degree from SMU in 1992, and a law degree from St. Mary's University School of Law in 1995. Welcome.

MR. HAWKINS: Thank you.

CHAIR SESSIONS: And next, William Gibbens, who's a CJA panel attorney, district representative from the Eastern District of Louisiana. He's been an associate at the New Orleans law firm of Schonekas, Winsberg, Evans and McGoey?

MR. GIBBENS: McGoey.

CHAIR SESSIONS: McGoey, thank you, since 1996. He served as an assistant United States attorney in the Eastern District of Louisiana from 2002 to 2006.
He was a law clerk for the Honorable Edith Brown Clement. He received a Bachelor of Arts degree from the University of Virginia and a law degree from the University of Virginia School of Law in the year 2000. So welcome.

MR. GIBBENS: Thank you.

CHAIR SESSIONS: Unless you have, among the three of you, decided an order which is inconsistent with our order —

MS. O'CONNELL: We have.

CHAIR SESSIONS: Oh, you have?

MS. O'CONNELL: We have.

CHAIR SESSIONS: Okay. So who's going first?

MR. HAWKINS: I drew the black bean.

CHAIR SESSIONS: Great. All right.

Mr. Hawkins.

MR. HAWKINS: Good afternoon, Mr. Chair, and Commissioners. Thank you for giving me the opportunity to appear before you today.

In preparing my testimony, I looked over the list of questions that the Commission had submitted to us, and of course, the very first one was what effect did Booker have on the advisory nature of the guidelines. And I can tell you that in the Northern
District of Texas, the guidelines are doing, they're alive and doing quite well.

Following the Supreme Court's decision in *Booker*—

CHAIR SESSIONS: Even after Joe Kendall left the bench, they continue to do well?

MR. HAWKINS: Quite well. Not quite as well, but quite well.

Following the Supreme Court's decision in *Booker*, the Northern District of Texas has been much more reluctant to vary downward from the guidelines in most districts. In 2006, the non-government sponsored downward variance rate in the guidelines was about six percent, took place in about six percent of the cases. However, the latest statistics show that the rate's doubled, and it's up to about 12.5 percent, and we're still not quite up to the rate that the government is of 15.8 percent, but we're getting a little bit better at it.

And to that end, I really attribute that to two main reasons. And it's actually something that Judge Conrad had testified to earlier in Atlanta, and Judge Cauthron testified to today. I think we in the defense community have been able to put the passion back in sentencing, in making our sentencing arguments. I
think that one of the unintended consequences of the mandatory guideline system was that all we had to argue about was whether a guideline subsection applied.

It's no secret that 95 percent of the defendants plead guilty, and at that stage of the sentencing process, under the mandatory Booker guidelines, I'd say my role as a defense attorney was reduced to that of pretty much a mere accountant, six plus six plus four minus three equals 13. Your criminal history category is three. That gives you a guideline range of 18 to 24 months. And I was there to argue the margins. And I say that I was there because during that time, at least in the Northern District of Texas, the assistant United States attorney would rarely say anything at the sentencing. He or she wouldn't have to, because the guidelines had done their job, and that was to put the defendant in prison. I think it's dramatically changed for the better.

No longer are we left to argue about whether a sentence of imprisonment is more appropriate, but we have the opportunity to argue that an alternative to incarceration is a better way of putting the defendant back on the right path so that he or she will never come before the court again. And you know, I guess I think that's in part because defense attorneys
are putting the passion back into sentencing.

I appreciate the fact that the Commission has made alternatives to incarceration one of its priorities for the amendment cycle. I believe that the reason the judges in my district do not sentence people to probation over other alternatives is because the guidelines don't encourage them to do so. Although about one-third of our cases, at least in the Northern District, involve clients that are not citizens, two-thirds of them are. The root evil of many of our clients' problems have to do with substance abuse, and now we're able to argue that there's an alternative sentencing involving treatment. As the Attorney General has recently stated, I think the low level of, the incarceration of low-level drug offenders is, I'm paraphrasing, but it's close to outrageous. We're putting nearly everybody in prison.

In Texas, we see a good number of methamphetamine addicts, and they distribute methamphetamine or supply pseudoephedrine to people who are cooking this horribly addictive drug to support their own habits. These offenders, we believe, should be given the opportunity to receive evidence based sentences geared towards addressing their addiction and increasing public safety, rather than a one-way ticket
to prison that existed previously.

Commissioner Wroblewski, I believe that you asked the earlier panel of district judges, you said we've got all these competing interests, and how do we bring all the parties together, and that's a difficult question, and I don't, I would not want to be in your position. But one of the things that I think that the Commission can do is to provide information to the district courts, provide information to Congress about what's working and what isn't. And I think it starts with the Commission here. I don't know that you can bring all the parties together, but I think the Commission can better inform people of what works and what doesn't.

In the past, there was little point in making argument that our client was deserving of a downward departure because the downward departure grounds were few. Some of those factors that people might consider mitigating were discouraged, and in our experience, if the government appealed any downward departure, there was an overwhelming possibility, in the Fifth Circuit, that that, that that sentence was going to be reversed. Indeed, I think that's probably, as stated today, that's why district judges are varying instead of issuing downward departures.
And that brings me to the second point I'd like to make of why I believe that the downward variance rate has doubled since 2006, at least in the Northern District of Texas, and that's the standard review on appeal. District courts now have a very clear picture from the Supreme Court as a result of Gall and Kimbrough, that as long as they calculate the guidelines correctly and then provide substantial reasons for the sentence, whether it be within the guidelines or whether they're going to vary from the guidelines, the district court, the people that are there in the trenches that get to see the defendant, get to see his family, get to see the victim, that decision is not going to be reversed, and I think that puts us in a better place. I agree with the defenders that have testified, the district judges that have testified also, that the current abuse of discretion standard of review for sentencing decisions strikes me as the appropriate balance between the district and appellate courts. Procedural reasonableness review in the Fifth Circuit has made sure that errors that affect the kind or length of sentences, like improperly calculating the guidelines, or clearly erroneous fact finding, the Fifth Circuit is going to reverse those sentences and send them back down so they can be remedied, remanded
and recalculated. The Fifth Circuit has reversed sentencing where the district court failed to provide adequate reasons why it was giving the sentence it was.

The one thing that I have noticed is that, unfortunately, there have been some troubling decisions from the Fifth Circuit recently, where the district court improperly calculated the guideline range, but at the sentencing, the district court stated it would have imposed the same sentence anyway, under 18 United States Code § 3553(a). Unlike other circuits, the Fifth Circuit doesn't require sentencing courts to explain in any detail why an alternative sentence, which often represents a substantial upward variance from the properly calculated guideline range, achieves the goals of 3553(a). This ruling by the Fifth Circuit, it acts to inoculate the district court's decision from appellate review, frankly, and I think it further masks to the Sentencing Commission whether the actual sentence given was a guideline sentence or an upward variance. I don't, I don't think the Commission will be able to, you know, perform part of its function of determining which guideline the judge disagrees with and revise the guideline accordingly under these circumstances.

But that said, the district courts that
do this are few and far between, and so are those
decisions. And I make this observation not because I
think the Commission can or should take action aimed at
giving the appellate standard of review more teeth, but
I think this practice violates the Supreme Court's
decision in Gall, and we're seeking a review of these
decisions before the Supreme Court now.

I think the Commission could hold a more
meaningful review, excuse me, a more meaningful
procedural review of sentences by providing relevant
information to consider when determining the appropriate
sentence under 3553(a). I note that the Fifth Circuit
has affirmed a number of sentences where the district
court cited the need for deterrence in support of an
unexplained sentence, or what turned out to be a sizable
upward variance. This decision is based upon, you know,
the belief that a long term of imprisonment supports the
goals of deterrence, when, in fact, the current body of
research shows that that's just not true. Instead it
shows that certainty of punishment, not the length of
punishment, has much more significance.

I would urge the Sentencing Commission to
publish a review of this research to better educate all
of us about the current knowledge regarding the term of
effective incarceration. I must admit that this is part
of my job as an advocate, but what I have found is the
district courts are much more willing to listen to
something that comes from an independent clearinghouse
of information, like the Sentencing Commission, more
than they would probably from me.

Judge Hinojosa, I repeatedly used your
testimony before the Senate subcommittee —

COMMISSIONER HINOJOSA: But were you under oath?

MR. HAWKINS: No, but you were. I
repeatedly used your testimony in the Senate subcommittee,
arguing before the district court that look, they agreed
that the crack to powder ratio isn't working. It should
be, at a minimum, less than 20 to one. And the district
courts listened to that.

The Commission has access to all of this
wonderful data, and it can be used as a powerful
independent clearinghouse of information as to what type
of sentence does and does not work in stopping people
from reoffending, and I think that's what the main goal
should be.

To that end, I'm looking forward to the
Commission's report on mandatory minimum sentences. I
join a long line of judges, defenders and other
witnesses who have urged the Commission to recommend to
Congress that it repeal or at least significantly reduce
the mandatory minimum sentences.

Mandatory minimums, they are a powerful tool prone to abuse in the hands of untamed and unchecked prosecutors. The dramatic effect these mandatory minimums have on a sentence, and the powerlessness of a district court or appellate court to reduce the impact of these mandatory sentences can result in just barbaric sentences, in my estimation. The only check or balance on the mandatory minimum sentence is the decision of a prosecutor, who's a fallible human being like the rest of us.

These mandatory minimums promote disrespect for the law, and nowhere in my experience has this shown itself to be true more than in the case of Mary Beth Looney, which I provided in my testimony. Mary Beth Looney was a 53-year-old woman who had never been arrested, much less convicted. Her husband Donald Looney began transporting methamphetamine from Arizona to be distributed in Wichita Falls. Mary Beth Looney and her friend LaDonna Harris became involved in the sale of minor portions of this methamphetamine. LaDonna Harris and Mary Beth Looney drove just across the board from Wichita Falls to a casino in Oklahoma. They ended up selling some of this methamphetamine to customers, and one of those customers was an undercover agent.
They made approximately four sales to the undercover agent. The other undercover agent wanted a bigger supply. He wanted a bigger amount. And so they arranged for him to come back to Wichita Falls so they can sell him this amount.

Eventually, they showed up with this methamphetamine. Mary Beth Looney, her husband, and LaDonna Harris were all arrested.

LaDonna Harris was taken up to the Western District of Oklahoma, and she was indicted on three counts, a three-count indictment that did not contain a mandatory minimum, but contained a statutory maximum of 20 years. LaDonna Harris pled guilty, and she was given a sentence of 37 months.

Mary Beth Looney was not so lucky. She was charged with two 10-year mandatory minimum counts, a five-year gun count, and a 25-year gun count, in the Northern District of Texas by the prosecutor here. She had no choice but to go to trial. Mary Beth Looney received a sentence of 45 years, due to the mandatory minimums.

LaDonna Harris was released from prison in 2007. Mary Beth Looney won't be eligible to be released from prison in the Northern District of Texas until she's 98 years old. These are the same
transactions, the same drugs, the same guns that were —
LaDonna Harris knew about the guns. She stayed in their
house. She used the guns no more than Mary Beth Looney
did. The only difference in this case was the
prosecutor.

I would like to speak to the issue that
has arisen previously about whether mandatory minimums
invoke cooperation or that they're necessary. And I can
speak from my experience. That has simply not been the
case. As much as I generally try to talk my clients out
of cooperating, and the reason why, because cooperation
in the Northern District of Texas generally involves a
moving target. There either has to be an arrest or you
have to testify, and despite your best efforts, you're
going to get no more than two to three levels off. My
clients are still willing to testify, mandatory minimums
or not, and I think the statistics bear that out.

With regards to some guideline changes,
I'd like to, you know, briefly talk about two or three
areas there. The child pornography guidelines, again, I
join everybody who I've heard testify, and I see most
recently the chief judge of the Fifth Circuit, Edith
Jones has also asked the Commission to reconsider the
guidelines for child pornography.

The ranges recommended in these cases all
too often reflect a life sentence. Just like Judge Moore testified in Georgia, just like the three district judges testified here today, the lion's share of my clients are middle-aged men that are simply social misfits. They have no prior convictions. When we have, you know, we try to determine whether or not they're a danger to children, we had them evaluated, it turns out that they're not, yet these guidelines punish them as though they have touched children, and it gives them a life sentence and something that they can never recover from. I urge the Commission to study and report on the possession of child pornography and whether it actually correlates with child exploitation, and to revise the guideline to distinguish between differently situated offenders on a rational basis grounded in research.

I'd also like to address the acceptance of the responsibility provision. In a fairly recent stance taken by prosecutors in the Northern District of Texas, prosecutors are routinely refusing to move for the third point for acceptance of responsibility, despite the fact that we've notified them that we're pleading guilty, and we've allowed the government to avoid going to trial.

Now that the power to grant this third point has been taken out of the hands of the judge to
make that independent determination, and put into the hands of the prosecutor, they're using this power to bludgeon our clients with a longer sentence. They require us to enter into plea agreements before we've seen the presentence report, before we know what the guideline calculations are, and if we refuse to do so, then they will deny us the third point for acceptance. I think that this is a corrosive practice that leaves our clients’ belief and my belief in the system of justice just a little less than it should be.

Illegal reentry guidelines. Briefly, illegal reentry cases, they comprise 16.1 percent of our case load, and there are more illegal reentry cases in this district in 2008 than in half the districts that have applicable fast track programs.

The Commission recognizes that the government's selective use of the fast track program creates unwarranted disparity because people in districts without a fast program receive longer sentences by mere accident of geography. I found it extremely difficult to explain to my client that he should have gone to work up in the meat packing plants in Nebraska instead of chosen chicken packing plants in Amarillo, Texas. He could have gotten a lower sentence had he, you know, possibly made that choice.
Troublingly, also, for us, is the fact that the Fifth Circuit does not allow a district court to account for whether or not the fast track program, if it were in place, you know, to allow the district court to vary downward. I think that the way the Commission can take action to promote a fairer system is a guideline comment stating that the district court may depart from the guidelines to reduce the unwanted disparity created by the absence of fast track programs.

I think also within the illegal reentry guidelines, other issues that the court should include, excluding from the most severe offense level any prior conviction that doesn't meet the definition of aggravated felony. I think the Commission should try to differentiate between the different levels of culpability between 2L1 and [2L]2.2, and by that I mean the reason for the defendant actually reentering the country. What was his motivation, his or her motivation for coming back in? Whether they ever lived in the country previously. Have they lived in the country previously to which they were deported? Were they caught here committing a new crime? And the existence or nonexistence of legal status in the country.

I would also ask the Commission to add a remoteness cutoff for prior offenses used to increase
the offense level. Currently, a prior conviction that does not count in the criminal history under Chapter Four, because it falls outside the applicable time frame, can still be used to increase the level under 2L1.2.

Finally, I ask the Commission to reconsider the enhancement where prior convictions are double counted when the prior conviction is used to both increase the offense level, and in the calculation of the criminal history score. In these sentences, the ranges, they're almost entirely driven by the double and triple weighting of the same conduct without a showing that it serves any purpose in sentencing.

In closing, I agree with you Judge Hinojosa, that this is an exciting time in the sentencing guidelines, and the Commission has the opportunity to exercise a tremendous amount of influence over the system in part by revealing to the courts and practitioners alike what sentencing practices and factors work to create a more fair and balanced system. Excuse me. I think the hallmark of this Commission's work has been the balanced and diligent efforts to create true reforms. As an example, I would point to this court's tremendous work that it did in reforming the crack cocaine guidelines. Again, I thank you for
the work, and I thank you for allowing me to appear before you.

CHAIR SESSIONS: Thank you, Mr. Hawkins. Who's next?

MR. GIBBENS: That's me.

CHAIR SESSIONS: Go ahead, Mr. Gibbens.

MR. GIBBENS: Judge Cauthron mentioned this morning that she felt her soul returned after Booker came down, and I think that's true of the whole sentencing process. In my experience, before Booker, I felt sentences were very clinical and technical. There was very little discussion of the defendants. Now there is. We talk about the defendants, the sentencings I think are more individualized. Even the, at least the process itself is more individualized, even, you know, regardless of what the outcome is, it's more understandable. It makes more sense to my clients. I think it makes more sense to the victims, to the public, to everyone that's involved, whereas before, you know, no one, no one would know, besides the judge, the defense lawyer, the prosecutor and the probation officer, really what was going on. And I think, I think that's all good.

But I do think there's still room for improvement. I think the best thing that the Commission
can do, I believe, is to remove the last impediments in
the guidelines to downward departures, which I think is
impeding courts from exercising their full discretion
and their duties understand § 3553.

I'm in the same district as Judge Zainey,
and I noticed the same statistics that he talked about
this morning, where, in our district, it seems that we
do have a very low departure rate compared to a lot of
other districts in the country, and I think what's
happening in our district is that judges are, they are
being reluctant, they are reluctant to depart or give
variance sentences without a guideline justification,
and that, that's the number one thing that I heard from
other defense lawyers and panel members in my district
when I was telling them I was going to come testify
here. The number one thing that everyone said was, “We
wish there could be, something could be done that we did
not always have to justify a guideline departure when
the courts have the authority to give sentencing
variances now.” And I think that in the practice that's
developing in our district, which I don't think is a
good one, is that defense lawyers are always making
their guidelines arguments first, and then sort of
throwing in an argument for a variance at the end,
because I think that what we're seeing happening is that
variances are not being granted unless there's a
guideline justification for the departure. And I think
the, all the restricted factors in §5H are still
being, you know, used, are still, at least in a lot of
judges' minds, are impeding them from giving variant
sentences which they are allowed to do now. And I think
to fully implement § 3553, the Commission could
remove some of these restrictions, retool §[5]H of
the guidelines, and I think that would make the process
even better than it is now, than it's become after
Booker.

The second, the second problem that I
have seen a lot of lately, and this is something that
several of the district judges mentioned this morning,
is that just over, over the years, so much of the
sentencing, of sentencing power has been concentrated in
the hands of the government, and that's through
mandatory minimums, through §5K1.1 and the safety
valve. Those are really all three things that are
strictly controlled by the government, and they have the
most impact of sentences overall.

Judge Cauthron mentioned this morning
that sentences can be manipulated at the investigative
stage by agents who will just keep going back for hand
to hand drug transactions until they reach a mandatory
minimum threshold. And I can say in my district, that
seems to be the practice. And I think the reality is
that the outcome of many of these drug cases is
determined before, before there's even an indictment.
They get the mandatory minimum amount. That's what the
defendants are indicted with. And then unless they can
get a 5K1.1 departure or unless they can get into the
safety valve, they're going to get the mandatory minimum
sentence.

I think what's very ironic about this is
that most of the time the government is really the least
interested in the sentencing when it finally occurs.
You know, we now have the defense lawyers arguing
variances and downward departures, and the judges are a
lot more interested in hearing the arguments for
variances and downward departures. Usually, the U.S.
Attorneys don't say anything. They don't object. And
you know, it's ironic that the reality of it is that the
decisions that they make at the inception of the case
are what's dictating the outcome. And I don't, I
personally don't, don't feel in my district that it's
because the U.S. Attorneys really want these mandatory
minimums. A lot of times I don't think that they really
care. I mean, as I said, by the time of the sentencing,
we get to sentencing, they've got the conviction.
Whether the defendant gets five years, ten years, 15 years, usually I don't think the assistants have, you know, a real strong belief on what it is, but just because of the way the system has been set up, we've, you know, we're getting, defendants are getting stuck with these mandatory minimums.

And I mean I have lots of clients and lots of examples of cases where we have, you know, a defendant with a, you know, a single parent with a child who is, you know, going to have to go live with relatives or go into foster care because the parent is stuck in a mandatory minimum sentence. There may not be anybody to cooperate against. The willingness is there. You know, the meetings with the prosecutors and the investigators happen, but, you know, there's just, it's just the 5k motion is not going to come. The motion for downward departure is not going to come. The assistants a lot of times feel bad about that, but you know, there's nothing they can do.

I think there are a couple things that the Commission can do to alleviate that problem, which would be, at the least, keep talking about the mandatory minimums and evaluate them, and maybe recommend to Congress that there need to be some changes in that. Also, allowing the government, allowing the defense or
the court on its own motion to initiate a 5K1.1 departure I think would, would help in some of these circumstances, where there has been some cooperation, but, you know, in the eyes of the government it hasn't risen to the level of a downward departure, and also, to expand the safety valve, because very often there are defendants with one criminal history point who I think everyone involved would, would like to get them into the safety valve or like to get them out of the mandatory minimum, but just can't do it because of, because of one conviction that, you know, sometimes could be for something relatively minor.

The third thing that I think the Commission can do now is offer more explanations and rationales for the provisions in the guidelines. At this point, at sentence, you know, sentencing is all about trying to convince the judge whether or not to apply certain guideline factors or to depart. I think if there were more rationales and explanations for why each of these factors existed, everyone would be better off, and able to make, you know, better sentencing arguments. The judges would, would be able to even give, you know, feedback to the Commission and to the lawyers in front of them about whether or not they agree with the rationales and the policies behind the
guidelines. And I think the more information that we all have about, you know, why certain factors and why certain guideline enhancements are in place would make it just a much, a much more understandable system and a much, a much fairer system over the long run.

I thank the Commission for the opportunity to testify, and I did address a few other, a few other issues in my written testimony that different members of our CJA panel have, have asked me to, asked me to include, and I'd be happy to address any questions that any commissioners have at the end.

CHAIR SESSIONS: Thank you, Mr. Gibbens.

MR. GIBBENS: Thank you.

CHAIR SESSIONS: Ms. O'Connell.

MS. O'CONNELL: Thank you.

In preparing for testifying, one of the first things I did was looked at the statistics for my two districts, and was a little alarmed to see this low government 5K1.1 below-guideline statistics, below-guidelines sentence statistics. For 2008, 1.1 percent of the cases are attributed to 5K1.1 motions, which equals one case. And I thought that to be odd. And I sat down with the lawyers that work in that district, and looked through our cases, and then realized that Rule 35(b) motions certainly were utilized a lot, and
for the life of me I couldn't figure out where I could
get that kind of data. And I think that probably one
thing that I would really like to say is it would be so
helpful to practitioners, I think to the courts, as
well, and to Congress if, if this data was tracked in a
way that was understandable and readily accessible and
not just as it pertains to Rule 35(b) motions, but that
is an example of a place where I personally experienced
just a little bit of frustration.

I would like to echo some of the things
that were said this morning. Alternatives to
incarceration is one of the things that I would very
much like to talk about. As with many others who have
testified, I'm very excited to know that that is a
priority.

