Before the
UNITED STATES SENTENCING COMMISSION
Public Hearing
Wednesday, June 1, 2011
Mecham Conference Center
Thurgood Marshall Federal Judiciary Building
One Columbus Circle
Washington, D.C. 20002-8002

The hearing was convened, pursuant to notice, at 8:34 a.m., before:

JUDGE PATTI B. SARIS, Chair
MR. WILLIAM B. CARR, JR., Vice Chair
MS. KETANJI BROWN JACKSON, Vice Chair
CHIEF JUDGE RICARDO H. HINOJOSA, Commissioner
JUDGE BERYL A. HOWELL, Commissioner
MS. DABNEY FRIEDRICH, Commissioner
MR. JONATHAN J. WROBLEWSKI, Ex-Officio Member of the Commission
PANELISTS:

Panel I: Executive Branch Panel:

THE HONORABLE ERIC H. HOLDER, JR.
Attorney General of the United States

THE HONORABLE STEPHANIE M. ROSE
United States Attorney, Northern District of Iowa
Cedar Rapids, Iowa

THOMAS R. KANE
Acting Director, Federal Bureau of Prisons
Washington, D.C.

Panel II: Practitioners Panel:

MICHAEL S. NACHMANOFF
Federal Public Defender, Eastern District of Virginia
Alexandria, Virginia

DAVID DEBOLD
Practitioners Advisory Group,
Gibson Dunn, Washington, D.C.

JAMES FELMAN
Co-Chairman of the Sentencing Subcommittee,
Criminal Justice Section, American Bar Association
Tampa, Florida
Panel III: Law Enforcement Experts Panel:

THE HONORABLE ASA HUTCHINSON
Senior Partner, Asa Hutchinson Law Group
Rogers, Arkansas

DAVID HILLER
National Vice President, Fraternal Order of Police
Grosse Pointe Park, Michigan

CHRISTOPHER D. CHILES
Chairman of the Board, National District Attorneys Association, Huntington, West Virginia

Panel IV: Judicial Branch Panel:

THE HONORABLE REGGIE WALTON
Criminal Law Committee of the Judicial Conference,
United States District Judge, Washington, D.C.

Panel V: Academics Panel:

MICHAEL M. O'HEAR
Associate Dean for Research, Professor of Law,
Marquette University Law School
Milwaukee, Wisconsin
Panel VI: Community Interest Panel:

MARC MAUER
Executive Director, The Sentencing Project
Washington, D.C.

HILARY O. SHELTON
Washington Bureau Director and Senior Vice President for Advocacy, NAACP, Washington, D.C.

JESSELYN McCURDY
Senior Legislative Counsel, ACLU, Washington, D.C.

PAT NOLAN
Prison Fellowship, Washington, D.C.

Panel VII: Community Interest Panel:

JULIE STEWART and NATASHA DARRINGTON
Families Against Mandatory Minimums, Washington, D.C.

NKECHI TAIFA
Senior Policy Analyst for Civil and Criminal Justice Reform, Open Society Institute, Washington, D.C.

JASMINE L. TYLER
Deputy Director of National Affairs, Drug Policy Alliance, Washington, D.C.
CHAIR SARIS: Good morning. I want to welcome everyone to this very important hearing on the possible retroactivity of the new guideline amendments implementing the Fair Sentencing Act of 2010.

This hearing will provide critical information to assist us, the Commission, in its deliberations on retroactivity. To date, the Commission has received over 37,000 pieces of public comment on this issue. This is not surprising, as over 12,000 people may be eligible to petition the courts if the new amendment is made retroactive.

These numbers are significant. The challenge of how to deal fairly and justly with the drug sentencing, and in particular crack sentencing, is one of the most essential issues presently facing the criminal justice community. This is particularly true today, as just more than half the people in the Bureau of Prison are there for drug crimes.

In the Sentencing Reform Act, Congress
specifically authorized the Commission to make amendments that result in lower penalties retroactive. To help in this retroactivity determination, the Commission has issued a policy statement under what we call 1B1.10. Under this section, we have made some amendments retroactive over the course of the guidelines' history, including the 2007 amendment that reduced crack penalties. However, we don't always make amendments retroactive. This section assists courts in deciding how and to what degree retroactive amendments should be applied to eligible defenders, and highlights public safety as an important consideration for the courts.

Only after careful analysis and consideration does the Commission determine that the purposes of sentencing as set forth in the Sentencing Reform Act and the views of the criminal justice community warrant retroactive application of the amendments.

Among the factors the Commission must consider are:
The purpose of the amendment;

The magnitude of the change in the guideline range made by the amendment; and

The difficulty of applying the amendment retroactively.

And of course these considerations must all take place in the context of the sentencing factors set forth by statute.

So the testimony and insights of each one of you today — the Attorney General, the prosecutors, defense attorneys, defendants, law enforcement, judges, and academics — are essential to our decision making process, and we appreciate all of you coming through this steamy Washington weather, and the brown-outs, to come here today.

So thank you.

I would like to begin with introducing the commissioners. I start with Mr. Will Carr, who has served as vice chair of the Commission since December 2008. He previously has served as an assistant U.S. attorney in the Eastern District of Pennsylvania from 1981 until his retirement in 2004.
And to my left, Ms. Ketanji Jackson, has served as vice chair of the Commission since February 2010. Previously she was a litigator at Morrison & Foerster, and was an assistant federal public defender in the Appeals Division of the Office of the Federal Defender in the District of Columbia.

Judge Ricardo Hinojosa served as Chair and subsequently acting chair of the Commission from 2004 to 2009. He is the chief judge of the United States District Court for the Southern District of Texas, having served on that court since 1983.

It is also my great pleasure, to the extent you don't know it — and he will blush — that last week Judge Hinojosa was selected as the recipient of the prestigious 29th Annual Edward J. Devitt Distinguished Service to Justice Award. So let's just give him applause.

(Applause.)

CHAIR SARIS: So, Judge Beryl Howell has served on the Commission since 2004. She is a judge of the United States District Court of the District of Columbia, probably still qualifies as what we call
a "baby judge," having been nominated to that position this past July and confirmed in December. And Dabney Friedrich – we didn't deliberately sit the women here [on one side], and the guys here [on the other side]; it just happens that way – so Dabney Friedrich has served on the Commission since December 2006. Previously she served as an associate counsel at the White House, as counsel to Chairman Orrin Hatch of the Senate Judiciary Committee, as an assistant United States attorney in the Southern District of California, and the Eastern District of Virginia.

And over here is Jonathan Wroblewski, an ex-officio member of the Commission, representing the Attorney General of United States. Currently he serves as director of the Office of Policy and Legislation in the Criminal Division of the Department of Justice.

So we are all eager to hear your testimony. And before we get going, does anybody here want to make any preliminary comments?

(No response.)
CHAIR SARIS: All right. So this is how it works. Each witness — except the first one — will have up to seven minutes for a statement, followed by a question and answer period.

So what we do is — actually this is what we do in the First Circuit; there's the green, the yellow, and the red lights, and that way we all make sure that everyone has time to be engaged in some discussion with us in Q&As.

So let me start with our very first witness, or participant, today. And he needs almost no introduction. Eric Holder of course is the Attorney General of the United States. People say, and I think it is a good metaphor, that justice is a three-legged stool consisting of judges, prosecutors, and defense attorneys. And Mr. Holder, Attorney General Holder, has served in all three roles.

Upon his graduation from law school, Mr. Holder joined the Department of Justice through the Attorney General's Honors Program, the program that all my clerks are dying to get into. And then in 1988, President Reagan appointed Mr. Holder to
serve as an associate judge of the Superior Court of the District of Columbia where he presided over hundreds of criminal and civil trials during his five years on the bench.

In 1993, President Clinton appointed Judge Holder to serve as the United States attorney for the District of Columbia. In 1997, President Clinton appointed Mr. Holder to serve as deputy attorney general of the United States, a position that he held until the end of the Clinton administration.

At the request of President Bush, Mr. Holder served as Acting Attorney General in 2001, pending the confirmation of Attorney General John Ashcroft. He also has joined the Washington, D.C. firm of Covington & Burling as a partner in the firm's litigation group, and he represented clients in both civil and criminal cases.

President Barack Obama nominated Mr. Holder to be Attorney General and his nomination was confirmed by the United States Senate on February 2nd, 2009, and he began his service as the 82nd Attorney General of the United States the next day.
I have had the opportunity to meet Mr. Holder before. He spoke before a group of judges last year, and I appreciate the respect and knowledge he shows about the function of the judiciary.

Welcome.

ATTORNEY GENERAL HOLDER: Thank you.

Well thank you, Madam Chair, and distinguished members of the Commission. I want to thank you for the opportunity that you are giving me to appear before you today.

Along with my colleagues, United States Attorney Stephanie Rose, and Acting Bureau of Prisons Director Tom Kane, I am here to discuss our shared goals and this administration's ongoing efforts to ensure the firm and fair administration of justice in our nation's sentencing policies.

Thanks to the extraordinary work of this Commission and the contributions of policymakers and prosecutors, advocates, and researchers, law enforcement officers, and administration officials, as well as congressional leaders on both sides of the aisle, in recent months significant and I think long
overdue progress has been made to improve the strength and the integrity of our federal sentencing system.

As we can all agree, I would hope, our sentencing policies must be tough. They must be predictable. And they must be aimed at enhancing public safety, reducing crime, reducing recidivism, eliminating unwarranted disparities, minimizing the negative, often devastating effects of illegal drugs, and inspiring trust and confidence in the fairness of our criminal justice system.

Last August marked an historic step forward in achieving each of these goals when President Obama signed the Fair Sentencing Act into law.

Now this law not only reduced the inappropriate 100:1 sentencing disparity between crack and powder cocaine offenses — a disparity that this Commission itself has found to be unjustifiable and repeatedly recommended should be amended — it also strengthens the hand of law enforcement, and includes tough new criminal penalties to mitigate the risks
posed by our nation's most serious and most
destructive drug traffickers and violent offenders.
Because of the Fair Sentencing Act, our nation is now
closer to fulfilling its fundamental and founding
promise of equal treatment under law.

But I am here today because I believe, and
it is the administration's viewpoint, that we have
have more to do. Although the Fair Sentencing Act is
being successfully implemented nationwide, achieving
its central goals of promoting public safety and
public trust, and ensuring a fair and effective
criminal justice system — this requires the
retroactive application of its guidelines amendment.

Now of course in considering retrospective
application of this amendment, protecting the
American people is and will remain the
administration's top priority. President Obama and
I, along with leaders across the administration,
understand how illegal drugs, including crack, ravage
communities.

Crack offenders, especially violent ones,
should be punished. And the Justice Department will
make every effort to prosecute them. However, as years of experience and study have shown, there is simply no just or logical reason why their punishments should be dramatically more severe than those of other cocaine offenders—a position that Congress overwhelmingly supported with the passage of the Fair Sentencing Act.

The Commission's sentencing guidelines already make clear that retroactivity of the guideline amendment is inappropriate when its application poses a significant risk to public safety, and the administration agrees. In fact, we believe that certain dangerous offenders, including those who possessed or used weapons in committing their crimes, and those who have very significant criminal histories, should be categorically prohibited from receiving the benefits of retroactivity.

The administration's suggested approach to retroactivity of the amendment recognizes congressional intent in the Fair Sentencing Act to differentiate dangerous and violent drug offenders,
and ensure that their sentences are no less than those originally set.

However, we believe that the imprisonment terms of those sentenced pursuant to the old statutory disparity, and who are not considered dangerous drug offenders, should be alleviated to the extent possible to reflect the new law.

As a federal prosecutor, and as Attorney General, and as a former judge, as a former United States attorney, and as former deputy attorney general, this issue is very personal to me. It is deeply personal to me.

While serving on the bench here in Washington, D.C., in the late '80s and the early '90s, I saw the devastating effects of illegal drugs on families, communities, and individuals. I know what it is like to sentence young offenders to long prison terms, and I did so to protect the public from those who were serious threats and who had engaged in violence.

However, throughout my tenure as the United States attorney in the city, I also saw that
our federal crack sentencing laws did not achieve that result. Our drug laws were not perceived as fair, and our law enforcement officers, and our law enforcement efforts suffered as a result.

That is why it is a special privilege for me, and was a special privilege for me to stand with President Obama when he signed the Fair Sentencing Act into law. And that is why I feel compelled to be here in person today to join my colleagues in calling for the retroactive application of the guidelines amendment.

Now I recognize that some disagree with this approach. We have heard this before. In 2008, after the Commission decided to apply retroactively an amendment that reduced the base offense level of crack by two levels, known as "the crack-minus-2" amendment, some, including some within the Department of Justice, predicted that such a move would cause a dramatic rise in crime rates.

However, as a study released by the Commission just yesterday shows, those whose sentences were reduced after that amendment was
applied retroactively actually had a slightly lower rate of recidivism than the study's control group.

Three years ago, the Bureau of Prisons, the Marshals Service, federal prosecutors, judges, probation officers, and others stepped up and did the necessary work to ensure the successful and effective retroactive application of the crack-minus-2 amendment.

Today, despite growing demand and limited budgets, my colleagues across the Department of Justice and the criminal justice system stand ready to do that which is necessary to make any sentencing system – our sentencing system fairer and more effective. And once again, we are relying on the Commission to lead the way.

Recently, some have suggested that since the Fair Sentencing Act contains no specific provision regarding retroactivity, it is beyond the role of the Sentencing Commission to make the guideline amendment retroactive without direction from the Legislative Branch.

We disagree with this position. Based on
the Commission's authorizing statute, we believe that
the Commission would be well within its authority to
make the Fair Sentencing Act amendment retroactive
along the lines that we suggest.

Madam Chair and distinguished members of
the Commission, it is time to honor not only the
letter of his law but also the spirit of its intent.
Our nation's ability to do so rests in your hands.

Again, I want to thank you for the
opportunity to appear before you. I look forward to
continuing to work with each of you, and with leaders
across Congress and the administration to strengthen
federal sentencing policy and to ensure that our
nation's criminal justice system serves as a model of
effectiveness and as a model of fairness.

I am now pleased to turn this over to my
colleagues, U.S. Attorney Rose and Acting Director
Kane. They will elaborate further on the
administration's position and also will be available
to answer any questions that you might have.

Thank you very much for the opportunity to
appear before you today.
(Attorney General Holder leaves the room.)

CHAIR SARIS: Thank you. Now I am going to introduce the other two panelists. I am not sure which order you have agreed to go in, but let me just start off with Stephanie Rose who is the United States attorney for the Northern District of Iowa. Previously she served as an assistant U.S. attorney, was deputy criminal chief, and a special assistant United States attorney. Welcome, and thank you for coming halfway across the country. Thank you very much for coming.

Acting Director Thomas Kane I just met the other day. He serves as an acting director of the Federal Bureau of Prisons in Washington, D.C. He has served in a number of capacities for the BOP, and previously served as an instructor at the New York State Police Academy. Welcome.

So have you decided you are going to go first? All right. Thank you.

MS. ROSE: Thank you. Madam Chair and members of the Sentencing Commission:

On August 3rd of 2010, President Obama
signed into law the Fair Sentencing Act of 2010, the FSA, a law that had both historic and bipartisan support. The President and the Attorney General have hailed the FSA's enactment as an important step in achieving more just sentencing laws and policy.

We appreciate the steps that the Commission has taken to date to implement the FSA, including the promulgation of a permanent amendment to the guidelines this past April.

We are pleased now to have an opportunity to testify before you — on behalf of the Department of Justice and federal prosecutors across the country — regarding the extent to which the recently promulgated amendment should be given retroactive effect.

The department's position is that the quantity-based component of the FSA amendment should be applied retroactively, except as to offenders with high criminal history scores, or who possessed or used weapons as part of their offense.

Like the Attorney General, this is an issue that is personal to me. Prior to becoming the
United States attorney, I served for 12 years as a prosecutor in the Northern District of Iowa's Drug Unit. During that tenure, I handled more than 100 organized crime drug enforcement task force cases involving crack cocaine.

As our district's deputy criminal chief, I was tasked with implementing the Northern District of Iowa's response to the 2007 crack-minus-2 amendment for nearly 300 potential inmates. These efforts required coordination with BOP, the United States Probation Office, the Federal Public Defender's Office, the Criminal Justice Act Defense Panel, the clerk of court, as well as our two primary judges in the Northern District of Iowa who hold, as is well documented, extremely divergent views on the crack cocaine laws. And for the past year I have served on the Attorney General's Advisory Committee.

These experiences have informed and shaped my view of crack cocaine laws both historic and present. As members of the department have previously testified, public trust and confidence are essential elements of any effective criminal justice
Our laws and their enforcement must not only be fair, but must be perceived as fair. It has been the position of the administration that the 100:1 quantity ratio embodied in the federal cocaine sentencing structure for most of the last 25 years failed to appropriately reflect the differences and similarities between crack and powder cocaine, the offenses involving each form of those drugs, and the goal of sentencing major and serious traffickers to significant prison sentences.

We believe the structure has been especially problematic because citizens view it as fundamentally unfair. Congress took a big step in rectifying this sense of unfairness with the passage of the FSA. The Commission took another big step by promulgating the recently passed sentencing guideline amendment.

We think one additional step is needed this year: to apply that guideline retroactively.

My written testimony contains a summary of the case law and policies surrounding the need for
finality in criminal judgments, the general presumption against retroactive application of guidelines amendments, and a discussion of those concepts in the context of Booker, and Kimbrough, and Spears, and Pepper. I won't repeat that information here, but it is clear that the interest in finality as a deterrence is as relevant, if not more so, in the context of the sentencing guidelines as it is in discussing criminal judgments.

In reaching our position on retroactivity of the FSA guideline amendment, we are driven first and foremost by the intent of the Act and the administration's goal to remedy the unwarranted disparity created by the 100:1 quantity ratio. We believe the presumption against retroactive application of the guideline amendments is overcome when an amendment is promulgated to rectify an unfairness that is widely recognized by the judiciary, Congress, and the public. The FSA amendment is, in our view, that kind of amendment. However, there is another interest that we believe must inform the Commission in how to apply
the FSA amendment retroactively. Public safety, we believe, must be at the heart of the Commission's decision. As such, it is our position that the release dates should not be pushed up for those offenders who pose a significant danger to the community.

We believe this limitation should be articulated more clearly in section 1B1.10, and certain dangerous offenders should be categorically prohibited from receiving benefits of retroactivity, a step that goes beyond the current Commission policy.

We think this approach to retroactivity of the FSA amendment also recognizes congressional intent in the FSA to differentiate between dangerous drug offenders and to sentence them to no less than the current policy, and in some cases more severely.

Outlined further in my written testimony is the Commission's authority to direct limited retroactivity. We believe the Commission should do so by granting retroactive application to just the quantity-based reduction in the amended guideline and
not give retroactive effect to the mitigating and
aggravating factors, and then again only to those
crack offenders who did not receive a weapon
enhancement, either guideline or statutory, and who
have a criminal history category of I, II, or III, as
was determined at their original sentencing.

With these limitations, all of which
should have been determined in a prior court action,
or should be documented in the court case files,
courts will be able to determine eligibility for
retroactivity based solely on the existing record,
and without a need for transporting defendants back
to court and holding extensive fact-finding.

Retroactivity would be available to a
class of non-violent offenders who have limited
criminal history and who did not possess or use a
weapon.

While these factors are not a perfect
proxy for dangerousness or for the limits Congress
intended in the statute, they are a reasonable proxy
based on the Commission's own research and a criteria
that will not require new hearings.
As the Attorney General has reiterated, the Fair Sentencing Act of 2010 is a substantial step toward alleviating sentences for those to whom the 100:1 quantity ratio was applied. In light of the consensus for change to the federal cocaine sentencing policy and the reasons behind it, retroactive application is appropriate. But we believe our recommended approach achieves an important balance between ensuring public safety and allowing the efficient administration of justice.

Thank you for the opportunity to share the views of the Department of Justice on this important topic. We look forward to working with this Commission on this issue, and to working with all of our federal justice system partners to achieve equity and fairness under the law.

I would guess that Acting Director Kane may answer some of the questions you would have. I would propose answering questions after his testimony, if the Commission approves that.

CHAIR SARIS: Thank you. Mr. Kane?

MR. KANE: Good morning. Thank you.
Madam Chair, Vice Chairs Carr and Jackson, and members of the Sentencing Commission:

I appreciate the opportunity to appear before you today to discuss the plan of the Bureau of Prison, the bureau, for applying the sentencing guidelines that the Commission amended in order to implement the Fair Sentencing Act of 2010, the FSA.

First, however, I want to thank the Commission for collaborating with the bureau on our data-sharing initiative that has allowed for detailed and careful analyses of potential changes to sentencing, including changes to the crack cocaine sentencing guidelines. I look forward to our continued strong working relationship.

As you know, the bureau is the nation's largest corrections system, responsible for the incarceration of more than 215,000 inmates. And our population continues to grow — from 2001 through 2010, we experienced annual net growth averaging 6,400 new inmates. So far this year, we have seen an increase of more than 5,800 inmates, and we expect another 5,000 inmates in Fiscal Year 2012.
The Congressional Budget Office has estimated that modified sentences required under the FSA as enacted — that is, without retroactivity — would slow the expected growth in the federal prison population by about 1,500 inmates between 2011 and 2015.

The CBO further has estimated that this would result in a cost avoidance of $42 million over that same period. While the bureau is in the process of coordinating with the Commission to estimate more accurately the cost savings to the bureau if the proposed amendment is given limited retroactive effect designed to promote fairness while ensuring public safety, we assume that such retroactive application would result in additional cost savings.

Based on our experiences with the 2008 amendment to crack cocaine sentencing guidelines, the bureau has established a plan to implement retroactive guidelines contemplated by the Commission.

First, we are prepared to allow inmates expanded access to legal materials, legal counsel,
and necessary equipment to review their cases and submit legal materials.

Second, we are prepared to rapidly and accurately recalculate inmate sentences to reflect amended court orders.

We know from experience that retroactivity will result in a marked increase in inmates seeking to review their central files and their presentence reports to determine if they are eligible for a sentence reduction.

All policies related to the secure maintenance of the central file would remain in force, including the prohibition on inmates retaining in their possession a copy of their PSR. To accommodate these increases in requests, access would be given as expeditiously as possible with priority given to inmates with the earliest release dates.

We also know that retroactivity would result in increased requests for legal telephone calls that, consistent with policy, can be made on unmonitored telephone lines. For such calls, staff must make reasonable attempts to verify that such
calls are to an attorney's office, a process that can be time-consuming if numerous inmates need to make such calls. Of course inmates can and do make legal calls on monitored Inmate Telephone System telephones, thereby ameliorating somewhat the administrative burden of increased legal phone calls. Legal visits would likely increase in the months following any action regarding retroactivity by the Commission. Institutions would need to contemplate expanding the number of days and the hours that attorney visits are allowed. Additional staff may be required to monitor these visits in accordance with existing policies and procedures, as well as to meet the expected increase in the amount of incoming and outgoing legal mail. Finally, expanded access to the law library would likely be needed to accommodate the increase in inmate legal work, and we would need to ensure that adequate resources such as typewriters and copier machines were available. No doubt, some inmates potentially affected by retroactivity will be housed in Special
Housing Units for Administrative Detention or Disciplinary Segregation. Providing these inmates with reasonable access to legal calls, visits, and mail, and access to the law library presents additional administrative challenges.

In the event that the guideline changes were made retroactive, the bureau must be prepared to rapidly and accurately recalculate sentences to reflect court-ordered changes. In response to the 2008 guideline changes, the bureau established a team of staff at our Designation and Sentence Computation Center that was responsible for the recalculation of sentences based upon the amended orders. The team was responsible for receiving the amended orders through the e-Designate system from the United States Marshals Service. Upon receipt of the order, the team recalculated the sentence.

In addition to the new release date appearing in our electronic inmate information system, SENTRY, the team also notified staff at each institution of the amended sentence so that institution staff could ensure that the inmate
completed appropriate programming and was prepared for release.

Finally, based on our experience with accelerated release dates occasioned by the retroactive application of the 2007 amendments to guidelines applicable to crack cocaine offenses, the bureau is prepared to take measures to ensure that offenders released due to the retroactive application of the FSA are transitioned effectively back into the community.

First of all, we plan to request that judges stay immediate release orders for ten days to allow the bureau to make required release notifications — for example, drug, violence, and/or sex offender notifications — to conduct Adam Walsh Act civil commitment reviews, and to conduct detainer reviews.

Further, successful re-entry is dependent upon the post-release continuation of both treatment needs — for example, drug treatment, sex offender treatment, or mental health intervention — and programming needs — for example GED and other
educational programs — that offenders otherwise would have received from the bureau while serving their sentences.

In the past, the majority of offenders scheduled for immediate release who identified medical, psychological, and psychiatric treatment needs generally received such follow-up care as a condition of their supervised release.

Similarly, we expect that most programming needs can be met via supervised release conditions through existing community programs overseen by the U.S. Probation Office.

For those inmates who will be scheduled for a fairly rapid, though not immediate, release, the bureau can address some treatment and programming needs through expedited referrals that facilitate inmate placement in the appropriate community-based programs. There will certainly be inmates with other re-entry programming needs that will not be addressed, however — most notably, educational programming needs such as GED completion.

With respect to community-based
programming such as Residential Re-entry Centers and home detention, some inmates identified for immediate release will already have transferred to RRCs and will have access to this important re-entry tool. With respect to inmates identified for immediate release who have not yet been placed in an RRC, or halfway house, the bureau would be open to working with the courts to seek RRC bed space for these offenders should the court choose to order or recommend a period of RRC placement during supervised release.

Coupled with our use of home detention for low-risk/low-need releasing offenders — many of whom will likely have the earliest release dates should the amendment be made retroactive — we anticipate no significant challenges in this area.

Madam Chair, and members of the Commission, again I want to thank you for this opportunity to discuss the Bureau of Prison's priorities and challenges as they would pertain to the guideline change contemplated today. I am confident that we can effectively
manage any proposed sentencing changes for inmates
within our population, and I would be pleased to
answer any questions you may have.

CHAIR SARIS: Thank you.

VICE CHAIR CARR: Ms. Rose, the President
and the Department of Justice were in favor of
reducing the disparity of crack and powder cocaine
altogether, correct?

MS. ROSE: They were.

VICE CHAIR CARR: And the Fair Sentencing
Act didn't go that far, did it?

MS. ROSE: Correct.

VICE CHAIR CARR: And if the 100:1 ratio
was unfair for people in criminal history categories
I through III, I want to know why it is not unfair for
people in criminal history categories IV through VI,
taking into account a couple of things.

One, that the guidelines take into account
criminal history and weapon possession in determining
a guideline range, so those would still impact
negatively people in those situations. And if our
own recidivism study— which I realize was just
released yesterday — reveals that there's no greater rate of recidivism for people who are in the higher criminal history categories who were released early under the 2007 amendment, or weapon possession, why is it fair not to let a district court judge who has the discretion to take into account, and we direct them to, public safety in deciding whether or not to reduce a sentence, why is it fair to limit it to criminal history categories I through III?

MS. ROSE: There's a couple different issues in there.

First, the data that came out on recidivism came out on May 26th of your Commission there. It didn't show that there was not an increase in recidivism the higher the criminal history category went. In fact, it showed the opposite. Those who were in a Category VI were 44 percent recidivist rate in both the control and the other group, in a two-year period.

And if you look at the charts there, in particular the tables that are part of that study, that trends up. The longer they're out, the more
likely they are to recidivate, and the higher the
criminal history category, the more significant that
rate of recidivism.

There was no rate increase with the
weapon, Commissioner Carr. You're correct about
that.

The distinction I think here is not that
the administration or the President is saying that
there was an unwarranted disparity in those criminal
history categories IV, V, and VI, but rather that when
this Commission makes a decision about retroactive
application, the Commission must consider public
safety.

And in this case, public safety has to be
balanced against some of those unfairness issues, and
looking realistically at the efficient and fair
administration of justice.