I note, as well, that the Department of
Justice has an interest in alternatives to
incarceration.

I was reading earlier Eric Holder's
comments to the ABA at the general meeting, and found it
notable that Eric Holder said that since 2003, our
incarceration rate has continued to grow, although the
crime rate has plateaued. Something is not working.
And Eric Holder, in that speech, said that he, that the
Department of Justice would be looking at many things,
including alternatives to incarceration.

Alternatives to incarceration, I think everyone here recognizes that they are viable, that there are studies. There is plenty of research that the Commission could report. There's additional research that the Commission could do. Some alternatives to incarceration certainly could bear very directly on the purposes of sentencing in federal court, and I, for one, would like to see the Commission urging alternatives to incarceration.

I do think that one of the most useful and relevant things that the Commission could do for practitioners and courts is to provide information, information that explains guidelines, information that explains what the guidelines' relationship to the purposes of sentencing are.

In that regard, I would like to first talk about Chapter Five of the guidelines, as someone mentioned that this morning. It is the defender's position that Chapter Five should, in its current form, be rendered obsolete. I would urge the commissioners to suggest to replace Chapter Five with a suggested list of factors that may provide bases for departures, not to assign points or levels for those bases, but to instead provide information, as it becomes available, regarding
each of those bases potentially along the lines of other lists that can be found in the guidelines that are not meant to be exclusive. But it seems to me that those not ordinarily relevant factors that are contained in Chapter Five are, in fact, not consistent with the purposes, the sentencing, they're not consistent with the 3553(a) in many ways. And I believe that it would be appropriate to just inform courts of what the research says about how each of these various factors affects the purposes of sentencing.

For example, family ties and responsibilities. When parents are incarcerated, are the children likely to grow up to be offenders? Those are things judges want to know about. Does a long sentence in fact have a correlation, a deterrent effect, which the research indicates that it doesn't. Mandatory minimum sentences, again, you know the defender position, but we recommend, we urge that the Commission recommend to Congress the abolition of mandatory minimums.

Judges find mandatory minimum sentences disturbing. They've resulted in overincarceration. They're easily manipulated and therefore prone to abuse, and they do not encourage cooperation, in my experience. They absolutely do not encourage cooperation.
I would submit to you that a defendant who is facing a term of imprisonment, if that person wants to reduce their term of imprisonment and feels comfortable cooperating, they are going to do so, no matter how small the potential sentence is, no matter how large the potential sentence is. Mandatory minimum sentences have a corrosive effect on the process. I discussed, in a couple — from a couple different angles, the problems that I've experienced relating to mandatory minimums in my written testimony.

But they are, mandatory minimums are the, if not the cause of overincarceration in this country, they're one of the major causes of overincarceration in this country. Mandatory minimum sentences do not reach the kinds of people that they are supposed to reach. Mules, drug mules get punished more because of large quantities that they're carrying, whether they truly know how much it is or not, in relation to a larger drug dealer. These kinds of problems don't result in just sentences. And I think everyone here has a tremendous interest in sentences that are just. Mandatory minimums do a lot of damage across, across the social realm, outside this room and outside of what we do. I know you've heard before from the Families Against Mandatory Minimums.
There is value in rehabilitation, as opposed to excessive incarceration, which is, in the defender's opinion, over-incarceration is the result, the unintended result, of mandatory minimums.

I'd also like to talk about the drug guidelines and safety valves. The defender position is that the drug guidelines should not be tied to mandatory minimum sentences. We would urge the Commission to consider an across-the-board two-level decrease in the drug guidelines.

Drug quantity does not correlate to role in the offense. The offender role in drug distribution is something that isn't appropriately addressed, accurately addressed by the guidelines now.

Low-level offenders are often subject to more severe penalties that were intended for higher level offenders. The defenders would suggest that the Commission consider the drug guidelines that take into account role in the offense first, and potentially drug quantity second, to effectuate the purposes of sentencing.

And as far as safety valve goes, we're proposing that the Commission take some action to suggest that the safety valve be expanded so that it might also apply to persons who are in Criminal History
Categories II and III. There are, and I believe you've heard about it previously, there are offenders who are excluded from the safety valve because of offenses that are minor, that are very old, but they are nonetheless excluded, and their incarceration does little if any, anything to effectuate the purposes of sentencing. And so we would submit that the Commission, request that the Commission undertake that, as well.

I'd like to mention the career offender guideline and talk about it some. The defenders believe that the Commission should recommend that Congress repeal 28 [U.S.C.] § 994(h), and in the meantime, that the Commission should take some other actions to alleviate the irrational impact of the career offender guideline.

The career offender guideline, in our experience, does not more precisely focus on, to use guideline words, recidivist offenders for whom a lengthy term of imprisonment is appropriate. Often, [it] recommends harsh sentences for petty offenders. I think Judge Cauthron's example is a prime example of the type of case that I'm talking about, a person who has, who's instant offense is a drug offense, and whose prior predicate offenses, if you will, were minor drug offenses, whether small amounts, whether sentences that reflect that clearly the state court or whichever
jurisdiction imposed the sentence thought were minor offenses, as Judge Cauthron's case, I think she said probation was imposed in those sentences. Someone like the defendant who is in Judge Cauthron's example has never been to prison before, is not the kind of person that the career offender provision should hit.

In order to, in order for the guideline to effectively affect the persons that it's intended to, we make several suggestions. First, the definition of "controlled substance offense," it's the defenders’ position that those should only be, those should be limited to federal offenses that are required in § 994(h).

Second, the definition of "crime of violence" should be amended. Judges are already using the definition in Begay quite a bit, and we would propose that the Commission use that definition. In the alternative, the Commission could use an elements test.

The third proposition that we make is that the Commission should amend the definition of "prior felony convictions" so that it's consistent with title 21, § 802(13).

And lastly, we're suggesting that the Commission should remove the limit for departures from criminal history — departures in the career offender
guideline of one criminal history level. The limitation adopted in response to the PROTECT Act was not required by the Act, and it's our position that the Commission should remove it.

Child pornography is another guideline that I would like to talk about. You've heard plenty about that today. But the sentences that are meted out in child pornography cases do not bear a rationale relationship to the purposes of sentencing. They don't reflect what is generally the low recidivism rate for the people who are guilty of possessing child pornography.

This is an area in my practice where judges will listen and will impose sentences below the guidelines, if they are presented with the information relating directly to the defendant's propensity for recidivism or the defendant's amenability to treatment. Often, if not frequently, the defendants that my office represents in child pornography possession cases are people who have sometimes startling backgrounds, the victims of sexual abuse, victims of molestations, and almost always, when they are evaluated by the experts that we hire, we are told that they don't pose a risk, or if they do, they pose a low risk of actually touching a child. That is these people are not predators in that
sense, and the sentences that they get make them out to be.

The consequences relating to the possession of child pornography, outside of the prison sentence and how the guidelines impact them, are so draconian, people can't integrate back into their communities, because they're restricted on where they can live. Oftentimes they cannot be reunited with their families unless everyone moves away from a school or a daycare center or a library, and in rural Oklahoma, that's very difficult to do. So many of the Eastern District communities are three or four or five blocks long, and someone who lives in one of those towns is inevitably too close to a school. Their names are on websites. They've got to register as sex offenders. They're identified on their driver's license as sex offenders. Consequences are tremendous. And the kinds of sentences that they receive as a result of the guidelines border on absurd.

I'd like to talk about acceptance of responsibility. That's §3E1.1(b). Mr. Hawkins already mentioned this, but this is something that I really want to talk to you about, as well.

I would urge that the Commission recommend that Congress repeal the government's motion
requirement for the third level for acceptance of responsibility. It is something that it has become so prone to abuse, and what originally we, defenders, thought was the ability to recommend an additional level, the government's ability to recommend an additional level for a defendant by assisting them to avoid preparing for trial, that's turned into doing almost any work.

The government and its use of the third point motion as a tool to extract a lot more than a guilty plea has risen dramatically. I talk about it in my written testimony, as well. This is something that the Commission certainly could remedy by explanation and commentary. What is the third level, what is the conduct that the defendant has to engage in? We've suggested some language, which is in my written testimony. But it's our position that any conduct that the defendant engages in or fails to engage in that doesn't cause the government to prepare for trial should not be a factor that allows the government to withhold the third point motion. And we would urge the Commission to clarify that.

I would like to also talk about some of the things that Judge Cauthron had to say regarding getting her soul back. I was pleasantly surprised to
hear her say that, because to answer the question that was put to us by the Commission when we were invited to testify, one of the benefits that I see to the system now, to the advisory sentencing guidelines system, is that it has given me my soul back.

It has been a difficult time, the last several years, walking with a man or a woman about to be punished and having to say to them honestly, no, that doesn't matter, or yes, it matters, but only between the top end and the bottom end of this range. People are very individual, and those individualities speak greatly to whether they will reoffend, to whether or not incarceration is really necessary to protect the public, whether or not treatment or some other, some other alternative would be more appropriate.

Now I find that I am able to go to court, and whether I win or I lose, whether the defendant gets a big sentence or a small sentence, I walk away from sentencing hearings now feeling as though I was heard, the defendant was heard, his side was heard, and that the court had the ability to make the sentencing decision based not solely on the conduct that resulted in the conviction, but also in all of the factors that speak to 3553(a), the purposes of sentencing.

We are all here because we want justice.
We want the system to work as best as it can. I think the best possible thing that the Commission can do now is to provide information, data to sentencing courts and practitioners. I would find that useful. I would find that relevant, and I know the courts that I practice in front of would, as well. Thank you.

CHAIR SESSIONS: Thank you, Ms. O'Connell.

So, are we up for questions?

COMMISSIONER FRIEDRICH: Ms. O'Connell, in your written testimony, you talked about § 994(e) the format.

MS. O'CONNELL: Uh-huh.

COMMISSIONER FRIEDRICH: And as you know, that provision directed the Commission to assure that the guidelines reflect the general inappropriateness of considering education, employment records, family ties and responsibilities and community ties, and recommending a term of imprisonment or length of a term of imprisonment. And if I'm understanding the defender's position correctly, you read that provision to direct the Commission not to consider these factors in deciding that a defendant should be sentenced to prison, as opposed to probation, but also direct the Commission to not consider those factors in determining
how long a defendant's sentence should be. Right? Am I reading you right?

MS. O'CONNELL: Yes.

COMMISSIONER FRIEDRICH: Okay. But as I read your testimony, you suggest that it is okay for the guidelines to consider these factors in order to recommend a lower sentence, but not a higher sentence. Am I right?

MS. O'CONNELL: No, you're not.

COMMISSIONER FRIEDRICH: Okay. What I, what I, and I'm on page five of your testimony.

MS. O'CONNELL: Uh-huh.

COMMISSIONER FRIEDRICH: You say, the list of factors should not be used to choose prison or probation, which I understand, or a lengthier prison term. Right? A longer prison term. But I read the testimony, maybe I've read it incorrectly, to say it's okay to consider these factors in reducing a defendant's sentence. Am I wrong.

MS. O'CONNELL: I don't think that you're reading what I'm saying accurately.

COMMISSIONER FRIEDRICH: Okay. So if defenders have repeatedly suggested to the Commission that we've misread Congress' directive to the Commission with regard to these factors –
MS. O'CONNELL: Yes.

COMMISSIONER FRIEDRICH: And that actually Chapter Five shouldn't discourage the courts from considering these factors.

MS. O'CONNELL: Right.

COMMISSIONER FRIEDRICH: Right? In imposing a shorter sentence. So the way I read your testimony, I interpret it as a one-way ratchet. It's okay to consider these factors in order to reduce a defendant's sentence, but not to increase the defendant's sentence. And I just, did I just misinterpret your testimony?

MS. O'CONNELL: I'm not talking about ratchetting sentences up in any direction. I'm not interested in ratchetting sentences up.

COMMISSIONER FRIEDRICH: No. I mean —

MS. O'CONNELL: My testimony is directed at the position that the Commission, in my view and in the defender's view, the Commission, when it comes to the departures provisions in 5H and in [5K2], that the Commission should, instead of assigning values and numbers, the Commission should —

COMMISSIONER FRIEDRICH: Well, I don't think we assigned values and numbers to these factors. I think what the Commission has said is that they're not
ordinarily relevant in determining. But I interpret the
defender's testimony, your written testimony and
testimony in the hearings as saying things like
employment and things like education, that those sorts
of factors could be considered and should be considered
to reduce the defendant's sentence.

MS. O'CONNELL: True.

COMMISSIONER FRIEDRICH: All right. But
yet they should not be considered to increase a
defendant's sentence. Correct?

MS. O'CONNELL: Well, yeah. I think the
legislative history would support the argument that as I
think I said in my testimony, a symmetrical reading of
the directive.

COMMISSIONER FRIEDRICH: Not just in
terms of prison versus probation, but also in terms of
length. It's okay to consider in terms of going down,
but not to go up. Let's, for example, say you have a
defendant and Mr. Hawkins has a co-defendant in a
conspiracy. Your client has no high school diploma.
Your client has no job. You agree that the Commission
guideline suggests that it would be inappropriate for a
judge to consider those factors to increase the sentence
your client receives. Correct?

MS. O'CONNELL: Yes.
COMMISSIONER FRIEDRICH: Okay. But Mr. Hawkins' client, who has a college education, who has a great job, he has lots of family and community ties and he's done a lot of work in the community, the [defenders’] submission [is] that the guidelines should permit a judge to consider those factors in reducing his time for the crime. Right?

MS. O'CONNELL: No. I still don't think that you understand what it is that I'm saying. My view is that the purpose of 994 is to, to ask the Commission or direct the Commission to ensure that these factors are neutral.

COMMISSIONER FRIEDRICH: But if they're neutral, and again, correct me if I'm wrong, but the impression I've had repeatedly is that the [defenders] believe that it's appropriate for the guidelines to consider them for purposes of lowering a defendant's sentence in a case where a defendant has extraordinary community ties, a good job, he has a college education, that those are things that a court should look at and say he's less likely to recidivate, et cetera, et cetera, therefore I'm going to give him a break in his sentence. Am I right? Have I misinterpreted what you've said?

MS. O'CONNELL: The reason that a judge
would consider employment or community ties goes to recidivism, it goes to the purposes of sentencing, and what we're saying is that a judge should not solely send someone to prison because he doesn't have a job. That's what the purpose of the directives in 994 were. That's what our position is.

COMMISSIONER FRIEDRICH: I'm not talking about prison versus probation. I'm talking about the length of sentence.

MS. O'CONNELL: It's the same.

COMMISSIONER FRIEDRICH: Should the college educated, should the, you know, your client with the good job, who's less likely to recidivate, statistics would show, than someone who is unemployed and has no high school diploma, should that defendant good get a lesser sentence? Is it appropriate for the Commission to encourage courts to sentence that defendant more leniently than your client who has none of these?

MS. O'CONNELL: Well, it depends entirely on the person. It depends on a variety of factors.

COMMISSIONER FRIEDRICH: But you think it's appropriate for the Commission to encourage consideration of those factors downward, not upwards, but downwards.
MS. O'CONNELL: I think it's appropriate, yes.

COMMISSIONER FRIEDRICH: The problem I have, given the purpose of the Sentencing Reform Act, I find that interpretation extremely hard to square with the Sentencing Reform Act. Congress wasn't concerned about having a win. Congress was concerned about like defendants who committed similar crimes being treated similarly, and Congress was extremely concerned about socioeconomic factors and other things, socioeconomic status, to influence the judge's sentence. So I find it very hard to square the defenders' suggested interpretation of 994(e) with the statute. I just —

MS. O'CONNELL: Well, I don't know that it's just our view. I think that judges have said that they don't want, they don't want to be told what to do in regards to, to those 5H factors. It's, when you look at 3553(a), there is the nature of the offense, the history and characteristics of the defendant, and several things necessarily play into that. Those are factors that speak to the purposes of sentencing, and considering them for a permissible reason versus considering them for an impermissible reason —

COMMISSIONER FRIEDRICH: It's impermissible to consider them to increase a defendant's
sentence, because he or she may be more likely to
recidivate. Right? I'm just, I'm asking.

MS. O'CONNELL: I don't know that that's
necessarily true. As I said, it's the entire picture of
the defendant. Judges don't sentence based on
employment. That's not my experience. They don't, they
just didn't do that. There are a number of factors that
play into how they determine what is an appropriate
sentence. The history and characteristics of the
defendant include long-term stable employment, that has,
that has valuing in, in determining what's the most
effective sentence to effect the purposes of sentencing
that are found in 3553(a).

CHAIR SESSIONS: Okay. I'll call a
truce.

COMMISSIONER HINOJOSA: Just a quick
comment. You have to admit that when you talk about
history characteristics of the defendant, you certainly
would exclude race, gender, socioeconomic status that
have been forbidden by the statute itself. Those are
forbidden factors by the statute.

MS. O'CONNELL: Yes, they're forbidden.

COMMISSIONER HINOJOSA: So you wouldn't
consider socioeconomic status.

MS. O'CONNELL: Yes, if, if I know what
COMMISSIONER HINOJOSA: Well, I'm just saying what the statute says.

MS. O'CONNELL: Well, socioeconomic status, you don't send someone — the way that I read 994 is that you don't send someone to prison because he's poor. You don't deny someone probation because they're poor. You don't give someone probation —

COMMISSIONER HINOJOSA: Well, those factors are not listed in that list that talks about determining imprisonment or not. Those are just strictly listed as forbidden factors in another section.

MS. O'CONNELL: But they would be factors that would be considered.

COMMISSIONER HINOJOSA: They would be?

MS. O'CONNELL: No. What I'm saying — no. I'm sorry. Those factors are, are sentencing factors that — they're not sentencing factors. They're just impermissible because —

COMMISSIONER HINOJOSA: I think they're congressionally worded as forbidden. They wrote 3553(a), and so I'm saying would you not have to read them together and say at least with regards to the history and categorization of the defendant, these are factors that cannot be considered?
MS. O'CONNELL: Well, I think that,
that — I think that what we —

COMMISSIONER HINOJOSA: You certainly can
agree on race and gender. Right?

MS. O'CONNELL: We agree on race and
gender.

COMMISSIONER HINOJOSA: And they also
listed socioeconomic status.

MS. O'CONNELL: They list socioeconomic
status, but I don't think that precludes consideration
of disadvantages [such as] youth. I don't think it does.

COMMISSIONER HINOJOSA: I guess my next
question was [about what] you mentioned, I guess it was the
Eastern District that you said had only one 5K1.1 case.

MS. O'CONNELL: Yes.

COMMISSIONER HINOJOSA: Of course, there
were 89 cases, and 83 were within the guidelines and then
there were five that were departure variances. Why didn't
you think it was odd that there was only one 5K1.1? The
total for the year is listed.

MS. O'CONNELL: In fiscal year 2008?

COMMISSIONER HINOJOSA: Right. And 83 were
within the guidelines and there was one 5K1.1, and five
departure variances.

MS. O'CONNELL: You mean in, under the
not otherwise identified?

COMMISSIONER HINOJOSA: Well —

MS. O'CONNELL: Is that what you're telling me?

COMMISSIONER HINOJOSA: It talks, it was five below the guideline range. None above the guideline, [] 83 within the range. I'm just saying one doesn't appear to be that much out of place when you look at the total picture. And then for Mr. Hawkins.

MR. HAWKINS: Yes, sir.

COMMISSIONER HINOJOSA: You talked about the departure variance rates in the Northern District of Texas. What's interesting about that is I looked up, in fiscal year 2008, the upward departure/variance rate in the Northern District of Texas is 6.5 percent, which is four times the national average. The downward departure variance rate is 7.2 percent. This is a phenomenon that you don't see in just about any other district, at least we haven't seen it. The national average for upward departure/variance is 1.5 percent, and then fiscal year 2008 I believe the downward departure rate is about 13 point something percent. What do you think causes this to be so different in that district? And are some of these factors that Commissioner Friedrich is asking about being used for the upward variance rates?
MR. HAWKINS: It's very difficult, you know, to explain those statistics and why that's happening. But let me, let me say that I, I believe that in 2008, that we had some very high profile bank robbery cases. Defendants engaged in multiple bank robberies. And I, I think, if I recall correctly, I think the statistics show, at least during that time period, that bank robberies comprised five times more of the case load than they did nationally, and that the bank robbery upward variances comprised about 15.5 percent, I believe, of the six percent of those things that you pointed out. The other places where these variance, variations take place a lot of times are in immigration cases. I —

COMMISSIONER HINOJOSA: Because it does appear to be about 70 cases or a little bit more.

MR. HAWKINS: Yes, and —

COMMISSIONER HINOJOSA: 71 cases, I guess.

MR. HAWKINS: And I think that I've got — by in large, the, those variances come from two to three judges.

COMMISSIONER HINOJOSA: Two to three what?

MR. HAWKINS: Two to three judges.

COMMISSIONER HINOJOSA: Is that an indication of judicial disparity, I guess?
MR. HAWKINS: I'm sorry, Your Honor. I want to make sure I understand your question.

COMMISSIONER HINOJOSA: Well, I guess what you mean there is that it depends on who the judge is.

MR. HAWKINS: In — yes. There are, we have judges that are, we have two to three judges that are much more prone to give variances than the other judges are, just like those same judges were more prone to give upward departures, back in the mandatory guideline days. For us, this system, at least in the Northern District of Texas, has been a net gain. Whereas before, any judge who was giving a downward departure, that sentence was going to be automatically, I'm not, pretty automatically saying it was going to be reversed by the Fifth Circuit, no matter what. Now those judges, those judges that are considering a 3553(a) factors and are troubled by these guidelines, they know that they can vary downward, as long as they explain their reasons, just like the judges that think the guidelines don't punish some people enough can get those same exact reasons and be informed also.

COMMISSIONER HINOJOSA: So in your district, it's probably about half and half, because you've indicated it's double what it was pre-Booker, and so I was going to assume then that half of it has gone up and
MR. HAWKINS: Yes. What happens is that they will come to you and say, well, if you're going to fight detention, then we're not going to offer a plea.
agreement. And if they don't offer a plea agreement, they won't move forward for acceptance. We have had several cases where an assistant United States attorney has just told us that if you're going to fight us on detention, then no plea agreements, and you know what that means. That means no third point.

COMMISSIONER HINOJOSA: Have you taken that to the Fifth Circuit?