This is a department that is in a reduced
situation as far as staff goes. This is a department
that's been through a more simple amendment cycle
regarding many of these same offenders back in '07
and '08, and knows well the amount of resources that
were taken to address those issues, and is looking at those recidivist rates, and in looking at the fact that people who have weapons are more dangerous, and on a balance, not a perfect balance, but on a balance saying our position is that we believe those exclusions are necessary to reach that appropriate I guess resolution.

COMMISSIONER HINOJOSA: Well I guess a follow-up question to Vice Chair Carr's question. I guess the point is then why did you not make that distinction with regards to the change in general? Obviously people will continue to be sentenced without retroactivity in all criminal history categories with the benefit of the Fair Sentencing Act, so why is that different? Or do you plan to argue in court that for those criminal history categories IV, V, and VI, the judges should go higher than the Fair Sentencing Act?

MS. ROSE: No. I think moving forward is a different analysis than looking back.

COMMISSIONER HINOJOSA: And why is that?

MS. ROSE: Well I think because the
statute in 1B1.10 requires us to consider public
safety in making a decision about retroactivity.

COMMISSIONER HINOJOSA: But so does 3553(a). I mean, isn't that one of the big factors in 3553(a), public safety, when we sentence somebody initially?

MS. ROSE: It is one of the many factors in 3553(a), yes.

COMMISSIONER HINOJOSA: In fact some would argue the most important, because [in] 3553(a)(2) three of the four issues there are public safety.

MS. ROSE: Yes, I think it is an important consideration in either one of those scenarios. But the law is different because of finality and a number of other things when you're looking back.

CHAIR SARIS: I was wondering what — I was looking at the statistics which we generate, and while you raise really important issues of public safety, I think judges take that into account. I mean, they actually, when you look at them, denied many petitions. In fact, the majority of the petitions in Category VI. And they denied the
majority in I think 13 percent, in some of the firearms categories.

So the judges are taking these issues into account. And why wouldn't we just rely on judges to use these factors, as they did the last time around?

MS. ROSE: Well a couple of reasons.

Judges denied overall, looking back at the last set of amendments, about six percent on public safety grounds. Now U.S. attorneys around the country recommended the denial in very, very few cases in order to allow us to get through kind of the glut of cases. Almost all offices agreed not to resist, in the vast majority of cases, to go to the bottom of the range, whether they were sentenced high or mid-range last time or not. And they did that because they simply couldn't process this many cases in that short of a space of time without making some of those decisions.

That is a different thing than saying that there weren't public safety exceptions that were never brought to the court's attention. The courts also had to make some of those kinds of concessions.
just to move these cases through.

I think what we're saying now is, when you start looking at a body of 12,000 people, choices have to be made in order to balance out the fair administration of justice against the public safety, against the disparity that's been there since 1992, and more historically back into the data.

And in doing that, what we have said is, these are easy, and clean cuts that can be made. There is clear data showing higher recidivism rates for those higher category offenders. There's an inherent danger when somebody has a weapon involved with a gun that's recognized in all kinds of different areas of the law.

And in our view, cutting those folks out, which would be to where we have a group of offenders that would then be eligible of about 5,500, or about 45 percent of the 12,000 who would become eligible, becomes a more manageable group where the court can move those cases through more efficiently and more fairly.

VICE CHAIR JACKSON: But it seems as
though you needed that exclusion more in the last go-round because there were more offenders. In other words, we have a smaller pool of potentially eligible offenders right now.

So if there is any time in which the court could actually — and the U.S. Attorney's office could actually look at the cases and make these determinations, it would seem to be here rather than in the previous go-round. And it also — I was just — I just wanted to make clear that I understood our recidivism report to show that, although recidivism rate increases by criminal history category overall, that there was no difference between the control group and the group of people who were released early. So you are not solving for the problem.

In other words, you know, by keeping them in longer it doesn't seem to make a difference with regard to whether or not they recidivate.

MS. ROSE: It does protect the safety of the public, though, when they're not present to recidivate.

VICE CHAIR JACKSON: But the amount of
time in jail doesn't affect that because there's no
difference. If we keep them in jail for the extra 36
months, or whatever, they're going to recidivate at
the same rate as if we released them early. So I
don't see how public protection is being affected one
way or the other in that scenario?

MS. ROSE: Because during the three years
they are in prison, they are not out committing new
crimes. That's the difference. And I agree, the
data does show between the control group and the
other group there's not a difference in the
recidivism rates. Both of them show that the higher
your criminal history the extreme more likelihood
that you're going to recidivate. And in a short
space of time, and in a serious way. That is what
the data shows.

I think the difference, at least from the
department's perspective, of why this position maybe
wasn't advocated in 2007 or 2008, is that you were
talking about a much different kind of adjustment.
That was at most a two-level adjustment downwards.
And what the department could live with with public
safety concerns and other things in a two-level adjustment downward, is different than looking at the current amendment and all of the ways in which sentences could be very significantly reduced.

And there is a difference in my mind in how the department must weigh those factors when you're talking about, you know, potentially 24 months versus many, many years.

VICE CHAIR CARR: But the Fair Sentencing Act didn't even go as far as the department wanted in terms of reducing the disparity, did it?

MS. ROSE: I think the department of Justice's policies and positions shifted, looking at the different data that was available at different times. What came out is the 18:1 ratio. I think the department has embraced that since the FSA was announced. And beyond that, yes, we had taken a number of positions in the years prior to that.

VICE CHAIR CARR: And on average, the people who get this reduction will still be spending more than ten years in jail, won't they?

MS. ROSE: I don't know that data.
COMMISSIONER HINOJOSA: But how —

CHAIR SARIS: Judge Hinojosa, and then —

COMMISSIONER HINOJOSA: Well, back to this point is how do you justify the fact that from now on these people are going to get released early and you're worried about recidivism for these future defendants, but somehow you don't want to give credit to the ones that are already in prison?

By that logic, if people are going to be recidivists, then you would just keep them in jail forever and then there would be no recidivism. But that's certainly not the logic that anybody has espoused.

MS. ROSE: No. And I think this is logic that applies to the retroactivity analysis under 994(a) and 1B1.10. This is not in the general realm of do we think it's good policy as a matter of, you know, principle across the board to look at when we release people and recidivist rates. This is within the very specific and narrow confines of the exact issue facing this Commission, which is whether to make this particular amendment at this particular
time retroactive.

And that is a different question. The law requires it to be a different question.

CHAIR SARIS: Judge Howell.

COMMISSIONER HOWELL: Yes. Can I just—

this has been a very interesting set of questions.

Can I just say that, having lived through the 2007 amendment when the Justice Department objected to retroactive application of the crack-minus-2, I just want to say at the outset that I really appreciate the leadership that the Justice Department is taking on this issue and supporting—I think it is one of the very rare circumstances where the Justice Department is taking the position in support of retroactivity, and I really commend the department for taking what I think is a very brave position.

I think what you're hearing from the Commission is, you know, exactly how we're going to implement it in terms of the details. And different people can take different looks and examinations at the statistics from our retroactivity analysis—or recidivism analysis from the 2007 release group.
versus the overall group and see that there are
different takeaways from that set of statistics.

I think it is — although our very precise
data analysis staff says the differences between the
comparison group and the 2007 group isn't
statistically different, but when I look at the
statistics I see that the 2007 released group that
benefitted from our crack-minus-2 amendment have
slightly lower recidivism rates than the overall
group, which means that judges were actually doing a
good job of looking at public safety concerns and
deciding which motions for reduction to grant and
which were not. Which is why we have some concern at
the administration's proposal, which essentially is
to remove that discretion from the sentencing court
and just make a categorical exclusion.

You know, in particular the cutoff that
the Justice Department is making in terms of its
decision on categorical exclusion of categories IV
through VI, when you look at the statistics, Category
IV in the crack-minus-2 amendment group had, you know,
a 32.8 percent recidivism rate compared to 45 percent
at the overall, you know, in the comparison group, which means that's almost an eight percent difference. Which shows that the judges were really doing a good job with that category.

So I think that gives us, you know, some pause.

I want to turn to a slightly different issue. Some of the testimony that we've gotten specifically from the federal public defenders based on experience with our 2007 retroactivity decision have said that the government has taken the position in court that if there's a downward departure granted, that the court is without jurisdiction to consider a retroactive guideline amendment decision, based upon a sentence in section 1B1.10 that says: If the original term of imprisonment constituted a non-guideline sentence determined pursuant to 3553(a) and Booker, a further reduction generally would not be appropriate.

Now unlike other limitations in section 1B1.10, that has no explanation – you know, application note that explains what it means. I was
here on the Commission when we made that amendment to
the guidelines, and my recollection was that we added
that sentence to 1B1.10 simply to mean that the
sentencing judges had already determined that a
defendant had received a fair sentence, after
considering fully all the statutory factors in
3553(a), this policy statement required no further
reduction to achieve the purposes of sentencing.

We certainly didn't mean for it to remove
jurisdiction from sentencing courts wherever a
downward departure had been granted to consider a
motion for retroactive application of a guideline
amendment.

So I guess my question to you, Ms. Rose,
is: Is the department taking that position in court?
So that even for, you know — so that for any of the
crack offenders who are in jail who were sentenced
after, post-Booker, that if a downward departure were
granted that the department across the board is going
to take the position that the court is without
jurisdiction?

And if so, should we change that? Because
that wasn't our intention, I don't believe.

MS. ROSE: The answer is a little bit, "I don't think so." I think there is a very narrow class of cases. And if you look at the 2009 Sourcebook data that your Commission publishes, there were 267 cases that were cited in 2009 where the district court judge, like in my court, Judge Mark Bennett, who believe a 1:1 ratio was appropriate, and who granted a variance or a downward departure to a 1:1 ratio, and imposed a sentence at that point. Certainly I would think the department would come in in those cases and say no further reduction is appropriate, because in fact this defendant has been sentenced at a 1:1 ratio and there is no need to give them any additional reduction.

If the downward departure was something else, I find it very unlikely the department would come in and say because you got a 5K, or because you had an overstated criminal history, or because of mental health, or medical conditions, you are therefore not entitled to any further reduction. However, because we don't know yet what
the Commission is going to do, no guidance has been
circulated back to the U.S. attorneys about what
positions it will take. So I can't predict with a
hundred percent certainty what might happen, but
certainly what I would anticipate based on the
positions we have taken and the data we have, and the
policies that have changed really in the last few
years within the department, I can't — I can't
conceive that we would come in in a situation and say
you're excluded categorically if X happened.

If that was our position, I think we would
have been testifying to that today.

COMMISSIONER HOWELL: Could I ask one more
question of Mr. Kane?

CHAIR SARIS: Yes.

COMMISSIONER HOWELL: So, Mr. Kane, you
heard from Chairman Saris's opening statement we've
received 37,000 pieces of mail regarding our
retroactivity decision. Many of those pieces of
correspondence are from currently incarcerated
defendants in the federal system, as well as their
families. So there is great anticipation across the
federal – I think federal prison population about
what this Commission is going to do in terms of
retroactive application of our FSA implementation
amendment.

You discussed a number of your plans for
what — depending on what our decision is. Do you have
plans to, or do you think it is necessary to have
plans to deal with this situation, that if the
Commission decides to exclude entire categories of
crack offenders from eligibility to apply for a
reduction, in terms of what the impact is going to be
within the federal prison population?

MR. KANE: Whenever important sentencing
matters are on the Hill for consideration, or here
with the Commission for consideration in important
sentencing matters from the perspective of federal
prisoners, we do our absolute best to communicate
with them directly and openly about what those are,
and what might or might not occur.

There have been times, as you all know,
when those sorts of issues involved potential
outcomes that would be very disappointing to the
inmate population in general. And that can be frustrating and upsetting to some, and could lead to decisions by the individuals that would not be wise involving misconduct of sorts.

But it is our experience that in working with them in advance, with the best information we can obtain, our staff become the individuals who are the foils for the receipt of their disappointment. And we work through that with them so that they don't make any bad decisions with respect to misconduct.

It is a delicate balance. We certainly would like to be well prepared to provide the information to the population. I think the greater, more challenging prospect would be that the Commission determine not to support retroactivity at all; those have been the most difficult issues to face with the population.

But we will work through it with them. And we will stay in touch with you to ensure that we are articulating where we're going, as we should, with them.

COMMISSIONER HOWELL: With our 2007
amendment we delayed the effective date for at least a couple of months. I think we made our decision in December and we made the effective date the beginning of March of 2008.

You mentioned that you were going to recommend that judges delay the effective date of any release order by ten days. Would it also be helpful if we considered a delay in the effective date should we decide to make our FSA implementation amendment retroactive? And if so, how much time would you recommend? The same amount of time we gave in terms of the delay in the effective date for the 2007 amendment?

MR. KANE: That will be sufficient, yes.

COMMISSIONER HOWELL: Thank you.

MR. KANE: And on the issue of making a decision for or against retroactivity, writ large, at all, the one thing I would offer is that, as I think you would suspect, you all have worked with offenders over time and you know they are attuned to the issues that are before you. And a decision against retroactivity I believe works against re-entry. And
the reason I believe that is that these are
offenders, these are individuals who have made many
mistakes throughout their lives. Most of them are
repeat offenders. But 60 percent of them do not
recidivate after three years.

That 60 percent will be comprised by
individuals who hope to receive retroactivity. And
if they don't, when they've tried their best to
follow the plans that have been laid out for them by
the staff, who have looked at their skill
deficiencies, and encouraged them to get a GED, you
know, to go through vocational training, that they
really need drug treatment, et cetera, et cetera, and
many of these folks, as demonstrated by the 60
percent who don't recidivate, do what they're asked
to do. And they do have terms that will have had
them incarcerated for a substantial period of time,
and over which they will have followed these
instructions and encouragements.

And what I am concerned about is that
individuals who, hoping to see a decision by the
Commission in favor of retroactivity, if you were to
decide against that, would say — this in fact was an issue of fairness — this is unfair. And so all that I've done has been for naught, from my perspective, and that may really hurt their own attitude toward continuing to pursue a productive re-entry into the community after they're released.

CHAIR SARIS: Thank you.

COMMISSIONER FRIEDRICH: Ms. Rose, I have a question about the department's recommendation that the Commission review its retroactivity policy. Am I understanding your testimony right to mean that you are recommending that we revise our own internal rules, as opposed to making an amendment to 1B1.10? Am I correct?

MS. ROSE: I believe that is correct.

COMMISSIONER FRIEDRICH: Okay. And I'm wondering, is the department simultaneously advocating in Congress that the statute, our authorizing statute, 3582(c), be amended similarly?

MS. ROSE: I do not know an answer to that, but I can get an answer for the Commission.

COMMISSIONER FRIEDRICH: Thank you.
VICE CHAIR JACKSON: Can I just — I'm sorry — can I just follow up on our general position with respect to retroactivity?

I understood you to answer Judge Howell by saying that there would be no categorical exclusion, or the department wouldn't argue for one based on sort of the post-Booker realities and what judges had done in the original sentencing. But what about this presumption against retroactive application of guideline amendments post-Booker, which appears in your testimony?

I am sort of troubled by this because either guideline amendments matter, or they don't. And I had understood that it was the department's position that the guidelines are important, that judges should follow them, that they should be given substantial weight. And if that is true, then how can we maintain the changes are essentially irrelevant post-Booker, and that, you know, in the new regime, if we change the guidelines because judges knew that, you know, they could do whatever they wanted up front, that we shouldn't give them the
authority to revisit it retroactively. That is sort of the first part of this.

And the second part is: Wouldn't this be the particular case in which the presumption would be at its zenith? In other words, here we have a situation in which every judge knew. The Supreme Court said repeatedly that in the crack situation judges could do what they want.

So it seems odd to me that, if we're going to have a presumption, the government wouldn't suggest that it be applied in this case.

MS. ROSE: I think there's a couple of layers there. The general presumption against amendments being applied retroactively obviously goes to the need for finality and the need for deterrence that is linked to that finality and to that certainty that comes from sentencing.

I agree, Commissioner Jackson, that this is "the" case where that is sort of a bizarre conundrum that is presented. If you look post-

Kimbrough at sentencing in crack cases, only 20 percent of those were still outside of the
guidelines, even after the Supreme Court had repeatedly talked about it. Chief Judge Hinojosa had testified in May of '09 about the crack cocaine disparity. Congress was looking at it. There was all of this activity, and yet for whatever reason 80 percent of the judges in our country, when they were sentencing, were still going within the old guideline ranges for crack cocaine offenses.

Whether they did that out of deference to the Sentencing Commission, or because the department urged them to— and we did back post-Kimbrough— I think that has to be taken into consideration. And that is why the government didn't come in with a position that said the line in the sand should be Kimbrough. Anything post-Kimbrough shouldn't receive the reduction.

Because we recognized that judges continued in part to listen to us, to listen to the Commission about those old guideline ranges. But that is a different thing. And the crack cocaine cases are a very different animal than most other amendment changes.
If you look at an amendment change such as a criminal history category change where you can get so many one pointers, or where you can't get both the two levels for committing it within a certain number of years, and things of that nature, are much less widely debated, are much less subject to things like variances and departures, than the cases we are talking about right now.

And so I think we can't remove from the department's argument the context of it being a crack cocaine case that affects, you know, 12,000 people. But I do think that the department will continue to advocate — and does in my written testimony — a general presumption against retroactive application of most amendments.

VICE CHAIR JACKSON: Thank you.

COMMISSIONER HINOJOSA: Am I to take it, then, that your position is with those judges who said I'm not listening to you, and I'm not listening to the Commission, and I'm just setting my own policy with regards to what crack should be, that those should not be eligible for retroactive application?
MS. ROSE: I think that depends on what they did. I think if the judge went to a 1:1 ratio, the argument likely will be: No further reduction is necessary. And that is a pretty limited number of cases.

COMMISSIONER HINOJOSA: What if it's anything less than 18:1?

MS. ROSE: I don't know what the government's position would be, although I can see us taking a position that no further reduction is warranted.

CHAIR SARIS: Thank you. Anything else?

(No response.)

CHAIR SARIS: I want to thank you all. It was very helpful testimony. Thank you.

MS. ROSE: Thank you.

(Pause.)

CHAIR SARIS: Are you all ready? Welcome. So this is the Practitioners Panel. I am reading, not necessarily in the order that you've chosen, but we'll begin with Michael S. Nachmanoff who is the federal public defender in the Eastern District of
Virginia, where he also served as the first assistant and acting public defender. Previously he has served, practiced law in Arlington, Virginia, with Cohen, Gettings & Dunham, P.C.

David Debold — did I pronounce that correctly? Yes — is chair of the United States Sentencing Commission's Practitioners Advisory Group, fondly known as PAG. He practices with Gibson, Dunn & Crutcher, and previously served as an assistant U.S. attorney in Detroit.

James Felman is a partner in the firm of Kynes, Markman & Felman, P.A., Tampa, Florida, and co-chair of the Committee on Sentencing of the American Bar Association. He also serves as a member of the Governing Council of the ABA Criminal Justice Section, and previously co-chaired the Sentencing Commission's Practitioners Advisory Group.

And last, but by no means least, James Lavine serves as president of the National Association of Criminal Defense Lawyers and is a partner at Zimmermann, Lavine, Zimmermann, & Sampson in Houston. Previously he was an assistant DA for
Harris County, Texas, and assistant states attorney
for Cook County, Illinois. You've seen a lot of
jobs.

Thank you. And maybe, unless you have
agreed to another order, we would just right down?

MR. NACHMANOFF: That's fine. Thank you.

Good morning, Madam Chair, and members of the
Commission.

Thank you for holding this hearing, and
for providing me with the opportunity to speak on
behalf of the federal and community defenders from
around the country.

It is especially meaningful for me to be
able to address you this morning because, as I think
many or all of you know, the Eastern District of
Virginia has had more cases affected by crack
retroactivity than any other district in the country.
And we will have the most, without a close second, if
the Commission once again votes in favor of
retroactivity as we strongly urge it to do.

I think if anyone could have cried "uncle"
at the prospect of assisting more than 1,000 clients
through the process of obtaining lower sentences, it
would have been our office, but we were truly happy
to help our clients and their families in this
important endeavor.

The opportunity to go through this process
again is one that we welcome wholeheartedly. We
firmly believe that it was worth the effort then, and
it is worth the effort now.

I think if there is one lesson that we can
take away from the last round of retroactivity, it is
that our criminal justice system is more than capable
of efficiently implementing the procedures set forth
by this Commission to lower sentences in crack
cocaine cases, and that it can be done fairly with
individualized judicial review to ensure public
safety concerns are addressed.

The predictions that this process would
bog down the courts, or cause a dramatic rise in
supervised release violations, have not come to pass.
In fact, we know now, as has been discussed already,
that the recidivism rate for the 16,433 defendants
who were released a little bit early – some a little
bit more early — as a result of retroactivity, is lower than the general recidivism rate.

The Commission deserves great credit for getting us to this point. After issuing four reports and urging Congress for more than 15 years to act to ameliorate the unjust crack/powder ratio, Congress passed the Fair Sentencing Act. And the Commission now has the opportunity to further achieve the critical goal of ensuring fairness in the criminal justice system and remedying the grave racial injustice that has stained our federal courts for more than 20 years by authorizing retroactive application of the most recent changes to the crack guidelines.

For me, I was particularly impressed and pleased to see the Attorney General of the United States here this morning, and to hear the Department of Justice tell the Commission that its position is that we should have another round of retroactivity. I think that is a true reflection that there really is a community consensus that the penalties for crack cocaine were unduly harsh and
they have had a pernicious and corrosive and racially unfair effect on our justice system that needs to be remedied.

And the best way to remedy that is not only by what Congress has done but by what the Commission has done now.

Now having said that, and having heard the questions from the Commission to the Department of Justice, as you can imagine the federal and community defenders respectfully and strongly disagree with the notion that there should be any exclusions limiting those who are eligible for relief.

We know from the statistics from the last round that the Commission did really an excellent job in predicting how many people would be eligible. And I know that particularly because I saw that huge number for the Eastern District of Virginia last time around. It was about 1,500 that was estimated that there would be in our district. As it turned out, and as the data from the Commission shows, there were 1,641 motions filed. And more than 1,000 of those were granted. And we were involved in a lot of
those. Not every single one.

I can't tell you the breakdown between the ones that were granted that we filed versus the ones that were granted that we didn't file.

The process that we went through I think was similar to the process that federal defenders and the U.S. Attorney's Office, probation, the clerk's office, and courts went through around the country. It varied a little bit, depending on the size of district and the culture of the court, but it was really a collaborative process. And it was a process that involved looking at who was eligible, trying to prioritize those cases to determine who would get out the fastest, and then trying to decide whether or not we could come to an agreement that those people should get the relief.

And in the overwhelming majority of cases, that is exactly what we agreed to. And that is how we were able to get through this process without bogging down the courts.

And the predictions that this would somehow be a free-for-all have not come to pass.
They simply have not come to pass. And the notion that now the Commission should exclude 54 percent, which is what criminal history categories IV, V, and VI, would be, is just plain wrong. And frankly it would undermine the very notion of fairness that we are trying to achieve by going through this retroactive process.

I think it was Commissioner Howell who pointed out in the recidivism studies, and of course the statistics aren't perfect, but it is clear that in the case of Criminal History Category IV there was a 12 percent differential. And I think there is some common sense that the Commission can bring to this.

And Mr. Kane alluded to it. Which is, that if people who have been serving long sentences and have felt for a long time that the punishments were unfair, are told that their government, that the Sentencing Commission, that people, that the courts, and even perhaps the prosecutors who originally prosecuted them, have recognized that there was some injustice in the original sentence that was imposed, when they get that sentence lowered, whether it's by
six months, or 12 months, or 24 months, I think it is logical to think that they go back out into the world feeling a little bit better about themselves and the community they live in than having to serve the entirety of that sentence.

That is as true for someone who has a more substantial criminal history as it is for someone in criminal history I, or II, or III.

And let me be clear about this. People who fall into criminal history IV, V, and VI cannot be painted with a single brush. The Department of Justice I think has used the word "proxy." And clearly they believe that people who fall into those criminal history categories somehow are more likely to be dangerous, or to engage in violence.

But that is absolutely not true. In any of those criminal history categories you could have somebody who has no violence in their background, who has no crimes of violence convictions, who has no drug trafficking convictions other than the crack offense for which they're sentenced. And that is particularly true in Criminal History Category VI.
As the Commission knows, career offenders often find themselves in Criminal History Category VI. And those individuals who are sentenced based on the statutory maximum based on section 4B1.1 are ineligible for relief. We went through that process, and the way the rules are written now those people are ineligible for relief— which is a shame, but that is the way the process works.

There are others, though, who are in Criminal History Category VI who are not career offenders. And what does that mean? It means that somehow they managed to get those criminal history points to put them in Criminal History Category VI, but without committing crimes of violence or drug trafficking offenses. Because if they had two predicate offenses, they would be career offenders.

What I am saying is that I have had a large number of clients who, because of the misfortune of being poor drivers, or disobeying laws related to bad checks, or other non-violent crimes, have managed to rack up enough criminal history points to be in criminal history IV, V, and even VI.
And that, to conclude that these are people who should remain at this higher sentence, which everyone including the Department of Justice recognizes is unfair, should not be excepted by the Commission and would really undermine the purpose of retroactivity.

There is also a racially disparate impact of excluding up front categories of people in criminal history IV, V, and VI, especially criminal history categories V and VI. The statistics reflect, and the 15-year report commissioned by the Commission, makes clear that African American defendants are more likely to have higher criminal history because they're subject to higher rates of arrest and charging than their counterparts who are White and Hispanic, and we would thereby be cutting off a whole category of people in an effort to try and ameliorate the racial injustice of the crack cocaine ratio.

That is equally true with regard to 924(c) and the gun bump. The statistics also show that there has been a disparate racial impact in the bringing of charges, the foregoing of charges between
924(c) and the gun bump, and that would be exacerbated by up front keeping these people from being considered.

The Attorney General stated in the Holder Memo that equal justice depends on individualized justice. That is absolutely true. And that should be the touchstone of this Commission's decision with regard to retroactivity.

Judges should be able to make these decisions. They did in the last round. We know that those people in categories IV, V, and VI, those people who had the additional increased punishment as a result of a gun bump or 924(c), are no more likely to recidivate at rates greater, often lower, than their counterparts. And therefore we would ask the Commission not only to vote in favor of retroactivity, but to allow judges to do it in the same way they did the last time.

Thank you.

CHAIR SARIS: Thank you. Mr. Debold?

MR. DEBOLD: Thank you, Madam Chair, and distinguished members of the Commission.
As the chair of the Practitioners Advisory Group it is always a great pleasure to appear before the Commission and offer our perspective from the private defense bar. We always appreciate that chance, but we especially appreciate it today in giving our perspective on the proposed changes to the — whether the crack amendment should be made retroactive.

Like the federal defenders, our members and the defense attorneys who we represent in our service with the Commission have seen firsthand the inequities that have been caused by the very different treatment of powder and crack cocaine over a vast number of years.

What I would like to do today is deviate a bit from my prepared remarks and address some of the key points that I think have come out from the first panel.

The first question which I know the Attorney General has answered in a way that we agree is the question of whether to make anything retroactive at all. In other words, the question in
our mind is: Why would we make a change like this and not open it up to those who are adversely affected by it in the past?

And perhaps an analogy would help, a drug analogy but a very different kind of drug analogy. Suppose there was a powerful medication on the market to treat a serious chronic illness. And after years of assessing its safety and effectiveness, the researchers discover that the dosage is probably six times more than is truly safe and effective and necessary for most patients, not everybody, but for most.

So the manufacturer is told by the regulator to change the dosage for the medication. I don't think that we would stand for a system in which we said those who still have the medication that they bought when it was at the higher dosage should continue to take it; don't worry about it; we're only going to worry about the people who are taking it in the future.

We would not tell them to stop taking the drug, whether they took it for the first time years
ago, months ago, weeks ago, or even the day before the change. And there's no reason to treat the amendments here the same.

Now I recognize that comparisons like this are always imperfect, and you could tweak it a number of different ways — some that would sort of make the point more poignant. You could posit that 25 years earlier when the original dosage was chosen it turned out that it was done without any kind of research or any kind of considered judgment on what was actually a last-minute decision based on circumstances that were not very predictive of what the need would be for that particular medication.