MR. HAWKINS: Yes, Your Honor. We've taken it in several circumstances. The case I think is United States v. Duhon, and what the Fifth Circuit has said, as long as it's not irrational, unconstitutional or arbitrary, then the government can do what they want. But there's no definition as to what that is. We've taken this challenge up when we've merely filed a motion to suppress and said if the judge denies our motion to suppress, then we're pleading guilty, and it's been upheld. They didn't have to do it.

COMMISSIONER HINOJOSA: I thought the Duhon decision was the one in which the Fifth Circuit said, well, you can get the guideline application wrong, but if the judge says ultimately he'd give the same sentence —

MR. HAWKINS: I apologize. I may have given the wrong case, Your Honor, I'm sorry, with regard
to the -

CHAIR SESSIONS: Any other questions?

I just want to go back to the 5H factors, because you talk about that they should be replaced with a set of factors for departure, essentially, and I think that what you're basically talking about is factors for downward departure. And I'd ask that you think about this in a different kind of way. You're talking about, all of you were talking about the need for the Sentencing Commission to give more information for practitioners and judges to use, and as an alternative, as opposed to the various discouraged factors, not the forbidden factors, but the discouraged factors, one option, of course, would be to give a full exploration of both the positives and negatives of these various factors. Now, it's not all down. It could very well be up, because, after all, some of those factors were actually developed historically because people felt they were proxies for racial discrimination or socioeconomic discrimination, et cetera. And my question is: Assuming that there is a removal of these discouraged factors, and a replacing them with the most current extensive research on how these particular factors are relevant in the sentencing process, isn't that what you're asking for ultimately?
MS. O'CONNELL: Yes.

CHAIR SESSIONS: Isn't that something that you would agree with, even though you know there could be, let's just say as an example, age. Well, age impacts recidivism at different, in different ways based upon where you are, and that could very well help some and hurt others. Well, family circumstances, those could very well be factors for socioeconomic discrimination or they could be used in very positive ways for lowering a risk of recidivism. But what you're asking for, I thought, was a full explanation of what the research says in regard to all of those characteristics, and in that way, giving informational guidelines to judges and practitioners about those particular factors, no matter how they end up, whether they hurt clients or whether they benefit clients. And I guess I'm asking you, is that what the defenders are asking for?

MS. O'CONNELL: Yes.

CHAIR SESSIONS: Or are they asking for just something which is just, you know, as Commissioner Friedrich is saying, a downward ratchet, use these factors for the down, but not in any way consider them for the up?

MS. O'CONNELL: Yes, Your Honor. You've
got it right. That's what we're asking for.

CHAIR SESSIONS: Do you agree with that?

MR. HAWKINS: Yes, Your Honor, I do agree with that. I don't want — I'm concerned about the Commission assigning any particular value to what that would be, but we would like for the Commission to highlight those statistics which can —

CHAIR SESSIONS: Knowing that they could be up and down, positive and negative.

MR. HAWKINS: We already know, I think, pretty much where those are anyway, Your Honor.

CHAIR SESSIONS: Okay. Any other questions?

Well, thank you, folks, for a great discussion, and as usual with the defenders, you're very well prepared. I must say that I read both. This is the first time two written submissions were forwarded to the Commission, and I think I read them all, and I appreciate the work. Thank you very much for coming.

MR. GIBBENS: Thank you for having me.

CHAIR SESSIONS: And we'll be seeing you probably in New Orleans.

MR. GIBBENS: We're looking forward to it.

CHAIR SESSIONS: Coming up in the near
future. Okay. Thank you very much.

I, Jane Demars, Certified Shorthand Reporter for the State of Texas, certify that the foregoing is a correct transcription of the proceedings in the above-entitled matter.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this transcript was prepared, and further, that I am not financially or otherwise interested in the outcome of the action.

Certified to by me this 4th day of December, 2009.

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CHAIR SESSIONS: Good morning. I just went out and just to check and see if Judge Jones arrived, and she's not arrived yet. She's driving in from Houston, so who knows about the traffic. So Judge, if you don't mind, we'd like to go forward. I want to express my appreciation that you're here today.

This is our sixth of seven regional hearings. We've been going around the country listening to all practitioners, all stakeholders in the process, and in particular, both district court judges and court of appeals judges. So it is a particular thrill that we have the two of you.

And let me just introduce you to the Commission. Of course, we met with Judge Benavides last night, but this is the Honorable Fortunato Benavides. You have served on the U.S. Court of Appeals for the Fifth Circuit since 1994. Prior to joining the federal bench, Judge Benavides served as a visiting judge on the Supreme Court of Texas and as a judge on the Texas Court of Criminal Appeals, 13th Court of Appeals for Texas, and 92nd District Court of Hidalgo and Hidalgo County Courts-at-Law. Judge Benavides has also practiced privately. He holds a Bachelor of Arts from the University of Houston, and a law degree from the University of Houston Law Center.
So Judge, it's an honor. I enjoyed talking with you last night, and it's an honor to have you here today.

JUDGE BENAVIDES: Thank you. And I wish to welcome you and the members of the Commission to Austin, and I hope you enjoy our fair city while you're in town. I assume that it's, the weather is probably what has delayed Judge Jones. And in the event that she may not make it, I had talked to her two or three weeks ago about her testimony, and she did indicate to me, as I think she will indicate if she does show up, that she would hope, that she thinks the guidelines are working, that she would hope that the Commission would go slowly in terms of any major changes, and let the courts kind of sort out the changes that have been made, and I think I can speak for myself and her with reference to the changes that she'd make with respect to adding statutory rape and other kind of questions that we had. Here she is right now.

CHAIR SESSIONS: I appreciate very much you speaking for her. But I think probably she can speak for herself.

JUDGE BENAVIDES: And if I can speak now for myself, that I do agree with that assessment, and that the Commission go slow in making changes, and give
the courts a chance to interpret some of the changes, I think they have been welcome changes, and let us sort those kind of things out. I would agree with that.

With respect to some of the items that were mentioned as potential topics, one, the mandatory minimum, I would not spend too much time with that. I view that as kind of the will of the Congress, and it's a political decision. I would hope that Congress would go slow in that area, because once you categorize things by offenses and punishments by offense, without looking to recidivism and without looking to the particular offense that's involved, you get more and more away from the idea of individualized assessment, which I think is necessary to a system of justice. Nonetheless, I do respect the political aspect of that, and that that is a role that Congress can play and does play, and probably that the public appreciates that they do play that role from time to time.

I think that the guidelines, as a practical matter, after Booker, are working well. As I indicated last night, I'm puzzled by the reasoning and the ultimate result that came with Booker. Nonetheless, as a practical matter, I believe that it's a good working, it's created a good working model. Most of the judges are sentencing under the guidelines, and it
provides, I think, for some uniformity, at the same time
allowing discretion to our district judges, and so I
think while I'm still, it's hard to understand how we
got there, I think that in effect, it has been a useful
tool.

As far as our work on the appeals court,
I think we're, we are sorting those things out. Our
biggest problem probably is in plain error analysis,
things are not raised before the district courts, and
that are raised for the first time. The district judges
throughout the circuit were a little perplexed at how
they were having to get people out of the penitentiary
and do resentencing on questions that were never brought
to their attention in the first place. I think the
circuit as of recently has gotten a little bit more, has
done a little more analysis as to whether errors are not
just errors, but whether they're plain, and also under
the, whether it caused some sort of substantial injury
to the complainant. And so we're probably having less
of those cases being sent back for resentencing.

Getting back to my main theme, I do think
that we have now a working solution, as a result of
Booker, and I think it's a proper blend. And once
again, I understand and I sympathize with the mandate
that you have with respect to trying to get uniform
sentences, but we kind of have a problem with that. And the way that I view what has happened now is, given the fact that the Supreme Court did find that certain facts had to be found in order to have some of these enhanced sentences, that the solution, the practical solution that has occurred has allowed both a concern for uniformity and a concern for discretion, and having had — and they forced the system, where the prosecutors would have been determining whether they were going to plead and prove these facts, then all you would have been, all we would have been doing is substituting the discretion of the district judges that we now have to the discretion of the prosecuting attorneys as to whether they were going to allege the fact and try to prove it, and I'm not too sure that in the long run that that would have created more uniformity than we presently have.

So I've probably exhausted my five minutes. If you have any questions, I'm open to your questions, any of your questions that you might have, and it's a great pleasure to appear before you, and thank you for the opportunity to do so.

CHAIR SESSIONS: Good morning, Judge Jones.

JUDGE JONES: Good morning. I have to
apologize. I was told we were starting at 9:00.

CHAIR SESSIONS: Well, that's fine. You had someone who was about ready to testify to exactly what you're going to testify to, but I think it's best that you're here, that you're here in person.

Let me just introduce you to the Commission. Judge Edith Jones was confirmed to the U.S. Court of Appeals for the Fifth Circuit in 1985, has served as the circuit's chief judge since 2006. Prior to her nomination, Chief Judge Jones practiced privately in Houston, Texas. She earned her bachelor's degree at Cornell and her law degree at the University of Texas, right here in the University of Texas School of Law. She also serves the Judicial Conference of the United States. And welcome. Thank you very much for coming.

JUDGE JONES: Thank you. You're giving me five minutes, initially?

CHAIR SESSIONS: I think we'll give you as much time as you'd like to take.

JUDGE JONES: All right. Thank you. I'll try to be reasonable here. I filed my comments, which are fairly brief, and Judge Benavides, fortunately, had gone over testimony of some other appellate judges, so I might have a couple of remarks about those, but I think I have several brief themes to
address.

First of all, that the Fifth Circuit judges, for good or ill, appear to handle almost 20 percent of the entire federal criminal docket. Now, a lot of that is concentrated along the border with Mexico. Nevertheless, because of the breadth and diversity of our circuit, we have a wide variety of federal crimes, and we see those on appeal. Our judges see them every day in the trial courts. We have fraud, we have Medicaid abuse, we have securities, we have bankruptcy fraud, immigration crimes. You name it, the Fifth Circuit has seen it, and in a very large volume.

For that reason, my first point would be a request that you take into consideration the views of our court. A lot of our judges are not among the most outspoken, because we're normally very busy. We are, our courts are very, very busy, especially those that are heavily affected by crime. We do not have time to write papers and speak at seminars in the way that some judges around the country do, who frankly have a lot less experience than we do. So I would urge you to call on our people when you need some advice, just to get that viewpoint of a court that is sentencing, courts that are sentencing routinely and in large numbers, and therefore can see the product of the guidelines and in
many respects, not sucking up too much, the wisdom of
the calculus that has been created.

The second is that I testified to the
Commission several years ago, hoping that you would take
some action on how to categorize sex offenses for
recidivism purposes, and our court had completely
botched it up. Our court plucked the categorical rule,
and the Commission has helpfully clarified that issue.

Another issue I mentioned at the time was
my concern about assaults on law enforcement officers,
as a recidivism element, and recent survey of our last
two years worth of appeals shows that that doesn't seem
to be such a problem. So I would not highlight that at
the present time.

Let us look, moving now to the appellate
area, in 2008 to '09, again, we had well over a thousand
direct criminal appeals, and of those, 73 percent or 659
were decided on the merits on challenges only to the
sentence. So I would suggest that our appellate, as
well as trial judges, are experts in guidelines appeals.
The remaining 27 percent either challenged the
conviction only or the conviction and the sentence. If
you do a rough calculation, I'd say just about every
judge on our court is responsible for over 100
sentencing appeals per year, a very, very large volume.
Does that mean that we have a better basis from which to fulfill our responsibilities under Gall and Kimbrough? Sadly, it does not. I read, I read the comments of a number of the other appellate judges who have testified before you, and I guess we're all just wringing our hands about what reasonableness review constitutes, not something that you or we can remedy on our own. It remains to nine Supreme Court Justices to try to help us out.

But just to give you an example, we are seeing a few outlier cases, although Judge, Chief Judge Hinojosa assures us, tells us that the Fifth Circuit is generally sentencing more within the guidelines than other circuits are. But I sat on an appellate panel just very recently, where we had two sentences in two completely different areas, I'd rather not talk about the facts in public, but both of those sentences were four times the guidelines, and in each case, the judge articulated some explanation, but one might have had the feeling that the judge hadn't been particularly familiar with this type of crime, because you could tell that had the judge been in another part of the circuit, likely at least one of those sentences probably would have been half what it was. Well, what could we do about that? You know, I'm not going to tell you the outcome of the
appeals, they haven't come out yet, but it is very
difficult to find a principle basis, after Gall and
Kimbrough, for saying that a sentence is unreasonable.
Justice Alito has written a little bit about this. I
heard a very interesting colloquy between one of our
judges and Justice Breyer I think several years ago,
before Gall and Kimbrough had come out, and our judge
kept saying, “Well, Justice Breyer, how can we on the
appellate court determine what's reasonable?” And
Justice Breyer said, “Well, you just look at the sentence
and you look at the guidelines, and then you understand
how it all works.” And of course, Justice Breyer is the
epitome of sweet reason when he's speaking. But he
finally got a little frustrated after this came at him
three times, and he said, “Well, I'm sure over the course
of time you will develop a database from which you can
determine whether a sentence is reasonable.” And you
know, with due respect, I think that's an unrealistic
way to look at it. Our mission on the appellate court,
after Gall and Kimbrough, is to say, “Did the district
judge follow the guidelines procedurally, yes or no? If
he did or she did, did he or she state a reason for the
final sentence that was issued?” And it doesn't take
much of a reason to fall within the parameters of 3553.
So it is not likely that even our judges, with 100 cases
per year on appeal, coming from all over the circuit, can develop our own internal, quote, database, to say that this is unequivocally an outlier sentence. Maybe there's some way the Commission would be able to address that, apart from maybe going into deeper analysis when variances occur as to, you know, obviously, even geography may have one thing to do with it, but if there is something in the underlying factors that cause an enhancement or a downward departure or variance that can be somehow categorized and explained.

We had a famous case in our court, well, famous because it was subject to some internal debate, where a fellow was a hopeless drunk. He was an illegal reentrant, and he had been in New York. One of his, one of his prior crimes was when he was in a flophouse in New York, and he fought over a, over a mattress on the floor with another drunk, and picked up a brick and conked the guy over the head and killed him. So it was rated a manslaughter in New York, and he got a minimal sentence of some sort, but nevertheless, he killed a man. This came back to, on his record of illegal reentry as a, as an assault crime, and then the judge departed way upward and gave him ten or 15 years. Well, why? Well, because he killed a man, and we do not have many illegal reentrants who have been guilty of that
kind of offense. So sometimes the underlying facts speak very loudly. As Dean Keaton used to say, the things speaks for itself. That's the point of res ipsa loquitur. But maybe there's a research ground that you can go into where, so you can articulate, for the benefit of the district and the appellate judges, some of the things that create legitimate outlier sentences.

The only other point I would make here is that in my experience, the guidelines are most difficult to rescue — wrestle with in regard to child pornography and the offenses that turn on proof of loss. I agree with the, our colleague on the appellate circuit who said proof of loss gets into very arcane and almost meaningless distinctions, sometimes, as to dollar amounts and the calculus that relies solely on dollar amounts is often a very unsatisfactory way to go about measuring the culpability and the problems with the victims and that sort of thing. And then in the child pornography, likewise, it's not clear to me that we have enough background in those prosecutions, at this point in time, to really identify culpability in terms of, especially with these sophisticated cyber crimes in terms of the number of images and the events that the, that the Commission has said we have to consider. And indeed, in those cases, I have seen a marked propensity
of our district judges to deliver sentences not within
the guidelines. Whether that's good or ill, I don't
comment, but it's more, I think it's something like a 40
percent variance rate, and that suggests that there's
something wrong with the guideline, something seriously
wrong.

I noticed that several judges alluded to
the impact of the Taylor case and the categorical
approach, and that's been stymieing us for a long time.
When you're looking at recidivism, and then you have to
fall back on recidivism in terms of what a statute, a
state statute defines as a crime, irrespective of what
the crime may have been, it's very unsatisfactory. You
may not be able to do much about that, but I'll just
point out it creates unevenness in application.

We had one case where, we've had more
than one case, where we would have a person with a prior
crime committed out of state, let's say under the law of
Colorado, and something was an assault under the law of
Colorado, and the Tenth Circuit said, under the
categorical approach, this is a violent crime and, or
under whatever its approach was, and our circuit said
that very same offense for, under our circuit, is not a
violent crime, and therefore, the offense level was
several degrees lower. So relying on this supposedly
objective framework of categorical approach and the
elements of the state crimes offers many opportunities
for unevenness, some of which Justice Alito referred to
in his, one of his concurrences.

But I really thank you for the
opportunity to testify, and would solicit your
questions.

CHAIR SESSIONS: Let me turn then to the
commissioners. Any questions?

COMMISSIONER FRIEDRICH: Judge Jones, you
referred to Judge Alito's opinion in the case today, and
I was just wondering, do you agree with his view that
the only way to right the Armed Career Criminal Act
ship, as he put it, is to have Congress enumerate more
crimes in the statute? Do you think that's the right
result to help the courts deal with the issue.

JUDGE JONES: To be honest with you, I,
since I'm a lower court judge, I don't presume to say
whether the Supreme Court is doing things right or not,
and whether that's – and if it's in Congress'
bailiwick, I'm not going to tell Congress what to do. I
think that would probably help, but it all goes back to
Taylor, which, to me, articulated the definition of a
crime in a direct appeal of substantive criminal
liability, and it's never been clear to me that using
that is the right approach to sentencing, once
culpability is established. In other words, Taylor was
guided by the requirement of due process and notice to
an offender, theoretically. Now, obviously, after
Apprendi, there's some element of that with certain
kinds of enhancements, but at the same time, you know, I
guess what Justice Alito was saying is that they have an
internal problem that they can't resolve. So if the
Court can't do it, I guess they're throwing it back at
Congress as a last resort. They certainly can't count
on us. I think the Court could rethink it, but short of
that, they would have to go back to Congress. If
Congress broadened the terminology, or let's say
referred specifically to generic crimes or allowed a
PSR. It's never been clear to me why a PSR can't offer
hearsay about the underlying crime in the way that it
offers hearsay about other drug deals. I've never quite
understood that calculation either. So I'm sorry not to
be more succinct.

COMMISSIONER HINOJOSA: I've heard from
both of you the sort of frustration we've heard from other
circuit judges across the country so far about the
reasonableness standard, where that leaves the appellate
courts. And I know, Judge Jones, you mentioned that it
might be up to the Supreme Court. Let's say Congress
decided to do something about this, and I know you just
said that you wouldn't attempt to give them any advice,
but how do you think this can be fixed if there's —
Since one of the things we're considering doing is
putting out a report with regards to what we regard as
possibly some suggestions. So knowing that the Supreme
Court has taken a piece of the statute and just
rewritten it, what would you do with regards to trying
to alleviate the frustration we hear from the appellate
courts as to what exactly our role is here. Would you
have any suggestions as to what recommendations should
be made?

JUDGE BENAVIDES: Well, we're talking
about recommendation in terms of dealing with subjective
reasonableness?

COMMISSIONER HINOJOSA: Well, any
recommendation that might make it clear to anyone what if
any appellate standard there was.

JUDGE BENAVIDES: I think the main thing
is to educate our district judges who are being educated
with respect to the type of findings that they make and
what their sentences are based on. I'm satisfied if
they consider the three 3553(c) factors, I guess, I get
the numbers mixed up, that we can deal with the cases on
the appellate level.
I think the idea of subjective reasonableness, it creates a problem. I'm not too sure there are any remedies, whether provided by the Supreme Court or provided by Congress. It's not going to present – you're not going to have a perfect solution. We're still going to have the problem of subjective reasonableness. It's going to be the next problem we have with the next piece of legislation or the next decision from, from the Supreme Court. And while it's a daunting task, I guess, to try to just find out what is subjectively reasonable and what is, what is not, I think over time we're going to have the case law developed, and there will be a body of law, and different types of sentences and different types of histories that will give guidance both to the appellate court and to the district judges. I just don't see a silver bullet out there. I mean as long as the sentences can't be mandatory, the guidelines can't be mandatory, you're going to have some variances, and so your charge is going to be, in a way, frustrating. On the other hand, I think it's a healthy thing to give discretion to the district courts because they are judges, and I think that it's very hard to sit up there and think of all the different circumstances that you create uniformity and all, and I think it's an
impossible task, if you look at the size of the
guidelines, it's an impossible task to make a niche and
have some kind of categorization where you're going to
get perfect uniformity, and I don't think that that
would be a good thing. I think you get uniformity as an
ideal, but there's got to be room for discretion. And
I'm not, while the task is difficult, I'm not unhappy
with the system. I think you-all have made some recent
changes that have helped us out. Judge Jones mentioned
them. I mentioned them earlier. And I think that
that's been most helpful. But I don't think we're going
to get to this Utopian situation where you have uniform
sentencing, the charge that you have, because I think
that itself, I think that straightjacket itself is, can
be very unjust.

And we can talk about mandatory minimums,
but I don't know why the Sentencing Commission is not
going to have similar problems, in setting up its
guidelines and its policies, that we would have if
Congress addressed the problem. We're still going to
have some problems. I think we're dealing with them,
and from time to time, like these hearings, we've
reviewed the comments of other judges before you, some
of those changes or things for your consideration, and
I, frankly, am very supportive of your work and the work
that you've done so far. These recent amendments have
really helped quite a bit.

JUDGE JONES: Just thinking about it a little bit here, it seems to me that there might be some thought given to requiring, I hate to say it, more documentation by district courts if they are going to vary off of a national standard, and you have loads of statistics about what national standards seem to be or circuit standards, depending on what level of generality you want to get to. But the, I'm thinking of these recent cases where you had four times the guidelines, and there are others, but the government doesn't normally appeal in our circuit if the sentences are under the guidelines, although we, our judges do that less than some other circuits, but we don't even see those. But if there's some duty of articulation of the district courts based on the heartland, so to speak, of those sentences for those kinds of offenses, that might be helpful. I suppose the courts could require that, at some point. Congress might be able to articulate that.

With regard to the categorical approach, and one way to go at that would be to, of course, we, you know, we've had — every time you define something in, you define other things out. So when you go to burglary has had a long history, attempted burglary, you
know, burglary of a habitation, burglary of a playhouse,
you know, all sorts of – you could, you could add an
additional framework based on the number of prior
events. I think criminal history tries to incorporate
that to some extent. If there is some way to allow the
courts to look at the facts through the lens of the PSR
in the same way that they look at prior drug dealings,
that's what I, that's what I don't understand. Because
if you've got some bum up on the stand who says this
fellow did cocaine deals with me ten times, and he's
only charged with two or three, and you're allowed to
enhance the sentence on that basis, what is so much, so
unreliable about using a PSR that says we called the
prosecutor out in this other jurisdiction, and he said
that this, what looks like a, an assault offense is
really a child rape offense, which is literally what we
encounter sometimes. So maybe loosening the Shepard
idea about what is valid underlying documents or what is
satisfactory. Now, I realize that brings into play this
idea that the government and the defendant both want to
move, move the ball, in criminal adjudication, from the
guilty plea phase to the sentencing phase, and I
personally think that's nonsense. I was a judge for two
years before we ever got to decide any sentence appeals
at all. Those were a halcyon period in my career. And
the judges looked at all sorts of things with no — and the defendant had no right to see them in advance, and you know, basically assess the punishment. So it's not clear to me that, when you're trying to achieve more uniformity, that putting this in the adversary system is going to help out with that goal particularly.

The other thing I'd say is that although I'm frustrated about having to perform these duties on appeal, I still think that the basic responsibility in sentencing is with the district judge because the judge sees the defendant, he see the family, if the family is there. He can tell the lawyer, you know, body language, all sorts of background events about the defendant that people on an appellate court simply can't. So there's no question in my mind that the sentencing judge is the ultimate repository of power here.

VICE CHAIR CARR: From the cases that come before you, do you perceive inconsistent charging or plea bargaining practices among the nine districts in your circuit.

JUDGE BENAVIDES: I can't see it, because I don't know what charge would have been filed if the attorney hadn't got there first and worked out the, the K1 or K1, I call it the K1 agreement. So I don't know whether we really get to see that. We're only
struck with what we have in the record before us, and we
don't know what's happened before. I think that's
always going to exist. You're going to have good
lawyers. You're going to have some, someone represented
by someone that knows the system better, and as a
result, and I don't use gaming the system in a
pejorative way, but that happens, and it's going to
happen regardless. Sometimes we do wonder, especially
if everybody comes up at the same time on the sentencing
appeal, how someone who obviously had a much bigger
role, was more involved, winds up with, with a better, a
more lenient sentence than someone who was clearly not
as involved, but did get the benefit of striking some
kind of bargain, and in those cases, we get to see it
because they come up at the same time. Absent that, I
don't think we have a way of knowing, you know, how the
deal came to be.

JUDGE JONES: I agree with Judge
Benavides on the plea agreements. On the charging
agreements, I do see some variations, and, but it seems
to depend. I don't know what factors it depends on. I
don't know if it's consistent or what, but I, in some of
the smaller jurisdictions, the U.S. Attorneys perhaps
don't have as much to do, and so they charge some people
to the max on crimes that where you'd think this is just
very, very unfortunate.

JUDGE BENAVIDES: I'm sorry.

CHAIR SESSIONS: Go ahead.

JUDGE BENAVIDES: I would realize that from my conversations with certain judges in the Western District, where the docket is unbelievable, that there are, maybe practicality has something to do with some of the findings that aren't made, in order to move the dockets, and there are instances where it seems fairly clear to me that the fact that the appeal is coming from that jurisdiction, from that division, for instance, has some bearing, if you compare it to something coming out of maybe the Eastern District of Texas or someplace in Mississippi where they don't have that docket, where the judges aren't under that pressure, and where the prosecutors aren't under that pressure. At the same time that I'm commenting on it, I don't want to, I'm not trying to comment disfavorably on it, because that's a reality that those district judges and those prosecutors are having to deal with. So if you look at the overall frame of justice, I cannot say that their consideration doesn't help move the docket and provide a system of justice that might — that it's okay, and it might be worse but for the fact that those people on the ground have those considerations in mind. I would like to
suggest that that might be so.

VICE CHAIR CASTILLO: I want to get back to this issue of the upward variances, but before I do, I do want to thank both of you for your testimony. I think, Judge Jones, you make a very good point in terms of the Fifth Circuit really being the laboring ground for our federal criminal justice system. I'm very mindful of that, and every time I come to the Fifth Circuit, I come to the place that dominates our criminal docket, and in a very real way has not only been well represented on our Commission through the presence of Judge Hinojosa, who I've had the privilege of serving with, but who basically is helping our national statistics in terms of what they look like for guideline sentencing. But at the same time, I think while we keep these national statistics, my concern is most defense attorneys right now see this as sort of a heyday of advocacy. There are more below the guidelines sentences than ever before, but people are losing track of these two cases that you talked about, Judge Jones, these upward variances, where the Supreme Court now has I think laid out a track for defendants, because if you use an upward variance, you don't, you're not even required to have notice that this might be coming. So you'd have a situation where, under the Irizarry case,
you could receive a sentence up to the statutory maximum, and there's no problem as long as it's an upward variance versus an upward departure, and while people might see the one point something percent going up to three percent as not being that big of a deal, it is a big deal if you're one of those particular defendants who receives one of these sentences. And as all members of the Commission, I try and keep track of every single sentencing opinion that comes out nationally, and where I'm seeing the biggest disparity is in child pornography, where I've seen sentences go from anywhere from 80 years to maybe as low as 18 months, and white collar offenses, where sentences are now ranging anywhere from six months to 30 years, or we could even take the Madoff sentence, which is off the charts. Would it be helpful, and this is my question, if instead of always nationalizing our statistics, if we broke it down circuit wide so that you would have what the average sentence looks like for white collar offenses in the Fifth Circuit, what the average child pornography sentence looks like in the Fifth Circuit? Would that give you, then, some kind of base to make these difficult reasonableness determinations?

JUDGE JONES: Absolutely.

JUDGE BENAVIDES: I agree. I'm a
proponent of the idea of local justice, and that what, what is acceptable to a community in one area of the country may not be as acceptable to another area of the community. I think that that would be a good idea. You would have many detractors from that idea, and they would be, have, be on solid ground in terms of you're charged to try to get some kind of uniformity, and so that uniformity, you know, winds up clashing —

VICE CHAIR CASTILLO: Right.

JUDGE BENAVIDES: — with this idea of a more localized justice system, which doesn't offend me at all.

VICE CHAIR CASTILLO: The down side would be that certain circuits might look unusual, when you start comparing them, you know, and I won't even mention what circuits, but —

JUDGE BENAVIDES: You mean like posting their names on the bulletin board, who didn't show up?

JUDGE JONES: Well, that's pretty clear to anyone who reads your statistics right now, so I think that would just be — but to provide some kind of database for us in our circuit to work from, I think that would be helpful. I mean there's no way of keeping it out of the press, but that's what the press is for.

JUDGE BENAVIDES: The other, there's a
secondary effect, because once you have that established, and a circuit knows that you're looking at the contours of a sentence within a circuit, that might promote more an idea of not being national and the idea of well, we're more local, so it's okay in this circuit to not give a guideline sentence more often, and so that might be at cross purposes. So it's a delicate question.

CHAIR SESSIONS: I'll offer that question. One of the general questions that we've asked during these hearings relates to how to make the guidelines relevant again, how to get respect for the guidelines among judges throughout the country. And I raised this in light of two opinions that I'm thinking of from the courts of appeals. The first is a Second Circuit opinion in which the court indicated, Well, you've gone through the guidelines, but they seem to be confusing and you can't arrive at a result without doing substantial research, then just go write the 3553(a), and you don't necessarily have to go through the guidelines. And the second opinion, actually I think is from this circuit, and it's a little bit less direct than that opinion, but essentially, if the judge gets the guidelines calculation wrong, but then the judge says but anyway I was going to give this sentence pursuant to
3553(a), and so therefore no prejudice, provided that the
judge gives a reason, basically that suggests that any
mistakes that were made in regard to the guideline
calculation become less significant, and I think the
Fifth Circuit has said, you know, that that does not
warrant a remand or a reversal. So my question is do
you see cases like that, the impact of cases like that,
and that, you know, logically, what follows is that
judges in the Fifth Circuit will just say, “Well, okay,
even if I got the guideline calculation wrong, that's
the sentence I would have given anyway, for whatever
reason.” And I wonder if just, if you, if you take our
position here, we're trying to make a guideline system
that has the respect of judges throughout the country.
You know, in light of those kinds of movements in the
law, in the country, do you have any advice for us as
to, you know, how to —

JUDGE JONES: I think you've got to
promote respect for the guidelines in those areas of the
country where there are a lot more downward departures
than variances. Because the Fifth Circuit has one of
the highest compliance rates. Of course, I was on the
panel in a couple of those cases that talked about
harmless error, and it was no part of what we said or
what we wrote, nor do I believe it was interpreted to
say that toss away the guidelines and just, you know,
dignify your sentence at the end with I would have done
it anyway, because we've, our routine statement in
sentencing appeals is you look first at the guidelines
calculations, and then we also go into the is it a
variance or is it a departure framework before the judge
can say, "Well, this particular issue is very unclear to
me, so if I am wrong, then I would have given the
sentence anyway." It seems to me that it is a very
useful harmless error device that does not relieve the
judge from looking at the guidelines to begin with, but
offers less opportunity — less possibility of all the
costs and delay attendant on resentencing. And as you
are probably aware, if you're dealing with illegal
reentry sentences, occasionally one faces the problem of
having a case on appeal when the defendant's within a
few months of release. So we try [to] work on those quickly,
but obviously, if there's a mistake and we have to
resentence, the whole purpose is gone. So I think
it's — I do not think it is our version of sticking a
thumb in the eye of the guidelines.

CHAIR SESSIONS: No, I didn't mean to
suggest that. I just was interested in any advice that
you may have to essentially make the guidelines more
relevant with judges and more respected by judges, so
that, you know, they essentially choose to accept the
guidelines.

JUDGE JONES: I think you're getting into
the Article III psychology to some extent.

CHAIR SESSIONS: Absolutely, right.

JUDGE JONES: I do, I have thought for
quite sometime that of course, there was great hue and
cry when they came in originally, you know, these are
unconstitutional, blah, blah, blah blah blah, and I had
thought that that was probably a generational impact,
and that as you — that we are 25 years in, but the
Supreme, and the Supreme Court has officially declared
these to be discretionary, but it has not said they
should not be taken into consideration, and I think that
generationally, as judges come on to the bench, some of
that problem will solve itself.

JUDGE BENAVIDES: I would, I guess I'd
try to figure out what you mean by having the district
judges respect them. If you're talking about respect
them from the standpoint of make sentences consistent
with the guidelines, that's one thing. If you're
talking about just the respect that judges have for the
guidelines system, that's completely different. As to
the ladder, if all the sentences were affirmed, that
would cause great respect, under the ladder view, for
district judges of the sentencing guidelines. They really do not like, and I agree with Judge Jones that this is kind of a harmless error analysis, the district judges, the thing, from my conversations with them, that they abhor more than anything is having to resentence when they know that they're ultimately going to be resentenced to the same amount of time, and the costs that are attendant with those, especially in parts of Texas where they're driving prisoners a lot of miles and it's costing a tremendous amount of money.

Now, if you're talking about respect from the standpoint of them following them, and what the Commission can do to make the guidelines followed more, if that's the question, there's a limit to how far you go without making it some kind of a de facto mandatory system.

I personally am happy with the way it works. I think you've got the best of both worlds. A lot of that is colored by the fact that I do believe in judges' discretion and local discretion, but I think that you're doing things, and I know our circuit is doing things to respect the proper calculation, and I think that for the most part, our judges are giving guideline sentences.

JUDGE JONES: May I add that I do think
that as is the case with any regime, the flaws are dominant in the public's mind over the things that work right, and for the most part, the calculus of factors that the, that the guidelines represent work reasonably well, I think. But when you have problems like child pornography and the white collar offenses, and I'm trying to think if there's some others, but those in particular, where the articles can come out, well, you know, one person gets 13 months, another one gets 13 years, then that creates a mindset. So getting your hands around those huge problems, it seems to me, would relieve a lot of the judges' concerns.

COMMISSIONER WROBLEWSKI: Can I follow up on what you just said, actually what both of you said? We've heard, in going around, this has been actually a fascinating experience, this is our sixth hearing, we've heard a number of criticisms, and many of them are things that you've described. For example, a lot of judges, and a lot of defense attorneys are thrilled that offenders' characteristics are now part of the consideration in ways that they weren't before Booker. On the other hand, we've heard criticisms from prosecutors that sometimes offenders' characteristics can drive the sentence down sometimes to probation. On the other hand, we've heard criticisms from defense
attorneys about relevant conduct, and the case example
that you've described of someone who's charged with one
crime, the guideline says X and the judge says, “Well, I
have all this other information about you, and now it's
four X.” We've also heard criticisms about the use of
substantial departures and cooperation. It seems to me
that a lot of that can be addressed in what you're
talking about, which is putting some limits on, on
movement away from the guidelines up on relevant
conduct, down on offender characteristics, in essence to
create a greater range of sentence that would have a
very deferential standard of review, but then if you
went beyond those limits, the review would be a little
bit more stringent. Do you think that necessarily gets
us too close to the mandatory system that you're talking
about, that, and therefore we have our constitutional
problems, or is there some way you can have something to
address these outliers.

JUDGE JONES: You'd have to talk to nine
other, nine other people before you could give the
answer to that, I fear, but someone else suggested
creating wide, wider ranges of variation, but you're
talking about a slightly different thing.

COMMISSIONER WROBLEWSKI: Even assuming
you have –
JUDGE JONES: The way we reviewed
departures was, you know, the judge would have to sort
of tie a departure to [inaudible] in criminal history
and sort of explain, “I went up three levels rather than
one because of the, you know, these were assaultive
offenses or whatever,” and I think you're talking about
that kind of ladder, and I think until you, until you
try it, you don't know whether it would be approved or
not. Not bad.

JUDGE BENAVIDES: I think also, I mean a
number of people that are being prosecuted in the United
States, I mean it's an absolutely daunting task to think
that you're, that with all those people in jail and all
the different circumstances that you have, that you're
going to have enough policy statements and have enough
definitions —

JUDGE JONES: Right.

JUDGE BENAVIDES: — of different types
of crimes that are aggravated by use of force, or things
like that, that you're going to, that you're going to
make people happy. You're going to have prosecutors
complaining and you're going to have defense attorneys
complaining. I think the larger question is in general,
how do people feel, in the legal community and outside
the legal community, about the sentencings that exist in
the United States today, and I think by in large, that
there is a greater feeling that there's consistency, I
think there's a greater feeling that justice is being
meted out in the federal system as a result of the
sentencing guidelines. Even though I came up under, and
practiced law when it wasn't sentencing guidelines, I
think there is respect for the, for the judges at that
time and their sentences, but there was a growing, large
communities in this country that felt that it was very
unfair, and they were exactly correct, and I don't think
you're going to get to a perfect system, but I would
cautions you not to feel that you have to address an
issue because, every time that the prosecutors or
defense attorneys are concerned about the case, because
they're always going to be concerned about the case,
they are always going to be dissatisfied, because
they're advocates, and I respect their role as
advocates, but by in large, I think you've done a very
good job. I think the system is working, and when you
make the small adjustments from time to time because
there's a need for it, I think that process is working,
and so I thank you for the work that you've done.

CHAIR SESSIONS: Judge Jones.

JUDGE JONES: And may I, may I make --

This isn't really relevant to the questions, but someone
mentioned the Irizarry case and about notice before the judge sentences. I have a lot of trouble with that. It seems to me that the judge would come into a — and I've never sentenced a defendant, but it seems to me that our judges read the presentence reports and they know what they're thinking about before the defendant comes into the courtroom for sentencing, but goodness knows things can happen in the sentencing process that cause the judge reasonably to change his or her mind. I mean the defendant may, you know, flick an obscene gesture to the prosecutor, or the family may give an indication that you know, they're disgusted with this person, which would seem to mean that there's something going on that maybe he's irretrievably bad, and anyway, things can happen, and the judge does have the right to sentence up to the statutory max. And of course, a guilty plea advises a person that they are subject to that, and that only the judge can make the final decision. So I think giving notice would add another layer of complexity and delay that would not help out the process.

JUDGE BENAVIDES: I support that.

CHAIR SESSIONS: That's one of the things that you, that you mentioned, that perhaps we should require judges to provide greater and greater notice about why they are making the decisions that they're
making, and I'm particularly sensitive to the judges in
the Western District of Texas, who are just overwhelmed,
frankly.

JUDGE JONES: Don't forget the Southern.
JUDGE BENAVIDES: Southern District, on
the border.

CHAIR SESSIONS: But the judges in the
Southern are so incredibly capable.
JUDGE BENAVIDES: That is true.

CHAIR SESSIONS: They're able to handle
it. I just wonder if there has to be some balance
there. The more you require people to explain the
decisions that they make, in a high case load
environment, you know, the more it slows down the
process.

JUDGE JONES: Well, but the good judges
articulate their reasons on the, on the record in a
paragraph, couple of paragraphs, so.

JUDGE BENAVIDES: It is strange that for
a departure you don't have to give notice, but for a
variance you do, and so there, that's an anomaly,
obviously. You could argue, on the other hand, that
since it's not required in one, and that's more drastic,
that it shouldn't be required in the other, which is
less. So I guess that's just something that you grapple
with. I'm sure that our district judges are in, are
smart enough that they could come up with some
statements that, you know, it is possible that there may
be a departure based on these things, and then just have
some kind of a form out there in all these cases so that
there would be some sort of a notice, and that's what, I
think if you formalize it, what's going to happen is
you're going to create some method to get around it
generically, you know, generally so that, so that in a
specific case he's not going to know any more than that
general notice that he or she might get, and I join
Judge Jones in the idea that it would be quite
cumbersome, I think.

COMMISSIONER HINOJOSA: One of the things
I've been surprised about at the appellate level is, you
know, when you read Rita and the cases that followed,
there is language that the court has given, that
certainly at an appellate level, you can presume that
any guideline sentence is reasonable, and that if it's
within the guidelines, the reasoning can be less than it
would be if it's outside the guidelines, and there's
even language in one of the opinions, I believe, that
says that the farther away you go from the guidelines,
obviously there would be the necessity for further
explanation, without setting the standard that the
appellate court can have a different standard because they're further away from the guidelines, and it seems to me that there has been a concentration at the appellate level, perhaps on other portions of the same opinions, and I wonder if that's because of the feeling that the district judge knows best or the feeling that this is not our jurisdictional situation from the standpoint that the sentence should be at the district court level, because it does seem to me that there are parts of those opinions that indicate that reasonableness, appellate review standards should mean something, as opposed to just if there was some explanation then it should be okay. I think part of the reason the Justice Department doesn't field these cases is because they feel that there is no such thing as reasonable or unreasonable. And of course, the defense attorney has the responsibility that the defendant has, to go ahead and file the appeal, which is different than the Department of Justice would be. And I just wondered if you all had any thoughts on any of that.

JUDGE BENAVIDES: Well, I think the system has been changed with the discretion reinforced after Booker. And I don't, I think, I don't think that we view ourselves as, as keepers of a mandatory regime. In other words, we're, we don't have this outlying thing
with reference to mandatory guidelines. And we're
keenly aware now that they're not mandatory. The fact
that they're not mandatory provides an extra layer, I
think, for being aware of the discretion [that] the district
judges have. I don't think you can get to discretion
from mandatory and still have the type of review that
existed before Booker.

JUDGE JONES: I agree with that. I think
that we are probably somewhat reluctant to use that
scale of reasonable articulation as a device to vacate
and remand, because in so many cases we know that the
sentence will be the same again, so I suppose that it's
just the sense of futility that if you – the judge will
be unhappy at having to go through the same routine
again, particularly if the judge has properly calculated
the guidelines, and it's just a question of our saying
you didn't explain why you went up so much. But a judge
might view – you are correct that we have not vacated
many sentences on that basis.

JUDGE BENAVIDES: It's like, kind of like
ordering a hamburger, but you don't get it because you
didn't say whether it had mayonnaise on it or not. Add
the mayonnaise and you're going to get the same
hamburger.

COMMISSIONER HINOJOSA: You're talking
CHAIR SESSIONS: Any other questions.

COMMISSIONER FRIEDRICH: Judge Jones, you made a comment about the fraud guideline and the emphasis on the amount of loss. I'm just wondering would you recommend that we simplify the loss table, emphasize other factors rather than loss? What sort of suggestions do you have, if anything?

JUDGE JONES: Well, of course, as you know I wrote the Olis case, and that was one where the sort of lower-level fellow in one of the, in Dynegy, which was a company that was involved in, you know, sort of daisy chain inflation of its revenues. Lower-level fellow got sentenced originally to 25 years, when the higher up executives who actually called the shots plead guilty and got one or two years. And in that case, that was a securities fraud, and the government wanted to predicate the sentence on proof of loss, where it would be something in the stock market, or I forget exactly what it was, but anyway, it was a hundred million dollars or something. And I said that this loss had to be tailored to the securities fraud standards for damages. And he ended up, I forget what the sentence ended up with, maybe eight years or something. But I think that, you know, making the ranges broader would
help, but there also — it's really hard to say, because each fraud crime has a different character of victims. And when you steal people's credit cards and may or may not take advantage of them, you may have a large technical loss, but not a large physical loss to the victims of crime, whereas in another one, I can remember one where some people were trying to sell something to elderly people, and just ruined them, ruined them, and under, but under the proof of loss guidelines, the loss might have been a few hundred thousand dollars, and the sentence, according to guidelines, would have been, you know, five, three or four, five years, but these people had taken total advantage of a very vulnerable population, and you know, so.

COMMISSIONER FRIEDRICH: Do you feel like the district courts aren't using the departure that's built into the guideline that enables the district court, in its opinion, in which it overrepresents a defense or underrepresents it departs, so you just don't think we're using that enough.

JUDGE JONES: No, and the other situation is I've seen some Medicare-type-fraud guideline loss cases where you say, “Well, do you calculate for defrauding the government for something. Well, what's your basis for loss?” In other words, they were
exploiting the guideline, and is the guideline the amount that they might legitimately have collected, or is the guideline, or based on an increment from that, or is it based on all of what they got? It's — I'm sorry, I should have prepared better for this subject, but sometimes the — you have to really invent the basis for the loss, and I could find some cases for you like that, and in those cases, it seems to me like the whole enterprise is probably not worth the candle. So you have a —

JUDGE BENAVIDES: Yeah. I agree, and I think the question is interesting because it reflects the other side of the coin, and that is that you don't want sentences to be uniform, that you want judges, from time to time, to make a departure, and so it's kind of at odds with the idea of mandatory guidelines, uniform type sentencing. Our concepts of justice vary, from time to time, based upon unique circumstances or a kind of a generalized feeling of the idea that all, that everybody ought to be treated the same, and they’re at cross currents. So I think your question itself reflects that kind of dilemma that exists.