And I suppose you could also say that the patients are all innocent, unlike members of the prison population, but I submit that the answer would not change if you were giving the medication to prisoners compared to giving the medication to people in the general population.

The fact is that the change that Congress made at this Commission's behest would not have been possible without the stories and the experiences of
those people, just like the experiences of people in
my medication example. And to tell them that we are
changing the rules because of what you have endured,
and because we have decided that what you have
experienced is not the right result, but you can't
have it, would be an incredibly unfair result.

So we agree that the question here is not
whether to make the guideline retroactive, but
whether — but the question here is: How?

And the Department of Justice in a general
sense, and also in this particular situation, has
said that it should be limited to certain categories.
And we have heard more generally about the concerns
of finality and how finality should somehow have a
role in this.

On that topic, I was reminded of what
Felix Frankfurter once wrote: Wisdom too often never
comes, and so one ought not to reject it merely
because it comes late.

And that is the situation we have here, I
think, quite clearly. The wisdom of changing this
ratio has come late, but it should not be rejected
for anybody, especially for those who are feeling the
effects of it most severely in the higher criminal
history categories.

I think as the questions you've posed
yourself to your first panel has indicated, the whole
argument about the criminal history categories really
does prove too much, because everything you can say
about why it shouldn't be applied retroactively for
people in the higher criminal history categories
could be said and would be said about future
application to defendants who have not yet been
sentenced.

In addition, I think the criminal history
category is a particularly bad way to distinguish
those who get the benefit of the decision and those
who don't. Chapter Four, when I was an AUSA and doing
training for our AUSAs in our office, I would often
tell them that Chapter Four of the guideline manual has
all the simplicity and grace of the Internal Revenue
Code. It is a very complicated provision, or part of
the sentencing guidelines.

It involves some very difficult
calculations and assessment of factors that can really change an outcome very quickly based on small, real differences in the background of the person. In fact, I know some of the members of the staff remember that after I did my detail here at the Commission 20 years ago, I was so frustrated with how hard it was to teach other people about criminal history category that I created this flow chart, this decision tree, which—I wish I had brought it today, because it is a full page of different decisions that can ultimately affect how many criminal history points you get.

And believe me, if you are making a distinction between somebody who has six criminal history points and seven criminal history points, and they have to explain to others why they are not getting the benefit of it, and they have to go into that kind of an explanation, it just is not going to fly.

And the Commission has recognized that. If you look at the distinction between Category III and Category IV, for example, and if you go at Offense
Level 32, the guideline range for Criminal History Category III is 151 to 188. The next highest range, and the next highest criminal history category, of those 37 months, 151 to 188, 20 of those months overlap with Criminal History Category IV, which I think clearly shows the Commission's recognition that these are not very concrete, easy, largely segregable kinds of differences that make such a big difference in the sentence outcome.

And as a result you are going to have some very tremendously different results based on very small distinctions between defendants who fall in those different categories.

It also should be remembered that the Commission I believe just last year changed the criminal history rules to deal with the issue of recency and decided not to make that amendment retroactive. So you will obviously have a situation where some people would never have been in Criminal History Category IV had that amendment been in effect, and yet they will be denied the advantages of this retroactivity decision.
So what it comes down to is, we already had a system in which we trust that we can differentiate based on such things as somebody's criminal past, or even whether they possessed firearms, or had firearms involved in the offense. Those people get longer sentences. Those people who are in prison now who had a higher criminal history category, or who had a weapon connected with their offense, got a higher criminal sentence. And that sentence was based on those factors. Those have already been taken into account. So in my medication example, some patients might still get the benefits from a higher dose. Somebody, a doctor looking at that person might take into account their individual circumstances and say I think you need the higher medication despite the increased risks. But in those cases, we don't say we're just going to give it to everybody in a broad category and a broad swath. We make individualized decisions. And that is what judges are appointed to do, and that is what judges did with the 2007
amendments, and they did it quite well, as the Commission's own data demonstrate.

The best solution here is to give the judges the information that they would want to have, and that they would need to make those kinds of public safety decisions, just as we did in 2007, and allow them to make the individualized decision based on the facts of the individual that appears before them.

I would also note with respect to the weapons suggestion that the enhancement, the two-level enhancement for possession of a firearm, is one of those what I call passive provisions of the guidelines. There are some provisions that are defendant-specific: abuse of position of trust is a good example. If a defendant abuses his position of trust, then the enhancement applies. But if somebody else in the offense abused their position of trust, it doesn't apply.

The firearms enhancement is a passive one. If a weapon was possessed in connection with the offense, you increase by two levels. So there is a
vast difference between somebody who may have the 

enhancement because somebody else in the conspiracy 
had a weapon that was foreseeable to them than 
somebody who actually wielded the firearm and used 
it. And the way to make those distinctions, again, 
is to go back to the judge who sentenced the person 
in the first place and say: Look at the presentence 
report. Consider any additional information, if 
there is any. And then make the decision whether or 
to what extent the reduction should be imposed. 

I think it is just an unfair system in 

which we would make such broad categorizations 

without allowing for that kind of individualization. 

And finally I want to just speak for a 

second about the issue about providing greater 

clarity on whether and when a reduction is generally 

not appropriate — the situation where a judge may have 

already reduced the sentence in the first instance 

because of a disagreement with the 100:1 ratio. 

The people who are best positioned to 

decide whether that actually affected the prior 

sentence are the ones who are going to be deciding
these motions: the district judge who imposed the sentence in the first place.

And I think the Commission would do well to clarify at a minimum that that is the reason behind that language, so that the judge can look back and say, yes, that's during the time period when I already took into account that the ratio was unfair. And so, no, you don't get a reduction. Or you get a smaller reduction based on how I took it into account in the first place.

I think all those things will help to make this a truly memorable and truly historic amendment like the one that the Commission promulgated in 2007.

Thank you.

CHAIR SARIS: Thank you. Mr. Felman?

MR. FELMAN: Chair Saris and distinguished members of the Sentencing Commission:

It is a pleasure and an honor for me to appear here before you today. I appear today on behalf of the American Bar Association, the world's largest voluntary professional organization. And our policies reflect the collaborative efforts of all
aspects and constituencies of the criminal justice
system: prosecutors, defense attorneys, judges,
professors — indeed, I note Chris Chiles, who will be
here later today on behalf of the National District
Attorneys Association is a member of our Criminal
Justice Section Council. Not to suggest he agrees
with my views today; I think you will hear he
doesn't; but we hear from every aspect of the
criminal justice community, and we try to form our
positions by consensus.

And it appears to my eye at least that
today is a hearing in which we join a larger
consensus. I think there is going to be maybe not
uniformity but almost consensus before the Commission
today that this amendment should be applied
retroactively, at least to some degree.

And so I note that consensus because it
occurred to me that there may be an easier way to
find such consensuses — if that is a proper plural;
and that might be to go to the annual Sentencing
Commission conference, hand out clickers, and have
Commissioner Carr just ask the question.
MR. FELMAN: Because we got essentially the same answer there from a random group of majority probation officers, over I think 60 percent supported retroactivity.

So I think that today presents an opportunity essentially for consensus about the big points, and we are really haggling about, to my mind at least, more the details. But without question, the American Bar Association feels very, very strongly that the retroactive application of the amendments to the drug quantity tables implementing the Fair Sentencing Act of 2010 is a moral imperative.

The 100:1 crack/powder ratio stands as one of the gross inequities of sentencing injustice in our generation. After decades of effort, a partial reform of that inequity has been enacted. And the guiding principle should be very simple: It should be extended to the greatest number of people possible to remedy, to the greatest extent possible, the extreme and undeniable unfairness of that injustice.
The Commission sensibly looks at three factors in determining whether to make something retroactive or not: the purpose of the amendment, the impact of it, and the difficulty of its implementation in a retroactive fashion.

And this one strikes me as an easy — relatively easy question on all three. In terms of the purpose of it, this is not a tinkering. The purpose of this is to reverse a drastic and long-standing inequity, a glaring inequity, an inequity that this Commission itself took the lead in recognizing and that Congress has agreed was unfair.

There may be no amendment in the history of the Commission that presents a greater imperative for retroactive application than this one.

The impact of it also cries out for retroactive application. We're talking about I think an average of 37 months. We're not talking about something that isn't worth the trouble. We're talking about three years of real people's lives.

This impact supports retroactive application. And at least as it concerns the changes
to the drug quantity table, it will not be difficult
to apply. And we know that inescapably because we
just got done doing essentially the same thing.

This time it will be easier. There are
fewer cases, and we have the experience of what
happened last time. I will say in the Middle
District of Florida where I have my office, we were
number two in number of cases, behind the Eastern
District of Virginia, last time. I think the latest
data suggests we would be number three this time, but
I can tell you that, even though I was not involved
in it, I am keenly aware of who was and what they
did, and it was a very collaborative, sensible
project between the probation officers, working with
the BOP, the federal defenders, the U.S. Attorney's
Office. They were able to do this very efficiently.

And I will say, as a point of personal privilege, I
put a call in to Elaine Terenzi, my chief probation
officer in my district, before I came up here today.
And Ms. Terenzi of course can take no position on
what the Commission should do, but she gives me
permission to use her name to state to you
unequivocally that they are ready, willing, and able
to do do this.

They have a computer database prepared
from the last time around. They believe they can
implement whatever retroactive decisions the
Commission makes in a seamless and smooth and
professional manner, and that it will not unduly
disrupt the functioning of the courts.

The Commission's prior retroactivity
determinations really set the pattern here that lead
to this, as well. In 1993 the LSD amendment was made
retroactive. In 1995, the marijuana plant amendment
was made retroactive. In 2003, the oxycodone
amendment was made retroactive. And of course we've
all been discussing the minus-2 amendment in '07 that
was made retroactive.

Virtually every significant change to the
drug guidelines that alter the base offense level
based on quantity, or the manner of calculating
quantity, has been made retroactive. I don't think
there's any reason why this one should not be.

In terms of the manner of its
implementation, I just say that the ABA does not support any of the limitations that have been published for comment, including those advocated by the Department of Justice, for the simple reason that they just do not go to the issue. The issue here was that the 100:1 crack/powder ratio was unfair. It was just as unfair for somebody in a Category I as it was in a Category VI. It was just as unfair for someone whose co-defendant had a gun for someone who didn't.

There does not appear to be any rational connection between these limitations. And I can't really do much better than the questions asked by the commissioners themselves of the department. You all obviously recognize that these people were already punished for these things. Their criminal history was already taken into account in setting their sentence. Their possession or their co-defendant's possession of a gun was already considered in setting their sentence.

All we are talking about is eliminating the added part of their sentence that was directly the result of the 100:1 ratio and nothing more.
Category VI people are more dangerous than Category I people, and they will continue to serve longer sentences as they should.

So there just doesn't seem to be any rational connection between these things. And of course the Commission already directs the courts to look carefully for dangerous people. The application note to 1B1.10 states that the court "shall consider the nature and seriousness of the danger to any person or the community that may be posed by a reduction in the defendant's term of imprisonment."

And so they shall be doing a case-by-case look. These are the judges who actually sentenced these people. They know who they are. They know what determinations they made about them the last time. I see no reason not to give the judges who did a fairly decent job on the last round the discretion to look at each case individually.

I haven't heard any good argument for a categorical exclusion, or a category deprivation of judicial discretion for these offenders.

Obviously we have heard the statistics,
that if you were to cut out the Categories 4, 5, and 6, you're talking about more than half of the offenders just right out of the box. I don't know exactly what the overlap is with the gun limitation, but now you are well over more than half, all really without any basis. There were no such limitations in the 2007 reduction. In fact, I don't think there is any precedent for limiting a retroactive guideline application by category like this. I don't think the Commission has ever done it.

And I don't think there is any reason to do it, because it flies in the face of the idea that we give guidance, and we let judges do their jobs. And of course we know that without those limitations, the '07 recidivism rates were actually lower than the control group.

So I see no basis for suggesting that the DOJ proxy fits very well what we're trying to do here. I also don't think it fits at all with the aggravators that are in the statute. I mean, that is the justification for it, but the aggravators don't have anything to do with — I mean, they speak in terms
of actual violence.

And I think that criminal history, or some co-defendant's possession of a gun is a pretty poor proxy for actual violence. I am heartened to see that even the department agrees that the limitation on Kimbrough should not be used. I think that we even heard in San Diego some judges explicitly voicing the view: Look, we knew after Kimbrough that we could do this, but out of respect for the Congress, out of respect for the Sentencing Commission, they'll wait and they want to see what the policymakers do. They don't feel comfortable just going out and making their own policy.

We know that. They say that. The statistics show it. So we don't think any of the bases for limiting the retroactive application have force.

Thank you.

CHAIR SARIS: Thank you. Mr. Lavine?

MR. LAVINE: Judge Saris and Distinguished Members of the Commission:

Thank you for inviting me to testify here
today on behalf of the National Association of Criminal Defense Lawyers. As its current president, I am here to present our views on the retroactivity which is the subject of the hearing today and the Fair Sentencing Act of 2010.

NACDL strongly supports the retroactive application of the Fair Sentencing Act guidelines amendment. The Act is the culmination of decades of reform efforts to ameliorate the disparate impact and undue severity of the federal sentencing scheme for crack cocaine offenses.

It is hard to overstate the negative social and economic impact of this uniquely severe sentencing scheme. Over-incarceration within the Black communities adversely impacts those communities by removing young men and women who could benefit from rehabilitation, educational and job training opportunities, and a second change.

While NACDL believes the Act and implementing guidelines amendment did not go far enough in reducing the disparity and the harms of excessive crack sentences, there is overwhelming
consensus from all sides that the 100:1 ratio was unfair, unjustified, and in need of remedy. There is no question that the congressional intent behind the Act was to fix a part of this notoriously flawed scheme. And the impetus for action was undoubtedly those sentences already handed down, and the disparate impact on individuals already sentenced.

Principles of fairness, consistency, and practicality instruct the Commission to include this amendment in the list of amendments eligible for reduction in the 3582(c)(2).

Since 1995, the Sentencing Commission has consistently taken the position that the 100:1 ratio was unwarranted from its inception, and has a racially disparate impact. Commission staff estimates that the 85 percent of the offenders eligible for retroactive application of the guideline amendment are African American.

The average sentence reduction for all impacted offenders would be a little over 22 percent. Given this dramatic impact in terms of race and
relief from unconscionably long sentences, failure to apply the amendment retroactively would directly undercut the primary objectives of the Fair Sentencing Act. In other words, to deny retroactivity would deny that the problem existed in the first place.

The Commission has recognized that reducing crack cocaine sentences is key to reducing the sentencing gap between Blacks and Whites. In passing the Act, Congress reached the same conclusion. The Act amendment directly contributes to that goal and there is no reason to give it purely prospective application.

Ignoring racial disparities among sentences currently being served will significantly stifle the Act's ameliorative effect, increase the distance to the goal post, and promote continued disparity based not only on race but among similarly situated individuals.

Perhaps the most compelling reason for retroactivity is the Commission's precedent in this area. While past amendments reducing sentences in
drug trafficking cases are few, the Commission has made those amendments retroactive, including the crack-minus-2 amendment. Prior to crack-minus-2 amendment, three other drug amendments were made retroactive—dealing with LSD, marijuana, and oxycodone. All three generally benefitted White defendants. The statistics demonstrate, however, that the retroactive application of the Fair Sentencing Act amendment will generally benefit Black defendants.

To carve out selected offenders, as urged by the Department of Justice this morning, would continue the notion that crack offenders should be treated differently as a class, a position not taken with LSD, marijuana, or oxycodone.

Similarly situated offenders with the same criminal history category and aggravating factors, and the same amount of crack cocaine, would receive a less sentence today than the same defendant who is already serving a longer sentence under the old law. This is the inequity that the Act was designed to alleviate. The only reduction in
sentence would be based on the change in ratio relating to crack cocaine. The aggravating factors, as was already discussed by this panel and others, already incorporated in the sentence would not change.

A decision to deny full retroactivity would likely undermine public confidence in the Sentencing Commission and the federal judicial system as a whole, and cement an understanding that justice is distributed on the basis of skin color. The Commission cannot ignore these potentially negative consequences.

NACDL urges the Commission to make the proposed permanent amendment retroactive without further limitations regarding the circumstances in which, and the amount by which, sentences may be reduced. Disqualification based on the dates of certain ameliorative Supreme Court decisions would sweep far too broadly, unjustly penalizing inmates who never benefitted from those decisions.

This is precisely the type of case-specific determination that should be left to the
discretion of the sentencing court.

The other suggested limitation —

disqualification based on criminal history category
or other aggravating sentencing factor — further would
serve no rational purpose. They already reflect such
factors, as discussed by other members of the panels
and I will not repeat that here.

Retroactivity is also warranted for the
mitigating adjustments which address over-reliance on
drug quantity for less culpable participants by
capping the guidelines and implementing a new
reduction based on offender characteristics neglected
by the guidelines.

Retroactive application of these
amendments would be consistent with the intent of the
Act and the language of the remedial purpose of 28
U.S.C., 994(u).

Given the relatively small number of
defendants eligible for release under these two
amendment provisions, the costs to the justice system
are minimal, especially when compared to the cost of
continuing to incarcerate these low-level
participants.

The Commission has the authority to allow sentence reductions for the least culpable drug defendants residing in our prisons. It should exercise that authority.

On the other hand, NACDL does not support retroactive application of the enhancements contained in the proposed permanent amendment. While this may appear inconsistent, there is ample justification for treating the enhancements different from the mitigating adjustments.

These enhancements address factors likely to have already been considered in determining the initial sentencing under the advisory guidelines. Moreover, even when the amended guideline range does not exceed the original term of imprisonment, retroactive application of the enhancements would, at the very least, result in unnecessary and burdensome litigation regarding Commission authority and ex-post facto limitations.

NACDL applauds both Congress and the Commission for this critical extension of sentencing
reform. Elimination of the 100:1 ratio and
implementation of the Act by the Commission is a
milestone on the path to fair drug sentencing.
Still, it is not enough.
The Commission recognized the horrible
injustice. You lobbied the Congress to correct it.
And now you must finish the job and allow the
multitude of human souls who have been suffering from
this universally recognized injustice to get the
release that you, yourselves have initiated.
I am grateful for the opportunity to
testify on behalf of our membership and welcome any
questions.
CHAIR SARIS: Thank you.
COMMISSIONER HINOJOSA: With regards to
some of the questions we have asked for public
comment on, 3582(c)(2) says: "In the case of a
defendant who has been sentenced to a term of
imprisonment based on a sentencing range that has
subsequently been lowered by the Sentencing
Commission pursuant to 28 U.S.C. 994."
The question I have is — and you have
addressed it in some of your written testimony here about we shouldn't limit it in any way whatsoever — but as you well know, the defense has argued, especially post-Kimbrough, that this is a guideline range that should not be paid attention to at all. And that it is not based on proper policy decisions, and that it should not be looked at at all from the standpoint of 3553(a) factors as to how it should be followed.

And in the cases where that defense argument has been successful, how do we comply with the statute with regards to based on the sentencing range that's subsequently been lowered when somebody has already been convinced in the courtroom that the range should not mean anything with regards to that particular sentence?

I think that is the question that I would like to hear something on as to what, if anything, we are supposed to do with regards to retroactivity and still comply with the limits of retroactivity under the statute.

MR. LAVINE: Can I give you just a simple
answer to that? Because I've listened to this
morning, and I've looked at the question as posed by
the Commission: That's not your job. It is up to
the discretion of the trial court who imposed the
sentence.

If in fact they took it into
consideration, the government can argue that and they
can equalize or not equalize. There should not be a
limitation.

COMMISSIONER HINOJOSA: No, but our job is
to follow the law here with regards to how we make it
retroactive, and what we state. I mean, we have to
follow the law as written. And the law is based on
the sentencing range. And if the argument has been
successful in that particular court, not to base the
sentence on the sentencing range and to totally
disagree with the guideline range, hasn't that
already been taken into account with regards to what
the proper sentence would have been in the first
place?

MR. DEBOLD: You are going to be getting
some guidance very soon from the Supreme Court on
what "based on" means in that provision in the Freeman case, which was argued this term and has yet to be decided.

I mean, I could try to answer that question, but I think you are going to get more guidance from the Supreme Court than you would want to take from any of us. But I think —

COMMISSIONER HINOJOSA: But isn't that case a little bit different because that's a plea bargain agreement, as opposed to whether there was really anything based on the sentencing range?

MR. DEBOLD: Right. But one of the issues there is when you say "based on," it doesn't necessarily mean the judge sentenced within the guidelines and followed the guidelines to the T. It means was this case one that started with the drug guideline and the Drug Quantity Table.

COMMISSIONER HINOJOSA: No, that one is easy. Where there's been a departure and it is based on the Sentencing Range. But where you've been successful in the argument which has been made in a lot of the briefs that we get in the courtroom that
this guideline should not be paid any attention to at all, and that you should just make up your own mind as to what it should be, and what your own guidelines should be, then what do we do in those cases?

MR. NACHMANOFF: Judge, if I may, I think first of all I want to congratulate those lawyers that have successfully made that argument.

COMMISSIONER HINOJOSA: Well they've done it in some places.

MR. NACHMANOFF: They have. There have been judges that have decided to, after Kimbrough, engage in analysis to decide whether or not they felt the guideline was sound or not. And of course those judges know exactly the process they went through. And so I think the first answer is that 1B1.10 already addresses this, which is where there's been a non-guideline sentence the court is required under 1B1.10 to determine whether a comparable reduction is appropriate.

If in fact there's been an enormous variance, and the statistics are clear that where there have been variances they've been relatively
modest, but taking the reality that there are some
sentences out there that perhaps went down
substantially based on a notion that the ratio should
be eliminated altogether, I think there are two
responses. And I don't think there's anything about
1B1.10 that the Commission needs to do to address it
differently.

First of all, the judge will know exactly
what he or she did, and will be able to determine
that perhaps as a matter of his discretion, or her
discretion, no further reduction is warranted.

The reality is that in the vast majority
of cases where there has been a variance, that
variance has been for reasons that are specific to
that offender. It might be a combination of a
departure and a variance. It might be a pure
variance. But there will be something about that
case that warranted it, and the judge will be able to
determine whether or not, had he known that the
guideline would be lower, he would have had the
comparable reduction based on those factors. So that
is a separate issue.


The other issue that I think really addresses it completely is that, if a judge in fact rejected the ratio altogether and went to 1:1, in virtually every case that individual would be sentenced at the mandatory minimum. Because the mandatory minimum would act as a floor to prevent the judge from imposing a sentence identical to powder cocaine. That's the reality of the way the statute worked.

And so that is a person who now wouldn't have an opportunity to get that sentence lowered anyway. So I think you are talking about a very small number of cases, and I think 1B1.10 addresses that issue already.

CHAIR SARIS: Thank you. Ketanji —

VICE CHAIR JACKSON: Go ahead.

COMMISSIONER HOWELL: Well I was just going to follow up on that, because one of the ways that 1B1.10 addresses that issue is not just the proportional reduction, which is the sentence that you're referring to in 1B1.10, but the other way it addresses it is with the sentence that I asked about
earlier this morning to the Justice Department that says if the original term of imprisonment constituted a non-guideline sentence pursuant to 3553(a) in Booker, a further reduction generally would not be appropriate. Which is more the example that I think Chief Judge Hinojosa is referring to, that the federal public defenders pointed out as problematic and asked us to eliminate from our directions. And I think also Mr. Debold's testimony also asked us to do the same thing.

Since this has no explanation, and we have heard in your written testimony that this has been an issue in some jurisdictions where the Justice Department, reading 3582 the way that Ricardo talked about – which is, is there any jurisdiction here even to reduce the sentence if you've just ignored a guideline range? And the Justice Department apparently has asserted lack of jurisdiction even to consider a motion for a reduction of sentence in that circumstance – should we add an explanation note that makes it clear that, if the judge has already sentenced a defendant outside the guidelines to a
term of imprisonment that that judge has determined
is fair, that no further reduction is necessary, or
may even be appropriate, do you think an explanation
of what that sentence means to at least give the
court the jurisdiction to review the sentence as
opposed to an interpretation that apparently varies
across jurisdictions that a judge may have no
jurisdiction to even consider the motion, would be
helpful?

MR. NACHMANOFF: I think the problem can
be solved as we suggest by simply eliminating that
sentence. However, we absolutely do agree that it is
important that judges understand that they do have
jurisdiction. And let me just back up one second.

In addition to thanking you for getting
all the way to pages 25 to 26 of our written
testimony —

COMMISSIONER HOWELL: I always — I have to
say I always compliment the federal public defenders
on their testimony because it is always enormously
helpful.

MR. NACHMANOFF: The Supreme Court has
made clear that calculating the guidelines is a
necessary element of sentencing, and it is necessary
under 3553, and it has been necessary since Booker
and since Kimbrough, and that I don't believe truly
that there are judges out there that are skipping
that part that are not looking at the guidelines
appropriately following the procedure. They know
they will be reversed.

There are cases even recently from the
appellate courts reversing judges for not following
that procedure. The Supreme Court has emphasized
that the guidelines remain a benchmark and a starting
point, and that even if a judge concludes that there
are reasons to disagree with that guideline
ultimately, the idea that judges simply are not
paying attention to the book, or throwing it out
altogether I don't think is really a situation that
we've faced, or that judges who are conscientious, as
judges are, are doing.

Now having said that, this issue came up
when this language, which we believe is confusing,
first arose in 2008, in January, at the crack
summits, and Commission staff at that point articulated that, no, no, no, we think that judges should make an individualized determination to determine eligibility if there's been a departure, if there's been a variance, if there's been some sort of combination — because some judges engage in that kind of analysis — that trial judge will determine whether or not the factors that went into that decision to impose a sentence outside the guidelines were factors that would essentially double-count the lowering.

You know, we think that that confusion can be cleared up, as it was orally at the crack summits, by simply making clear — by deleting that sentence. And then it makes it clear that the comparable reduction can be imposed on an individualized basis when that judge goes back to see why he or she lowered the sentence.

COMMISSIONER HOWELL: Well if the Commission is not prepared to delete that sentence, would, just as PAG has submitted some explanatory language that they think would be helpful in resolving any confusion that may be prompting in some
jurisdictions, would the FPD be willing to provide an explanation that you think the Commission should consider, if we decided we want to address that point?

MR. NACHMANOFF: We would be happy to.

COMMISSIONER HOWELL: I would like to ask one more question, if I could, on Part B of our permanent amendment. I think there's general, uniform consensus, as you mentioned, that there should be retroactive application of Parts A dealing with the Drug Quantity Table with some differences around the edges, and Part C on crack possession retroactive application. Part B on the aggravating and mitigating factors that the FSA — that Part B of our permanent amendment implemented, the Justice Department has made clear that it doesn't believe that any part of Part B of our permanent amendment should be made retroactive.

And I want to just be clear from you all whether I am understanding correctly on the mitigating factors. There are two. One is the mitigating role cap. And as I understand your
I testimony, all of you agree that we should consider
making retroactive the mitigating role cap. But the
mitigating factor that we've added to 2D1.1(b)(15)
that provides this two-level downward adjustment for
minimum role offenders if certain factors are met, do
I understand all of you that you agree that that
particular part, mitigating factor in Part B, should
not be made retroactive because of the additional
fact-finding that may be required?

MR. NACHMANOFF: That's correct.

COMMISSIONER HOWELL: Can each of you
address that?

MR. DEBOLD: Yes, that's correct.

MR. FELMAN: Yes.

COMMISSIONER HOWELL: And, Mr. Lavine, I
was confused in your testimony. What is your view on
that?

MR. LAVINE: Our view is that all
mitigating factors should be made retroactive. If
it's an additional fact-finding, it would be
relatively minor additional fact-finding. But if it
in fact helps the defendant in terms of what his
ultimate sentence would be, it should be made retroactive.

VICE CHAIR CARR: And your answer would be the same if she had called you "Mr. Lavine"?

(Laughter.)

VICE CHAIR JACKSON: Can I just follow up on that? Because I have to say, this Part B issue is making it all complicated for me, and perhaps unnecessarily so.