CHAIR SESSIONS: Well, we feel honored, by the way, to have both of you testifying today, and we appreciate it very much, and I guess we’ll call it a day
for this moment.

JUDGE BENAVIDES: Thank you.

JUDGE JONES: Thank you.

(Recess taken from 10:01 to 10:20.)

CHAIR SESSIONS: I'll call the meeting to order. Good morning. Thank you very much for coming today. This is the sixth out of seven regional hearings. In each regional hearing, we've heard from judges on the courts of appeals and judges from the district courts of those particular regions, and I must say, they have, the discussions that we've engaged in with judges has been incredibly instructive and, frankly, helpful. So I really appreciate your willingness to participate today because I know of your busy schedules.

So let me introduce you to the Commission. First, J. Leon Holmes has served as a district judge in the Eastern District of Arkansas, and has served as chief judge of that district since 2005. Prior to his judicial appointment, he practiced law in a private firm in Little Rock. Judge Jones has also served as an adjunct professor of law at the Arkansas School of Law and a professor at Thomas Aquinas College. Chief Judge Holmes has also, holds a bachelor's degree from Arkansas State University, a master's from Northern
Illinois University, a doctorate from Duke, and a law
degree from the University of Arkansas. And I saw,
according to my notes, that I have changed you with the
chief judge of the Fifth Circuit of the United States,
and referred to you as Judge Jones on one occasion.

JUDGE HOLMES: I'm flattered. I hope
she's not insulted, but I'm flattered. Thank you.
That's all right.

CHAIR SESSIONS: Well, fortunately,
you're in different circuits, so. Welcome.

Next, the Honorable Micaela Alvarez has
been a district court judge in the Southern District of
Texas since 2004, having previously served as a
presiding judge at the Texas 139th Judicial District
Court. Before joining the bench, Judge Alvarez
practiced privately in McAllen, Texas. Judge Alvarez
received both her Bachelor of Science and her law
degree right here from the University of Texas. You
just flashed the Texas sign. That is the Texas sign.

JUDGE ALVAREZ: That's the Texas sign.

CHAIR SESSIONS: For those of us who are
not from Texas, we don't exactly know what that is, but
I imagine —

COMMISSIONER HINOJOSA: If they had it,
they could have the sign.
CHAIR SESSIONS: The Honorable Kathleen Cardone has been a district court judge in the Western District of Texas since 2003. She previously served in the Texas Judiciary as a visiting judge, as a judge with the 388th and 383rd judicial district courts, as an associate judge of the Family Law Court of Texas, and as a judge of the Municipal Court for the City of El Paso. Judge Cardone has also served as a mediator, and in private practice. She got her Bachelor of Arts degree at the State University of New York at Binghampton, getting closer to my home, and also her law degree at Saint Mary's School of Law. Welcome to all, all three of you.

Is there any preference as to who wishes to go first, or should we go in order of introduction?

JUDGE ALVAREZ: Order of introduction, for my money.

CHAIR SESSIONS: All right. It's just that I can't order a judge around, so.

JUDGE HOLMES: Let me begin by saying thank you for the opportunity to testify here today, and thank you for the excellent work that you do with reference to the guidelines.

I assumed the duties of a judge of the United States District Court for the Eastern District of
Arkansas on July 19, 2004, less than a month after
Blakely was decided, and less than five months before
Booker was decided. My first sentencing was on January
12, 2005, the day Booker was decided, and since that day
I have imposed sentence on 341 offenders. I know that
some of the districts, over that number of five years,
would be much greater than that.

But I believe that the current system
strikes a reasonable balance between judicial
discretion, on the one hand, and uniformity and
certainty of sentencing on the other. It is helpful for
me to have the guidelines to inform me of the sentences
typically imposed for offenders committing the crime for
which the particular offender to be sentenced has been
convicted so that there can be uniformity in sentencing.
I am interested in knowing what has been the judgment of
my peers with respect to the application of the § 3553(a)
factors in similar cases. At the same time, however, I
believe it is important that judges have the discretion
to impose a sentence outside the guideline range because
in imposing sentence, we are not imposing sentence on
categories or types, we're imposing sentence on human
persons with their own individual characteristics and
history.

The current system has the advantage of
providing the judge with some indication of what other
judges have found to be a reasonable sentencing range in
similar cases, while at the same time allowing the judge
to tailor the sentence to the human person before the
court for sentencing.

While I believe that the current system
is generally a good one, I am concerned that it rests on
unsteady foundation. As we all know, the advisory
guideline system has never been adopted by Congress. It
was the result of a decision in Booker in which by a
vote of five to four the court held that the mandatory
guideline system was unconstitutional inasmuch as it
permitted judges to find facts that could result in
sentencing enhancements, and therefore violated the
defendant's right to trial by jury. We all know that
the four Justices from the opinion of the Court on that
issue then joined one of the Justices in the majority to
create a new majority in holding that the remedy for the
constitutional violation was to render the guidelines
advisory. One Justice who joined the opinion of the
Court on the constitutional issue joined four Justices
who dissented on that issue to form a majority voting to
excise § 3553(b)(1) and § 3742(e). The result of excising
those subsections is that the guidelines are now advisory
in many cases in which either no enhancements would apply
or the facts that would give rise to enhancements
are not in dispute.

It has been nearly five years since Booker was decided. We continue to operate under the
same statutory scheme, substantially the same rules of
criminal procedure, and substantially the same
guidelines manual, which is to say that even though the
guidelines have been advisory for five years, we still
operate under statutes, rules and guidelines designed
for a system of sentencing in which the guidelines were
mandatory. I hope that the Sentencing Commission will
recommend changes in the statutes and rules to make them
fit the advisory system under which we operate, and also
adopt changes to the guidelines to remove vestiges of
the mandatory guideline system.

I suggest that the Sentencing Commission
recommend that Congress repeal 28 U.S.C. § 3553(b)(1)
and 18 U.S.C. § 3742(e)(3), I think I just miscited that,
which were excised by the Supreme Court, but which remain
in the statutes.

I also call the attention of the
Sentencing Commission to the attention of § 3553(f).
That's the safety valve section, as you already know.
It allows the court to impose a sentence below the
otherwise applicable statutory minimum when
certain facts are present. This provision appears to say that the mandatory minimum for a defendant who is eligible for the safety valve is the low end of the guideline realm. The Supreme Court did not hold that § 3553(f) is unconstitutional, nor did the Court excise any portion of that section in the remedy portion of the Booker decision. The courts have consistently held that the guidelines are advisory, even under § 3553(f), but the reasoning that leads to that conclusion is not particularly persuasive.

I also suggest that the Sentencing Commission recommend to Congress that the second sentence of 3553(e) be repealed. That sentence provides that when the government moves for a departure below the statutory minimum because of the defendant's substantial assistance, the sentence shall be imposed in accordance with the guidelines.

The notion of departures in the sentencing guidelines and in the Federal Rules of Criminal Procedure appears to me to be out of place in the context of an advisory guideline system. In the current system, the duty of the court is to impose a sentence that is sufficient but not greater than necessary to comply with the purposes in § 3553(a)(2). In arriving at a sentence that is
sufficient but not greater than necessary to comply with
those purposes, the court will consider the sentencing
guidelines range as advisory. When the court imposes a
sentence outside the guidelines range, however, the
court is not departing from anything, but is simply
performing the function required by the statute of the
Supreme Court. The term departure suggests a
presumption that the appropriate sentence was within the
guidelines range and that a sentence outside the
guideline range therefore must be supported by some
important justification. It suggests that somehow the
parties are entitled to expect a sentence within the
guidelines range. The term variance has the same
infirmity. As we all know, the Supreme Court has
rejected the notion that district courts may impose a
presumption that a guidelines-range sentence is
reasonable. It may be important for statistical
purposes to make a record of the number of sentences
that are within the guidelines range and the number of
sentences outside the guidelines range, and it may be
important to distinguish between the sentences that are
outside the guidelines range that are based upon those
motions by the government for leniency because of the
defendant's substantial assistance and those that were
not, but otherwise the provisions in the sentencing
guidelines manual pertaining to departures appear to me to be of no particular significance. It appears to me that when the provisions, that the provision in the manual relating to departures are vestiges of the mandatory guidelines system, and my suggestion is that the Sentencing Commission should consider deleting them. If there are portions of the guidelines relating to departures that need to be considered in determining the sentencing guidelines range, those portions should be moved to the section of the manual relating to adjustments to the advisory sentence range.

Rule 32(h) of the Federal Rules of Criminal Procedure requires the sentencing judge to give notice of a possible departure from the sentencing guidelines. The Supreme Court held in Irizarry that Rule 32(h) does not apply to variances. Rule 32(h) should be repealed. After the Supreme Court's decision in Irizarry, Rule 32(h) has no practical effect. A sentencing judge can impose a sentence outside the guidelines range without notice by basing the sentence on the § 3553(a) factors, which are the factors that ultimately must justify the sentence.

Let me conclude by saying, again, that I am in favor of the advisory guidelines system. The theme of my suggestions to the Commission is that our
statutory scheme, procedural rules and guidelines manual, which are designed for a mandatory guidelines system, should be redesigned for an advisory guidelines system.

CHAIR SESSIONS: Thank you, Judge Holmes.

Judge Alvarez.

JUDGE ALVAREZ: Thank you. Good morning.

CHAIR SESSIONS: Good morning.

JUDGE ALVAREZ: Thank you for inviting me to present my view from a district court bench. I began sentencing immediately after Booker. I can recall calling Judge Hinojosa, in fact, to see if he could provide me with any guidance about how I should proceed, now that Booker had been, that the decision had rendered the guidelines advisory.

During my short tenure on the bench, I have sentenced, by my latest calculations, over 5,500 defendants, so although in numbers I may be one of the newer judges on the bench, in number of years I may be one of the newer judges on the bench, in numbers of sentencings, I think I have sufficient experience to be able to speak to the application of the guidelines.

Now, having listened yesterday afternoon and this morning, one of the things that has come up, of course, is that all the judges agree that it's very
difficult to sentence defendants. We have various
people involved in the sentencing, but when it comes
down to it, it is the district court judges that are, in
fact, applying the guidelines and determining what a
sentence will be.

In performing my duties, I hear often
from defense counsel and defendants that the guideline
that applies to that particular individual is too high.
I have yet to hear anybody say that it is too low, and
the complaint is always that it is too high. One of the
things I think that they forget is that we are looking
at a defendant, yes, as an individual before the court,
but also considering a sentence that should be imposed
in consideration of a lot of other factors, not just
what the defendant himself thinks is appropriate for him
and not just what I individually think is appropriate
for me. In that respect, I do believe that we should
consider a national standard for sentencing, because we
are federal courts, we're not state courts, and I have
sentenced at the state court, but as a federal court, I
believe that it is, in fact, necessary to consider what
is going on across the country.

The statute specifically provides that we
should impose a sentence that avoids unwarranted
disparities, and that is part of what we as judges have
to consider. In this respect, I do believe that the guidelines are an essential tool for sentencing. There are many who say that the guidelines, because they look at a cold record, based on the offense, the particular factors that apply to that offense, and the criminal history, that they are, you know, in fact not promoting uniformity and justice, but rather, in one way or another, bringing about some sort of unfairness. I do not necessarily agree that uniformity equates to unfairness. In fact, it can, in some instances, promote it. But I do believe that there is a distinction between uniformity and fairness. Now, in our system of justice, we believe in equality and fairness for all, and what that means, in my opinion, is that we have to consider what a similarly situated defendant with a similar history would receive, not just in my particular court, but again, because we're in federal court, across the nation.

I don't believe, however, that, that said, that any system of justice can be fair if it does not take into account the individual, and so for that, you know, factor I do believe that it is important that we have discretion. I believe that the guidelines as they are now provide the court with the discretion that we need to impose the sentence that is fair and just to
all, not one that considers in isolation the particular
offense, the particular defendant, but that considers
all the factors that we have to consider.

Judge Benavides touched upon the fact
that, you know, that we should look at it on the
community level. I do believe we should look at it on
the community level, but I believe in our instance,
because we are federal judges, the communities that we
are looking at is the United States of America, not the
particular county in which we live, not the particular
district that we serve or the particular division where
we sit.

Having said that, as I said, I do believe
that discretion is necessary in order to serve justice,
and to bring about fairness. I have, on many occasions,
heard from a defendant about their particular case and
their particular situation. In conducting my
sentencing, as you have heard, you know, I review the
presentence investigation report. I do not come to a
conclusion about what sentence will be imposed based
upon a review of the report, but I obviously reach some
conclusions. But I listen to the defendant. I listen
to the attorney. I listen to the government. After I
have heard from all, then I consider, you know, the
sentence based upon all that I have to consider, which,
of course, includes the information in the presentence
investigation report, includes the 3553(a) factors, and
includes anything else that may be presented to me by
that particular defendant, his counsel and the
government, and anybody else that would speak to the
court, because I do, despite the numbers that I have, I
do provide each and every opportunity to a defendant to
present whatever he may wish, and that includes calling
witnesses. I often have a defense counsel calling
family members or other people who they believe need to
present something to the court, and I listen to all of
those. After I have heard all of that, then I determine
what the appropriate sentence will be for that
particular individual. However, I cannot just ignore,
in my opinion, at least, what the guidelines provide for
initially, because I believe that if we ignore the
guidelines altogether, then we are, you know, going back
to a system that comes down to my personal opinion about
this, you know, personal defendant.

As a state court judge I sentenced in a
system that did not have guidelines, and I have seen the
disparity that results from that system, and although
some may argue that that, in fact, reflects the
community opinion about what is appropriate for that
particular case, I'm not sure that that is always so,
because I have seen, within the same community,
different defendants who appear to be very similarly
situated who have received very, excuse me, committed
very similar offenses, receive very different sentences.
As a state court judge, although I consider it to be
inappropriate, I also believe that sometimes there are
influences on that state court judge that are reflected
in sentences that should not be considered for
sentencing purposes, and part of that, of course, has to
do with the fact that in Texas, at least, our judges are
elected judges.

I believe that Booker, Gall and Kimbrough
have provided us with the appropriate balance between
the abstract nature of the guidelines, because I do
believe they are to some degree abstract, with the very
human aspects of each particular case that comes before
the court, and I believe that consideration of the
guidelines provides for both uniformity and because they
are now advisory, with the discretion that is necessary
to ensure fairness.

Now, having said that and having praised
the guidelines, I do have some concerns about particular
guidelines. One area of particular concern to me is the
application of §2L1.2, which is one that I use
quite often that is a section that pertains to the
immigration cases, that is, you know, either the illegal
reentries or the reentries after deportation. And it
concerns me as to one particular, one particular type of
defendant. That is, I often have in front of me a young
defendant, generally a male, I cannot recall a single
female in this category, but generally a male who is
often in the range of say 18 to 22 who was brought here
as a child by his parents, who has been raised in the
United States, who has spent his entire life as what he
believes is a citizen of the United States, who
sometimes in that age range commits some offense or in
one way or another comes before an immigration court and
ends up being deported. Most of the times the ones that
I see have committed a felony. Otherwise I don't know
that they generally get deported. Most of the time they
have committed a felony. The felony can be a four level
enhancement felony or it can be a 16 level enhancement
felony. So we have a young person who has been, for all
practical purposes, a citizen of the United States, who
knows nothing but living in the United States, who quite
often does not speak any [Spanish], quite often does not
have any family in Mexico, who has, quite often, has not
even been to Mexico, who gets deported. They come
before the court, and again, depending on the particular
offense that resulted in their deportation, they may be
looking at the low end of the guideline range, maybe six
months in custody, at the high end of the guideline
range, depending on those variables, at three to four
years in custody. In that particular case, I believe
that the guidelines, when they, you know, are up in the
three to four year range, quite often are greater than
necessary, because this is an individual who, despite
whatever felony he has committed, is looking, for the
first time, at an immigration offense, having to come to
the realization that he cannot live in the United
States. And this age range, 18 to 22, I think as
anybody who has dealt with those people, anybody who as
a parents knows, they are most often not capable of
living on their own, especially in a foreign country.
Most often they are facing not just the consequences of
the felony, the consequences of the immigration offense,
but the emotional turmoil of coming to grips with the
fact that they will be having to make a living on their
own in a foreign country, removed from their family. I
do believe that in those cases that there should be some
mechanism in the guidelines for consideration of that
type of defendant. Cultural assimilation, of course, is
one of the considerations in that respect, but I don't
think that cultural assimilation always covers this
particular kind of defendant. And so I would urge the
Commission in that respect to consider whether this is an area that perhaps some adjustment could be made in the guidelines. Now, over time, when these young defendants have gone through immigration court several times, I don't know that it's necessary anymore because as they get older and I see them, occasionally when they continue to come back, as they get older, I feel that well, you know, time should have given them the ability to make the adjustment, but I believe that at least for the first-time offender, in our court system, that there ought to be some adjustment there.

Now, let me make a few other comments [that] pertain to the guidelines that I didn't intend originally, that are not part of my written statement, because it's a result of some of what I've heard over the last day and a half.

Let me speak to child pornography. I've heard from members of the Commission and from some of the people who have testified that there are many judges and others who feel that the guidelines are too high. I have not had a lot of cases dealing with child pornography, but I have had a couple. One of those was earlier on, when the guidelines had not yet been adjusted. In my opinion, in that case, the guidelines were not high enough. I sentenced the defendant to
I think it is important to remember that child pornography is not a victimless crime. There are many who look at it as a victimless crime. You cannot engage in even the simple possession of child pornography without some child having been somewhere abused by some adult, you know, individual, male or female, and I say adult, I suppose it can happen with somebody who is not an adult. But the bottom line is that a child somewhere was abused. And you know, we use some very nice terms sometimes. Abused speaks to a wide variety of conduct. What we are talking about is we are talking about children forced into performing some sort of sexual act. Whether it is displaying their body in a sexual manner or whether it is actually engaging in sexual conduct, that is what we are dealing with when we deal with child pornography. And I do not believe that the viewing of child pornography is in any way a victimless crime, because regardless of when that video image was captured, that child has to live with that for the rest of their life. And I will put it to you on a personal level. If, under some circumstance, you have been photographed naked, would you want that on the internet for everybody to see? There's nothing wrong. There's nothing illegal about being naked, and everybody
has done it at some point or another, but not a single
person in this room would want that out there. Well,
what we are talking about is children who have been
forced to perform sexual conduct, and those children
grow up, and they have to deal with that for the rest of
their life. They have families. They have children.
They are school teachers, policemen, they are people
that wait on us in the restaurants. And for those
children to know that there is somewhere out there this
image of them in that manner is something that affects
them.

And the one, the first case that I had,
one of the children was identified. I had from her
mother a letter addressing, you know, the effect that
this has had on her daughter. And the mother addressed
the letter because of the fact that she said that her
daughter could not, in fact, make herself sit down and
write about this because it was something that affected
her every single day, you know, in dealing with anybody
and everybody. You know, she wondered whether this was
a person who had seen her in that video.

So I believe that the guidelines reflect
some of that concern, and I would urge anybody who is
dealing with an issue of child pornography to go back
and read some of the reports that reflect these
I am always terrible with names, but there is, you know, the Supreme Court case that touches on these issues in connection with a statute, not necessarily with sentencing. But one of the things that sticks to me from that case is the fact that one, were there not a market for child pornography, we would not have, you know, these images being produced. So I urge the Commission to take that into account. And maybe what we need is not necessarily a better understanding of the guidelines, because I think one of the indications is there may be something wrong with the guidelines, but I think maybe we need a better understanding of the crime itself. And I don't know that that is necessarily a job for the Commission, but perhaps in formulating the guidelines, the Commission could better lay out the rationale for the guidelines and what drove the guidelines in particular.

Very quickly, I will touch on one other matter that was raised, as well, and that is pertaining to the drug quantities and the statutory minimums in some cases. You know, I do believe it is appropriate to consider drug quantity, and I believe that the role enhancement or the role adjustments provide for the proper adjustments in consideration of what the quantity
is, because I do believe that part of this pertains to culpability. A defendant who agrees to engage in the offense of, you know, drug trafficking, this is, you know, in addition to immigration, what I deal with on a very, very regular basis. And it is appalling to me, as a court, how people so easily agree to engage in drug trafficking. I do believe it is appropriate to consider quantity because of the fact that there is a vast difference between somebody who may be, you know, selling on a street level to somebody who is helping these drug cartels get their product into mainstream America. So I think that the tables as they are now provide for that consideration.

With that, I will conclude my statements by saying this: I am an individual with my own personal values and beliefs. You know, the defendant in front of me is an individual with his own particular concerns. But I do believe that it is important for us to remember that it is not me individually and it is not the, just the defendant individually that is affected by sentencing. But as a nation, we have to take into account how this impacts the community that we serve. I believe that the guidelines provide for the proper balance between all of the factors, both those that are already reflected in the guidelines, those set out by
3553(a), as well as the individual before the court and
and their particular characteristics and history. Thank
you very much.

CHAIR SESSIONS: Thank you very much,
Judge Alvarez.

Judge Cardone.

JUDGE CARDONE: First of all, let me
begin by thanking you for the opportunity to appear here
today to give testimony. I'm honored to be able to
share with you some of my thoughts regarding the
sentencing guidelines. And before— I prepared a
written statement and I'm going to go over that with
you, but before I do, I want to say two things, because
I was just listening to my colleague Judge Alvarez. On
page two of my written, prepared statement, I'm going to
talk about exactly the same things she just talked about
and I find it interesting that she was talking about it
because I haven't seen her in probably a year, but it
brings home to me how very real that situation is for
those of us who are dealing with it on a regular basis,
and I'm talking about the, the children that we find
here in the United States that are, that come back
illegally, and are facing the enhancements under [2L1.2(b)].
And I'll talk about that in just a minute.

But I wanted to emphasize to you, I
prepared this statement with no input from Judge Alvarez, and we both have the same information. The other thing is she mentioned about pornography. And I want to reiterate what she said. I actually see quite a few, not as many as other cases, but I see a lot of pornography cases, and you know, we're not just talking about depicting children by pictures. Some of the graphic, some of the things they've done to children, you know, tied up, hung upside down, I mean you know, if you've ever dealt with some of those images, they are not just nice little images of pretty little girls painted up. Some of them are horrific, horrific images. So I just wanted to say that, because I think some people think we're just talking about pretty painted little girls, and oftentimes we're not.

My tenure on the United States district court began in July 2003. Before joining the El Paso Division of the Western District of Texas, I spent over 25 years as a state judge. In my early career, I practiced before the federal courts, but as the year progressed, I became more involved in the state court system. Thus, when I was elevated to the position of a United States district court judge, I had only a very passing knowledge of the sentencing guidelines. As I began working with the guidelines, I
found them to be extremely useful in setting a framework for sentencing. I appreciated their thoroughness in addressing each separate offense and in incorporating the surrounding circumstances of that offense. However, by January of 2005, sentencing was thrown into a turmoil with the U.S. Supreme Court decision in Booker, and it seemed no sooner had I figured out what I was doing, everything was, might be for naught, it was all changed.

What I believe to be the result of Booker and its progeny is essentially a system of sentencing where the U.S. Sentencing Commission offers its expertise by compiling data which will provide ranges within which a particular sentence should fall. However, the ultimate decision of tailoring that sentence to fit the individual rests in my hands, the hands of the district court judge. Though I'm required to follow the three-step process as set forth in Gall in imposing a sentence, in the end I must give a sentence which flows from the correct calculation of those guidelines in keeping with the factors of 3553(a). Though I find this process to be a much improved system of determining a fair sentence for any given defendant who might appear in my court, I've also found that this method is not without its hurdles. Any structure that's built to accommodate every situation is
inevitably going to find someone who just doesn't fit that structure. It's some of those more problematic structures that I want to address here today.

First, I want to review with you some statistics, so that you get a sense of the breadth of my experience in working with these guidelines. For your information, I've brought with me, and I think each of you have a copy of the 2009 fiscal year statistics for the Western District of Texas. In there you will see that the total criminal case filings for 2009, in my division alone, in El Paso, was 3,424 cases. That's approximately 38 percent of all of the criminal cases filed in our district. There are only four district judges in El Paso. In 2003, when I took the bench, the total number of criminal cases filed in El Paso was 2,140. So the number has actually increased by 1,284 over the past six years, just in my division. And for fiscal year 2009, in my court alone, there were 898 criminal defendant cases that were filed and 963 criminal defendant cases closed. Thus I meted out approximately 1,000 criminal sentences in the past fiscal year.

The majority of the cases that I see in my court are immigration cases and drug cases. The drug cases involve large quantity of drugs, including
marijuana, cocaine, heroin, ecstasy and methamphetamines. The recent publicity that the City of Juarez, Mexico has received, and the indictments by Attorney General Holder of the Mexican drug cartels, indicates that the El Paso-Juarez corridor is one of three major drug smuggling corridors into the United States. In fact, in the indictment filed by Attorney General Holder in August of 2009 against Vicente Carrillo Fuentes, Attorney General Holder stated that approximately 70 percent of the cocaine which entered the United States annually was transported through the Juarez El Paso corridor.

So today I'd like to address my remarks to the two areas of the sentencing guidelines that I deal with the most and that I know the best, immigration and drug cases.

First, and this is the part that pertains to Judge Alvarez, I'd like to address the issue of the enhancement under [USSG] §2L1.2(b)(1), and that's the enhancement which applies when an alien unlawfully enters the United States and has a prior conviction or convictions. In many of the cases that I see, this enhancement applied, I have before me a young person in his twenties, and it's almost tracking what she said, who was brought into this
country as an infant by undocumented parents seeking a better life. This child grew up going to school in the United States, speaking only English, working, and most of the time never questioning where he was born or his nationality. He believes himself to be an American. Then, at some point in his twenties, the person has a run-in with the law. He's convicted of a felony offense, and as a result of that conviction, he's deported from the only country he knows. Though he's deported back to Mexico, he speaks no Spanish, is unfamiliar with that culture, has no family members there to assist him. All of his family is back here in the United States. This person oftentimes will panic, return back into the United States, not realizing that if he's caught he faces sentences of 37 to 46 months for a plus 16 enhancement, 24 to 30 months for a plus 12 enhancement, and or 12 to 18 months for a plus eight enhancement.

Now, contrast that with somebody who has come into the United States repeatedly for the past 20 years. That person has been voluntarily removed to Mexico 11 times, has been returned to Mexico two times. This person is found at the El Paso County Detention Facility because he's been arrested and convicted of a DWI. He has numerous prior run-ins with the law for
public intoxication, misdemeanor theft, assault, all
with the labels or disposition of the case unknown.
This person would probably be a total offense level of
six, criminal history category two, and his sentencing
guideline range would be one to seven months.

I'd like to propose to you the following:

I believe that the sentencing guidelines should
recognize circumstances where a defendant has been in
this country for many years, only to find that now the
only country he knows is no longer an option for him.
These individuals are often in this country through no
fault of their own. Shouldn't there be some recognition
of that in mitigation of their guideline range? Perhaps
there could be an adjustment provision, much like a
minus three adjustment for acceptance. It could allow
for a downward adjustment by factoring in that there are
numerous, factoring in their numerous prior years of law
abiding residence in this country.

Currently, to address this issue, counsel
for the defendant often files what we call a motion for
downward departure, citing cultural assimilation.
Though recognized in the Fifth Circuit, it is a highly
discouraged and infrequently granted departure. It
essentially requires the sentencing court to make a
finding that the defendant's circumstance are so
atypical or extraordinary that it warrants a downward
departure on the basis of cultural assimilation, and as
I've indicated, these are cases that I see quite often,
as evidenced by Judge Alvarez referring to the same
thing, thus making a finding by me that they are
extraordinary or atypical is just not warranted. That's
why I would propose to you that these defendants should
be entitled to some sort of formulaic downward
adjustment. I believe that this would avoid many of the
variances that the judges must resort to in order to
recognize those special circumstances.

A second issue in immigration that I'd
like to touch upon is the criminal history
documentation. Though over the years I have seen many
different types of immigration cases, the vast majority
of those cases that pass through my court are illegal
reentry, 18 U.S.C. § 1326 cases. Many of these
defendants are charged with enhanced felonies understand
1326(b)(1) or 1326(b)(2), and it is these enhanced illegal
reentry cases which cause the most consternation. It is
the rare enhanced 1326 case that doesn't require an
extensive check into the defendant's criminal history.
Most of these criminal histories expand over decades,
entail searching into court documents from New York to
California to Denver to Florida, in any one given case.
Often cases must be postponed to allow the United States probation offices, officers to obtain copies of documents from small counties which keep very poor records. And with the advent of computer filing and docketing, many courts have destroyed paper copies altogether and can only provide the court with some sort of computer generated entries. This, in most cases, doesn't satisfy the needs or the requirements of documenting a defendant's criminal history for purposes of accurately determining that correct enhancement calculation and their criminal history category.

Though I am unsure of the exact solution to this problem, I would like to point out that it is truly a problem that I see on almost a daily basis. One solution might be to limit the criminal history in those cases to a certain number of years, perhaps ten. I don't know the exact fix to this dilemma, but I would point out to you that it is a very time consuming and difficult task to comply with the requirement of this section of the guidelines.

Now, turning to drug cases. The situation under the guidelines that I'd like to address is a common one along the U.S. Mexican border, a multi-defendant drug smuggling conspiracy case. This issue involves my giving what I consider to be disparate
I'll use as my example a case involving seven defendants charged in a seven count indictment for conspiracy drug offenses including possession with intent to distribute large quantities of methamphetamine, marijuana and MDMA, which is ecstasy. Obviously, since it's a conspiracy case, each of these defendants have different roles to play. The main defendants are the ones who directed the transporting and loading of the controlled substances between Mexico and the United States to stash houses in El Paso, and then subsequently directed those transfer of those drugs to far away states such as Georgia and Tennessee. Then, as co-defendants, there are the truck drivers who transported illegal narcotics from El Paso, Texas, into the interior of the United States, often using what we call a cover load. In this case, one of the leaders of the drug conspiracy received a sentence as low as 90 months, while the truck driver received a 120-month sentence, which is the mandatory minimum.

What I would like to address regarding the way these cases are handled under the guidelines calculations pertains to the availability of safety valve, which would allow for a guideline range below the mandatory minimum of 120 months for the leader
organizer. Compare this to the inability of the co-conspirator with a prior criminal record to be sentenced below that mandatory minimum. This low level co-conspirator is now eligible — is not eligible for safety valve because of a prior conviction. Even if he fully cooperates with the government by providing a safety valve statement, and even if he played only a minimal role, a minor role or even a minimal role in that offense, if this low-level co-conspirator is a truck driver with a prior misdemeanor record that somehow amounts to more than one criminal history point, any possibility of getting below that mandatory minimum is foreclosed. Meanwhile, safety valve for the leader organizer is automatic. Certainly, the low-level co-conspirator can seek some sort of 5K.1 motion for downward departure from the government, but it is not automatic, and frankly, because the government's obtained everything they wanted from the conspiracy leader, who obviously would have much more knowledge about what was going on, the minor co-conspirator is facing a mandatory minimum. And I, as the judge, seeing the potential injustice of this, am powerless due to the mandatory minimum.

Now, I recognize, and I brought it with me, that in your March, 2009 publication, Impact of
Prior Minor Offenses on Eligibility for Safety Valve,
you discuss my concern in part with regards to that,
those prior minor offenses. In the conclusion of that
publication, you state that only 260 defendants, 1.1
percent of all drug trafficking offenders, were
disqualified from eligibility for safety valve due to
minor offenses in their criminal history. Thus you
conclude prior convictions for minor offenses have a
minimal impact on safety valve eligibility. First, in
my court, this is not such a rare occurrence, and as a
judge, I strive to give fair and reasonable sentences to
100 percent of the defendants appearing before me, not
some calculated subset, and I believe that fairness and
reasonableness demands consistency. This is what I
believe justice requires. To mete out an injustice to a
defendant should not be disregarded because it is a
statistical minority. Furthermore, I would argue to you
the opposite statistic, and that is if this provision is
allowing 99 percent of leader organizers to get that
less significant sentence than a minor player, where is
the justice or fairness in that?

I have attempted to limit my comments
today to the few areas where I believe the guidelines
and statutes have resulted in disparate sentences.
These comments, however, should not belie the fact that
I believe the sentencing guidelines generally work very well.

Thank you for the opportunity to speak, and I'd be glad to answer any questions.

CHAIR SESSIONS: Thank you, Judge Cardone.

So we open it up for questions. Mr. Wroblewski.

COMMISSIONER WROBLEWSKI: Yeah. I'd like to just ask you, Judge Cardone, just something about the last sentence you spoke about.

JUDGE CARDONE: Sure.

COMMISSIONER WROBLEWSKI: The guidelines and the safety valve provision in the guidelines, in the statute, are supposed to preclude organizers and leaders from getting reductions under the safety valve. So I'm a little curious about that. And one of the things you talked about in one of the other panels is that if a leader or organizer involved in these truck loads, their offense levels should be in the high thirties, if not the forties, and they may be getting reductions because of substantial assistance because they're cooperating.

JUDGE CARDONE: Right.

COMMISSIONER WROBLEWSKI: But isn't part of that that those reductions are taking them down to as low
as a 90-month sentence?

JUDGE CARDONE: No, no question, and again I will say to you that this is a conspiracy case. So in a conspiracy case, the amount, if you've got a bunch of people working in conspiracy, the amounts are attributable to everybody in that conspiracy. So even the one truck driver who's taking only a part of that huge amount of drugs is going to be in the conspiracy and is going to be sentenced with everybody else, and so they're in the high 40 range too. And yet they're not going to get the benefits that that leader organizer can get. And let me, let me qualify. When I say leader or organizer, I use that term to differentiate from — I know under the guidelines it's a very specific term, but I meant even if it's not the actual top of the line leader organizer, to be so much more culpable and be eligible for those reduced sentences because, because you're — some of these people are Mexican nationals, so they don't have a record in the United States. God knows what they have in Mexico, but they don't have a record in the United States, so they're not going to have to worry about that, that minus one that won't allow them to get a safety valve, whereas you've got some truck driver who picked up a DWI, you know, sometime in Tennessee, and he's not going to be eligible
for that because he, he scores higher. So that's really
what I'm trying to refer to more.

COMMISSIONER WROBLEWSKI: And I take it
that the steps that the Commission has taken over the
years, for example, if you're a minor player, you don't
have the leading role, you have levels — more levels off of
the leading role, you have two to three levels taken off
for accepting responsibility, and the person who's more
culpable is supposed to be going up because of being an
organizer or leader or manager or something, I take it
you don't think any of that is sufficient, that those
things are not sufficient to take into account.

JUDGE CARDONE: I think it helps, but if
you're looking at a mandatory minimum, there's nothing
that I can do.

CHAIR SESSIONS: Commissioner Howell.

COMMISSIONER HOWELL: I just want to
start off with one comment about the child pornography
case that both of you judges made, and that is that
across the country, both at our hearings and it's
revealed in other areas, so many judges think that our
child pornography guidelines are producing too severe
sentences for some of the offenders that they see in
front of them. I think because across the country
consistently in each circuit, the highest variance rate
among all the different offense types is in the child pornography area, this is something that is a priority for the Commission, and that we're looking at.

We're in the process, I think Judge Alvarez, you said having the Commission, you know, having the Commission do some sort of, you wonder whether we would be able to do a report or study of this type of offense and the type of offenses that are coming out to help explain some of the variances, and we are undertaking such, such a study right now, looking at the literature regarding recidivism, how many child pornography possessors actually have contact with, contact of a sexual nature with children, and so we are, we are undertaking that study now, and re-examining that child pornography guideline to see if there are refinements that can be made that make it more useful to judges around the country, because the variance rate is such that this is something that many of us feel we just can't ignore.

JUDGE ALVAREZ: May I make one comment?

COMMISSIONER HOWELL: Yes.

JUDGE ALVAREZ: You said one of the things that you're looking at is to see how many of those offenders have actual contact with children —

COMMISSIONER HOWELL: Yes.
JUDGE ALVAREZ: And I see that in very different settings, and I would urge the Commission to consider that that is not necessarily the most important criteria. And I'll give, by way of example, you know, there was an incident, I don't remember it was six months ago, a year ago, where a news reporter was videotaped in her room by some stalker, and that was put out to the public. I don't know that it was, you know, more or less embarrassing to that news reporter, the fact that that stalker had not personally touched her. Okay? So it is not just a question of is there physical contact. I go back to, you know, the statement that I made, it's a matter of is there a market for this, because there are those who will view it?

COMMISSIONER HOWELL: I didn't mean to say that that was the only harm we were looking at. I think there are a variety of harms, and that one is the embarrassment, continuing, almost permanent embarrassment.

JUDGE ALVAREZ: More than embarrassment.

COMMISSIONER HOWELL: But one of the, you know, significant harms that, that we are looking at gauging or trying to evaluate is people who possess child pornography and whether they do have actual contact with children. So I agree with you that there
are a number of other harms that Congress decided to get it again, the Supreme Court decided, and these are overriding things that we're looking at in this report.

I started with comment. I actually wanted to turn to, for this question, to a comment Judge Holmes made.

JUDGE CARDONE: Can I?

COMMISSIONER HOWELL: Yes.

JUDGE CARDONE: Because I just wanted to say something about your job on the child pornography, and I didn't mean to cut you off, but my concern is this sort of leaves the topic, and that is I would only say, on your looking at it, and some of the comments that you get that it's either too harsh or too easy, I know as a judge that when I get these child pornography cases, what happens is that we get these presentence investigation reports, and they cite numerically, and when somebody downloads this stuff, it can be volumes of stuff or it can be just a few things, normally it's volumes, because once you get it on, it just keeps coming.

But we get sort of this very sort of analytical analysis of like what is on the computer and how many images and all of those kinds of things. And I, I see it quite often, not, I can't say, you know, but
I see it quite often, and when you see it and you read it like that, it's not the same thing.

And I will give you only an example that I had. And that was that I was reading this report, and it was making reference to the fact that he had, this person had clicked on some website. It had a very sort of innocuous name, as some of them do, and then all of a sudden found himself in all of this child porn. And the attorney tried to use that as a way to say, Judge, you know, this is not a bad guy, he has no prior record, et cetera.

At the sentencing hearing, I actually got, got testimony, and they brought the website in, and you know, if you have to see those images, if the judges or the people that are commenting about this saw what they're talking about, not just looked at it sort of analytically, it is a lot different. And I would only, I'm only saying that to you because it's one thing to read about it, but it's another thing to see some of those images, and when you see those images, when we're talking about child pornography, it is not something that — it's like Judge Alvarez says, and again, it's not something that you can go, "Oh, this is just harmless." These are oftentimes very young children, in all kinds of acts and circumstances, and I, I don't know
if the guidelines can somehow — I mean, you know, you
hate to force anybody to look at these pictures, but
I'll tell you what, when you look at these pictures, you
have a very different opinion than if you're just doing
some sort of analytical, well, it's 1,550 images versus
two images. I would only point that out.

COMMISSIONER HOWELL: This question is
for Judge Holmes. One of the things that you
recommended to us is to update the manual to make it,
you know, to make it more workable, this advisory, and
one of the things that you've suggested with regard to
the departures, Chapter Five, is perhaps they should be
deleted, and you're not the first person to appear in
front of us to make that suggestion. And I have to say
one of the things that I puzzle over with respect to
that suggestion is our statutory mandate, which tells us
that we, as a Commission, shall, and it says shall,
consider how much relevance certain factors should play
in sentencing, and those factors include age, family
ties, community ties, education, and I think that the
first Commission looking at that statutory mandate, what
their job was, created Chapter Five in part to address
those factors and make a number of them discouraged
factors. So if we are looking to update the manual, and
looking at the ones, the suggestion on one side to just
delete all references to those discouraged factors, and
from the other side, our statutory mandate to give
guidance to judges about how they should consider those
factors, what relevance they should play in sentencing,
I puzzle whether the elimination option is really an
option that which comports with what we're supposed to
be doing. I just wanted to know if you could help me or
give me your thoughts on that.

JUDGE HOLMES: It may not be the best
suggestion for how to go about it. My real thought is
that we are five years into an advisory guideline system
and we're still dealing with a manual, rules and
statutes designed for a mandatory system. That's
really, in thinking about that, and in thinking about
what I do as a judge, what is helpful to me, and it is
helpful, it is helpful to have the sentencing guideline
range, to calculate that and look at it and think about
it in light of the 3553(a) factors. And, and but once,
once I have the sentencing guideline range and I have
the defendant in front of me, and I have the 3553(a)
factor to the consider, by in large, the departure
provisions in the manual don't play much effect on —
don't really affect what I do.

COMMISSIONER HOWELL: So if those
departure provisions were revised to actually explain
more fully what, how those offender characteristics
should be considered as part of sentencing, would, would
that be more helpful, a rewrite of that chapter?

   JUDGE HOLMES: You know, a rewrite of the
35, you know, some commentary on the 3553(a) factors
probably would be helpful, and how you apply them.
Certainly we all struggle with that. We know there is
no magic formula, and we all know that, on how to apply
those factors. It's a difficult process, and it
involves judgment. But once you, under the sentencing
guidelines manual, you calculate the guidelines range
and then you look at determining whether there are any
departures that apply, if there are departures that
apply, and you don't change the guideline range, then
you're outside the guideline range. But once you're
outside the guideline range, you're already into the
3553(a) factors, and they're going to control in every
instance. That's what you have to justify your ultimate
sentence on anyway. And because of the, the other
things that I mentioned, and everybody is aware of it,
the Irizarry case, when you get in, when you go into
sentencing and you hear the arguments and you, you hear
the presentations, and you make a decision, and some of
the judges, I think Judge Jones mentioned in the earlier
panel, you don't necessarily know where you're going to
come out. If you did, there would be no point in having
the arguments and the allocution and all those things.
You're going to listen to all that, and then make a
judgment. And if you're going to impose a sentence that
is either above or below the guideline range, and you
hadn't anticipated doing that in time to give notice,
then, then you're going to base it on the 3553(a)
factors and not on the, and not on the manual.

I will say, unless you try a case — I
don't know how the other judges do this, but if we have
a, if you you know the statistics of the percentage of
them that plead guilty, we have to see them at the
change of plea hearing and at the sentencing. And I
will read the presentence report either the day before
or the day of sentencing, and then go over it with the
probation officer before the hearing. But I don't read
it two weeks in advance. You know, I wouldn't remember
it if I did.

If we have a trial, and then we have
sentencing, I can give notice, and I've done that. I'm
thinking about departing upward. I have done that where
I've heard a trial, and I know the case, and I can give
them advance notice. But if all we have is a change of
plea, I may not know I'm going to consider a departure
until I read the presentence report, because I don't
have enough information about the case.

So the departure provision, in terms of what I do with Booker and with Gall and Rita and all those cases, is not, it's just not a significant part of, of what – we may look at it in terms of how we fill out the sheet that goes to the Sentencing Commission, but in terms of the actual decision making, it's not a significant part.

CHAIR SESSIONS: Judge Hinojosa.

COMMISSIONER HINOJOSA: This is just, I guess a follow-up. Booker and the cases since then have said the procedure is termination of the guideline range, consideration of departures, and then going to variances. The one thing, when you talk about 3553(a) factors, when you look at those factors, two of them, two of the seven of the guidelines, one is the guideline, the other one is the policy statement, which is the departures, and I, as a judge –

JUDGE HOLMES: And it's all written for a mandatory guideline system. And I do look at those things, and I say it, and again, to the extent that someone argues for a departure under the guidelines, I will look at those guidelines and I will make a determination is it applicable. It's part of my duty. And if one side or the other argues for a departure
under one of the provisions of the guidelines manual, I will make a decision, either it fits or it doesn't fit, because it's part of what I'm required to do, and it makes a complete record for appeal. But at the end, the decision on the sentencing is going to be based on the 3553(a) factors, and that does include considering the guidelines, but there are a lot of things in the departures that — I mean I, in my, in my experience, it's just not a very practical aspect of the manual that's helpful to us at this point.

COMMISSIONER HINOJOSA: You are required to look at it, and you know, really, one of the things that I don't think the Commission has done a good enough job is to really explain [§]5K2.0 with regards to the possibilities for the cases that have been brought up by the two federal border judges, and the opportunity not just to look at 5H1, but point six, but then also go to 5K2.0 with all the possibilities there.

But it appears to me that the statute does require the steps that you just described, and then to say well, it was written when the guidelines, that statute was written when the guidelines were mandatory. Nevertheless, the Supreme Court has left it there. They decided which parts of the statutes would be written off, but the statute is still there.
JUDGE HOLMES: And that's true. And I do, in every instance, I tell them we're going to go through the steps, including the departure steps under the guidelines. If someone argues for a departure or asks for a departure under the guidelines, we consider it, listen to the arguments, reads the cases if they're applicable cases, and make a determination.