You know, I understand the argument that offenders who committed their crimes before the FSA should not be prevented from getting the same benefit as those who will be sentenced prospectively. But if we exclude the aggravators and the mitigators that the FSA provide for, it seems to me that we have a situation in which prior offenders could actually be getting more of a benefit under some circumstances, and less as far as the mitigators are concerned.

Now, you know, the response — which Judge Howell pointed out — is, or at least I took away from your testimony, is that it would be too administratively difficult to sort of figure out the
aggravators and the mitigators.

First of all, I just wanted to figure out if that's really so. We have a smaller pool here—12,000 people as opposed to twice as many the last go-round. It seems as though the commitment that has been articulated by everyone is such that if there's any chance that judges would, you know, go into this and try to figure it out and get it right, it would be in this circumstance.

Everybody is committed to sort of, you know, doing the right thing. So it is odd to me that we sort of have given up this notion of having individualized hearings. If we're going to have judges do this, then why aren't judges doing it?

That is my first question.

Then the second question is: What about the case if we say no individualized hearings, we're just going to do this on the papers, what about the case in which it is clear, very clear on the papers that the aggravator or a mitigator applies? What is a judge supposed to do under those circumstances?

MR. NACHMANOFF: I think there are two
quick answers to that which goes to sort of the pragmatic reality of how this process works. Which is, those facts that are likely to be in the presentence report and be in the record that both the lawyers get access to and the judge gets access to, are things that it makes sense to recalculate and do.

With regard to both the aggravators and the mitigators, setting aside the minimal role cap — because that clearly was a finding that would have been made at the time and be in the presentence report and be in the court record — both the aggravators and the mitigators are facts that there would not have been reason for the parties necessarily to argue about, to present to the judge at the time, or for the probation officer to include in the presentence report.

And so as a practical matter, unlike the other kinds of fact-finding that can be done and, you know, now that presentence reports and even the Eastern District of Virginia has come into the 21st century and PSRs can be disseminated electronically on ECF, which was one of the benefits that came out
of retroactivity last time, we now have a process
that's relatively efficient even with old cases in
going the essential facts before the court.

To ask the parties in that small number of
cases where each of those factors may apply to try
and figure out where those witnesses are and present
it, I think is not an appropriate forum in the
3582(c) proceeding. And that is consistent with the
history of retroactivity.

So it is not a matter of not caring about
those issues.

To answer the second part of your
question: If it is patently clear, for whatever
reason, that an aggravator exists, or otherwise, that
is something that the lawyers can bring to the
attention of the court. And certainly a judge could
in his or her discretion say, well, here is a factor
that I am aware of that may go into my analysis as to
the extent of the reduction.

But I think those circumstances are going
to be pretty rare, given the nature of these factual
changes, unlike all of the other changes that we have
VICE CHAIR JACKSON: Mr. Felman?

MR. FELMAN: I think that was the main basis that I was looking at, too, was it's sort of a weighing. You know, if I thought that the mitigators and aggravators were going to be applying in a very, very large number of the cases, I think that could change the analysis. I think you have to weigh the burden of going to all the trouble of transporting people back and having new evidentiary hearings, which can be difficult. Some of these things are pretty old cases. Versus how much is the actual sentencing outcome going to change much?

And that is why I think there have been some questions recently about whether the Commission is looking at data on how many cases would these aggravators apply to?

And I guess it is just my gut sense that there's probably a pretty small number of cases. They are very specific and fact-intensive — these premises with the use of a — you know, there's a whole lot of things in there. I just don't think the
number of cases at the end of the day warrants all
the extra effort.

I have heard the point made that you could
have a circumstance in which somebody sentenced now
actually gets hurt, compared to somebody sentenced
before. And I think the answer there is, look, we're
doing the best we can. I think that Pepper
recognizes that there's going to be occasions where
somebody might get a crack at a resentencing, and
they might get a benefit that somebody else didn't
get because they didn't get a resentencing because
they didn't get a remand.

These things just happen. I think that
what the Commission is doing is rough justice here.
We are going to try to do the best we can at
implementing fairness and in getting rid of this
inequity. And I guess our judgment was that changing
the Drug Quantity Table gets it pretty close, and
that the rest of it is not worth the effort.

CHAIR SARIS: Commissioner Wroblewski?

COMMISSIONER WROBLEWSKI: Thank you,
Judge Saris.
Can I ask the same question in a slightly different way? It strikes us that the intent of Congress was to differentiate—was not only to address the 100:1 ratio, but it was to also in the FSA to differentiate the "more dangerous" from the "less dangerous" offenders.

Mr. Felman, if we could wave a magic wand and know with certainty everybody who is in prison and whether any of the aggravators and mitigators would apply to them, am I right that you would say: Apply the entire guideline amendment retroactively. Is that right?

MR. FELMAN: Yes.

COMMISSIONER WROBLEWSKI: Okay, and then what I think you're saying is we can't. And that if we could, certain categories of offenders would be categorically denied any benefit from the change in the Quantity Table based on a finding that those persons were involved in these aggravating factors.

We can't, though, wave this magic wand. And so we have to do—because of the burden, which is I think we are in complete agreement about that—and
so we have to do rough justice. And if we don't do anything with regard to the aggravating factors, if we just sort of leave them aside, there are some people, as Commissioner Jackson indicated, who will get a benefit that if we applied the entire thing together would not get a benefit?

Is that correct, roughly?

MR. FELMAN: Yes. But of course there's also the mitigators. And so it's on the other side, too. If we could wave our wand, there would be people who would get lower sentences because they would qualify for these mitigators. And so, yes, I think it is the same answer I gave before.

And it is not that we can't do it, I think we could do it. It is a question of balancing resources versus outcomes.

COMMISSIONER WROBLEWSKI: Right. And Mr. Nachmanoff talked about the purpose of a 3582(c) proceeding, as opposed to an initial sentencing proceeding, and there is a difference. And there is a difference in the fact-finding that we would normally have in the two different proceedings, and
the amount of individualized examination of all the
facts and circumstances of the case.

MR. DEBOLD: I view it as a default rule.

I mean, our default will be you don't apply the
aggravators. But if the government comes forward and
says: Look, judge, he would have gotten a two-level
increase if this provision had been in effect, so
take that into account in the amount of the
reduction, then the judge can do that. It is part of
the individualized consideration of circumstances.

But I would not require all the parties
and the court to do this kind of analysis in every
case and usually come up empty; but would rather put
the burden on the party who is going to,
quote/unquote "benefit" from the aggravator or the
mitigator to come forward with the information and
say, judge, this is a special case. You should take
this into account, just like you should take into
account all the other public safety factors.

COMMISSIONER WROBLEWSKI: But if we did
that, wouldn't you, Mr. Debold, wouldn't you insist
that the government produce evidence —
MR. DEBOLD: Yes.

COMMISSIONER WROBLEWSKI: — and perhaps

live evidence, and you would have an opportunity to
rebut that evidence —

MR. DEBOLD: In the few cases —

COMMISSIONER WROBLEWSKI: — and the

defendant would probably have some sort of

opportunity to be physically present?

MR. NACHMANOFF: If I can just make the

brief point that the position that we're taking is

really consistent with exactly what the Judicial

Conference urged the Commission to do in 1994 when it

changed the rules with regard to 1B1.10, with regard

to the one-book rule, applying the entire manual as

opposed to the change in the guideline itself. And

the notion was exactly this: 3582(c) proceedings,

when there's been a change, an ameliorative change,

that everyone agrees should be applied even to people

who have been sentenced, you don't want to have to

open the can of worms to create essentially

additional fact-finding that would be really

burdensome.
Now let me just be clear that even in the process that we have, based on 1B1.10 as drafted by the Commission originally, there was a need for adversarial hearings. There was a need for counsel. There was a need for litigation when there were arguments over dangerousness, or activity in the jail. I saw a lot of SENTRY reports in which somebody had failed to brush their teeth, or not show up for count, and that could be used as an argument for why they had bad conduct in jail.

That was the sort of thing where you needed to have litigation to resolve whether or not those kinds of facts should result in a denial of the retroactive application.

Of course if there were serious facts that needed to be presented by the government, like a shanking or a stabbing, that might well result in a denial. But that required a hearing with some fact finding.

CHAIR SARIS: Let me ask you this. I think that one of the big concerns of the Department of Justice was the resources that went into
determining whether someone was a public danger. And they basically used these categories as a proxy for that, because they wanted to avoid having these kinds of hearings, and getting involved in the rough justice business.

It is my sense from Boston, which is a very small jurisdiction compared to all of yours, that we actually didn't have that many of those kinds of hearings. There were a few, but in general the collaborative process — and I was the judge who was the liaison to that group — worked out almost everything. And it was precious few cases which resulted in this huge new hearing.

MR. NACHMANOFF: That's exactly right.

CHAIR SARIS: We're small — and is that your experience in both of your jurisdictions?

MR. NACHMANOFF: Yes. And, you know, just to make one point about statistics, in this round — which involves half the number of cases that were filed, 25,000 last time; there are 12,000 that may be eligible this time — 80 percent of the jurisdictions have 200 eligible defendants or less.
I would point out, there were jurisdictions like the Northern District of West Virginia, which if you look at the data shows that there was a 98 percent granting rate, which was a reflection that probation, and the federal defender, and the U.S. attorneys, and the courts, all worked together to determine who was eligible, and who they were going to fight over, and there were five. There were five denials.

And whether or not those had hearings or not, I don't know, but I think that is exactly right. And we know, as a result of Dillon, that there will be even less litigation.

So I don't think the Commission should worry about resources. It is clear that, both because of the numbers, the experience of having gone through this before, and the resolution of the number of litigations issues, that the resources that the Department of Justice will need to devote just as in all other parts, including the federal defenders, will be significantly less this time around.

VICE CHAIR JACKSON: But only insofar as
we do A and C, right? You're saying if B comes in, then we have this resource problem?

MR. NACHMANOFF: Well, I don't know if it would create a resource problem, but it would certainly go to that issue.

CHAIR SARIS: Were you the federal defender when the 2007 amendments were retroactive?

MR. NACHMANOFF: I was.

CHAIR SARIS: So how many full-blown hearings would you say you had, let's say if somebody was in Category VI, or had a firearm?

MR. NACHMANOFF: Very, very few. If an AUSA who was — especially we often would have an AUSA who was familiar with the case, who prosecuted the case originally, so it wasn't just a matter of reading the presentence report. They would know the case.

If they really thought that this was an individual who posed a risk of danger, they would file a pleading. And if there needed to be a hearing, there would be a hearing. Most of the time the objections came not from past criminal conduct,
or the possession of a gun, but from post-conviction behavior in jail.

And the BOP became very efficient at providing the SENTRY report. And then if there was a dispute over the toothbrush, or the stabbing, that's when you might have a hearing. But those were relatively rare, because as you can imagine it doesn't take a rocket scientist to figure out whether somebody's record in prison is really serious or not.

CHAIR SARIS: Did you have that experience in Florida?

MR. FELMAN: Yes, like I say I wasn't directly involved in it. I have spoken to the probation officers, the U.S. attorneys, and the defenders, and my understanding is that it was essentially done almost by consensus. They would get the list from BOP. They would compare it to the probation list. They could come up with a pretty accurate list of who was eligible.

The defender was then appointed to represent those people. They sat down with a representative of the U.S. Attorney’s Office. They
went through their files. And I think there were
very, very few hearings. And it was essentially all
done on the paper. And I think that if you were to
make Part B retroactive, there probably wouldn't be
that much on the mitigating side. I think the role
cap you could probably do, because that's going to be
in the PSR. The main thing is this super-minimal
role/spouse issue, or whatever, and I guess the
defender could ask their defendants, hey, do you
think you qualify for this? And if so, they would
ask for those hearings.

I think the more troublesome side would
probably be from the government side, because you've
got violence, threat of violence, bribery of a law
enforcement officer, this premises business, and this
super aggravator. It's a pretty — you know, it's a
pretty wide array of factual circumstances, and even
if there's stuff in the PSR about it, I think we have
to be a little bit reluctant on relying on that.

I mean, there are times where I don't
always make a big deal out of something that's in the
PSR if it doesn't affect the guidelines. So now that
it would affect the guidelines, it might change my calculus.

So I think that the issue would be on the government. They would have to decide, I guess, how much of their resources they want to devote to this, and how seriously they want to push these new aggravators.

It would certainly be up to them. They wouldn't have to. I think it would be mostly on them.

COMMISSIONER FRIEDRICH: This is directed to Mr. Nachmanoff, Mr. Debold, and Mr. Lavine.

You all three argue that we should apply just one provision in Part B, correct? And—

MR. NACHMANOFF: Minimal role cap.

MR. DEBOLD: Yes.

COMMISSIONER FRIEDRICH: Right. And the basis of that is because it's administratively easy, right? That's the basis of your recommendation?

MR. NACHMANOFF: No. We believe the minimal role cap should apply because it relates directly to the drug table. Unlike the other
mitigating and aggravating factors which are factors that are not necessarily related to the change in the drug table, which is the essence of this retroactive application, the minimal role cap of course caps based on where you fall in the drug table, and therefore there is a consistency in seeking that.

We calculate, I think the data shows there are about 88 individuals who would qualify.

COMMISSIONER FRIEDRICH: Well there are 88 individuals who would qualify for all drug offenses, but there are only five crack offenders who would qualify. So when the Commission decides whether to apply something retroactively, it looks at the purpose.

And as you pointed out, the purpose of this part of the statute is very different than the rest of the statute, which was to rectify an unfairness, right? The purpose of this was to fine-tune 2D1.1. And of course Congress included the mitigating factors, as well as aggravating factors. And so for the Commission to carve out just one aspect of this based on the fact that it
relates to the drug table, and it's administratively easy, when the purpose is different, and the number are so few, traditionally the Commission hasn't applied amendments that affect so few retroactively. And of course as you point out, when the Commission did the initial minimal role cap it did not apply that retroactively. So my question is: Recognizing that only five crack offenders would benefit from this, do you still think that the Commission should carve out this one part, contrary to sort of the structure of the statute, and apply that retroactively? It just does not make a lot of sense when you consider all the factors as a whole.

MR. NACHMANOFF: Well it would not be difficult to do. It would certainly make a huge difference to those five defendants, and it certainly would make a difference to anyone else who was eligible for whom that could be determined who are amongst the least culpable of drug offenders in the system.

COMMISSIONER FRIEDRICH: Recognizing that the purpose isn't to rectify an unfairness, but just
to fine-tune the drug guideline?

MR. NACHMANOFF: I'm a great believer in fairness.

CHAIR SARIS: And I think that is a good point to take our morning break. Just as with my juries, I don't expect anyone to sit for more than two hours, and we are beyond that. So we will be back here at 11:00 o'clock. Thank you.

(Whereupon, a recess was taken.)

CHAIR SARIS: Good morning. We need to get going here. I should bring my gavel down to get us going.

All right. So thank you very much. This is our law enforcement expert panel, and we begin with Asa Hutchinson, who is a former U.S. attorney, member of Congress, administrator of the Drug Enforcement Administration, and current senior partner in the Asa Hutchinson Law Group in Little Rock, Arkansas. Previously he has served many years in a variety of roles in the federal government and is currently also an adjunct professor at the University of Arkansas at the Little Rock School of
Law. Welcome.

Next we have David Hiller, who is the national vice president of the Fraternal Order of Police. For over 38 years he's worked at the Grosse Pointe Park Department of Public Safety in Grosse Pointe, Michigan, where he has worked in both uniform and plain clothes assignments. Thank you for coming.

And finally, Christopher Chiles is the chairman of the board of the National District Attorneys Association. He is a prosecuting attorney of Cabell County in Huntington, West Virginia, and serves as chairman of the board of the National District Attorneys Association. And he has been a prosecutor since 1981 and was elected prosecuting attorney in 1990. Thank you for coming.

Mr. Hutchinson.

MR. HUTCHINSON: May I proceed?

CHAIR SARIS: Yes.

MR. HUTCHINSON: Thank you, members of the Commission, for your work on this particular issue, and for your invitation today.

I approach this topic as someone who has
been engaged in this issue for over 12 years. When I first got elected to the United States Congress, I was probably one of the few Republicans that signed on to support reducing the disparity between crack and powder cocaine sentencing.

I did this as a member of the House Judiciary Committee. I did this as a former United States attorney, and someone who was very much supportive of law enforcement. And I did this because I saw the fundamental unfairness of the sentencing regime at that time, and believed it should be remedied.

And thankfully, for your leadership and others, this has been remedied by the Fair Sentencing Act that was passed. And now the issue is retroactivity, and I am here today to express my support for making the new guidelines retroactive in the application of the Fair Sentencing Act.

I think it is the right thing to do, and I think in the long term having a fair sentencing structure aids confidence in the criminal justice system and will help law enforcement as a whole.
I will make my testimony very straightforward today, and then look forward to the questions that might come after. But my views are shaped as a former federal prosecutor. I look back at the 1980s whenever I was a Reagan appointee. We prosecuted in Arkansas cocaine cases. And it is true, without any doubt in my mind, that tough sentencing laws makes a difference in the public view and the public consumption of illegal drugs.

And in fact, since the 1980s it should be noted that we have reduced overall cocaine usage in this country by 75 percent. And I like to underscore that point because most people do not believe that. But it is true under the statistics, and I think there's a lot of reasons for that, but part of it is our tough sentencing law.

And I don't want to do anything that undermines that. I do not believe that the Fair Sentencing Act undermines that success, and we can continue down that path. It is also important, though, when I reviewed this again as I was head of the Drug Enforcement Administration. I don't speak
for them today. The Attorney General did an
outstanding job representing the Department of
Justice today. But for my experience as head of the
DEA, I looked at this issue again and I did not see
it undermining law enforcement efforts. I did not
see it making it more difficult to pursue the big
cases.

I think that in the long term it helped
what is most important in our society, and that is
confidence in law enforcement and our criminal
justice system.

And whenever you look at the concerns of
law enforcement, many times the Department of Justice
expresses concern about workload. They, with great
congratulations, handled well the 20,000, I believe
it was, review of the 2007 two-level reduction. And
that was handled well. They handled it under their
current workload.

And whenever you look at the potential of
12,000 that are eligible under the – if we made this
retroactive, it breaks down by district fairly well.
In Arkansas, there would be 71, in the Eastern
District of Arkansas, and 29 in the Western District of Arkansas. Those are real lives that are impacted that could be reviewed. But the workload is manageable for those districts.

The Eastern District of Virginia would be hit the hardest, about 844, but from my experience you can manage that kind of workload. They have a large office, but you can also assign assistant U.S. attorneys from across the country if they need additional assistance.

The other concern of law enforcement is simply that we're going to be releasing dangerous criminals. Well the fact is, those who were sentenced under the guidelines then in effect by the Sentencing Commission, those factors were considered. They should be reconsidered, if there's a resentencing under a retroactive application, and I certainly believe that the public safety issue should be considered by the judge in resentencing. But beyond that, I don't think — I think the concern about safety can be protected by that review once again by a judge in any resentencing because of retroactive
So in conclusion, I do support the retroactive application of the guidelines. I applaud the work of this Commission in taking a leadership role. And I do hope that there will be a growing support for that in the Congress of the United States, as well.

Thank you.

MR. HILLER: Thank you, Madam Chairman.

As indicated, I am the national vice president for the Fraternal Order of Police. We are the largest law enforcement labor organization in the country with over 330,000 members across the country.

I want to thank you, Madam Chairman, and the rest of the Commission for inviting me here today to give you the view and the opinion of these rank-and-file boots-on-the-street that work every day to support our communities.

The FOP strongly opposes any retroactive application of the guidelines. It would allow for the release of thousands of convicted drug offenders into the communities where the state and local law
enforcement are already under immense pressure. According to the data provided by the Commission, more than 12,000 offenders would be eligible to receive reduced sentences. And within five years, over 7,000 convicted drug offenders could be released back into society. Half that number, 3,500, would be released within two years of enacting the proposed retroactive reductions.

These are significant numbers of offenders that could be released early, placing undue burdens on the law enforcement personnel working the street.

It should also be noted that the sentence reductions would be in addition to any other reductions the offender receives. Cooperation with the government, good time rulings in prisons and so on, would also credit early release.

It is also important that the Commission recognize that these are not low-level dealers, or first-time offenders. At least 80 percent of them have been previously convicted of a crime. A majority of them have multiple prior convictions. And at least 14 percent of them also possessed a
firearm in connection with their drug dealing operation.

Furthermore, more than 25 percent of these offenders are in the highest criminal category history. Clearly these are the inmates that are far more likely to be what we call "repeat offenders."

The current fiscal climate is such that law enforcement agencies are being forced to lay off officers and reduce community services across the nation.

State and local agencies have been forced to make drastic cuts to their law enforcement personnel, as much as 44 percent in some cases.

These cuts have already placed a great strain on law enforcement officers who work tirelessly to keep their communities safe.

As indicated in the intro on my other life, other than the FOP, I am the chief of police of the City of Grosse Pointe Park where I have been there, in January it will be 40 years. We border Detroit on two sides. I can assure you, crack cocaine is a problem that we deal with every single
day. And the guidelines and the certainty of
punishment to me is critical for us to maintain the
community that we want to have.

Releasing thousands of those drug
offenders would only add to that strain, creating a
more dangerous situation. These criminals are
responsible for creating and feeding the addiction of
an estimated 1.4 million Americans. Early release of
these criminals would only serve to further the
destruction of our communities from the evils of
cocaine.

In conclusion, Madam Chairman, I would
like to thank you and the Commission for your
consideration of the view of the 330,000 members of
the FOP across the nation.

CHAIR SARIS: Thank you. Mr. Chiles?

MR. CHILES: Madam Chair, Members of the
Commission, I also want to thank you for inviting me
to testify before you on behalf of the National
District Attorneys Association, the oldest and
largest organization representing over 39,000
district attorneys, states attorneys, attorneys
general, and county and city prosecutors who have responsibility for prosecuting 95 percent of the criminal violations in every state and territory of the United States.

As the chair mentioned, I am from Huntington, West Virginia, and I have been a prosecutor for right at 30 years. I have served on the board of directors of NDAA for over 15 years. In July of 2008, I became the president-elect, and then served as president from July 2009 to July of 2010. I now serve as chairman of the board of NDAA.

It has truly been an honor to serve NDAA, and I have developed even more of an appreciation and respect for those men and women who have chosen to make the sacrifices and serve their communities as state and local prosecutors.

It is clear that all of our jurisdictions, be they large, small, or somewhere in between, have many of the same problems, and prosecutors in all these jurisdictions are working every day to find solutions, often innovative solutions, and ways to make our communities safer.
It has been an honor to represent America's prosecutors these past three years, and it is an honor to represent NDAA on behalf of America's prosecutors before you today.

I am also proud that NDAA continues to be at the forefront of promoting equity and fairness within America's criminal justice system. Our membership is made up of state and local prosecutors who have been leaders in introducing drug courts, diversion programs, re-entry programs, mental health courts, and many other initiatives in our communities.

As Jim Felman mentioned a little while ago, I also serve as the vice chair on the Criminal Justice Section of the ABA, and I also had the honor of being NDAA's representative to the American Bar Association's Commission on Effective Criminal Sanctions, which was of course the follow-up to the Kennedy Commission.

And NDAA, in conjunction with ABA, came up with many historic recommendations of alternatives to incarceration. Prosecutors are not just looking to
put people in prison. We are looking for appropriate, appropriate dispositions based on the offense, the offender, and all these other factors. We don't just want to put people in prison and lock up the cells.

While I was serving as president of NDAA in 2009, we were approached by several senior members of the United States Sentencing – Committee on the Judiciary when the Fair Sentencing Act was first introduced. NDAA agreed that a 100:1 ratio in federal sentencing guidelines between crack cocaine and powder cocaine was outdated and needed to be addressed.

And we offered testimony supporting a reduction in this sentencing disparity before the House Judiciary Committee in May of 2009. NDAA worked closely with members of both the House and Senate Judiciary committees on the Fair Sentencing Act to identify the proper adjustments to the sentencing disparity between crack cocaine and powder cocaine.

NDAA was one of the first major law
enforcement advocacy groups to support and actively
push for the Fair Sentencing Act to be passed by
Congress and signed into law.

Now while NDAA firmly believes that
passage of the Fair Sentencing Act was the right
thing to do for America, we strongly oppose this body
making its amendments to the sentencing guidelines
retroactive for a variety of reasons.

Each individual case handled by America's
prosecutors, be they state and local prosecutors, or
United States attorneys and their assistants, is
analyzed and handled individually based on the merits
and the gravity of that case under the laws which
existed at the time the crime was committed and
prosecuted.

Now obviously the contemplated action of
this committee regarding retroactive application of
these new sentencing guidelines only directly affects
the federal court system and the United States
attorney's offices around the country.

However, state and local prosecutors and
local law enforcement agencies have been working very
closely together with our federal counterparts for many years in this ongoing effort to combat illegal drugs and appropriately prosecute the drug dealers.

We have, as state and local prosecutors, have a strong and legitimate interest in this debate, as this decision will directly affect the safety of our communities that we have sworn to protect.

Over the last 30 years, probably 90 percent of the cases handled in federal court were disposed of by plea negotiations which resulted in a guilty plea. In almost all of those cases, the offender was facing many more charges than those to which he or she ultimately pleaded guilty, including non-drug offenses.

The federal prosecutor, defense attorney, and defendant all knew what the possible penalties were for the various offenses to which the defendant was subject to being charged, and the strength of those various offenses.

Agreements were reached based on those known factors, especially the likely penalty. The federal prosecutor undoubtedly considered the
defendant's prior history and potential threat to the community when engaging in these negotiations which resulted in a particular plea and disposition.

Had the penalties been less at the time the case was pending, the prosecutor would have had the ability to alter his or her negotiation to still be able to achieve a punishment which he or she felt to be appropriate for that individual for the criminal activities in which the defendant was engaged.

To arbitrarily now retroactively apply these new sentencing guidelines totally negates the thoughtful and reasoned negotiations which the federal prosecutor engaged in originally at a time when he or she knew far more about the individual and the appropriate sentence.

This result would have a negative effect on our communities. But there are other ways in which this contemplated action by the Commission would directly and unfairly impact state and local prosecutors.

Many of these defendants were also
committing state and local crimes, including non-drug offenses such as burglary, aggravated assault, and robbery. In the vast majority of those cases, state and local prosecutors agreed to dismiss their state charges, or in some instances agreed to a concurrent sentence due to the federal sentence the defendant received.

Had the federal sentence been significantly less, or more aptly for this discussion had the state or local prosecutor been told that years after the plea and sentencing in federal court the sentence of the defendant would be significantly reduced, then the prosecutor would have never agreed to dismissal of the state charges in the first place.

If this sentence reduction is applied retroactively, it will negate the well-reasoned, good-faith negotiations that the state or local prosecutor engaged in with the defense attorney, and the decisions made by him or her based on their knowledge then of the seriousness of the other offenses, the degree of violence used in committing those offenses, and the danger these offenders caused
to the respective communities.

And it will happen without us having any input, any say, which we had originally. And that is not fair.

These state and local prosecutors relied on and had an absolute right to rely on the federal sentences received by these offenders in making their decision to dismiss local charges. And such actions went on virtually across the United States. To change the rules of the game now when the state or local prosecutor is now barred from bringing those same charges that could have been prosecuted at the time but were dismissed due to the sentence received, and in reliance on the fact that the sentence would not change, is simply wrong for the victims of the crimes committed, and the communities affected by the crimes.

Such a decision would affect literally thousands of cases and decisions made by state and local prosecutors across the United States and would place the citizens and their communities at risk.

By your own statistics, over one-half of
those eligible for retroactivity were sentenced
between 2011[sic] and 2011, and the average age of
those eligible on November 1st will be 36 years of
age. That means over one-half of the people eligible
for release were 30 years old or more when convicted.
So we're not talking about 18 and 20-year-old kids
who made a mistake. These are mature men and women
who were clearly old enough to know better, and who
were almost all prior offenders also.

State and local prosecutors, as I said,
prosecute over 95 percent of all the crime in this
country. To be prosecuted in federal court, these
offenders have to earn it. This was not, generally
speaking, their first or even second offense. They
deserved the sentence they received, and everyone had
the right to rely on the sentence which was imposed.