But you know, and my point was not that we should not be doing that as judges today. I mean that is our duty to do that today. But at the end, we have to make the decision based upon — we have to impose a sentence that is sufficient but not greater than necessary to comply with the purposes of [18 U.S.C. § 3553(a)(2)], and that's, in the final analysis, what we're supposed to do. Consideration of the guidelines is one of those, one of those points. When we do that, when we do that, we have done our duty under the law as it stands today, and if it's not a sentence within the guideline range, I don't think that we're departing from anything or varying from anything. We're simply doing our duty under the statutes. And I would like to see us move toward a, a system that is actually designed for an advisory guideline system.

And I don't disagree with you about what I'm supposed to be doing today. It may be that, in my
experience, the, the 35 – the departures don't play a big part in our sentencing, other than substantial assistance. Substantial assistance still plays a really big part in sentencing. The others don't play a big part. I very rarely get arguments based on the guidelines. We do occasionally. But we don't, we don't very often get arguments based on departures under the guidelines.

But I do think we should be rethinking if this is a good system, and I think it is. I think the advisory guideline system is a good system. I think it's superior to the mandatory guidelines system. I think it's superior to having sentencing without any guidelines at all. If we're going to do that, I think we ought to rethink the whole scheme, including the statutes, about what we're required to do and how we're required to do it.

And it's very helpful to me to know here is a sentencing range that, over time, has been the, a common range for sentences like this. That's helpful to me. But a lot of the rest, some of the other things are not. That's the meat of the guidelines, and I think that is helpful. The rest of it I think is probably not so helpful.

CHAIR SESSIONS: Commissioner Friedrich,
COMMISSIONER FRIEDRICH: Yes. Judge Cardone, thank you for providing the statistics. This is published material to be used by the court?

JUDGE CARDONE: It's, I don't know who it's published to. It's certainly published to us, and it is prepared by our district clerk, and provided to all of us, and so we receive it. I received it just last week, and so I was able to bring it with me.

COMMISSIONER FRIEDRICH: Well, it's interesting, it's very interesting to me how it's broken down, different reports by judge in terms of your case load, criminal and civil, and bench hours and how long it takes to resolve a case and all these factors. It's very interesting to me.

I'm wondering, and I pose this question to all of you, what your reaction would be to having information published about the sentences you impose. You know, in the advisory system, the litigants are much more — much less certain about what sentence they might expect before a certain judge. It seems to me it would be especially helpful for them, appearing before certain judges, to have a better sense of what judges have done in particular types of cases. And I'm just interested in what your reaction would be to having more
information providing, provided about individual judges' sentences.

JUDGE CARDONE: Well, I would say to you that I think that's probably not the case, because the attorneys that appear in front of us on a regular basis know us very well, and know the, know sort of what gets us going and what doesn't. I mean I, I don't know how else to put it. But I would say to you that each of these, these defendants are represented by counsel who are in our court every single day, who know us, who know sort of the things that we look at and, and you know, I can tell because the attorneys argue them to me, and sort of know, and have said to me, and I've told my client, judge, that, you know, you don't like blah, blah, blah, blah, and I don't mean to say that it's our personal opinions, but it's sort of the way we look at different issues, the factors, some of the factors, et cetera, et cetera. So I don't know that statistically that would make a big difference, because I think nationally maybe, but in our communities, the lawyers that practice in front of us, I think, and I'm a big believer in consistency, I think because of your reputation and the way you consistently hand out sentences, that those lawyers then counsel their clients of that. So I think oftentimes they already have that
COMMISSIONER FRIEDRICH: Judge Alvarez.

JUDGE ALVAREZ: I would agree with that.

I don't have any problem with, you know, my statistics being published. They are quite open records so that is not an issue. But I believe that the attorneys that practice regularly are familiar with what we tend to do in similar cases, and I don't know that it would make any difference to the particular defendant, because obviously he's already before us. So that as a defender —

COMMISSIONER FRIEDRICH: In terms of deciding whether to plead, that sort of thing.

JUDGE ALVAREZ: I suppose in that respect it might help to a certain degree, but I think that for the most part they'd get that information from their counsel, because they do know our work already.

COMMISSIONER FRIEDRICH: Judge Holmes.

JUDGE HOLMES: I have no objection to that information being compiled and published. I agree with what the other judges said, that most of the lawyers are going to be aware, and so for that purpose, it's, it has some value, but not great. But the public has an interest, a legitimate interest in knowing what we do, and, and being able to form their own opinions on
whether we're doing our job properly, and I don't have a
problem with that information being published.

CHAIR SESSIONS: Well, thank you all very
much for coming here today. This is a very interesting
discussion. We'll take your thoughts, and clearly, I
think the expression is under advisement. Thank you.

(Recess taken from 11:30 to 11:47.)

CHAIR SESSIONS: Well, welcome. This is
exciting for us.

Mr. Lappin, we've been together at
meetings all across the country, in the Criminal Law
Committee for, in your case, for ten years, and to have
you testify before the Commission is an honor for all of
us. And Ms. Vance, I really sincerely appreciate your
coming here today. So this is our last panel
discussion, and we're really looking forward to it.

So let me introduce each of you to the
Commission.

Harley Lappin was sworn in as director of
the Federal Bureau of Prisons in April of 2003. He has
a long and distinguished career as a public
administrator with the Bureau of Prisons. He began his
career in November of 1985 as a case manager at FCI in
Texarkana, Texas. He was promoted throughout the ranks
through the Bureau. Mr. Lappin received a Bachelor of
Arts degree in Forensic Studies from Indiana University in Bloomington, Indiana, in 1978, and a Master of Arts degree in Criminal Justice and Correctional Administration from Kent State University in Kent, Ohio in 1985.

Today is special for me. One of my favorite experiences of my professional life, really my first experience, was as a teacher and warden, which, of course, was not under your jurisdiction at that point. And then I worked my way through law school in the General Counsel's Office, Office of the Bureau of Prisons in Washington, D.C. So that's sort of a, I don't know, is that a circle of history or something that I'm, many years later, I'm —

DIRECTOR LAPPIN: We were lucky to have you.

CHAIR SESSIONS: I'm not so sure about that.

And Joyce Vance was confirmed as United States Attorney for the Northern District of Alabama in August of 2009. Prior to serving that post, she was chief of the Appellate Division in the U.S. Attorney's Office in the Northern District of Alabama, where she has worked since 1981. Before entering government service, she was an associate at the Birmingham law firm
She earned her Bachelor of Arts degree from Bates
College in 1982, and her law degree from the University

For those of you who don't know, Bates
College is in Lewiston, Maine, which happens to be the
school where my eldest daughter went.

With those personal introductions,

Mr. Lappin.

DIRECTOR LAPPIN: Thank you, Judge. It's
really a pleasure for me to be back before you for the
hearing. I certainly appreciate the opportunity to
appear before you today and discuss the Bureau of
Prisons inmate reentry programs, as well as the
challenges we are facing, including continued increases
in the size of the inmate population, unfortunately
without corresponding increases in capacity or staffing
for the agency.

Over the past 20 years, the federal
inmate population has increased by more than 200 percent
to more than 209,000 inmates. Over the past few years,
we haven't been able to build enough facilities to keep
up with the increase in the federal inmate population,
and we have not been able to increase staffing, as well.

Today our inmate to staff ratio is 50 percent higher
than that reported by the five largest state departments
of corrections. We are forced to double bunk nearly all
of our high security institutions, many of whom are
aggressive and violent offenders, and have various
antisocial tendencies, and we are triple bunking nearly
half of the remaining inmate population housed in our
lows and mediums. Over the past 25 years, the number of
inmates in federal prisons who have a history of
violence has increased more than six-fold, and that is
affiliated with gangs have increased by four-fold.

Rigorous research demonstrates that
increases in crowding and reductions in staffing lead to
increased serious assaults by inmates, both on staff and
inmates. Additionally, crowding and reduced staffing
levels affects inmates' access to important services,
and limits our ability to prepare inmates for reentry
into the community. Inmates are being released,
unfortunately, without the benefit of some programs that
enable them to gain the skills and training necessary to
reintegrate successfully. In fiscal year 2007-2008, for
the first time, the Bureau of Prisons was not able to
meet the statutory mandate for treating 100 percent of
eligible offenders in need of residential substance
abuse treatment. The waiting list for such treatment
currently exceeds 7,000 inmates, and waiting lists for
education programs currently exceed 15,000 inmates.

Our most important reentry program, or one of them, Federal Prison Industries, is dwindling, rather than expanding. We operate factories, primarily at medium security and high security institutions, where we confine the most violent and criminally sophisticated offenders. More than three-quarters of the inmates who work in Federal Prison Industries have been convicted of serious offenses, including drug trafficking, weapons, robbery or other violent offenses. Work in Federal Prison Industries keeps inmates productively occupied, thereby reducing the opportunity for violent and other disruptive behavior. Work in Federal Prison Industries also teaches inmates job skills and work ethics, and it does so without the use of appropriated funds. Rigorous research has confirmed that inmates who participate in the program gain valuable skills and training, resulting in substantial reductions in the rate of recidivism. Federal Prison Industries participants are 24 percent less likely to recidivate, when compared to similar nonparticipating inmates, and inmates who participate in vocational or occupational training programs are 33 percent less likely to recidivate than similar inmates. Additionally, Federal Prison Industries participants were 14 percent more likely to be employed one year
after release from prison than their nonparticipating peers. Finally, inmates in Federal Prison Industries are less likely to be involved in misconduct while incarcerated, as compared to other inmates.

Last year Federal Prison Industries closed or downsized 20 factories, resulting in the loss of approximately 1,700 inmate jobs. That's nearly ten percent of the federal prison inmate workforce in Prison Industries. These actions, while necessary, can be expected to result in more idleness, higher recidivism, and increased staffing required on the part of the Bureau of Prisons to supervise more idle inmates.

There are many factors that significantly affect recidivism, including prison programs. Research by the Washington State Institute of Public Policy confirms that programs such as those operated by the Federal Bureau of Prisons, which include residential drug treatment, Federal Prison Industries, education and vocational training, yield savings as high as $6.23 for every dollar spent, as a result of lowering costs for arrests, conviction, incarceration, supervision and avoiding further crime victimization.

The longstanding philosophy of the Bureau is that preparation for reentry begins on the first day of imprisonment. The broad array of programs available
at every federal prison is designed to facilitate prisoner reentry. All medically-able sentenced inmates are required to work. Most inmates are assigned to do institution jobs such as food service worker, orderly, plumber, painter, warehouse worker, groundskeeper. They earn between 12 and 40 cents per hour in these institution jobs. Inmates who participate in Federal Prison Industries earn up to $1.15 per hour.

The Bureau of Prisons' educational programs are effective in reducing recidivism. Inmates who participate in these programs are 16 percent less likely to recidivate, as compared to their nonparticipating peers. Inmates who do not have a high school diploma or a General Educational Development certificate must participate in the literacy program for a minimum of 240 hours or until they obtain a GED. Non-English-speaking inmates are required to participate in an English as a second language program until they are proficient in oral and written English. Post-secondary occupational-oriented programs are available in many institutions, and inmates with their own resources are permitted to enroll in post-secondary education programs.

The Bureau operates 62 residential substance abuse treatment programs for the 35 percent of
the inmate population who have moderate to serious substance abuse problems. Inmates in these programs are housed together in a separate unit of the prison that's reserved for drug treatment, which consists of intensive half-day programming five days a week. The remainder of the day is spent in education, work skills training or other inmate programming. Upon completion of this portion of the treatment, aftercare services are provided to the inmate while he or she is in the general population, and also later at the residential treatment center. A rigorous evaluation of the residential drug abuse treatment program demonstrated convincingly that offenders who participated in residential drug abuse treatment were less — and were released to the community for at least three years, were 16 percent less likely to be re-arrested and to have their supervision revoked and returned to prison than inmates who did not receive such treatment. This reduction in recidivism is coupled with a 15 percent reduction in drug use for treatment subjects.

The agency is often challenged on its use of residential reentry centers, an important part of the reentry program. Most inmates who are released to United States communities are transferred to a residential reentry center to serve the last few months
of their sentence in a structured setting in the community prior to completing their federal sentence. Some inmates are transferred to home detention during the last portion of their residential reentry center stay, while others are sent directly to home confinement for the last few months of their sentence. Inmates who are released through RRCs are more likely to be gainfully employed, and therefore less likely to recidivate, as compared to inmates who are released from prison directly to the community. We have recently begun to place inmates at low risk for recidivism, based on their age, criminal history and other criminogenic factors, and with few reentry needs, such as a need for housing or employment or family ties, directly into home confinement whenever possible, allowing us to allocate the residential reentry center beds to those with the need for the services and the structure provided in that environment. The Second Chance Act expands the Bureau's authority to place inmates in RRCs for an extended period of time from which to — I'm sorry, for an extended, extending the time limit from the ten percent not to exceed six months, to 12 months, and authorizing the agency to place inmates with shorter sentences, 12 months or less, directly into RRCs for service of their entire term of imprisonment. Based on the mission of
the agency to confine offenders in institutions that are secure and most cost efficient and provide opportunities to prepare for reentry, the Bureau of Prisons is rarely using the RRCs for direct court commitments, and rarely uses transfers, or rarely transfers inmates to RRCs for prerelease services for more than six months. Most inmates with short sentences are appropriately placed in prison camps, which are minimum security, much less costly than RRCs and offer a wide variety of inmate programs, and most releasing offenders receive the necessary transitional assistance in the three or four months at an RRC. While it is certainly desirable for offenders to remain with their families and in the community for extended periods of time, such placements cannot be justified with the agency mission as cost efficient and necessary to address reentry needs. Again, I appreciate joining you today. I look forward to answering questions that you may have.

CHAIR SESSIONS: Thank you, Mr. Lappin.

Ms. Vance.

MS. VANCE: Mr. Chairman and members of the committee, it's an honor to speak to you this morning about criminal sentencing in the federal system, and especially the impact of United States v. Booker on all of us. I have the unusual position of having
been a career federal prosecutor, and now being a
relatively new United States attorney, and I know you've
heard from a number of my colleagues. I'm here to offer
you a view from the Deep South. It's a little bit
strange being an appellate lawyer in recovery to be in a
room with this many federal judges, and to have gotten
that far without drawing a question. I'm not sure if I
can make the shift, but I'll try my best.

I'm a U.S. attorney in the Northern
District of Alabama. I have about three-fifths of the
state's population, the northern 31 counties in Alabama.
My main office is in Birmingham. My office has
prosecuted, for an office so situated, a rather
extraordinary amount of both public corruption and of
white collar crime. Most recently, a couple of weeks
ago, we convicted our mayor on an indictment involving
in excess of 60 counts of fraud and other related
crimes. Ex-Mayor Langford's conviction makes him the
fifth member of the Jefferson County Commission to go to
federal prison in the State of Alabama, he having
previously been a county commissioner. My office also
prosecuted a systemic accounting fraud at HealthSouth
Corporation, once one of Alabama's largest corporate
entities. Virtually every high ranking corporate
officer was convicted, with the exception of the CEO and
Chairman of the Board Richard Scrushy, who was acquitted, but subsequently convicted in the Middle District of Alabama on unrelated charges.

So because we do a large number of both significant and smaller prosecutions in this area, this community context gives us plenty of reason to consider the impact of Booker on sentencing, and particularly in the area of white collar crime. My belief is that Booker has made sentencing less uniform, and thus less predictable for prosecutors and defendants alike, particularly in the white collar context. Whatever deficiencies some of its detractors believe the guidelines have, the guidelines have promoted consistency by treating like cases alike, without regard to the particular jurisdiction or the randomly selected sentencing judge. The individual consideration that judicial discretion promotes I think appeals to all of our innate senses of fairness in the sentencing process of individuals.

Consistency, on the other hand, provides a systemic sense of certainty in sentences handed down to defendants convicted of similar conduct. And I believe that that comes with the additional benefit of promoting and contributing to the public's trust and belief that the system has integrity, a very important
factor from where I sit.

My sense is that the challenge that the system and certainly the Commission faces going forward is to balance, in the post-Booker era, those competing concerns of judicial discretion and the individuality benefits it brings, with concerns about consistency, so that the system as a whole imposes fair, certain and consistent punishment.

The guidelines were obviously predicated on the belief that it was important for defendants who committed similar crimes and had similar characteristics to receive similar sentences. By in large, the experience in my district, the guidelines were very successful in achieving that goal of consistency.

Appellate review is important to us in making these guidelines effective, because a court of appeals could provide a single interpretation of the guidelines for cases brought in multiple district courts, and thus promote consistency within a circuit.

After Booker and Gall, the role of the courts of appeal has been significantly diminished so that sentencing is once again a matter almost exclusively for the district court. Like other courts of appeals, in my circuit, the Eleventh has applied a highly differential standard of review in evaluating
sentences since Booker was handed down. The court reviews the sentence for procedural and or substantive reasonableness, applying an abuse of discretion standard of review. Since very few cases at this stage involve any significant procedural question about the calculation of the guidelines, the focus is generally on substantive reasonableness. And the Eleventh Circuit has held it will not vacate a sentence for substantive unreasonableness unless it is left with the definite and firm conviction that the district court committed a clear error of judgment in weighing the § 3553(a) factors by arriving at a sentence that lies outside the reasonable range dictated by the facts in that case.

The Eleventh Circuit has not completely forsaken reasonableness review, and I worry sometimes that I'm the poster child for anger by the district court in my district, because we have appealed a number of cases and had reversals, but quite frankly, even though the Eleventh Circuit has noted that the district courts' choice of sentence is not unfettered, it is very rare to have appellate review of a sentence that reverses a case.

Recently we have had that happen. This past week the Eleventh Circuit issued a published opinion in United States v. Livesay. That is one of
the HealthSouth related cases, a 2.7 billion dollar accounting fraud that essentially eviscerated one of the largest health service providers in the company, and the district court has sentenced this particular gentleman, the company chief financial officer, and he held other positions, to a sentence of probation. The court of appeals held, on appeal, that that sentence was not reasonable for a key player in the massive 2.7 billion dollar fraud, and took the unusual step in our circuit of instructing the district judge to impose a custodial sentence. But a case like Livesay is by far the rarity. The bottom line is that a procedurally sound sentence will almost certainly be affirmed on appeal.

So given the limited role of appellate review after Booker, a district court has significant authority to impose a sentence outside the guideline range.

The data suggests that district courts nationwide still impose guideline sentences more often than not, although they have imposed more non-guideline sentences since Booker, and those statistics hold up pretty well in my district. I think we actually have higher than the national average of guidelines-based sentences.

In fiscal 2008, the judges in our
district imposed above-guideline sentences in 2.7 percent of cases, below-guideline sentences in 10.9 percent of cases, and then we had another 19.9 percent of our cases that involved §5K.1.1 departures. So primarily we had a heartland of guideline sentences.

As a practical matter, in my district, federal prosecutors continue to treat the advisory guideline range as the appropriate benchmark for beginning the sentencing conversation. Defense lawyers treat the guidelines as a ceiling for sentencing, without regard to the existence of statutory maximums, and quite frankly, each judge has his or her own view of the wisdom of the applicable guideline range. So while it's difficult to generalize about the reasons for the variances we see, it's clear to us that a downward variance is far more likely than an upward variance at this point in the progression.

Although we generally believe that the judges in our district carefully exercise their sentencing discretion, and I have to say, you know, we are the Deep South, we both like and respect our bench and enjoy excellent relationships, but we have noticed an increasing number of below-guideline sentences in white collar cases. We take very few affirmative sentencing appeals in our office, and of those taken
since Booker, the majority have been appealed from below-
guideline sentences in either white collar or public
corruption settings.

So I want to be very clear that in the
overwhelming majority of our cases, we believe that our
judges sentence reasonably. Even when they don't select
the sentence that we advocate for, we believe that they
are well within the reasonable range.

Having said that, though, I do want to
touch briefly on our concerns in white collar
sentencings, and I'd like to do that by offering to you
an example of a case. This is a post-Booker case.

We prosecuted a man named Michael Crisp.
Crisp was the comptroller for a small construction
company based in Birmingham. He prepared false
financial statements, overstating the company's accounts
receivable, and provided them to a bank which
predictably extended a line of credit. The bank relied
on the false reports and continued to extend credit well
beyond the company's means, and when the company was
ultimately unable to repay the line of credit, the bank
lost over $480,000. Crisp's victim was a small family-
owned bank. He plead guilty. His guideline range was
24 to 30 months. He cooperated against the owner of the
company. We filed a, perhaps an overly generous 5K1.1
motion offering him a 50 percent downward departure, the
low end of a range of 12 to 15 months, and the district
court sentenced Crisp to five hours of custody in the
United States Marshals' custody to be served at Crisp's
convenience. We appealed, it was my case, and the
Eleventh Circuit vacated the sentence. The Eleventh
Circuit held that the below-guidelines sentence was
substantively unreasonable, in light of the § 3553(a)
factors, and noted that the court gave Crisp,
and I'm quoting, "five hours for a crime that caused
$484,137.38 in harm." That equates to $96,827.48 per
hour, or $1,613.79 per minute served in custody. I
think that that was Judge Carnes's opinion.

On resentencing, the district court
resentenced Crisp to 100 days in custody, still
significantly below the guidelines range, and quite
frankly, the Crisp case, which was not unique in our
district, gave us great pause.

Below-guideline sentences are extremely
troubling to us in the white collar context, because we
think deterrence there is important, and is a more
reachable goal, perhaps, than it is in some more
opportunistic crimes.

In vacating another below-guideline
sentence in a white collar case in our district, I think
the Eleventh Circuit really got it dead on. They said because economic and fraud based crimes are more rational, cruel and calculated than sudden crimes of passion or opportunity, these crimes are prime candidates for general deterrence. The defendants in white collar crimes often calculate the financial gain and risk of loss, and white collar crime, therefore, can be affected and reduced with serious punishment. Sentences like Crisp's could reasonably lead a potential white collar thief to conclude that fraudulent conduct in the Northern District of Alabama is worth the risk. And I think some of our crime statistics bear that out. You might be willing to go to jail for seven days to make $7,000,000,000. We've seen little deterrent effect from this type of sentence.

Although the Eleventh Circuit did correct the sentence in Crisp, and has corrected sentences in other egregious cases, there remains a real risk that below-guidelines sentences in white collar cases will undermine the effectiveness of white collar sentencing and statutes.

Post-Booker, I think the result will likely be less consistency, as we get further into it, and it may actually migrate from white collar into other areas with similarly detrimental effect.
One of the things I like to think that I've learned in my years as a prosecutor is that we do have more in common in the system than we have that separates us, and I mean prosecutors, defenders, judges and the probation department. My experience, in talking with colleagues, is that we all seek the same thing in sentencing. We all seek fair, certain sentences that impose appropriate punishment for a particular defendant, while providing meaningful deterrence for would-be criminals.

It is sometimes very difficult, and I don't think we acknowledge enough that as stakeholders in the system, it can be very difficult for us to engage in honest conversation because, quite frankly, if my job is to be a defender, it's difficult for me to come into a hearing and explore a position that's against my client's interest. Similarly, you don't hear prosecutors willing to give ground very often. But this issue is so serious and so systemic that I think it requires us, in an exercise of responsibility, to be willing to step away from our advocacy positions and to explore meaningfully and very openly what works best for us as a system.

My instinct is that the best results that we achieve happen when we come and work together. We
did that in my district under the leadership of our chief judge when we explored resentencing after the crack guidelines were amended, and it was very effective and interesting experience, because we found that we all walked away from our initially held opinions and worked together to get those cases through the system quickly. So that's my belief. And my experience leads me to believe that the best way in the system that we can balance the often competing goals of individualized sentencing, on the one hand, and consistency on the other, is for the Commission to encourage communication by all of the stakeholders in the justice system, much as we did with the nationwide conferences that followed regarding the crack guidelines. I think prosecutors want to ensure that the guidelines continue to have a valid advisory role. I do believe that we are willing to be open and to consider other points of view, although they may need to be brought to us aggressively, but we are open and we do like to consider propositions that promote the fairness of the system. My belief is that it will work best if we do all work explicitly and deliberately together. So on that note, I'd like to thank you all for the work you've done. You've certainly provided appellate lawyers like myself with a full
employment plan over the years, and we're grateful, but
we are more grateful for the guidance and the
leadership, and for the Commission's willingness, I
think, to re-examine and to update the guidelines to
work in the legal framework that we now find ourselves
in. And I look forward to answering any questions
you all have.

CHAIR SESSIONS: Thank you, Ms. Vance.

VICE CHAIR CARR: Director Lappin, you
mentioned in your written submission that the Federal
Prison Industries program has diminished significantly,
in part because of the authorization and appropriations
bills, but also administrative changes by the Federal
Prison Industries Board of Directors. What were they?

DIRECTOR LAPPIN: Excuse me. There are,
the Federal Prison Industries organization is overseen
by a board appointed by the President, and there has
been pressure over the years, similar to that which
we're seeing in litigation, to have less impact on law
abiding citizens' businesses in this country, a notion
we agree with, and as a consequence of that, they have
put caps on certain types of products and services not
to exceed a certain level of production, in an effort to
protect the businesses in, that are operating in the
United States. Given that, we're kind of going in a
different direction. We are looking for more products and services to perform offshore, and seeking authorities to be able to pursue that on a larger scale so that at the end of the day, we'll have even less of an impact on people's businesses in this country, but they put some established caps to protect certain products and services areas.

CHAIR SESSIONS: Commissioner Friedrich.

COMMISSIONER FRIEDRICH: Director Lappin, I have two questions. You mentioned in your testimony that the Second Chance Act gave the Bureau of Prisons the ability to sentence inmates to halfway houses for the last 12 months of their sentence, and you mentioned that it's the rare case that you send an inmate to a halfway house for more than six months, and your typical average is three to four months. And I would ask you if you could elaborate on why you typically don't send an inmate to a halfway house for more than six months. Is that solely for cost? And secondly, the Second Chance Act also gives the Bureau of Prisons the ability to sentence inmates to home confinement at the end of their prison term. Is that also for twelve-month periods, and if so, are you sending some low-level offenders who typically you might send to halfway houses, that are low security, are you sentencing them to home confinement or
are you sending them to home confinement for 12 months, the full — are you exercising your authority to the full extent.

DIRECTOR LAPPIN: Yeah. First of all, on the second question, it allows up to ten percent of the sentence to be served on home confinement, so it's how much time, and home confinement is driven by the length of sentence, and again, up to ten percent.

We are currently evaluating every inmate for up to 12 months. We have found in the past that oftentimes, for many inmates, beyond six months can actually result in less success because many of the inmates have family ties, and as a consequence, have opportunities for employment and a place to live long before the six-month period occurs. Our sense is they tend to get a little frustrated, and sometimes act out because of their desire to move on after they've established themselves back in the community.

So secondly, there's a limited number of halfway house beds available, and it varies geographically. We have some communities that are, bend over backwards to offer halfway house opportunities in their communities. The other extreme is that some completely resist, and as if their citizens are not going to return home. And as a consequence, there's not
an abundance of beds. So our objective, always, is to send every offender, if we could, in the United States to a halfway house for at least some period of time, and we do it on the basis of how long have they been incarcerated, what are their community ties, do they have some, do they have skills that might lead for them to be employable moreso than others, do they have a place to live or is that something that they're going to have to accomplish during that period of incarceration, and based on that, we are currently averaging about 120 days in a halfway house, when you, when you average all of the inmates.

Eighty-five percent. So last year, for example, the Bureau of Prisons released just slightly more than 60,000 inmates. About 18, 19,000 were deported. Slightly more than 40,000 were released into the United States. Eighty-five percent of those transitioned out through a halfway house, on average for 120, some more than six, but not a lot, and, and the majority of those transitioning out through a halfway house today are getting home confinement towards the end of that sentence.

The most difficult inmates to place are three groups: sex offenders, inmates with mental illnesses, and those that have very violent records and
continue to be, act out during a period of
incarceration. Those are the more troublesome ones to
place. So that's kind of an overview of the halfway
house situation. We are now, for lower risk inmates who
have family ties and job opportunities, we're moving
more of them typically coming out of camps, minimums and
lows, directly into home confinement, in lieu of halfway
houses, so that we can reserve those halfway house beds
for those inmates that have the greatest needs, and
typically those are the inmates that fall into the
medium and high security institutions, who have been
incarcerated for longer periods of time, may not have as
very good family ties, are going to be more troublesome
to find jobs given their records, some with lack of
skills, and so what we're trying to reserve those beds
that we do have for those inmates that have the greatest
need, in anticipation that towards the end of the
sentence, if the stay goes well, we'll also put them out
on home confinement for a portion of that sentence.

The other issue is funding. When the
Second Chance Act passed, even though we may have other
cases that we would like to put in for a longer period
of time, it costs us more money. And so when we went
from about a 92-bed average, a year and a half ago, to
120-bed average, it cost us an additional $30 to
$40,000,000 a year to do that. We were able to do that without reducing staff in the Bureau of Prisons. But today, for us to be able to put more money into community corrections, I'd have to, we would have to lower staffing in our institutions, reprogram that money from institution operations to community corrections, and we're unwilling to do that, given the low level of staffing that currently exists. So it's a combination of things that are driving that.

COMMISSIONER FRIEDRICH: But those low-risk offenders who you're sending directly to home confinement, are you maximizing the ten percent —

DIRECTOR LAPPIN: Yes.

COMMISSIONER FRIEDRICH: — relatively speaking?

DIRECTOR LAPPIN: Yes. We're trying to put them up for as long as we can. Now, there's a cost to that. It's not as expensive, nearly as expensive to be in a halfway house, but we still have to pay for people to supervise and to monitor. So most places we have halfway houses who, as part of their contract, provide that supervision. Do they show up for work? Phone calls, home visits, things of that nature, while they're on home confinement.

And I'll say, you know, the cost of
halfway houses has increased, and it's, it was, we
expected that, because we want more services in those
halfway houses. We want drug transition services. We
want more mental health services. We want more medical
services. We want more job placement services. And
when you build those into the contracts, obviously, it
has a greater expense. We think it's worth it. It's
worth the investment, given the critically important
period of time it is transitioning from prison to the
community. So we're all in favor of it, but it does
cost $72, $73 per day per inmate, which is slightly
higher than what it costs us to keep them incarcerated
in a minimum or low security institution.

COMMISSIONER FRIEDRICH: In halfway house
or home detention?

DIRECTOR LAPPIN: Halfway house.

VICE CHAIR CARR: When you talk about the
counterproductive results of more than six months, is
that home confinement, halfway house or both?

DIRECTOR LAPPIN: Both.

VICE CHAIR CARR: And is that annual
or —

DIRECTOR LAPPIN: It is. We're currently
doing some research on this very issue. Typically, I
don't, I don't think the problem is the home
confinement. I think the problem is moreso a person who
has really done well in that halfway house, established
themselves, has a job, and gets anxious over the
continued increased supervision, even though, you know,
they're well established, they're doing, they're ready
to move on, and there's indication not to do that.

CHAIR SESSIONS: Mr. Wroblewski.

COMMISSIONER WROBLEWSKI: Thank you, Judge.

First, I'd like to say thank both of you
so much for coming. I know how much time you've taken
out of your schedules to be here. It's very important
to us. A couple of questions.

Joyce, you mentioned, in your case list,
the white collar defendant had a 50 percent reduction
for substantial assistance. Is that typical of
reductions for 5K in your district?

MS. VANCE: You know, being new to the
process, I've taken a look at our 5Ks, and we do have, I
think, a pattern of 5Ks that approach the 50 percent
mark. There are even some that exceed that, and
obviously, that's something that we look at fresh at
this point, but yes, I'd say that's pretty typical.

COMMISSIONER WROBLEWSKI: All right. Mr.
Lappin, the programs that you talked about, you mentioned
some statistics about reductions in recidivism. How often
does your staff evaluate or re-evaluate those programs that you have? Is that done every decade? Every two years? Is there some role that you think that this Commission could play in either part of those evaluations, promoting Prison Industries or other programs like that?

DIRECTOR LAPPIN: We update those. We, there's an ongoing research assessment for drug treatment and all of the other programs. I don't recall exactly how often it's done. It's not as difficult to do today, given the automated nature of the information that we have. But I can follow up and find out how often we're doing that. I don't know exactly.

COMMISSIONER WROBLEWSKI: Can you do a case study on the statistics? It doesn't go back up to you, but —

DIRECTOR LAPPIN: Yeah. And that's the thing. The trigger is rearrests. It's not reincarcerations. We oftentimes — It's too difficult to determine that. So in some cases, even though our recidivism rate, our return rate is about 40 percent in the Federal Bureau of Prisons, which is slightly lower than the average of the states, which is, you know, I think 65 percent range, so — and the trigger is rearrests, and there may be some that we're counting as recidivating who get arrested but don't get convicted
and sent to prison, so the number could be actually a little lower than that.

COMMISSIONER WROBLEWSKI: Do you have that data now, for example? Because we've been struggling on the Commission with getting recidivism data on people in the system.

DIRECTOR LAPPIN: I will check and follow up for you with our research folks.

COMMISSIONER WROBLEWSKI: Thank you.

DIRECTOR LAPPIN: I think just your interest in reentry is noteworthy. In my opinion, it's, there's a resistant public to the ex-offender who, not unlike other social issues, out of sight out of mind, and even in those supportive communities, they still bear the brunt of discrimination in employment and in finding a place to live. Some communities go so far as to passing restrictions on them returning to their home districts. It's a shame. I believe it makes the communities less safe because, and this is especially true of sex offenders, when we're forced to release them and we actually have to release them into districts and into locations that they have absolutely no ties. And so again, I think the more this is discussed, the more sympathetic — and I understand the social, society's concerns over folks coming back from, after spending a
period of time incarcerated, and what they've done in the past, but at the end of the day, the vast, vast majority of these people coming home, very few stay for the rest of their life, and I think the more we talk about it, the more involved — you know, a few years ago, to be honest with you, not to get political on this, but when President Bush mentioned reentry in the State of the Union address, that was a real turning point for a more open discussion on these things, and I encourage us to continue that dialogue, because these are still our citizens, many of whom can be productive, and I think we've got to figure out ways to bring people along.

We just, we just finished four years of litigation to get a halfway house in one community, and until this halfway house, their inmates were basically released directly into the street, again, which I think is far less safe than having structured supervision in that transition.

CHAIR SESSIONS: Let me just follow up with the reentry programs, because obviously, we have an interest in the reentry programs, as well, and in particular, incentivizing inmates to participate in treatment options and ultimately a reentry. You know the 500-hour drug and alcohol rehabilitation program is
incredibly positive. The responses, in terms of recidivism rates, have been terrific. You obviously have so many people wanting to go in it that you can't, you can't service everyone, and violating your statutory obligation in that respect. Of course, the reason that many people are participating, you know, let's be realistic, is because they're going to get a reduction in sentence. Despite that fact, you have a program with that level of subtle coercion, which is extraordinarily positive. And then you describe the other programs that you've had, vocational training, educational training, the requirement of getting GEDs, all can be reflected in the risks of recidivism. So my question is have you thought or what's your — I'm not too sure I'm allowed to ask you what your personal view is, but perhaps I can ask on behalf of the Bureau, what the Bureau's perspective is on creating incentives to participate in reentry programs before they actually are released into the community, and then, once they go through a reentry program, perhaps provide the incentive of a slight reduction in sentence to get them into the program, and then move them through halfway house or alternatives, you know, like home confinement, ultimately into the community in coordination with the probation officers who are receiving them at the other end, I mean that
seems to me like a no-brainer. So that's the first area of incentivizing.

And the second is, you know, essentially good time, where 85 percent, and this is a good point, your good time has essentially been taken away as an incentive for managing behavior within facilities. I mean based upon my very limited and ancient experience. I don't mean to suggest that I have any expertise in this regard. But it would seem if people have to earn good time, or can have it realistically taken away for bad behavior, that you are improving people's behavior. And so I guess my question is: Are there any discussions about perhaps going to Congress and suggesting an increase in good time at the end, maybe minimal, but increase the good time at the end, and then ultimately, is there anything the Commission can do to help you in this endeavor?

DIRECTOR LAPPIN: Both very good questions, and I'd be more than happy to answer them and provide my opinion. Given the fact that I'm now retirement eligible, if it does go sour, I can kind of move on.

But anyway, one, we like, and I'm, I'm really encouraged by the recent sentencing, and working group, sentencing and corrections working group that the
Attorney General has established, and Jonathan is very much a part of that, and our staff are participating in that, to consider these options. Quite honestly, I think it's long overdue, especially considering the fact that we are struggling acquiring the funding we need to run the Bureau of Prisons in the manner in which we think it needs to be run, and if that's going to continue, I think it's long overdue to look at other options to lower the burden of additional inmates.

And in doing that, you have to look at two options. Two things: how many and how long? Adjust either of those, and you can see a trend going one way or the other. And so as you mentioned, I think the residential drug abuse program is a perfect example of the benefit of incentivizing those opportunities. They need to earn it. We need to teach responsibility. They need to be able to make choices. And 35 percent of our inmates we have are addicted to drugs or, to drugs or alcohol, such that we think they need, should have treatment. Ninety-two percent of those inmates are volunteering for treatment. What's interesting is that 40 percent of those inmates get no time off their sentence. So about 60 percent of those volunteering can get some time off. Certainly they're there in part for that reason. And 40 percent get no time off. They're there because they've
come to the realization they need help, and they want
treatment, and I think that's noteworthy.

A real brief example, I, not long after
becoming Director, I was visiting an institution in
Alderson, West Virginia and I happened to be there on
the day that the drug treatment program was having
graduation. And I walked into this class, and they're
crying. I said, “Geez, I didn't mean to have that kind
of an impact on you.” I said, “Well, tell me of your
experience. You know, how has this impacted you?” And
of course, there was a lot of brown nosing going on and
all that kind of stuff, but this one lady says, “I did
this program for one reason and one reason only, I
wanted time off my sentence. And when I began this
program, I didn't think I needed help to begin with,
but,” she says, “soon into this program, I realized the
burden I had carried my entire life, the trauma I'd
experienced coupled with drugs addiction. It has had
such an impact on my life that I stayed in prison longer
than I have to,” not beyond her sentence, but she could
have gone to a halfway house earlier, and she decided to
stay and finish the entire treatment program before
going to a halfway house, she says. That's noteworthy.
because this, she says, “I'm a whole different person
than I was when I came to prison.” And so I think that's
critically important.

We would like to see more of that. We've had some candid discussions going on about that, the first step being let's look at the other group of nonviolent offenders, the least risky group of inmates, less risky than the nonviolent drug or alcohol addicted, given the fact that they don't have that burden, and looking at programs or strategies in which we might be able to offer some time off their sentence if they complete certain programs, as well.

Today we're doing much better than we did years ago. Inmate comes into prison, we do a skills assessment, and we know, we've identified the nine skills that most inmates lack. The inmate does an assessment, and we identify which of those skills they have the greatest need for improvement in, and all of our institutions eventually will have programs to address each of those skill categories, and so we can quickly lay out a program plan that will identify here's what you need to do, here's what we expect you to do, and then if they are successful in completing those things, a strategy could be considered to offer some additional time off their sentence.

So I think the discussions on additional good time incentives — again, it has to be earned. You
just can't show up and get it. I think you'd have a huge, huge impact.

On the other hand, we need more leverage. You're right, leverage encourages people to behave better. On the other hand, it gives us more leverage for those inmates who misbehave. That's the other problem is that today, unlike in the '80s and before, when you had more flexibility for good time, when inmates misbehaved, you could take large amounts of good time away, and for some it had huge, huge impact on them. Today our most severe sanction for misbehavior is isolation, segregation. I don't think that's wise long-term. It is for some, but for some, break my heart, throw me in a cell where I don't have to work and feed me three meals a day. They could care less. Time out. But take six months of good time away from them. Tell them you're going to serve more time in prison because of your misbehavior, may have a much greater impact than us throwing them into a segregation cell for 60, 90, 120 days. So we think that's an important part of the discussion, as well. It's tragic, but we've got this group of inmates, a small group, a small group, who are misbehaving very severely. Again, we're pursuing prosecutions on a number of them, but that's, it's unrealistic to prosecute them all. But I think that
type of leverage is critically important to really step up and meet the demand.

CHAIR SESSIONS: So it's a two-pronged approach, that is to increase good time, obviously with a congressional act.

DIRECTOR LIPPAN: Uh-huh.

CHAIR SESSIONS: But then you also increase the ability to use the imposing of time or the removal of good time, so that you can enforce behavior.

DIRECTOR LAPPIN: Soon after the passage in '88, when it went to 54 days a year, until a few years ago, that was, it was vested yearly. So the most good time you could take from an inmate, until a few years ago, was 54 days. That's the most you could take from an inmate. 54 days, an additional 54 days, they could do that standing on their head, no big deal. But then they did away with that, so you can take more now. Still, it's just not a lot to take over the course of a sentence.

VICE CHAIR CASTILLO: Thank you both for your testimony. My question is for Director Lappin. It seems to me, going to the two questions of how many and how long, which I'm very sensitive to, your big growth is with defendants who are not citizens, and at the same time, all of them, who by definition probably have
immigration detainers, are not eligible for a lot of your good programs that reduce recidivism or could reduce their sentence. So by definition, they're serving effectively longer, possibly an abusive, more onerous sentences.

Now, some judges throughout the country are taking this into consideration at the front end and reducing their sentences, some others are not. So there's a certain amount of inconsistency. How would you feel if we encouraged some type of consistency by making this one way to reduce sentences at the front end, taking into consideration that somebody is not going to be qualifying for some of these great programs that the Bureau of Prisons has?

DIRECTOR LAPPIN: Just so you know, we offer most of these programs to all the inmates.

VICE CHAIR CASTILLO: Okay.

DIRECTOR LAPPIN: Many of them do participate.

VICE CHAIR CASTILLO: Okay.

DIRECTOR LAPPIN: There are some restrictions that result in fewer of them participating. There are some restrictions if you have a detainer, you can't earn over a certain pay grade in the Prison Industries, and as a consequence, they don't have as
much of an interest. But we encourage them to participate in the literacy programs and the work programs. There are a few limitations, not many, and I could get those for you and provide them for the record.

Just so you know, the average sentence for an immigration inmate, it is actually one of our shorter sentences. The average immigration offender is serving like 27, 28 months, comparatively speaking, to the average drug offender, it's in the seventies. In fact, I was sharing with some of you that sex offenders have just exceeded some of our highest average sentences slightly.

So we do encourage them. I think that, I'm not sure how to respond to should we consider it at the front end. But you're right. I mean 54,000 of our inmates are non-U.S. citizens, the vast majority of them serving immigration violations. Many of them have detainers. As I mentioned, we transitioned 18,000 to ICE last year, and they deported the vast majority of those folks.

VICE CHAIR CASTILLO: Like you say, this is at the top of page eight of your testimony, and I think this is what you're referring to, you're talking about a recent March 19th, 2009 Bureau of Prisons regulations adds treatment in community correctional
facility as a mandatory component of the program. One consequence of this change is the exclusion from the residential drug abuse program participation of inmates with detainers. I take it you're talking about immigration detainers.

DIRECTOR LAPPIN: You're correct. Those inmates, and that's, I think it's unwise, to be honest with you. I think they should be in treatment, to be honest with you, because they're going to return to their communities and continue to have drug and alcohol addictions. And so we, we've limited it some, because we've been struggling to get the U.S. citizens through, who are returning to our communities, so they've taken a higher priority.

VICE CHAIR CASTILLO: I take it the thinking behind whoever implemented that policy is since they're going to be deported, the taxpayer is not getting the bang for the buck –

DIRECTOR LAPPIN: That's right.

VICE CHAIR CASTILLO: – in having them go through the drug treatment program.

DIRECTOR LAPPIN: Yes. And I really believe that we should be providing that treatment, if we have the resources available to do that.

Just so you know, in 2009, we were able
to treat all the inmates who volunteered. So unlike in '07 and '08, we've added enough resources that we were able, we were able to do that. Also, the crack powder adjustment released some of those inmates from our waiting list, so our waiting list wasn't quite as long as it had been.

VICE CHAIR [CASTILLO]: Thank you.

CHAIR SESSIONS: Any other questions?

Well, thank you very much for coming. This is a fascinating discussion, and we know you've put a large amount of effort into coming, and we really appreciate it.

DIRECTOR LAPPIN: It was a pleasure.

CHAIR SESSIONS: Thank you.
I, Jane Demars, Certified Shorthand Reporter for the State of Texas, certify that the foregoing is a correct transcription of the proceedings in the above-entitled matter.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this transcript was prepared, and further, that I am not financially or otherwise interested in the outcome of the action.

Certified to by me this 4th day of December, 2009.

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