And I would submit this is also shown by
Table 5 of your May 20th, 2011 memorandum. That
table shows that for 7,000 of the 12,000 eligible for
retroactivity, 60 percent, their crimes involved
weapons or other aggravating factors. And many of
them used weapons in state charges that were not
prosecuted because of the agreement reached in federal court. So there was a lot of violence attendant here, also.

Unfortunately for America's communities and the countless victims of crime brought on by the sale, distribution, and use of drugs in America, drug criminals are not stupid. It is dangerous for America's communities if we make this sentencing retroactive, and it also opens the door for further decriminalization debate for other drug-related crime in the future.

A very dangerous precedent, and one that is very unfair to America's prosecutors and citizens that we are sworn to protect will be set if this Commission decides to apply these sentence reductions retroactively.

Again, I would like to thank you for giving me the opportunity to testify before this Commission on behalf of America's state and local prosecutors, and I would be happy to answer any questions.

CHAIR SARIS: Thank you, Mr. Chiles.
VICE CHAIR CARR: Mr. Hiller and Mr. Chiles, according to our research the average reduction in sentence for the people who would be eligible would take them from 164 months to 127 months. Why do you think an average sentence in excess of ten years for these defendants is inadequate for purposes of punishment and deterrence, given the fact that the whole reason for the reduction under the Fair Sentencing Act was that the 100:1 disparity was unwarranted, had a disparate racial impact, and was unfair?

MR. CHILES: I'll answer that from my side. As a state and local prosecutor, and I assume as a federal prosecutor also, when I get a case I look at the offender. I look at the offense, the seriousness of the offense. And I decide what sentence is appropriate, or what range I feel would be appropriate for that offender.

And then I structure my negotiations around that. So I have the option then of taking into account guidelines, quantities, different things like that. If I don't feel, even though —
VICE CHAIR CARR: Let me interrupt you there.

MR. CHILES: All right.

VICE CHAIR CARR: Because I retired from the U.S. Attorney's Office six years ago, and that's not the way we operated. That's not the way the Department of Justice directed us to operate. And before 2005 and the Booker decision, that is not the way a prosecutor or a judge could operate.

The sentences were determined by mandatory minimums. They were determined by guidelines. And we didn't sit there and get to decide what a fair sentence should be. We were dictated by what Congress and the Sentencing Commission had determined, which we have now, the Congress and the Sentencing Commission, determined was excessive.

MR. CHILES: I understand. But you had the right to decide on how many counts you were going to make them plead to.

VICE CHAIR CARR: Counts didn't matter. Drug quantity mattered. I'm just saying that the differences in our systems may be vast, but my
question was why is an average sentence in excess of
ten years for these defendants inadequate for purposes
of punishment and deterrence?

And I am guessing that that is a greater sentence than most state jurisdictions would be meting out.

MR. CHILES: Well if they also committed an aggravated robbery in my jurisdiction, and I chose not to proceed on the aggravated robbery because of that ten-year sentence, I had a right to rely on the fact that they would serve that ten years.

VICE CHAIR JACKSON: Mr. Chiles, that argument, which I understand and in some ways appreciate, which is that the negotiations were structured around what you understood the federal sentence was going to be, would seem to undermine any retroactivity determination on the part of the Commission.

In other words, it is not really directed at crack versus powder, which you say that you all supported in terms of the Fair Sentencing Act prospectively, but I mean is it your assertion then
that the Commission should never make a retroactivity
determination with respect to any issue? Because
that would be the case with respect to your relying
on the previous penalties.

MR. CHILES: I am not familiar enough with
the federal laws, because all I've been is a state
prosecutor my whole career. In state court, they've
got 30 days to file a motion to reconsider and then
it's done. There's something to be said for
finality. There's something to be said for the
victim knowing what the sentence was going to be, and
being entitled to rely on that. And there's
something to be said for the community knowing what
the sentence was going to be and being able to rely
on that.

When these defendants and their counsel,
again, enter into plea negotiations, they knew what
the guidelines were. And everything was agreed upon
at that time based on the law. And I just don't
think it is right to go back now, years later, and
change it.

VICE CHAIR JACKSON: And so retroactivity
is not a common thing in the state.

MR. CHILES: No, ma'am. Not at all.

MR. HILLER: I listened to the panel before us, and I share the panel today with additional legal minds that I am very thankful I'm a cop — we're the boots on the street. We're the ones that make the arrests.

And I was in charge of our detective bureau for a number of years, and we have never, ever convicted an innocent person under my watch. But that's not to say that a number of them weren't given some tremendous breaks. And again I'm familiar with state courts. Wayne County Third Circuit Court in Wayne County, Michigan, which is Detroit, and which we are part of, 90 percent of our felony cases never go to trial, never go to trial.

We don't have the time. We don't have the volume. We don't have the prosecutors. We don't have the judges. We don't have the courts. We know the cops that send them down to court. We cut deals. And that is, we believe no retroactivity, absolutely. That's from the police perspective.
You broke the law. You got sentenced.

You took your lumps. Do your time. That's the cops.

When we make a mistake on the street, we're now held to a higher standard also, which we should be, and we agree. But we take a little bit different perspective than the legal minds, and I respect all of them. You know, I envy them for their guidance and their support. But on the same token, the guys on the street are saying: You broke the law. You've got to pay.

In fact we were just talking about, I noticed huge, dynamic differences in our communities since we have less law enforcement and unemployment. And I actually anticipated crime going up in the communities. And, knock on wood, it hasn't. And I attribute that to consistency.

You break the law; you're going to be arrested.

VICE CHAIR JACKSON: Did you see any difference after 2007? The Commission previously made a retroactivity determination, and I'm just wondering whether from the law enforcement
perspective there was any impact in your community.

MR. HILLER: Understand, we deal mainly, 99.9 percent state and local stuff, not the federal stuff, but we know the federal guidelines are there, the federal laws are there. And we work, as Chris said, we work with the Federal Government also. And we take the best case for the victim, the community, and the defendant. And they cut the deals, and they do it. And I think that—I don't know the 164, 127, the numbers you quote, how many of those deals are out there, but they broke the law. And the cops on the street are saying: Do your time. That's us.

COMMISSIONER HINOJOSA: I guess a follow-up question. Does this mean, Mr. Chiles, that you would be making different decisions now that we have the Fair Sentencing Act as to what cases you would call on the Federal Government or the federal prosecutor to take, as opposed to the cases that you did in the past? Because obviously the penalties are still high from the standpoint of the mandatory minimums apply. So the question is: Does this mean you're going to have a different viewpoint as to what
cases you would turn over to the Federal Government, as you did before, since you supported the Fair Sentencing Act?

MR. CHILES: Yes. I think what it means — and again, I can't obviously speak for 39,000 prosecutors around the country — but I think again, one of the things we look at is the total picture of what is the appropriate resolution of this case based on the seriousness of the offense, the seriousness of the offender, the injury to the victim, et cetera.

And we take all of those things into consideration. Will there be some cases where now, because of the 18:1, or the new sentencing amount, whatever it is, that we might also hold out for a state charge where we didn't before, sure. I can see circumstances where that might happen.

Will it happen in every case, just as a matter of form? No sir. But it will be a factor in the determination in the plea negotiation process.

CHAIR SARIS: Judge Howell.

COMMISSIONER HOWELL: Mr. Hutchinson, thank you so much for being here, and thank you also
to Mr. Hiller and Mr. Chiles.

I take it that you differ with the Department of Justice's position on retroactive application of the FSA implementation amendment in that the Justice Department would like to exclude certain categories of crack offenders from having the judge being able to exercise discretion about whether or not to grant a motion for a reduction.

And I take it that you differ from that and feel that we should trust the judges to exercise their discretion in evaluating all the public safety factors which, you know, as Mr. Hiller and Mr. Chiles pointed out, are very, very important to the consideration. Am I understanding your testimony correctly?

MR. HUTCHINSON: You are. And that is my view. And let me elaborate on it. I did review the Attorney General's testimony as I came in today, and I believe one of the assistants that outlined some of the restrictions on the retroactivity.

And I sort of understand where they're coming from from a political perspective, but in
terms of a rational, logical application of the
sentencing guidelines, I do not see carving out those
distinctions. The reason being, obviously, as you
know, that the criminal history category is one of
the biggest factors in the original sentencing.

I think another category was whether they
had a mandatory minimum for the gun charge, or a gun
was in place at the time. Those are all factors in
the original sentencing, in addition to the quantity.
We are simply saying that the quantity should be
re-evaluated under the Fair Sentencing Act.

That to me is a logical, sensible
application of the guidelines.

COMMISSIONER HOWELL: In fact, some of the
witnesses that we're going to hear from later have
used the word, if we exclude certain categories it
will be like double counting them in a reduction
context. Is that a view that you share?

MR. HUTCHINSON: Well, I would share the
view that it would be unfair. It would be
inconsistent. And I am sure that some creative
lawyers can figure out some ways to try to challenge
that. Now I don't know whether they would be successful or not.

But for those reasons, I think it is important to make it retroactive and to not make a hodgepodge decision of retroactivity. I think that could create a lot of problems.

But let me elaborate, though. In particular I respect Mr. Chiles as to his testimony's concern as a state prosecutor. One of the things he pointed out was they would not have any input into the resentencing. And I think that is the whole design of the public safety review and discretion of the federal judge. And any United States Attorney should reach out to the state prosecutor if they have any concerns about the application of retroactivity in a particular case. It can be expressed. It can be raised, and the judge should take the public safety concerns into consideration, as has been done in the past, that resulted in hundreds not getting that applied.

So public safety is hugely important to me, but I believe the Attorney General's concerns can
be addressed by the judge's discretion and not by those carve-outs.

CHAIR SARIS: Let me ask you. You gave a statistic that the tough drug laws have reduced cocaine usage by 75 percent. Did that include crack usage?

MR. HUTCHINSON: Yes. That's all cocaine.

CHAIR SARIS: That's all cocaine. And so where do you — where are those statistics from? And does that give us any guidance as to how we implement this?

MR. HUTCHINSON: Excellent question. And the cocaine statistics has been a 75 percent reduction in overall drug use. Overall there's been a 50 percent reduction since the height of drug use in our country in the late '70s and the early '80s. Now obviously it's way too high, still. But you asked where those statistics come from. It's two surveys that have been consistently applied measuring usage. I believe one of them is Monitoring the Future; and I think the other is a SAMHSA program. So one is government and one is non-government.
Consistent surveys over the last 30-some years that have been testing this.

They are available on the DEA website, those statistics. And there's a lot of different combinations. I quite frankly believe that the national leadership and what we say about drugs in our society makes as much difference in usage as — in addition to tough sentencing.

But to put it in contrast, I don't want to lose my reputation as a tough prosecutor but as was pointed out by Commissioner Carr, it's 164 months now. It goes to 128 months with the new guidelines. Those are still pretty doggone tough laws, and most state prosecutors would defer because it is so much tougher than what would be ever given in the state system.

It is internationally still — our standards are still higher and tougher than other countries. I was asked to testify before the Canadian Parliament on our sentencing structures here in the United States because they were considering for the first time a mandatory minimum.
Well I learned: Don't do this. If you're invited to go to a foreign country, don't go.

(Laughter.)

MR. HUTCHINSON: I mean, our sentencing structures are so different. They are debating a one-year mandatory minimum for selling drugs in a school zone. You know, and you compare that to the United States of America.

So we are not going to diminish the impact on reducing drugs because we're modifying our sentencing.

CHAIR SARIS: So in general are we tougher than most states still?

MR. HUTCHINSON: Absolutely.

CHAIR SARIS: Under the new laws? So that if you're correctly heralding the reduction in crack and cocaine use, that will in your view still continue under the drug laws as they exist now under the new statute?

MR. HUTCHINSON: The new statute, the sentencing will continue the tough approach to drugs in our country. Now what I'm worried about are other
factors that you don't control that will reflect on drug usage such as national leadership, our advertising campaign, our money that goes to rehabilitation, money that goes to drug treatment courts, and other issues.

But the sentencing regime will still be effective as a deterrent to drug usage in our country.

VICE CHAIR JACKSON: I was just wondering, Mr. Hutchinson, do you have a position on whether the entire amendment should be applied retroactively as opposed to just Parts A and C? There is something of a side debate going on about that aspect of it.

MR. HUTCHINSON: And I don't know enough about that side to debate the comment.

VICE CHAIR JACKSON: Okay.

CHAIR SARIS: Mr. Wroblewski.

COMMISSIONER WROBLEWSKI: Thank you all for coming. Congressman Hutchinson, I just have one quick question.

One of the reasons we are sort of in this whole mess about crack and powder cocaine is that
powder cocaine is brought into this country, it's prosecuted at the federal level largely as a wholesale drug with very large quantities.

Crack cocaine, on the other hand, is largely a street-level drug and we're prosecuting retail sellers and people who are involved in violence and other crimes, the kinds that Mr. Chiles and Mr. Hiller spoke about.

When you were the Administrator of the DEA, you suggested a new sentencing regime that would sentence retail offenders — it would have a new mandatory minimum. Instead of a five-year and a ten-year mandatory minimum, perhaps a new two- or three-year mandatory minimum — I don't quite recall — for retail level offenders with higher mandatory minimums for those wholesalers who were moving large quantities.

Do you still support that kind of reform to the drug sentencing laws?

MR. HUTCHINSON: You've got a better memory than I do. We put a lot of thought into it while I was Administrator of the DEA, and I'll certainly stand by the positions that I took then.
My reaction is that can make some sense. I'd want to give it a little bit more thought and refresh myself on it.

But in terms of the enforcement policy toward powder and the retail marketing of crack cocaine, it just always struck me as inconsistent. You know, generally you go after the higher level producer. You go after what is the source product. And crack cocaine comes from powder cocaine. And to have a lower sentencing regime for powder cocaine than crack cocaine, the retail product, always seemed to be reverse to me.

Now I am very happy with what we have done here, but that I struggled with whenever I was Administrator of the DEA on that enforcement policy. I think the DEA goes after high-level producers, the cartels, the ones that are bringing it in. But sometimes you have to deal at the retail level to work your way up. And so I do think you need to have some toughness there toward the retail producer, but it certainly should be distinguished.

VICE CHAIR CARR: Do you still think there
should be mandatory minimums?

MR. HUTCHINSON: Yes. I have no problem with the concept of mandatory minimums. And while I've been a good ally with my good friend Julie Stewart on this issue of crack/powder cocaine, you know for the Congress of the United States, or for their elected representatives to express outrage at a particular societal problem through a mandatory minimum, I think can be appropriate.

I think they should be reserved, and careful, and I think there needs to be some, I say safety valves, which actually changes it from a mandatory minimum, I guess you could argue that, is inconsistent. But I think there has to be some exceptions to it.

But, you know, for example, the gun mandatory minimum, I certainly think that is appropriate in our society.

CHAIR SARIS: Anything else?

(No response.)

CHAIR SARIS: Well thank you very much for all of you coming. Thank you for providing the law
enforcement perspective. Thank you.

MR. HUTCHINSON: Thank you.

(Pause.)

JUDGE WALTON: Good morning.

CHAIR SARIS: Good morning. And thank you so much for coming this morning. Many of us already know Judge Walton, who is a United States district court judge for the District of Columbia, and a member of the federal judiciary's Criminal Law Committee. He has taken a big leadership role in this issue of crack cocaine and the fairness or lack of fairness of the penalties, but when I was reading your bio, there were lots of things I didn't know about you.

For one, you were an associate judge of the Superior Court of the District of Columbia from 1981 to 1989. He served as associate director of the Office of National Drug Control Policy, an executive assistant U.S. attorney in the Office of the U.S. Attorney in Washington, D.C.; that, in addition, he served some in Philadelphia as a staff attorney for the federal defenders.
So I thank you and would love to hear your testimony.

JUDGE WALTON: Again, good morning and thank you for having me appear before you on behalf of the Criminal Law Committee of the Judicial Conference of the United States.

I listened to the last panel and, like Congressman Hutchinson, I don't want to lose my reputation of being tough on crime, and I don't think anybody would accuse me of being tough on crime. They call me a long-ball hitter because I do think when people do certain crimes they deserve to be punished, and punished severely, if appropriate.

The predicate for the position that I take on behalf of the Judicial Conference is one of fundamental fairness. And I think that permeates all that I will say to you. I have prepared written testimony, and I would ask that that be adopted, or accepted by the Commission, but I would like to basically summarize it and maybe supplement what I have to say in reference to this issue.

I was involved early on in the drug issue
as a part of the first Bush administration as the associate director of the Office of National Drug Control Policy. At that time, based upon some of the things I had seen happen in reference to drugs and what they do to communities and individuals, I took a very hard line position regarding penalties that should be imposed for drug trafficking offenses.

And I had the view, based upon the knowledge that we knew about crack cocaine at the time, that we were in fact talking about a different substance, that we were talking about a substance that was more addictive. We now know it's not chemically more addictive; it may be more addictive because of the way that it is used. We believe that it had a greater impact on the fetus. At the time there was a lot of violence related to the crack trade, and that was because it was a cheap drug. It was proliferating in our society, and there was a war taking place in communities to garner that market.

I can say now, however, I don't see any difference between the level of violence that I see in reference to cases coming before me involving
crack as compared to any other drug.

So many of the predicates that I operated under at the time when I took the position that there should be disparity – never took a position it should be 100:1 – I think have been dispelled by our current knowledge.

And the Commission has recognized that the disparity was a problem for a long time, and was calling out for a long time for the Congress to take some action to remedy this situation. Fortunately, Congress has now acted. But there was a period of inertia when Congress did not act. So if Congress had acted at the time when the Commission first called for these changes, many of the individuals who are incarcerated now would not be serving the long sentences they are serving.

And I don't think the irony of when Congress decided to act should continue to work an unfairness on individuals who otherwise should not be serving the sentences that otherwise they should.

I heard the testimony concerning the concerns that communities and individuals have about
the crime and drug problem, and I share those
concerns. I, before I got married and married a
doctor and she is able to now let us live in a
different environment than I used to because judges
don't make a whole lot of money, I lived in two
neighborhoods in Washington where drugs proliferated.
And I can tell you, it was very troubling to look out
of my window and see drug dealers selling drugs.

So I have been exposed to that
environment, and I fully appreciate the adverse
impact that drug selling and drug activity has on
communities. But I also know that in many of those
communities that are affected most by crack cocaine,
you are talking about poor communities. You are
talking about communities of color. And many of
these people in those communities don't believe in
our justice system, and they don't believe in our
justice system because they know that the system has
been unfair.

One of the things I also just finished not
long ago was chairing the National Prison Rape
Elimination Commission, and had the opportunity to
travel all throughout the country going into various
institutions, federal, state, and local. And the one
thing I saw as I went into most of those
institutions, are people who look like me.

And I have no problems with locking up
people, regardless of who they are, if they deserve
to be locked up. But many of our prisons are
congested with people of color, young men of color,
just because of this unfair disparity that we know
exists. And I am not in any way suggesting that
anybody, and clearly not me, advocated that when the
disparity went into effect that it should be done for
the purpose of racially locking up people.

But mistakes were made. And I am willing
to admit that my psyche in reference to the issue was
mistaken because of the premises that I operated
under. And now that we know that those premises that
predicated that 100:1 disparity were wrong,
fundamentally unfair, and imposed too harsh of a
sentence on people, I don't think it is fundamentally
fair to say that now we're not going to redress the
unfairness that many of those people experienced.
The Judicial Conference takes the position, in reference to the specific question you asked about which parts of the new law should be made retroactive, that it should be Part A and Part C. We don't take a position in reference to Part B. Those are obviously factors, however, I would assume, judges would inevitably take into account in assessing whether someone should be subject to the reduction if this were made to be retroactive.

I want to leave enough time for you to ask me some questions, so I won't go on much longer, and I do have to get back — I serve on the FISA court so I need to get back to handle matters that I have to deal with on that court, but I do want to respond to any questions that you have. But I would basically like to conclude my comments at this time with an example of who we are talking about.

And I don't think we can group everybody who we're talking about in the same category, as I heard being suggested just a minute ago. And believe me, I have the highest respect for law enforcement. I worked as an assistant United States attorney with
police officers and FBI agents, and DEA agents, for a significant part of my career. And I have the highest regard for law enforcement and the things that they do. They keep us—they protect us, and I think all of us when we get in trouble, or something happens, that is who we call out to. So I have the greatest respect for them.

But I think the perspective that we should not change this now is just wrong-headed. And the one example which I'm sure all of you are familiar with, is the case of Kemba Smith, a young lady who grew up in a suburban area of Richmond. She was the only child—sort of reminds me a lot of my child, who is the only child—who grew up somewhat naive to the world. And she went off to Hampton University, a historical Black college. She wanted to go to that school because she had lived in a majority White environment and wanted to go to a historical Black school.

So she went there. And unfortunately, she fell in love with a drug dealer, a drug dealer who not only used her but abused her. And as a result of
her love for him, mistaken as it may be, she got involved in trafficking drugs for him. Never used. Never sold, but trafficked in drugs as a mule for him.

And as a result of her involvement, she ended up getting a 24-1/2 year sentence. And that was, to a large degree, because of the disparity that existed between crack and powder.

And that young lady needed to be punished. No question. But 24-1/2 years? No. And if she had not been pardoned by President Clinton in the year 2000, she would still be in the ranks of who we're talking about here today. And she would be there probably until, assuming she got good time, and I assume she would, and she went into a halfway house six months before she finished the end of her sentence, she would be incarcerated until approximately 2017.

Here is a young lady now who has formed a foundation, who travels throughout the country going to colleges. My brother heard her speak in Pittsburgh and he said she was eloquent. And talking
to young people about not doing the things that she did. And hopefully that is acting as a deterrent. If we had — if she had not been pardoned, she would still be there, and we would be paying $24–to $26,000 a year to incarcerate someone who clearly does not have to be incarcerated for that period of time.

So if for no other reason other than pure economics, this country is drowning in debt. We cannot continue to incarcerate all the people that we incarcerate who do not need to be incarcerated for long periods of time in certain instances, and continue to exist as a thriving nation.

So I think for pure economics we have to revisit some of the things that we do in reference to incarcerating people — again, not that we shouldn't. Some folks need to be locked up. I remember the joke that Richard — it wasn't a joke, he got locked up out in Arizona, Richard Pryor, and he went in. And when he saw some of the folks who were there, he said:

Thank God we have prisons!

(Laughter.)
JUDGE WALTON: So the reality is, yes, there are people who need to be locked up. But some people, like Kemba Smith, no. Not for the period of time she was locked up. We throw away money. We throw away lives — because not only was she involved with this man who was a drug dealer, she had become impregnated by him. So her parents had to raise her child for about the first six or seven years of his life.

Now she's back in his life. She can be a mother to that kid and hopefully steer him away from the things that she fell into. So at bottom, the position of the Judicial Conference is that fundamental fairness, fundamental fairness dictates that this change be made retroactive.

And then judges — in reference to the change that the Commission made in 2007, I took that, and I know my colleagues took that issue very seriously. I did not just willy nilly grant those requests. In fact, I probably denied 50 percent of the applications that were submitted to me because I was not going to, as I believe is the case with most
of my colleagues, they are not going to put somebody in the community who has not done well in prison, who has had a history of violence, who would probably go back and engage in more violence. That is not what we are talking about.

We are talking about the Kemba Smiths of this world, and other individuals like her, who don't need to be locked up for the extended period of time that they've been locked up. And would it impose a burden on the courts? Yes. To some degree, yes. Even if it's to a significant degree, that in my view doesn't justify our not making this retroactive because I can't in good faith say that just because I'm going to have to work a little harder that we shouldn't rectify a clear unfairness.

Thank you.

CHAIR SARIS: Thank you.

VICE CHAIR CARR: Do you think one of the ways we could relieve the crime problem in this country is if more of us would become, or marry, doctors?

(Laughter.)
JUDGE WALTON: It would make life a lot easier.

(Laughter.)

CHAIR SARIS: Commissioner Friedrich.

COMMISSIONER FRIEDRICH: Judge Walton, as you know in 2007 when we made the two-level reduction retroactive, we made significant changes to the policy statement 1B1.10, including adding a real emphasis on public safety, which you've stressed here today.

I am just wondering, based on your experience handling these motions over the course of the last several years, whether there are any additional recommendations you would make to this Commission regarding that policy statement? Whether in your view it has worked well?

JUDGE WALTON: I think it has worked well, and I know, talking to the judges I've talked to, that they take those policy statements very seriously. And because the Commission did express its concern about public safety and the fact that judges should be taking that into account in deciding
whether they would grant the reduction, they did so.

And I believe the judges would do that. I mean, we are not in the business of releasing people if we have a reason to believe that if we do that they are going to go back into the community and commit further crimes. So I think, yes, I think those policy statements are important. I think those policy statements should be a part of any change you would make in regard to this application.

COMMISSIONER FRIEDRICH: And just to follow up, at least one judge, maybe more, in your district had applied a different ratio than the 100:1. Do you think the Commission needs to address that issue specifically and give some sort of direction to the courts in situations where they've given maybe less than 18:1 that would warrant additional reduction under this amendment? Do you think that that sort of clarity is needed?

JUDGE WALTON: Well I can't speak on behalf of the Criminal Law Committee and the Judicial Conference because that is something that we have not addressed, but I will speak to it from a personal,
individual perspective.

Having worked in a system, the District of Columbia local system, as a judge for 18-1/2 years, I saw the consequences of no guidelines and the disparity that existed within our system. And it depended upon which courtroom you went into as to what sentence you were going to give.

So therefore I have a real problem with the issue of disparity, because I think it is a real problem from the perspective of fairness, and from the perspective of the individuals who are being sentenced when they're sitting in the cell and they're talking to each other and they basically have the same background, the same crime, and they're doing very disparate sentences.

And I had a problem, to be blunt, with the perspective that some judges took one position, and others took another position. Because, again, it was now going to depend upon which courtroom you went into as to what sentence you received.

So, yes, I think there should be some guidance, some policy guidance that the Commission
would give to judges as to what type of sentences
they should be imposing if they are permitted to
retroactively redress the problems that resulted from
the 100:1 disparity.

COMMISSIONER FRIEDRICH: Thank you.

CHAIR SARIS: Go ahead.

COMMISSIONER HOWELL: Just to follow up on
another aspect of 1B1.10 that Commissioner Friedrich
was talking about, she was focusing on the part of
that policy statement that gives directions to the
sentencing courts on how to apply a retroactive
application.

I want to turn to another aspect of
1B1.10, which is the explanation of what the
Commission itself looks at in deciding whether to
make a guideline-reducing amendment retroactive.

There are three factors we generally look
at: the purpose of the amendment; the magnitude of
the change; the administrative burden on the courts
in administering it.

You raised an issue that we actually have
not talked about yet very much this morning, although
it has been mentioned by a couple of witnesses, including the acting head of BOP, and that is overcrowding in our prisons.

We have about 35 percent overcrowding in our federal prisons today, which as you said is a huge taxpayer burden. It is one of the mandates to the Commission in 28 U.S.C., 994(g) that the Commission should take into account in all of our guideline amendments, including retroactive ones in my view, the capacity of the prisons and services available to formulate the guidelines and to minimize the likelihood that the federal prison population will exceed the capacity of the federal prisons.

Do you think that – that is part of our organic statute. Do you think that that is an appropriate factor to add to the directions to ourselves when we decide retroactivity? What the capacity is of the federal prisons?

JUDGE WALTON: Absolutely. I can tell you, again from my experience chairing the National Prison Rape Elimination Commission, that one of the significant contributing causes to prison rape is
overcrowding.

So I think to the extent that we reduce overcrowding, that has a significant impact on those incidents which cause our society to expend tremendous amounts of money, and the impact obviously it has on those who have been abused in that manner.

So, yes, I think it should be an appropriate factor to consider in deciding internally whether this change should be made retroactive.

CHAIR SARIS: Let me ask you, the representative from the Department of Justice when she testified expressed some concern about the resources it would take from the courts, and I guess probation, if we had to triage every single person for public safety.

It was my experience when we did this last time in Boston, a smaller jurisdiction, that it actually didn't demand so many resources, and that much of it was resolved through collaboration and cooperation. I wanted to know what the District of Columbia's experience was. How much time did it actually take in court? How much probation time?
That sort of thing.

JUDGE WALTON: It didn't take an extreme amount of time. It did take some additional effort, there's no question about that. I think the major burden was on our probation department. And I just this morning talked to our chief probation officer, Gennine Hagar, and asked her whether the burden that will be placed on them would be oppressive, and therefore they would have a problem with retroactivity. And she said absolutely not.

And she has talked to a lot of her co-chiefs around the country and they take the same position. They believe, as I believe, as the committee believes, that the disparity was fundamentally unfair. And if it takes, you know, more effort and more work to try and redress it, that we just have to make that effort.

Yes, it did impose a greater burden on me because I did not, just because the application was filed, conclude that there should be the relief granted. So I had to hold hearings in certain respects. But at bottom I had to assure myself that
the individual I was releasing was not going to pose  
a danger.

So, yes, it would impose a greater burden  
but I don't think burden can trump fairness.

COMMISSIONER HINOJOSA: Judge Walton, one  
of the things the Commission did when we made the  
2007 amendments retroactive is give some period of  
time before it became effective, so that the courts  
could be prepared. Did you find that helpful? Or  
would that still be necessary at this point, if the  
Commission decided to vote for some retroactivity  
here?

JUDGE WALTON: I think some period of time  
is obviously, and did in fact help us gear up to deal  
with the 2007 change. However, as I understand, the  
change, if you recommended retroactivity and Congress  
did not oppose it, would not take place until  
November in any event. And I think that probably  
would be a sufficient amount of time, especially in  
light of the fact that we've done it before.

So I don't think it would entail the same  
amount of preparation that it did the last time
around.

CHAIR SARIS: Anyone else?

(No response.)

CHAIR SARIS: Thank you very much. Thank you for coming.

JUDGE WALTON: Well thank you again for having me, and I would like to publicly commend Judge Hinojosa for receiving the Devitt Award as one of our top judicial officers in the country. I think it is well deserved.

COMMISSIONER HINOJOSA: Thank you, Judge.

(Pause.)

CHAIR SARIS: So, Professor O'Hear, you are our panel. It turns out, because of a last-minute problem, Professor Chanenson could not come, and so we welcome you to represent the academics of the country.

Mr. O'Hear is the associate dean for research and professor of law at Marquette University Law School. He is an editor of the Federal Sentencing Reporter, which I always enjoy reading, and the author of more than 40 scholarly articles on
sentencing and criminal procedure. Welcome.

PROFESSOR O'HEAR: Thank you, Madam Chair.

And I won't feel myself obliged to speak twice as long to fill in for my missing colleague.

(Laughter.)

PROFESSOR O'HEAR: In fact, having talked a few times in the dreaded "11:00 to 12:15" teaching slot, I know the perils of standing between an audience and its lunch break. So I will try to stay brief.

I want to thank the Commission for giving me an opportunity to appear today to speak on a very important topic. I would like to focus my remarks today on urging retroactivity for Part A, and distinguishing Part A from the new "aggravating specific offense characteristics" in Part B. Then I want to very briefly respond to a couple of the aspects of the Department of Justice's presentation this morning.

First of all, with respect to Part A, the case for retroactivity is clear and compelling.

There is widespread recognition that the old 100:1
ratio was a profound injustice, and the 2007 amendment only partially corrected that injustice.

Indeed, there is good reason to think that even the new 18:1 ratio is excessively harsh. Be that as it may, there can be little doubt that making the new ratio retroactive would result in many thousands of crack offenders receiving new sentences that are more closely commensurate with the gravity of their offenses.

If the Commission agrees that the amended Drug Quantity Table advances the cause of just punishment, then it should be made available to as many defendants as possible unless there are good countervailing reasons.

Although the concerns relating to recidivism and administrative burdens are certainly not trivial, they do not seem compelling, particularly in light of the very recent experience of implementing retroactivity for the 2007 amendment. I believe that the new aggravating specific offense characteristics, however, present a very different picture for at least three reasons.
First of all, they do not respond to long-standing, widely shared views that the crack sentencing guidelines are too lenient with respect to the targeted classes of offenders. Although some of the new factors, such as acts of violence, or bribery may be perfectly appropriate sentence enhancers in the abstract, we have to bear in mind that many of the underlying concerns are already addressed through existing guidelines enhancements.

For instance, we get at dangerousness through the dangerous weapon enhancement, through existing mandatory minimum statutes such as section 924(c), and of course through existing stand-alone offenses such as bribery offenses.

Moreover, district judges have always been able to take these considerations into account in selecting a sentence within a range and, in extreme cases, selecting a sentence above the range.

I am not aware of any arguments that district judges have been unable historically to impose appropriately severe sentences under the guidelines in any subcategory of crack cases, and
certainly I have not heard those sorts of arguments made in the way that we have constantly heard the drumbeat of criticism going the other way that crack sentences are systematically across the board too high.

Second, even if the new aggravating characteristics are not formally made retroactive, district judges are still free to consider them in response to sentence modification requests. The commentary to section 1B1.10 contemplates that the 3553(a) factors will be taken into account in deciding whether and to what extent to grant a sentence reduction. And these factors would authorize consideration of the new specific offense characteristics.

Preserving some flexibility in the way that the new aggravators are weighed is consistent with the basic approach of the post-Booker federal sentencing world and respects the capacity of the district judge to put these aggravators into appropriate context and not apply them mechanistically.
Finally, the flexibility is especially important in light of the fact that many of the cases presenting the new specific offense characteristics may have already resulted in enhanced sentences, either within the range or above the range. There seems some risk of double counting. A defendant may have received a much longer sentence the first time around on the basis of the new specific offense characteristics and now lose the ability to obtain a sentence reduction on the basis of the same considerations.

So for that reason I think district judges should retain the ability to take these into account on a case-by-case basis.

Now briefly in response to the Department of Justice's position in favor of limitations on retroactivity for Part A, the Commission of course did nothing like this with respect to the 2007 amendments. And I haven't heard any explanation for why 2011 is different than 2007, what compelling new information is available that tells us that we ought to carve out these categories of offenders that the
department would like to carve out.

If anything, the just-released recidivism data would seem to validate the approach that the Commission used in 2007.

As far as a justification for this, from Ms. Flowers this morning, what I heard was that the real issue here is that the Department of Justice can't realistically assess and litigate danger —

CHAIR SARIS: "Ms. Rose"? Not "Ms. Flowers"?

PROFESSOR O'HEAR: Is that right? I'm sorry. I'm sorry.

(Laughter.)

PROFESSOR O'HEAR: Smells as sweet, I suppose, whatever the term is we use. I heard Ms. Rose say that the issue is that the department can't realistically assess and litigate dangerousness on a case-by-case basis, and so needs to use what I think even the department would admit are very crude proxies for dangerousness in lieu of case-by-case litigation.

But I don't understand what the rush is in
these cases where the department believes that there is some significant dangerousness concern. Why can't the department take the time that it needs to assess and litigate these cases properly based on the Commission's data?

Most of the people affected by the amendment would not be released until year three, or later — in some cases, much, much later, giving quite a bit of time for the department to explore and litigate the dangerousness on a case-by-case basis.

If the judges are driving the cases faster than the department can deal with them, and I didn't hear the department's representatives saying that, but if that is the underlying concern that the judges are driving the process too quickly, then I would hope the department would suggest to the Commission what some appropriate deadlines and timetables are and the Commission could provide guidance to judges in that regard as to what categories of cases the department needs additional time to consider, and how much time the department needs to consider them.

If necessary, the Commission might even
consider a rolling series of effective dates also to
to provide more time for the department to assess
individual cases. Say for instance setting the
effective date for high criminal history offenders an
additional six months out, or something of that
nature, to give the system an opportunity to process
the easy cases, the cases that can be handled in a
non-adversarial fashion, get those handled quickly and
then give the department more time to handle the more
difficult cases.

The criminal history cutoff that is
proposed I thought was particularly odd, given that
the data from 2007 shows that Criminal History
Category IV actually has a lower recidivism rate than
Criminal History Category III. So it is hard to see
any basis for excluding Criminal History Category IV
from the people who benefit from retroactivity.

And then finally, the weapons possession
exclusion. Weapons possession is very broad, given
the way that vicarious liability operates in the
conspiracy context. This is going to sweep a lot of
people into the excluded category who may have had
little or no contact with a weapon, did not actually
use a weapon, and don't present any heightened risk
of dangerousness.

If it is felt necessary to deal with
weapons' issues through an exclusion, then the
Commission might consider a narrower, much narrower
exclusion for instance just for defendants who
received a 924(c) enhancement for brandishing or
otherwise using a firearm, rather than focusing on
possession alone.

Thank you.

CHAIR SARIS: Thank you.

VICE CHAIR JACKSON: Mr. O'Hear, thank you
for being here. I have actually been anticipating
your testimony because I am really trying to flesh
out the effect of the retroactive application of the
entire statute as opposed to just Part A, Part C, et
cetera.

I understood you to say the district court
should retain the ability to take the aggravators
into account on a case-by-case basis. What I don't
understand is why that wouldn't still happen if we
made the entire statute retroactive.

A previous panel indicated that it would be the government's obligation to press the aggravators; that the government would have to come to the fore with the evidence. The government would have to say violence was used, and here it is.

And then I heard the government say, oh, my goodness, you know, administrative burden. We don't want to have to do that.

Well, fine. They can just waive it. Like I don't understand. The government doesn't have to in every case apply the aggravators. So why would the Commission do sort of Jiu-Jitsu gymnastics to get out of Part B when it doesn't seem to me it has to apply all the time, and the district court could still use the flexibility that you suggest?

PROFESSOR O'HEAR: Well, first of all I mean I guess we have to all concede that when we talk about retroactivity for an enhancer in any sense we are in new terrain here. So it is not entirely clear as a practical matter what it would mean to make these new specific aggravating circumstances
retroactive.

As I understand it, the question is whether — the retroactivity question for these enhancers — is whether you would categorically exclude defendants from taking advantage of the reduced Drug Quantity Table numbers if there is a corresponding and offsetting new enhancer in place. That is how I would understand it.

So that there would not be flexibility for a district court judge to say, all right, there was a premises here, there was drug-dealing on the premises, it was maintained for that, but in the big picture this isn't really worth taking into account, or it is not worth weighing it as much as is called for with the two-level increase.

VICE CHAIR JACKSON: That is interesting, though, because I didn't — I mean, if I read 1B1.10 correctly, we would just put Amendment 2 in the list. And as you read that, you would see that as somehow excluding judges from applying Part A if Part B was too significant, categorically? They wouldn't be doing the entire weighing of Part A and Part B,
but somehow we wouldn't do Part A. We would do Part B first, and if Part B is so significant than we wouldn't even worry about Part A. So you would be excluded from – an offender would be excluded from getting the benefit of Part A?

PROFESSOR O'HEAR: That is my concern, at least. Again, I think we are in uncertain terrain here, but that would seem to me to be a plausible reading of 1B1.10, is that you take the amendment in its totality and determine whether there is a net decrease in the sentencing range based on application of all of the pieces of the amendment.

Now the Commission has already –

COMMISSIONER WROBLEWSKI: What is problematic about that? Could you explain that?

PROFESSOR O'HEAR: What is problematic about it in my view is that it precludes district judges from weighing on a case-by-case basis the significance of the aggravators as they would do in the prospective cases under Booker; that there's flexibility under Booker going forward, but retrospectively we would be setting up a different
system which in effect is mandatory.

COMMISSIONER WROBLEWSKI: But didn't the
Supreme Court in Dillon decide that for us and say
that's precisely what we have?

PROFESSOR O'HEAR: The Supreme Court in
Dillon said that you could do that. You're
authorized to do that if you think that is the best
policy. And I am arguing that that is not the best
policy.

CHAIR SARIS: I was — oh, I'm sorry,
Dabney. I just

COMMISSIONER FRIEDRICH: I just want to
make sure I understand your testimony. The way I
interpret how this would work if we were to apply the
statute as a whole is a judge would apply the new
ratio, 18:1, calculate the base offense level, and
the Drug Table, and then would consider whether you
get the plus-two bump for maintaining a premises for
the purpose of drug dealing.

VICE CHAIR JACKSON: If the government
pressed that issue.

COMMISSIONER FRIEDRICH: Of course. And
then — so therefore the court would be working from
the Drug Table up plus two. Now that might not be
all the way up to the initial sentence imposed. It
might be somewhere in between, but the defendant
could still get the benefit of the reduction, the
overall reduction.

Are we saying the same thing? Because I
understood what you said to mean that it would — I
guess it could conceivably negate it entirely, but it
also could fall somewhere in between. Right?

PROFESSOR O'HEAR: It could. And if so, I
think the new level would constitute a floor, a firm
floor below which the judge could not go.

COMMISSIONER FRIEDRICH: And your problem
with that is?

PROFESSOR O'HEAR: The problem with that
is that again in effect you are giving a mandatory
effect to the — you're giving a mandatory weight to
the new — no, wait a minute. I may be actually — I may
be — we may not be saying the same thing here.

Are you — is your suggestion here that the
judge would, if you have aggravating circumstances,
that the judge would weigh how much weight to give to those aggravating circumstances? In other words, the judge might be able to say, premises here, I'm going to bump the offense level by one instead of two?

COMMISSIONER FRIEDRICH: No. I mean, I agree with Jonathan Wroblewski that Dillon says we can limit it, and we can limit it with a firm floor.

PROFESSOR O'HEAR: Right.

COMMISSIONER FRIEDRICH: But my point is that firm floor can be somewhere below the initial sentence imposed. It's not going to, in some cases, negate the entire effect of the retroactive amendment should we decide —

PROFESSOR O'HEAR: Right. But I think we're still saying, I think, that you would be giving mandatory effect —

COMMISSIONER FRIEDRICH: Yes.

PROFESSOR O'HEAR: — to the new specific offense characteristics, and I am agreeing that under Dillon that the Commission could do that. And I am arguing that the Commission should not take advantage of its power to do that.
COMMISSIONER FRIEDRICH: But we should apply — to make sure I understand your testimony — we should apply the mitigating provisions, but not the aggravating? That's your testimony?

PROFESSOR O'HEAR: Yes.

COMMISSIONER FRIEDRICH: All the mitigating provisions?

PROFESSOR O'HEAR: Well, in my written testimony I agreed with the position taken by the defense practitioner representatives.

COMMISSIONER FRIEDRICH: Just the mitigating role?

PROFESSOR O'HEAR: Right.

COMMISSIONER HINOJOSA: Well to clarify something, what you're saying is, with regards to Part B you would just do anything that was mitigating and ignore any aggravating factors that have been added? Is that right? I think that's —

COMMISSIONER FRIEDRICH: No, he's taking role cap only.

PROFESSOR O'HEAR: Just the mitigating role cap.
COMMISSIONER HINOJOSA: Right. And you wouldn't deal with any of the other aggravating factors that are in there as far as —

PROFESSOR O'HEAR: Right. I wouldn't deal with them at the level of a Commission pronouncement. I would permit district court judges to take those into account on a case-by-case basis.

COMMISSIONER HINOJOSA: But you would agree that if we did have judges consider the mitigating factors as well as the aggravating factors that it doesn't have to be the prosecutor who brings it up, it would be the duty of the judge to make those determinations without the prosecutor bringing those up? Right? I mean, that would be the role of the judge, as it is on any aggravating or mitigating factor, or any determination of the guidelines. It is not the prosecutor or the defense attorney bringing those up. The judge has the responsibility to make those decisions and to consider all of them on a one-by-one as far as each one of the SOCs or the base offense level in relevant conduct matters. Isn't that the way you would think this should be?
PROFESSOR O'HEAR: I would agree with that. There is the sort of formal answer to the question. There is also the practical answer to the question; that with respect to some of these aggravators in some of the cases, there's not going to be any record that's going to tip the judge off that the aggravator is present, in which case the aggravator is, even though formally available to the court, is practically not available to the court unless the government presents the information and makes the argument.

COMMISSIONER WROBLEWSKI: Professor, I've got a couple of questions about a case called Freeman v. United States. Are you familiar with that? It's a case before the Supreme Court now.

PROFESSOR O'HEAR: Only in fairly vague contours. This is the plea bargaining case?

COMMISSIONER WROBLEWSKI: Right. And the question there before the Court is what the term "based on" in [3582](c) really means.

So for example we've had some debate internally here today about whether someone who has
gotten a reduction, a Booker reduction in their initial sentence, should be eligible for a further reduction? And one of the questions is that under the statute which says you can get a further reduction if the guideline that your sentence was based on is reduced.

The question is: Well, what does "based on" mean if you got a 3553(a) sentence rather than — so one of the things that was suggested by Mr. Debold was that the Commission wait, probably no more than 30 days, until the Supreme Court decides the case, hear what they have to say. Do you think that is okay? Do you have any concerns about the Commission waiting for that decision?

PROFESSOR O'HEAR: Well, it will come out soon. The amount of time is not likely to have a material effect on very many people. On the other hand, I don't know that the Commission needs to. 3582 and that based-on language is I believe a directive to judges, isn't it, rather than a directive to the Commission? And so it should be the district judges who are concerned about what "based
on" means because this, as I understand it, defines the scope of their jurisdiction to modify a sentence.

COMMISSIONER WROBLEWSKI: Right. Well one of the things that was debated, again, and suggested by the defenders, was to eliminate a particular sentence in 1B1.10 about Booker variances. So I think it has still some impact.

But let me get to the facts of that case in particular because I think it addresses some of the things that Commissioner Jackson was talking about.

In that case the defendant was arrested as a suspect in an armed robbery case. It turned out, when he was arrested by the local policy officer, he had in his possession about 3.5 grams of crack, as well as a loaded weapon. A plea bargain was established. They negotiated a plea bargain where the defendant would be charged in federal court with the crack offense and with possession of a gun, and he would get a 106-month sentence. That is the case that we have.

Now if that goes back to the district
court, if this is applied retroactively without any
limiters for possession of a weapon or so forth,
there is a possibility—without the limiters that the
Attorney General was suggesting—and the government
wanted to have consideration of that robbery, if you
were this person's—if you were Mr. Freeman's defense
attorney, would you insist on proof, perhaps even
beyond a reasonable doubt, about whether violence was
committed as part of that robbery?

And what proof would you require from the
government as part of that?

PROFESSOR O'HEAR: So this is—what world
are we in here? Are we in a world where Part B is
retroactive in its entirety?

COMMISSIONER WROBLEWSKI: Well that is
another question about why would it be inappropriate
to apply Part B in that circumstance where there
might have been some proof of violence. Let's say
Part B. I now would like to hear your answer on both
possibilities, both worlds—

PROFESSOR O'HEAR: I'm digging myself a
deeper hole here.
COMMISSIONER WROBLEWSKI: — and without Part B. But let's say with Part B, and there is some evidence that there was a robbery that took place. What would be the level of proof? Who would have to prove it? Would the defendant have a right to be physically present, either if Part B was applied or not?

PROFESSOR O'HEAR: There are a lot of questions in that that I don't know the answer to, and I'm not sure what the right answer is to it. This is sentencing, and I would think—

COMMISSIONER WROBLEWSKI: It's not sentencing. It's a re-sentencing.

PROFESSOR O'HEAR: Well, yes.

COMMISSIONER WROBLEWSKI: And the Supreme Court said that there's a difference there.

PROFESSOR O'HEAR: Actually they said it's not a resentencing; it is a sentence modification.

COMMISSIONER WROBLEWSKI: Exactly. That's correct.

PROFESSOR O'HEAR: In Dillon. Still, my instincts would be to apply the same standards of
proof that normally obtain, and the same processes
that normally obtain at sentencing; and that the
judge would weigh the evidence that is presented and
make findings. And under my view where Part B is not
retroactive, the aggravators are not retroactive, the
judge has really discretion to decide how much weight
to give to that evidence.

CHAIR SARIS: Let me ask you this: The
tail end of your testimony, "Other Considerations," and
you talk in terms of drug sentencing reform more
generally, you had a statement which intrigued me.
You said: "Yet, it should be possible to
identify ways in which the federal system is
significantly out of step with a substantial majority
of states – as it was with the 100:1 ratio – and to
move the federal system in the direction of the states’
center of gravity." Which makes me think – you don't
amplify – that you have something in mind.

When we've asked people in prior panels,
sometimes the state systems are more severe, and
sometimes they're less severe. So I want to
understand what you have in mind when you suggest
sort of the federal sentencing guidelines are out of step in other ways, other than crack/powder.

PROFESSOR O'HEAR: I don't really have a hidden agenda there, believe it or not. Certainly one thing that stands out really quite dramatically is drug treatment courts, which have just grown explosively in state systems across the country.

There are — the last numbers I saw were 2,000, and that was a few years ago; there's probably far more than that now. The options available for drug defendants to receive treatment in lieu of prison in state systems is vastly greater than in the federal system.

CHAIR SARIS: So there is no one drug that you feel, other than the crack/powder, which we've just addressed, there's no other drug that you have in mind which creates a gross disparity between the way the feds deal with them and the states deal with them?

PROFESSOR O'HEAR: No. I simply haven't seen research on that, so I don't want to say that that drug doesn't exist. It may well exist. This is
really a suggestion that I think this would be a very fruitful area for the Commission to engage in some research to determine whether such drugs exist.

CHAIR SARIS: Go ahead.

COMMISSIONER HINOJOSA: But isn't that a factor, the fact that the person that gets charged in the state system is a very different defendant that in the federal system? The federal system, as you heard Mr. Chiles, takes on the cases that involve large drug traffickers, or large amounts, as opposed to a personal user who is arrested for personal use. I don't even remember the last — in fact, I don't know of a case where I have had someone who was arrested and then came to my court in federal court for a personal use amount, as far as other than drug trafficking. There might be smaller amounts that it was in drug trafficking, but not just simply because somebody had possession for use, regardless of what the drug is.

PROFESSOR O'HEAR: Well, yes.

COMMISSIONER HINOJOSA: So that is why that is different as to what happens in the state
versus the federal with regards to rehabilitation, as far as what's available.

PROFESSOR O'HEAR: Right. And this, as far as I know, is something that varies a lot from district to district. When I speak with federal prosecutors, or federal defenders for that matter, around the country I hear very different amounts as far as what is going to trigger federal action in one district versus another.

And there are also the weird kind of random outliers who end up in the federal system for no apparent good reason.

So I am not pushing the drug treatment court thing hard here, but I'm pointing that out as one area where there's a pretty dramatic difference in terms of what's available to appropriate defendants in state court systems versus the federal system.

And this is a topic, again, that I think would be appropriate for the Commission to explore and consider whether there are ways of making these sorts of opportunities available in the federal
system to appropriate offenders.

CHAIR SARIS: Anybody else?

(No response.)

CHAIR SARIS: Thank you very much for being our academic panel.

PROFESSOR O'HEAR: Thank you.

CHAIR SARIS: We will have lunch. Let me just — we are hopefully going to come back in — we got going a little bit late, but not too late — we are hoping to come back around 1:30 for the community interest panel. So we will see you then.

Thank you.

(Whereupon, at 12:32 p.m., the meeting was recessed, to reconvene at 1:30 p.m., this same day.)
(1:32 p.m.)

CHAIR SARIS: Good afternoon. Welcome back to the community interest panel. We've all eaten well and are ready to go. So I am going to introduce this panel.

I begin with Mark Mauer. Welcome back.

MR. MAUER: Thank you.

CHAIR SARIS: Who is the executive director of the Sentencing Project where he has served since 1987. He is also an adjunct faculty member at George Washington University, and began his work in criminal justice in 1975 as the national justice communications coordinator with the American Friends Service Committee.

Next to him is Hilary Shelton. Welcome, who is the NAACP's Washington Bureau director and senior vice president for advocacy and policy. Previously he served as federal liaison and assistant director to the Government Affairs Department of the United Negro College Fund. And as the federal policy program director to the United Methodist Church's
Social Justice Advocacy Agency. And he serves on a number of boards of directors.

Jesselyn McCurdy is a senior legislative counsel for the ACLU. Previously she served as counsel for the House Subcommittee on Crime, Terrorism, and Homeland Security; as the co-director of the Children's Defense Fund's Education and Youth Development Division; and as a staff attorney for the American Prosecutors Research Institute.

And last but by no means least is Pat Nolan, the vice president of Prison Fellowship, a Christian ministry serving prisoners. And he also heads the Justice Fellowship, the criminal justice reform arm of that organization. Previously he served for 15 years in the California State Assembly, four of those as the Assembly Republican leader. He has also served 29 months in federal custody for a racketeering conviction, and since his release has testified many times on prison-related issues.

Welcome. So did you all organize internally, or do I just start at the end?

MR. MAUER: You're in charge.
CHAIR SARIS: All right, first at bat.

Thank you.

MR. MAUER: Well thank you so much for inviting me here again, and my thanks again for all the hard work the Commission has done over the years on this important issue.

You have my written testimony, and I address a number of issues supporting retroactivity in terms of fairness, compassion, and public safety goals.

I think my time may be best used here to address the issue that has been raised significantly this morning about whether there should be any excluded categories of offenders who would not benefit from retroactivity, which I do find problematic.

It strikes me that in setting up a policy like that it has a lot of parallels to the whole issue of mandatory sentencing, which the Commission is taking an investigation on, where essentially we have a one-size-fits-all sentencing, or retroactivity policy rather than letting judges make individualized
decisions about individual cases.

And we have seen all the excesses that
have been caused by mandatory sentencing, and I think
such a policy here would be overly broad, as well.

It strikes me, as well, that the way in
which dangerousness or public safety is defined here
is not terribly useful, and is overly broad by quite
a bit. The data that the Commission has just
released on recidivism I think makes that argument
very clearly, where a substantial majority of the
people who would be excluded from any consideration
of retroactivity we know would not offend, or at
least to the extent they are similar to the 2007
cohort and the measurements there.

The highest rate of recidivism, even
Criminal History Category VI, even there 55 percent
would not be expected to recidivate. When it comes
to weapons involvement, as much as two-thirds of the
people would not be expected to recidivate. And yet
we are excluding 100 percent of these people from
consideration.

It seems it gets even more bizarre in some
respects if we were to exclude categories IV, V, and VI
criminal history, Criminal History Category IV, where
no one would be considered eligible for
retroactivity, has a recidivism rate that is actually
somewhat lower than Criminal History Category III.

So Category IV is 32 percent, 32.8;
Category III is 35.5. So if public safety as measured
by recidivism were the only consideration, it seems
like the policy should promote that we exclude
Category III, but not Category IV. And it is not clear,
you know, how this is going to help us make informed
decisions about who should be eligible for this.

The definition of "dangerous" also strikes
me as being very much sort of outdated in the sense
that we are not talking about people who are
sentenced 12 or 24 months ago in most cases. In many
of these cases these are people who have been in
prison 10, 15, 20 years or more and the 25-year-old
who carried a gun while committing a crack sale 15
years ago is now a 40-year-old who is a very
different person in many ways. We have seen this for
all sorts of offenders. In prison, people do grow
up. People getting out, or are eligible to get out, largely are going to be in their late 30s or 40s. We know that there is a significant aging out process of criminal activity. It doesn't tell us about any given individual, but as a group these people should be less of a threat to public safety.

And so to base their eligibility on their behavior more than a decade ago seems to be looking at the wrong picture there. I was also struck this morning listening to the testimony from the acting director of the Bureau of Prisons who talked about the programming that goes on in the Bureau of Prisons, a program that would be implemented to help prepare for releases, all of which sound fine to me.

But what is strange here is that it seems that by excluding certain categories of offenders from any consideration is essentially making an assumption that not a single one of these more than 6,000 people could possibly benefit from any constructive programming that goes on in the Bureau of Prisons. And that would be a rather sad state of affairs if we assume that nothing good could happen
to any of these people when we sort of have this assumption in general we think rehabilitation, we think programming for re-entry is a good thing to do. We have some evidence that it can make a difference in people's lives.

So why would we assume categorically that it was not at all effective potentially for any of this group of people. We know, as well, I think from the recidivism data, the 2007 group, where the people who spent more time in prison had slightly higher rates of recidivism. You know, many people have speculated, and there is some research to support it, that prisons may be either criminogenic, or the longer you spend in prison the more removed you are from family and community.

And so there certainly is an argument that more time in prison may actually make re-entry more difficult and may actually contribute to higher rates of recidivism.

So if we are concerned about public safety, yes, excluding these people may delay that onset of recidivism by several years or so, but it is
not eliminating that by any means.

The other part of this thinking about the public safety issue is to try to put that in perspective. If all 12,000 people were eligible for consideration, the Commission's estimates suggest that in the first year, which would be the biggest, the most numerous number of people getting out, we would have something like an additional 2,000 people above what would normally be expected to be released for crack cocaine offenses.

This is 2,000 people out of about 50,000 people released from the Bureau of Prisons, and out of about 700,000 people released from any state or federal prison in a given year. And I should also note that 700,000 people certainly includes many people who have significant criminal histories; many people convicted of a violent offense; and yet every day of the year corrections systems are releasing people because they have done their time and they are eligible for parole.

And, yes, this is a problem. That is why the re-entry movement has taken off. But there are
things we can do to try to prevent and reduce the risk of re-offending. This is what corrections people and parole and community groups are doing every day of the year.

So the additional problem posed by 2,000 people out of 50,000, or 700,000, yes, any individual case can be a problem, but the scale is what we really need to be thinking about here.

Let me just say finally that it seems to me to be highly unfortunate at a time when the BOP prison population is expanding and expected to keep going up in the next couple of years, in sharp contrast to what is happening around the country at the state level where prison populations are stabilized or even being reduced significantly in a number of states. This is a golden opportunity to have an impact on that overcrowding and what I think most people would consider to be excessive incarceration now, to limit by more than half the number of people eligible. The fiscal cost is probably in the range of hundreds of millions of dollars that we are talking about in additional
costs. And those costs have to be balanced out in terms of public safety.

You know, there are tradeoffs here and money that could be invested in public safety and other ways I would argue would be much better used than expanded incarceration for people who could otherwise be eligible here.

Finally of course are the racial dynamics of crack cocaine. This has been one of the key driving forces in addressing the sentencing policy change. Over the last 20 years, crack cocaine, as you well know, has been viewed as the most sort of egregious aspect of mandatory sentencing, excessively punishing lower-level offenders, and having an unwarranted racial effect.

And to say that some 6,000 offenders, 85 percent of whom are African Americans, should be denied this possibility of consideration for release by a federal judge seems to me would send a very unfortunate message and would be unfortunate, given the momentum we have seen on the issue, and given the constructive change enacted by Congress and this
So it seems to me we have a very good model in place from the previous retroactivity system. There has been—you know, it has been a relatively smooth process by all accounts, and the recidivism data confirm that this has not been problematic any more so than anything else would be in prison release on any given day.

So I appreciate your consideration. I would strongly encourage you to make this apply as broadly as possible, and I think this would be a very strong signal to send around the country in terms of fairness, equity, and compassion in sentencing.

Thank you.

MR. SHELTON: Thank you, Chair Saris, Vice Chairs Carr and Jackson, and members of the U.S. Sentencing Commission, for inviting us here today to share our perspective, the perspective of the NAACP.

For almost 25 years, sentences for conviction of crack cocaine possessions have had a tremendously disparate and devastating effect on racial and ethnic minority Americans, especially
African Americans.

The result has been not only the loss of millions of African Americans and others of their basic rights for which the NAACP has fought for so long and so hard, including voting rights, the right to affordable high-quality education, as well as the essential rights including assistance for housing, employment, and food; but the sentencing guidelines which led to the incarceration of a vastly disproportionate number of African Americans and Latinos has led to a very real destruction of entire communities of color and has also led to the crisis of confidence in the American judicial system.

Founded more than 102 years ago in 1909, the National Association for the Advancement of Colored People, the NAACP, is our nation's oldest, largest, and it is the most widely recognized grassroots-based civil rights organization.

We currently have more than 2,200 membership units across the nation with members in every one of the 50 states. For over 15 years now I've been the Director of the NAACP's Washington
Bureau, our association's legislative and national public policy arm.

As many of you know, the NAACP has testified before you at previous hearings regrading the disparate impact of crack cocaine laws on African Americans in particular, as well as communities nationwide served by the NAACP.

The members of the NAACP across our nation know all too well the devastating impact the 100:1 sentencing disparities have had on our communities. That is why we celebrated on Tuesday, August 3rd, 2010, when President Obama signed the Fair Sentencing Act into law.

This important legislation reduced mandatory minimum sentences for a federal conviction of crack cocaine possession from 100 times that of people convicted of carrying the drug in its powder form to 18 times that sentence.

The NAACP supported this legislation as an important first step towards completely eliminating this racially discriminatory sentencing disparity. There is still work to be done, however, to fully
correct this injustice.

The NAACP appreciates all the hard work that went into passing this legislation, as well as the fact that it represents the first time the U.S. Congress has moved to reduce any mandatory minimum sentence in over 40 years.

The NAACP also recognizes and appreciates that everyone involved in the negotiations seem to agree that the current 100:1 sentencing disparity has had a hugely unfair and racially discriminatory impact on racial and ethnic minority Americans.

The NAACP will continue, however, to push for a complete elimination of the disparities between crack and powder cocaine sentencing. Because of the mandatory minimum jail sentences for those convicted of possession of five grams of crack cocaine or more, people of color are being put in prison at much higher rates than their Caucasian counterparts. And the judges have virtually no discretion to mitigate the sentence for first-time or non-violent offenders for special circumstances.

This is especially galling in light of the
fact that there is no scientific reason for the sentencing disparity. We know that crack and powder cocaine are pharmacologically indistinguishable. Furthermore, ongoing research into crack and powder cocaine has further eroded the myth that crack cocaine is more addictive than powder cocaine; that crack cocaine users are, because of their choice of drug use, more violent than powder cocaine users, or that the prolonged presence of crack cocaine in our communities has led to a maternity ward full of crack babies.

It was these initial theories which were widely held beliefs in 1986 which led to the dramatic disparities in the treatment of crack versus powder cocaine in federal law. The question before us today is whether or not to apply the new guidelines as dictated by the Fair Sentencing Act retroactively to those who were convicted of crack cocaine possession prior to enactment of this new law.

To us, the answer is a clear and resounding "yes." Retroactive applications of the revised guideline is a necessary next step in
addressing the unfair, unjustified, and racially
discriminatory disparity in the treatment of powder
and the crack forms of cocaine.

Let's look for a minute at who would have
their sentences reduced with retroactive application.
Of the more than 12,000 men and women currently in
jail who would be impacted by retroactivity, more
than 10,000 — or more than 85 percent — are African
American. Another 8.5 percent of those who would see
their sentences reduced are Hispanic; and 5.5 percent
are Caucasian.

By applying the new law retroactively, the
U.S. Sentencing Commission would, by agreeing with
the Congress when it passed the Fair Sentencing Act
and with President Obama when he signed the bill into
law that too many racial and ethnic minority
Americans have been unfairly and discriminatorily
incarcerated under that new law.

While not fully correcting the sins of the
past, applying the new guidelines retroactively would
send a strong signal to those who are currently
incarcerated, as well as to their families, their
friends, and their communities, that the discriminatory nature of the law has been recognized. And this is a big, crucial, and necessary step.

As the U.S. Sentencing Commission said in its 2002 report to the Congress, and I quote, "even the perception of racial disparity (is) problematic. Perceived improper racial disparity fosters disrespect for and a lack of confidence in the criminal justice system among those very groups that Congress intended would benefit from the heightened penalties for crack cocaine." Unquote.

In developing and debating the Fair Sentencing Act, as I said earlier, the NAACP was gratified to see that everyone seemed to agree that the policies adopted in the 1986 law had a racially disparate impact.

It is now up to the Sentencing Commission to follow through on Congress's attempt to ameliorate that discrimination. By the U.S. Sentencing Commission's own estimate, more than 12,000 men and women who are currently incarcerated because of a crack cocaine conviction would have their sentences
reduced if the guidelines of the Fair Sentencing Act are applied retroactively.

A vast majority, again according to our own research, are African American. Your actions have the potential to have a dramatic impact on our communities and their perception of justice.

As I have in the past, I would like to again thank the U.S. Sentencing Commission for their efforts to correct many of the problems associated with the federal convictions for possession of crack cocaine. By holding this hearing, and by accepting and reviewing my testimony, the NAACP is grateful that somebody is indeed listening.

It is, however, our further wish that change will come and fair and equal justice will be served for all Americans.

I want to thank you again, and I welcome any questions you may very well have for me. Thank you very much.

CHAIR SARIS:  Ms. McCurdy.

MS. McCURDY: I would like to thank the Commission for inviting the American Civil Liberties
Union to testify today on whether Amendment 2 to the United States sentencing guidelines promulgated in response to the Fair Sentencing Act should be applied retroactively.

The ACLU urges the Commission to retroactively apply Part A of Amendment 2 which changes the Drug Quantity Table by lowering base offense levels for certain amounts of crack cocaine, Part C, and the mitigating role cap provision in Part B.

These parts of the amendment implement the heart of the congressional objective behind passing the Fair Sentencing Act, which is to increase the fairness of federal sentencing by reducing the disparity in treatment between crack and powder cocaine.

Also, these parts of the amendment can be implemented easily, almost mechanically, without the complicated calculus and additional fact-finding required by most of the role adjustment factors in Part B.

In addition, the ACLU believes that a
straightforward retroactive application to all affected defendants would best balance the goals of actualizing the Commission's findings over the years, and congressional intent, while avoiding significant complications in the re-sentencing process.

The Fair Sentencing Act, also known as the FSA, represents the culmination of more than a decade of debate and controversy about reducing the racial disparities caused by federal crack cocaine sentencing laws.

The FSA also represents Congress's efforts to restore much-needed confidence in the criminal justice system, especially in communities of color, and to reserve sacred law enforcement dollars for the most serious criminal offenders.

Correcting the racial disparities inherent in the federal crack cocaine sentencing law and reducing overly harsh punishment for those offenders are goals of the FSA. This is clear from the legislative history and the bipartisan floor statements during the debate about the bill.

It would be contradictory for the
Commission, having just promulgated Parts A and C, to
avoid future inequities and now leave defendants
whose sentences are already tainted by the extreme
racial disparity of the prior crack cocaine
sentencing regime without a remedy.

As others have said, the Commission will
consider three factors to determine whether the FSA
should be applied retroactively.

The first is the purpose of the amendment.
The second is the magnitude of the change. And the
third is the difficulty of applying the amendment
retroactively.

The ACLU thinks that when all three of
these factors are considered in the context of the
Fair Sentencing Act, it supports applying Parts A and
C, along with the mitigating role cap, retroactively.

First, the purpose of the FSA. Congress's
purpose in passing the FSA was to rectify the
unfairness inherent in the prior cocaine sentencing
policy. Simply stated, continued application of that
discredited regime and its associated guidelines to
previously sentenced offenders would undermine
Congress's goals of promoting fairness and reducing penalties.

The only difference between an offender sentenced one year ago and an offender sentenced today is the date of the sentencing relative to Congress's moment of recognition that a restoration of fairness was in order.

Subjecting these two offenders to two different sentencing levels, one of which has now been recognized by Congress as unfair, would not only be arbitrary but would perpetuate the unfairness of the prior system.

The fact that 85 percent of the offenders who would be eligible for relief if the amendment were retroactive are African American dramatically demonstrates the effect retroactivity will have on addressing racial disparities as well as implementing congressional intent.

Denying retroactivity would be inconsistent with the Commission's previous decisions on retroactivity. This Commission has rendered amendments retroactive when they serve to correct
congressional and Commission errors related to the harms of drugs or the inflated penalties that result from a poorly reasoned sentencing policy.

For all these reasons, the FSA's purpose strongly supports making it retroactive as the Commission applied the 2007 amendments for crack cocaine retroactively.

Second, the magnitude of the change. The Commission's Office of Research and Data reports that for offenders sentenced between October 1991 and September of 2010, the effect of the new base offense levels would be to reduce the average crack cocaine sentence by nearly one-fourth, or about 37 months out of an average of 164 months. And for a small group of offenders, sentence reduction would exceed ten years.

In all, if the new base offense levels were applied retroactively, 12,040 offenders sentenced between October '91 and September of 2010 would be eligible to receive a reduced sentence.

In other words, the guideline modifications significantly alter penalties across
the crack cocaine landscape, and if applied retroactively would impact a wide range of offenders to a significant extent.

On the other hand, if not applied retroactively, thousands of offenders sentenced under the flawed guidelines would be left behind to serve an average of three more years than Congress now believes is fair.

Third, difficulty of applying the amendment retroactively. The decision of the Commission to apply the 2007 amendments retroactively and its results provided a valuable lesson about the ease of retroactive implementation of the FSA amendment.

The relatively smooth application by courts of the two-level reduction in 2007 and 2008 demonstrates that retroactivity can be done without burdening the courts or other parts of the criminal justice system.

In fact, the courts granted a significantly greater number of reductions in 2007 than the number of individuals estimated to be
eligible for a reduction during this amendment cycle. As in 2007, Parts A and C can be implemented easily because they involve no more than a change to the base offense levels. Likewise, an adjustment to the mitigating role cap only involves a mechanical change in offense levels and therefore could be implemented easily.

For these reasons, and just out of pure fairness, the Commission should apply Parts A and C of the Fair Sentencing Act amendment, as well as the mitigating role cap retroactively.

The Commission is also considering whether there should be limitations on retroactivity for specific categories of defendants. The ACLU does not think that limitations on retroactive application are warranted or necessary.

The starting point for all crack cocaine defendants, regardless of whether they were sentenced within the guideline range, received departures, or variances, had criminal history points, or aggravating factors, or were sentenced before or after Booker, Kimbrough, or Spears, were a guideline
range driven by an unfair 100:1 ratio.

Limiting retroactivity based on whether
the court granted or could have considered a variance
would be inappropriate. Any limitation based on
whether the guidelines were advisory under Booker,
whether a policy disagreement could have applied
under Kimbrough, or whether an alternative ratio
could have been imposed, Spears, would be premised on
the false assumption that every defendant sentenced
under these cases received, for policy reasons alone,
a benefit equivalent to what would be provided under
the FSA amendment.

Even after Booker, Kimbrough, and Spears,
while some defendants have received variances, many
others have not. But the vast number of defendants
who did not benefit from policy-based variances at
the outset, or where such variances were not
sufficient to reflect the change in the guideline
range, the Commission should not restrict the
opportunity to benefit from Congress's recognition
that the old law was unfair to everyone.

In conclusion, the ACLU appreciates the
opportunity to testify on the proposed retroactivity.

We urge the Commission to seize this historic opportunity to correct the injustices of the past by making Parts A and C, along with the Mitigating Role Cap, retroactive.

Thank you.

CHAIR SARIS: Thank you. Mr. Nolan.

MR. NOLAN: Madam Chair, and Commissioners, I thank you for allowing me to testify before you. It is a privilege to be on this panel with these esteemed colleagues.

I am Pat Nolan. As the Chair mentioned, I am vice chair of Prison Fellowship, and I head up their justice reform arm, Justice Fellowship. I was a member of the California Legislature for 15 years, and was Assembly Republican leader for four of those years.

I was a leader on crime issues, especially involving victims' rights. I was one of the original sponsors of the Victims' Bill of Rights, and received the Victims' Advocate Award from Parents of Murdered Children.
I was prosecuted for a campaign contribution I accepted, which turned out to be part of an FBI sting. I pleaded guilty to one count of racketeering and served 29 months in federal custody. So I have seen the criminal justice system from both sides.

I sit before you as a conservative Republican, a former legislator, and a former prisoner, who is convinced that this country needs a more rational approach to apprehending, prosecuting, and sentencing those who traffic in cocaine.

Congress and the President moved us in that direction by enacting the Fair Sentencing Act. Prison Fellowship respectfully asks you to take the next important step to apply those changes retroactively.

While I was in prison, I saw the bitter resentment created by the disparity in punishment of those who dealt in powder cocaine with those who dealt in crack. It made no sense that an inmate who sold crack cocaine received a longer sentence than a dealer of powder who sold 40 or 50 times that amount
when both substances are pharmacologically equivalent.

Congress recognized the injustice of this disparity and passed the Fair Sentencing Act. However, unless you make the new sentences retroactive, there will remain a terrible injustice in the system as offenders incarcerated under the new sentences arrive, serve their time, and go home while inmates convicted of the same offense under the old law will remain behind bars for several more years.

If you approve retroactivity, these offenders will not be getting off easily. The average offender benefitting from retroactivity will see their sentence drop from 167 months to 127 months. That is, they will end up serving over 10-1/2 years. That is not a light sentence in anyone's book.

Prison Fellowship works with prisoners to help them turn their lives around. We share the good news of the gospel and work with inmates to develop a moral compass so they can make good, moral decisions after they leave prison.
We found our efforts ring hollow if we don't also care about the condition in which the inmates' families live, and the justice of the system that keeps them in prison.

If you allow this disparity in sentences to remain, our volunteers will have a difficult time explaining the unequal treatment to the men and women we minister to. And it will be very hard to tell their spouses and children why they must suffer without a parent or partner when someone who did the same thing gets to go home.

The extra 30 months may not seem that long, but to someone inside prison it seems like forever. Think of the family events they will miss if held for a longer time:

Graduations of their children and grandchildren; walking their daughters down the aisle at their weddings; funerals of parents, loved ones; coaching soccer; leading a Girl Scout troop. I know the importance of these family occasions.

My first furlough from my first halfway house was to take my eldest daughter's first
communion. My three-year-old son ran through the house shouting: My daddy home! My daddy home! To anyone who would listen.

It would have broken my heart to miss that special day for my daughter and my family, but it would have been even more devastating if someone convicted of the same crime were let out and I had to remain in prison.

Support of families are the most important factor in helping offenders make the difficult transition from prison to freedom. Why would we keep these families apart a day longer than necessary, particularly when Congress has recognized the injustice of those original sentences.

Now some will say they should have thought of that before they committed the crime. In fact, I probably would have said that when I was a member of the Legislature. But it would have been wrong. Because if a lot of things had been different they wouldn't have committed the crime.

Punishing them harder and longer than someone else with the same offense just isn't right.
It is unfair to both the inmates and their families. It is a fundamental principle of the law from the Code of Hammurabi through the Bible's *lex talionis*, and to our common law, that the punishment for a crime should do no more harm than the underlying crime.

The disparity in the justice of the system — excuse me — the disparity in sentences between crack and powder has done far more harm to our communities than the original offenses. To leave this vestige of disparity unaddressed would be a tragedy not only for the individuals and their families but for those communities, as well.

Now some have warned that you will unleash a wave of violent criminals if you apply these new sentences retroactively. This is not borne out by our past experience. Kingpins and violent drug dealers will not be set free if you make the amendment retroactive.

In fact, not a single offender will be released automatically. Retroactivity will merely permit certain offenders who have already served long
sentences to request a reduction in their sentence. The decision to grant a sentence reduction can only be made by the sentencing judge. If there is reason to believe that the offender remains a danger to the community, the government can present that evidence to the judge.

In fact, the statute that allows retroactivity also directs the court to make public safety — take public safety into account. No one wants to inflict an increase in crime and violence in our cities. We know from past experience that that won't happen.

In 2007 I testified before you on whether to make your recently enacted two-level downward adjustment retroactive. I listened as several officials with impressive titles made breathless predictions that mayhem, violence, and social disintegration would follow your decision.

An assistant U.S. attorney flatly predicted, quote, "These offenders likely will reoffend and will do so within a short time of getting out of jail." She testified that
retroactivity would contribute to the growing violent crime problem, increase the number of murders, and undermine public safety.

Of course those overheated predictions didn't come about. Nothing of that sort happened. So for those who predict that applying the Fair Sentencing Act retroactively will set free thousands of violent criminals to run riot in our cities, I press them to explain why this retroactivity would be different than the previous one in 2007.

In addition, those benefitting from retroactivity would still have served ten years on average. Do those who oppose applying the new sentence retroactively really believe that ten years in prison won't change someone, but an additional 30-or-so-months will? I would really like them to make that argument with a straight face.

At the 2007 hearing, an assistant director of the U.S. Marshal's service predicted that his agency would be overwhelmed by the flood of requests and, quote, "manpower and funding (will) be diverted from task forces, protection details and new
initiatives like the Adam Walsh Child Protection and Safety Act."

We can always rely on bureaucrats to threaten to close down a popular effort like the Adam Walsh Act in order to resist reforms. His prediction of cataclysm of course proved erroneous.

The courts, prisons, prosecutors, and marshals coordinated the processing of requests for retroactive sentence reduction, and the system handled them seamlessly.

The Bible tells us that we are to seek punishment in proportion to the crime. The same punishment should be meted out for the same offense, measure for measure, and pound for pound.

The Commission has the opportunity to restore fairness and balance to our sentences for crack cocaine. As a matter of principle and justice, the Commission should make the new sentences retroactive.

Thank you.

CHAIR SARIS: Thank you. Judge Howell?

COMMISSIONER Howell: Mr. Mauer, you spent
a few pages in your written testimony talking about 
prison overcrowding, and it is one of the mandates 
that the Commission has to keep track of prison 
overcrowding in the prisons. And the Commission has 
taken, I think, an important step to fulfill that 
obligation in our organic statute by having the head 
of the Bureau of Prisons testify at the beginning on 
our proposed amendments, testify here today.

And one of the things I have been thinking 
about is whether or not we should incorporate more 
directly that obligation that the Commission has been 
given — and using "shall" a couple of times in 994 — to 
the Commission by incorporating that more explicitly 
in our consideration of retroactive application of 
the guidelines in 1B1.10, in addition to the three 
other factors that Ms. McCurdy talked about that we 
normally look at.

I asked this question of Judge Walton, my 
colleague on the bench here, and I wondered from your 
perspective — since you spent so much time talking 
about overcrowding — what your reaction would be to 
that proposal.
MR. MAUER: Well, you are all lawyers and I am not, so I am going to be careful about the "shall" and the "may" and things like that, and I will leave that to your discretion. But certainly as a matter of policy, it certainly seems like there is a very close relationship to the extent that you are looking at prison overcrowding issues as part of sentencing policy, why would retroactivity be substantially different?

You know, essentially we are talking about how many people should go to prison, and how much time should they spend there. And the sum total of those decisions adds up to overcrowding potentially. And it is just a matter of circumstances in large part whether people are getting out at 85 percent of their time, or some people benefit from retroactivity for good policy and legal reasons.

And so it would seem to me that it is essentially the same argument in terms of what the Commission should be looking at, and to do so in a responsible manner certainly.

Public safety is always going to be a
concern, but public safety concerns can be addressed. And if there is an additional benefit of dealing with overcrowding, it is hard to see any objections to doing something like that.

Yes, Mr. Nolan?

MR. NOLAN: Could I also respond to that?

COMMISSIONER HOWELL: Yes. Anybody else can respond to that, as well.

MR. NOLAN: I really think that is a very important idea. I served on the Prison Rape Elimination Commission with Judge Walton. I also served as a member of the Commission on Safety and Abuse in America's Prisons. And it is very clear from the evidence that crowded prisons create a violent atmosphere.

Oftentimes the inmates end up running the institution. They overpower the guards. It's the most the correctional officers can do to keep a lid on it by protecting the perimeter of the prison. A riot out in California occurred in a dorm where two rival gangs were. There were 250 inmates in a dorm, a squad bay that in the military would have housed 50
There was one correctional officer for those 250 inmates with the bunks stacked three high. Literally, the officer who went in the dorm could not see what was going on halfway down the dorm, let alone all the way down.

And all those inmates were put at risk, not just the violent ones but those who were in for relatively low-risk offenses. And frankly, those ones in for low-risk offenses are younger, and usually are the ones that are the victims of rape and of other types of violence perpetrated on them.

I come from California. I no longer live there. But in California, the prisons are so bad there's no room for re-entry. Every hallway, every chapel, every library, every classroom has bunks in them. They literally do not have room in which to run drug education classes, to run Bible studies, to teach life skills, no re-entry preparation can go on because of the crowding.

And I realize that is a state prison, but we can see the impact of crowding. And so I really
commend you for suggesting that. That should be very much a priority.

If a corrections department can be worthy of saying "corrections," there has to be room in which not only to warehouse people but to have programming to have them leave prison better than they come in. And that is impossible with these crowded prisons that are so violent.

CHAIR SARIS: I had a question. You know, as we were discussing this morning, some judges have already gone 1:1, and some judges have stuck with the really tough former penalties. And so as we roll this out, some prisoners aren't going to get much of a benefit because they've already received the benefit. And how do we — I guess this would be true for both Mr. Nolan who has been there and understands how communications are effective within the prison, and you Mr. Shelton, how are we going to tell the communities this, so that there aren't going to be unrealistic expectations that not everyone is going receive a reduction? Some may have already received it. I don't know if you have any ideas for us.
MR. SHELTON: I would just say there are many ways to actually educate the community on the changes that are occurring. And certainly even as we celebrated the marginal, we've—though extraordinary change has already occurred, I think people recognize, celebrate, but look forward to other things that need to be done.

Certainly as we talked about, going from 100:1 down to 18:1. Many of us celebrated. This was the first time we have seen this kind of movement, and the thousands upon thousands of people that it would affect.

Explaining that to the community made people feel better about the direction the nation was going in; that their cries were not going unheard, but that still much more needed to be done.

I think the short answer is that I think people will appreciate that we are going in the right direction, and appreciate that there are those that have actually taken the extraordinary step even before we have gotten to formal retroactivity along these lines. And I think they will appreciate that
still much more needs to be done.

  Don't forget, even after we go beyond retroactivity, we will still be here fighting to bring this down to 1:1. Because as one of my good friends on Capitol Hill said, though we've seen a major change in going from 100:1 down to 18:1, that is going from a lot of racism down to a little racism. The world is getting better. It is something to celebrate, but there is still so much more to be done.

  I think it can be done very well, and people will be measured, quite frankly, in their enthusiasm over these very positive changes.

CHAIR SARIS: Mr. Nolan, how would it be best to communicate?

MR. NOLAN: I am so glad you brought this up, because frankly I hadn't thought of it. And it will be a big problem. The inmate underground is unusually accurate in most ways, but they tend to over-hope. I don't know if there's such a word, but to —

CHAIR SARIS: We'll make it one.
(Laughter.)

MR. NOLAN: In fact, every year I was in, rumors would sweep through the camp that there were warehouses full of GPS devices just waiting to have us all sent home on home confinement. And they all believed it.

I think the best thing—and I am so glad you brought this up, because again I had not anticipated that. The important thing is that we educate the inmates, those of us, to train our volunteers to discuss this, and knowledgeably have something to hand to the inmates—groups like FAMM, other groups, NAACP, [ACLU], others. I frankly think that we should have a little brochure that explains that not everyone is going to benefit from this. And, depending on their own unique circumstances, some will benefit more than others.

That is very different than just saying categorically those under the old law can't. But that's a very good point. I'll undertake an effort to educate our people, because it is really important that we not falsely give them hope—expectations more
than hope. So that is a very good point.

MR. SHELTON: I would only add that the NAACP, and I think so many of our other organizations, actually have units within the prisons. So certainly that task of educating the prisoners on how this change would affect them is something that we can very easily do.

But also on the outside, not forgetting that most of these prisoners have families, and indeed those families still live in our communities, the assumption is, as they come out of prison they will be going back to the same communities they left, and a community which houses their families, as well.

So certainly educating the prisoners inside through the various entities, and educating them outside throughout the community structure is something that we can easily do.

CHAIR SARIS: Does anybody have any other?

COMMISSIONER HOWELL: Let me just have one last question to Ms. McCurdy. And that is, you know this morning we had some discussion with some of the panelists about one of the directions in 1B1.10
regarding directions to sentencing courts, should we decide to make the FSA implementation amendment retroactive in whole or in part.

There is a specific direction that says that if a court has already given a non-guideline sentence, which could be interpreted as a downward departure, then any further reduction in the sentence may not be appropriate. Even if we made the guideline retroactive.

The federal public defenders have a very strong position that we should eliminate that line. Our Practitioners Advisory Group says the same thing. I was interested to see that in your testimony that you think that no changes to 1B1.10 are required, and specifically cite to that sentence as a good thing, as opposed to one that we have heard other people say should be eliminated. And if not eliminated, then certainly provide an explanation that would allow judges, sentencing courts who have given downward departures to still evaluate whether or not a further reduction should be required.

Could you just explain whether I am
reading your testimony correctly? And whether that
can be reconciled with the other testimony we have
heard?

MS. McCURDY: You are reading our
testimony correctly. And I guess what we looked at
was a balance. Again, our position is there
shouldn't be any limitations on who should benefit
from this amendment, or these parts of the amendment,
if they are applied retroactively.

And if there is concern, if the Commission
has concerns about whether, for example, cases post-
Booker, post-Kimbrough, post-Spears, that that
particular part of the guidelines, 1B1.10, will give
the judges enough direction so that they can take
into account whether a person has already had a
variance or not.

And so that is why our position is you
don't need to change it. We think that that
particular part of 1B1.10 gives judges the kind of
flexibility to be able to look to see whether a
variance has happened in the past, and take that into
consideration.
And again, as I said in my testimony, and we say in our written testimony, most people have not benefitted from either a Booker, a Kimbrough, a Spears, a variance. And so the majority of the people have not, and so that is why it is not fair in our mind to then say categorically that these defendants should be – there should be limitations on their retroactivity if most people have not benefitted from it.

COMMISSIONER HOWELL: Okay. So if I am understanding your testimony correctly, both your written testimony and what you've explained orally, it's that the ACLU's position is that just because a crack offender had at his or her original sentence been given a downward departure, that should not preclude that defendant from eligibility for a further departure should we make this amendment retroactive? And, that interpretations of that specific sentence that you cite to the contrary – meaning you get a downward departure, you're not eligible anymore – in your view is not the correct interpretation of that sentence?
MS. McCURDY: Right. Because our view is that the judge — that, while it discourages the judge from — the judge will be discouraged from giving further variances, we feel like that will give judges an opportunity to be able to decide on individual cases whether it is appropriate in this case to give a Fair Sentencing Act variance or not, or that judge can see from the record that that person has already gotten a variance.

COMMISSIONER HOWELL: Understood.

CHAIR SARIS: Thank you. Anyone else?

(No response.)

CHAIR SARIS: Thank you, very much. It was very helpful.

(Pause.)

Well, so this is the second community interest panel and I want to introduce Julie Stewart whom most everyone in this room knows already, the president and founder of Families Against Mandatory Minimums, fondly known as FAMM, which she organized in 1991 to promote fairer sentencing laws. Previously she worked at the CATO Institute for three
years as director of public affairs.

Next is Natasha Darrington, who is currently enrolled in a full-time business administration college program in North Carolina. She was arrested in 1997 in her husband's cocaine-based conspiracy, and was sentenced to 15 years and eight months in federal prison. She was released in March 2008 after serving 11 years as a result of the Commission's 2007 crack cocaine retroactivity amendment.

Now I am not going to do justice by this, Nkechi?

MS. TAIFA: That's good.

CHAIR SARIS: Taifa?

MS. TAIFA: That's it.

CHAIR SARIS: All right. She is a senior policy analyst for civil and criminal justice reform at the Open Society Institute, and a commissioner on the District of Columbia Commission on Human Rights. Previously she was an adjunct professor at Howard University School of Law, legislative counsel for the American Civil Liberties Union, public policy counsel for the Women's Legal Defense Fund, and staff
attorney for the National Prisons Project. Wow.

And finally is Jasmine Tyler, deputy
director of national affairs in Washington, D.C.
Office of the Drug Policy Alliance. Previously she
worked as a research director for the Justice Policy
Institute, and as a sentencing advocate collaborating
with public defenders in Washington, D.C., and
Fairfax, Virginia.

Welcome. Ms. Stewart?

MS. STEWART: Thank you. Good afternoon.

Yes, everyone I hope knows I'm Julie
Stewart, and the president and founder of Families
Against Mandatory Minimums. But I have not had the
pleasure yet of testifying in front of you,
Chairwoman, or I don't believe also you, Ketanji
Jackson. So it is a delight to be here. Thank you.
The work you do is incredibly important to all of the
people that support FAMM.

Four years ago I testified at a similar
hearing about the so-called crack-minus-2
retroactivity, and at that time a woman named De-Ann
Coffman was with me, and some of you saw her
testimony.

I think that it is always important if we can bring someone whose life your work has personally affected to come and testify before you. And so De-Ann did an excellent job, and I know that Natasha will do as well. It is important for you to see that your work has real bearing on individual lives.

You did the right thing in 2007 by voting to make the amendment retroactive. I am confident that you are going to do that again. Your moral leadership really made it possible for Natasha to be here today, because without your vote for retroactivity she would still be in prison for about another year.

She does represent so many of the 16,500 people that have benefitted, or will benefit from retroactivity, and I want you to be able to hear her story and what she has done with the extra years of freedom you have given her.

In addition to Natasha, there are about two dozen FAMM members here who have come from quite distances – Chicago, New Hampshire, North Carolina.
They have come today to help you remember and see who your policies affect.

I would like, with your permission, Madam Chair, to ask them to stand and just identify themselves.

(Many audience members stand.)

MS. STEWART: These individuals, by their presence alone, can testify more powerfully than I can as to why the Commission must apply the new crack amendment retroactively and without restrictions.

Thank you so much. You can sit down.

I know it has been a long day and a lot of people have already told you what I would like to tell you, so I am not going to tell you the same thing. But I can probably — you can probably guess that we do support retroactivity without restrictions.

But I do want to say a couple of things.

First, I don't want to belittle or minimize the legitimate concerns of public safety that we all share, but I do want to put those concerns in perspective.
For one thing, four years ago when I testified in support of making crack-minus-2 retroactive, the Fraternal Order of Police testified that retroactivity would, quote, "inflict a great harm on many innocent Americans and drive up crime rates."

They said, with great certainty, that those who would benefit from retroactivity were, quote, "far more likely to reoffend."

These predictions — the predictions coming from the Mukasey Justice Department were even more frightening. Of course now today we know better than that. The Commission recently released its retroactivity report which showed that — or recidivism report, which showed that the release rate — the recidivism rate for those released early because of crack-minus-2 retroactivity was actually a little lower than those in the control groups.

So we know that retroactivity for people who have a crack offense is not going to result in violence across the country.

The second thing I would like to mention,
especially in light of what has been discussed here
today, is the definition of "violence." I think that
as one of the carve-outs that the Department of
Justice is recommending is that those with a gun bump
or a weapons enhancement not be eligible for
retroactivity.

I just want to point out that Natasha is
an example of who would be considered a "violent
offender." Her husband had two legally registered
firearms that were in the house with the drugs. So
when they were arrested, the guns were found. She
received a two-level gun bump in her presentence
report and in her final sentence, which means that
she is considered "violent."

If those carve-outs had been part of your
2007 retroactivity policy, she would not be sitting
here today; she would still be in prison. So I just
say that because I think it is very easy to throw the
word "violent" around, and we picture the worst-case
scenario, when in fact as we well know there are a
lot of people who are convicted under conspiracy laws
that get a two-level gun bump for a gun that the co-
defendant may have had. And she is a perfect example
of that.

So we certainly think that adding special
restrictions on the courts considering crack
defendants who have been sentenced to unduly harsh
terms will undo the good will that your work to
mitigate racial disparity in sentencing has fostered.
I understand that the Department of Justice pretty
much split the baby, and there was I'm sure some
politics behind that, but you don't have to.

So I would just like to close by saying
that again you have done fantastic work here. For so
many years I have worked with this Commission and
previous Commissions on this very issue of crack
cocaine reform. I probably have done this for 17
years, and I feel like we are so close to the end,
and I am very, very hopeful that on behalf of
Natasha, and the people who are here today with loved
ones in prison, and the 30-some-thousand letters you
received, the people who wrote those, the 14,500
people we communicate with on E-mail in prisons,
which is a fantastic way now to get information to
them, that you will make the right decision yet again
and that these people will be able to benefit from
the retroactivity that they are deserving of.

Thank you.

MS. DARRINGTON: Is it on? Hello? Good afternoon. My name is Natasha Darrington and I would like to thank you for the opportunity to testify.

Today you are asking me whether the new crack guidelines should be made retroactive? My answer is a resounding "yes."

In 2007 the Commission voted to make the crack-minus-2 guideline changes retroactive. I am only sitting here today before you because of that decision. I am a direct beneficiary of that vote for justice.

If the Commission had rejected retroactivity, I would still be in prison until next year. Today I am here to thank you in person and to tell you how retroactivity can transform lives.

I hope that you can take some comfort in knowing how well I am doing, what coming home early has meant to me and my family, and what it would mean
for the women I left behind.

In 1997 I was sentenced to 15 years and eight months for my involvement in a crack cocaine offense. I was 37 years old. People in my community were shocked by my sentence. I was devastated. I was a first-time offender who had never spent a day in prison. At that time, there was a 100:1 disparity between crack and powder cocaine sentences.

This disparity has come under fire from the public and the Commission. It was notorious as one of the most racially discriminatory laws on the books. Sadly, I came to know that law's devastating impact personally and deeply. More tragically so did my family.

My four children, who were 10, 12, 15, and 17 when I went to prison 14 years ago, are all adults now. In one way they were lucky. They didn't have to go into foster care. They stayed with my father until he passed away, and then with my husband's family.

But I wasn't there to help them grow up. I missed their birthdays, high school graduations, I
missed the birth of my first grandchild. I missed the funerals of both of my parents. I missed the chance to comfort my children when their grandparents died.

My children and I are close. Every day I served in prison, my family served it with me. My children and I had many a soggy pillow over those years. I became involved with FAMM early in my incarceration. I closely followed their efforts to change crack cocaine sentencing laws. When the Commission created the crack-minus-2 changes in 2007, I mailed you all a letter with the picture of my grandson visiting me in prison, and I urged you to make the changes retroactive.

The day the Commission voted for retroactivity, my daughter Kamille heard the news in her upper division writing class at Fresno State. She, her professors, and her classmates had been discussing the unjust crack laws for some time because they knew I was in prison for them. When they learned that the changes had been made retroactive, all the students and Kamille's professor
began yelling and cheering. Kamille began shouting, "My Mom is coming home! My Mom is coming home!"

When I heard the news in prison, the women around me were excited and nervous, anxious to see if they would benefit. They lined up at the phones to call their attorneys. Women who were in prison for other drug offenses said that even though they wouldn't benefit from the changes, they were glad that the Commission had done something to make the system fairer.

Retroactivity gave the rest of the women hope. I cannot tell you how much it meant for us to know that the Commission cared enough not only to reduce unjust sentences, but also to leave no one left behind who would benefit.

I call March 3rd, 2008, my new year's day. After nearly 11 years in prison, I was going home to my children. I was released one day before Kamille's 23rd birthday. She said it was the best birthday present she had ever received.

The following year I was able to hold her hand when she went into surgery for her appendix,
also on her birthday. My life no longer revolves around the events that I missed, but the events that I am able to be a part of. I was present for the birth of my second grandchild. My grandmother's 96th birthday. And later her funeral.

I was present for Thanksgiving dinner with my sister. I was present for Kamille's graduation when she received her bachelor's. And I'll be present when she receives her master's. I will be present for my son's graduation. I will also be present for my own graduation next year. And when I receive my bachelor's degree in business administration, I will be going right into my MBA program.

My dream is to start my own photography business. None of this would have been possible if the Commission had done what was easy instead of what was right in 2007. I would still be in prison today, still missing out and being missed.

On the day that I heard about the vote for retroactivity, some of the prison guards gathered us together and told us we would not benefit from the
Commission's changes. For some, the guards were right. Even for many who did benefit, they still had years, or decades left to serve.

To this day, I feel that most of these women pose no threat to the community. They are kind, compassionate, and have something to offer society. Is the system fairer now than it was three years ago? Yes. Even the people I left behind think so. But for too many, it isn't fair enough.

Today I ask the Commission to repeat history. Fairer, more just laws shouldn't apply only to some people; they should apply to all people. Please do the right thing and make these crack guideline changes retroactive.

Thank you.

CHAIR SARIS: Thank you. Ms. Taifa.

MS. TAIFA: Thank you. Judge Saris and distinguished members of this esteemed Commission:

Thank you for the opportunity to testify in support of retroactivity. My name is Nkechi Taifa. I serve as senior policy analyst for the Open Society Policy Center, and I also convene the
Washington-based policy network, the Justice Roundtable, a coalition of over 50 organizations working to reform federal criminal justice policy, several of whom have testified today.

Since 2006, the 20th anniversary of the Anti-Drug Abuse Act of 1986, the Justice Roundtable has been at the epicenter of advocacy efforts to completely eliminate the 100:1 quantity ratio in sentencing between crack and powder cocaine.

As an advocate supporting crack cocaine sentencing reform since 1993 when the Sentencing Commission first began to reach out to the public for comment on the issue, I am honored to testify before the Commission once again this time in support of the retroactive application of the Fair Sentencing Act guideline amendment.

On behalf of the Justice Roundtable, I applaud this Commission for its tenacity for nearly 20 years, through different commissioners, administrations, and Congresses in doing everything within its statutory power to end the irrational, unwarranted, and racially discriminatory disparity.
between crack and powder cocaine.

We hope at the conclusion of this hearing that the Commission will once again act within its power and make the Fair Sentencing Act guideline amendment retroactive.

Commissioners, it has indeed been a long day, and you have heard a lot of testimony. So rather than rehash much of what has already been discussed, I would like to begin by focusing my remarks a bit more personally. And as I do, I ask that you sit back for a moment and relax, and close your eyes if you wish, okay, and listen with your hearts.

Now I know this is not conventional in an official public hearing setting, but bear with me for just a moment and take a deep breath. And I want you to visualize a long, hot day in August. Let's just say it was 2008, August 3rd to be exact. And three people who had never been arrested in their lives, had never committed any violent acts at all, were arrested for possession with intent to distribute five grams of crack cocaine – the weight of a couple of
They were each sentenced by Judge Draconian to a mandatory minimum sentence of five years in prison. And let's just say that the names of these three first-time, non-violent offenders were Patti, William, and Beryl.

Now visualize it being two years later, August 3rd, 2010, to be exact, another long, hot summer day, and three additional people — Ricardo, Ketanji, and Dabney, and let's not forget about Jonathan as well, okay — were arrested for the exact same —

COMMISSIONER HINOJOSA: He's the leader.

(Laughter.)

MS. TAIFA: — crime, possession with intent to distribute five grams of crack cocaine, but because Congress had just recognized that crack cocaine sentencing was unfair, they were sentenced by the exact same Judge Draconian not to five years in prison but to probation.

How would you feel if you were Patti, William, and Beryl, the first three to be sentenced?
Now close your eyes and answer this question in your mind. Should a sentence be based on whether or not an individual was, quote/unquote, "lucky" enough to commit a crime August 3rd, 2010, the effective date of the Fair Sentencing Act, as opposed to years, or months, weeks, or even the day before?

Commissioners, you have heard how the three factors from the background guidance overwhelmingly favor retroactive application of the Fair Sentencing guideline amendment.

First, that the purpose of the Act was to correct the flawed, unwarranted 100:1 sentencing scheme and to lessen its racially discriminatory impact.

Second, you have heard that the change in the guideline range is significant, and supports retroactivity with 12,040 people being eligible for retroactive relief with roughly three years shaved off of their sentences.

And third, you have heard how retroactive application of the Fair Sentencing Act guideline amendment would not be unduly burdensome on judicial
resources; that throughout the years amendments have been promulgated adjusting the guidelines for particular drug offenses, and in each case the Commission has made these amendments retroactive, whether it be LSD, marijuana, oxycodone, or the crack-minus-2 reduction to the sentencing guidelines. It was shown to be a relatively smooth process and not involving difficult calculations.

You have heard all of that. And you are beginning to hear the voices of those impacted. You heard from Pat Nolan. You just now heard from Natasha. And I want to continue that with the pleas of two additional people who wanted me to share with you today as well, that of Kemba Smith and Roderick Piggee, whose parents arduously testified before the Commission during the early years of the crack cocaine reform seeking justice and relief for their children's sentences under the 100:1 quantity ratio regime.

Both are currently members of society, very very productive. Kemba, whose case became the poster child of the crack disparity, received
clemency after six years. And Roger, who co-founded
the first organization to solely focus on eliminating
the crack cocaine disparity, served a minimum of 17.5
year sentence — the maximum. Excuse me, he served the
maximum.

Kemba wanted you to know that it is
imperative that the Commission apply the Fair
Sentencing Act retroactively. She was sentenced to
24-1/2 years in the same Eastern District of Virginia
which today has the highest number of people who will
be eligible for a sentence reduction if the amendment
were made retroactive.

Kemba Smith implores this Commission to
look at how unfair the disparity has been, and
concludes that it will continue to be a grave
injustice for offenders who will be affected, and
their families, to know that we have been fighting so
hard for them to gain relief, only for them to not
benefit from the change at all.

Rod Piggee stresses that cocaine is cocaine
is cocaine. Without powder, he says, you can never,
ever, ever get to crack. He wants the Commission to
understand that from the standpoint of a prisoner, long and unjust prison terms only make one bitter. Retroactivity, he states, would not only right some wrongs, it would also save the country tons of money by giving individual relief from unjust, lengthy prison terms that were never fair in the first place.

And I saw Lawrence Garrison in the back there, also, who I think benefitted from the 2007 crack-minus-2 reduction as well. These are very, very real people with very, very real cases.

But to expound on Mr. Piggee's statement, the Bureau of Prisons currently incarcerates over 200,000 people at a price tag of $6 billion, a 700 percent increase in population over the past 30 years, and a 1700 percent increase in spending.

With the entire nation focused on the economy, one area with clear savings is the criminal justice system — in particular sentencing reform. These astronomical costs to taxpayers can be curbed with the retroactivity of the Fair Sentencing Act guideline amendment.

As I bring my oral remarks to a close, it
is important to note that retroactivity is not a get-out-of-jail-free card. And retroactive release will not burden communities. The courts will systematically review all applications for sentence adjustment, and the release of prisoners will be gradual across the country, staggered over a 30-year time period.

Many people serving sentences for non-violent drug offenses are spending the majority of their adult lives behind bars for the commission, in many instances, of victimless crimes. They have incurred lengthy sentences, now agreed by lawmakers to be unjust, inconsistent, unfair, and biased. They have been watching developments throughout the years. These incarcerated individuals cheered the Commission's 1995 Special Report to Congress which recommended the complete elimination of the 100:1 ratio.

The ensuing 1997, 2002, 2007 reports which consistently called for reform provided them with additional hope for change. Prisoners were ecstatic by the Commission's study, Fifteen Years of Guidelines
Sentencing, which recognized that, quote, revising the sentencing disparity between crack and powder cocaine would better reduce the gap in sentencing between Blacks and Whites than any other single policy change, dramatically improving the fairness of the federal sentencing system.

Some enjoyed relief with the 2007 crack-minus-2 guideline reduction with its retroactive application. And finally, the currently incarcerated saw a light at the end of the tunnel with the passage of the Fair Sentencing Act. It is important to note that the Commission has never denied retroactive application of any drug guideline amendment.

Based on this past practice, for people currently incarcerated such as the fictitious Patti, William, and Beryl, not to benefit from the changes in the law which benefitted Ricardo, Ketanji, and Dabney, changes which ironically were inspired by the egregiousness of the sentences of the first three, would be cruel and unusual. Cruel, because of fundamental unfairness, and unusual, again because the Commission has never denied retroactive
application of drug guideline amendments. Therefore, it is only right that the Commission apply the guideline amendment retroactively, eliminating any disparate sentencing treatment between current prisoners and those newly sentenced. The luck of the draw is not sound policy, but inconsistent, unfair, and biased. The Commission must follow its established practice and apply the new guidelines retroactively.

If the disparity is wrong today, it was wrong yesterday. Everyone should have the benefit of today's better judgment.

Thank you for this opportunity to testify.

CHAIR SARIS: Thank you. Ms. Tyler.

MS. TYLER: Good afternoon, Madam Chair, Vice Chairs, and Commissioners.

I am Jasmine Tyler – is this on?

CHAIR SARIS: No.

MS. TYLER: Sorry about that. Good afternoon, Madam Chair, Vice Chairs, and Commissioners.

I am Jasmine Tyler, deputy director of
national affairs for the Drug Policy Alliance here in D.C. I am also the daughter of a former federal prisoner.

Thanks sincerely for allowing me to be here to share our thoughts on this very important issue. While my Dad is no longer with us, I speak for him and those he left behind who are still incarcerated for low-level drug offenses, and for their family members.

In a cruel twist of fate, the top of our press releases say, "For Immediate Release. Contact Jasmine Tyler."

Many people have misinterpreted this statement to mean —

(Laughter.)

MS. TYLER: — please get my loved one out of prison immediately.

CHAIR SARIS: I guess we should be careful on our press releases, too.

(Laughter.)

MS. TYLER: I have to unfortunately tell them that I can't help them, and it breaks my heart
every time I have to do so. Many of these calls are very, very tearful calls.

It is also very timely that the Commission is holding this hearing today, as this month marks the 40th anniversary, if one can call it that, of the War on Drugs, a war that has cost over a trillion dollars and directly and indirectly harmed millions of lives.

The Drug Policy Alliance, the nation's leading organization promoting new drug policies, is grounded in health, science, human rights, and compassion and fully support retroactive application of the Fair Sentencing amendment without restriction and urge you to do so as soon as possible.

I will now elaborate on why you should do that, but I will deviate from my testimony a little bit first.

Over the past 20 years in four separate reports, as Nkechi mentioned, the Commission has repeatedly requested that Congress raise the threshold quantities for crack cocaine triggers that trigger the five- and ten-year mandatory minimums in order
to ease the unconscionable racial disparities in sentencing, mitigate the harsh treatment of lower level crack offenders who are on the periphery of the drug trade, and better focus the prosecution of serious drug traffickers.

Congress explicitly recognized that the sentences handed down under the previous regime were manifestly unfair and had egregious side effects. Failing to provide retroactive effect to this amendment would frustrate the intent of the Fair Sentencing Act to reduce the over-incarceration of low-level offenders.

In the Commission's own analysis of the impact of this amendment, you found that 3,100 individuals serving time for crack cocaine offenses would be eligible for release in the first year alone. Indeed, the vast majority of people who would be affected by retroactive policy have been sentenced since 1995, the year the Commission first made its recommendation to Congress to reform the sentencing scheme.

Failing to make this amendment retroactive
would arbitrarily deny relief to more than 12,000 individuals whom Congress and the Commission have finally acknowledged should not have been sentenced so harshly in the first place.

Perhaps most importantly, though, denying retroactive application would exacerbate the racial disparities associated with crack cocaine sentencing policy since 85 percent of those individuals eligible for a reduction are African American.

The mass incarceration of the African American community in which the crack sentencing structure plays a huge role has become so pronounced that many claim the drug war functions as an institutional system of social control in communities of color, tantamount to the Jim Crow era.

In fact, Michelle Alexander, civil rights attorney, professor, and the author of *The New Jim Crow: Mass Incarceration in the Age of Color* *Blindness*, has found that the U.S. government currently supervises, through imprisonment, probation, or parole, more African American men than were enslaved in 1850.
Imagine for a second that the Civil Rights Act of 1964 had upheld segregation in existing schools, and only mandated integration for new schools being built. Imagine that discrimination was only prohibited in new bathrooms or water fountains, while maintaining separate but equal standards in all those already in operation.

Once these racial injustices are identified, they must be eradicated in all of their forms, and the Fair Sentencing Act and the crack cocaine sentencing disparity is no different.

Second, the amendment is a good candidate for retroactive application because it will have significant impact on prisoners. The Commission has estimated that if the changes in the amendment were applied to currently incarcerated individuals, it would reduce the sentence for over 12,000 people by approximately 37 months. That is a savings of over $75,000 per person for taxpayers.

This would considerably benefit the Bureau of Prisons, which is hurting for money and currently operating over its rated capacity. It is also
important to note that drug offenders make up more than half of the Bureau of Prisons population.

This is especially — I'm sorry. Reaching the maximum operating capacity for the Bureau of Prisons should be the ceiling, not the floor, and greater care should be taken to ensure that the prison beds are being occupied by those who truly do compromise public safety.

It is very important to note, in light of the recent Supreme Court decision that found prison overcrowding in California is so severe that it has been deemed an Eighth Amendment violation against cruel and unusual punishment.

Furthermore, retroactivity would not result in the mass and chaotic release of eligible offenders. The most significant impact of the amendment would be seen in the first year when 34 percent of individuals who are eligible would be released. But the remainder of those who are eligible, their sentences would be reduced gradually over a period of more than 30 years.

Third, retroactive application of the
amendment will not be difficult to administer, as district courts would simply be able to use the modified Drug Quantity Table to derive new sentences using the previously determined quantities in the record.

The simplicity of this implementation would not pose an undue burden on the court system, as only three court districts would be presented with 100 or more eligible defendants in the first year of implementation.

Since 1993, the Commission has promulgated amendments that have had the effect of lower sentences for particular drug offenses, and in each instance has made that amendment retroactive. This is true for LSD, marijuana, oxycodone, and crack. In the 28 months after the crack-minus-2 retroactivity decision, approximately 24,000 applications were processed, of which 16,000 individuals benefitted from early release.

In the 1995 decision to change the marijuana plant calculation, the Commission articulated the need to enhance fairness and
consistency in their decision to do so.

These examples serve as strong evidence that retroactive application to the Fair Sentencing Act guideline amendment can be effected without undue difficulty or expenditure of resources.

And fourth, criminological research on recidivism has not found major differences in the degree of reoffending by the time served in prison, and major studies, including one by the Department of Justice, suggests that longer prison terms do not reduce recidivism and may in fact be counterproductive.

In fact, evidence is beginning to surface that imprisonment may actually worsen rates of recidivism among drug offenders, especially when compared with probation and other alternative interventions.

Scholarly research has generally concluded that increased penalties for drug crimes has had little if any effect on criminal behavior.

Many of those who become eligible for sentence reductions will have served, or continue to
serve, lengthy prison terms and would also therefore have aged out of major crime-prone years by the time they are released. As research shows, criminal activity peaks among individuals in their teenage years and then markedly decreases.

In conclusion, the retroactive application of the Fair Sentencing Act is absolutely necessary in order to facilitate a just application of the Act. It will best mitigate the problems of over-incarceration and racial disparity in sentencing that were created, maintained, and continue to exist under the decades-old crack cocaine sentencing regime, and also improve order and safety in the Bureau of Prisons.

The Fair Sentencing Act application should not be arbitrarily restricted to those who are arrested and sentenced after the enactment of the Fair Sentencing Act. It makes no sense to deny relief to thousands of defendants whose sentence the Commission has consistently condemned for the past 17 years.

Instead, the Commission should seize this
opportunity to undo some of the harm that has been wrought by more than two decades of unduly harsh sentencing structure.

For these reasons, the Drug Policy Alliance urges you to adopt retroactivity of your promulgated amendment. In other words, "For Immediate Release, Contact the Sentencing Commission."

(Laughter.)

CHAIR SARIS: Thank you. Do you have a question?

VICE CHAIR JACKSON: Yes. Ms. Stewart and those of you who represent similar organizations, thank you for continually reminding us of the real people who are affected by our policy decisions.

One of the concerns that was raised previously was about communication to inmates, to families, so as to stem any concerns about unrealistic expectations when we talk about these retroactivity determinations.

You mentioned that FAMM has some 14,000 E-mails that you carry — E-mail communications with
inmates, and I'm just wondering if you could talk a
little bit about FAMM's role in communicating with
inmates perhaps in light of what happened in 2007 and
what plans you would have if the Commission did vote
for retroactivity?

MS. STEWART: Sure. We've always worked
very closely with the Bureau of Prisons to coordinate
information so that they know what we're sending in
and that they're okay with it, and so that there's no
confusion.

And one of the things that I think FAMM
has done very well for two decades — this is our 20th
year — is provide accurate information to prisoners,
and so that they aren't getting — the rumors get
dispelled, and the truth gets disseminated.

The wonderful advantage we have now over
2007 is the E-mail access in federal prisons. I
believe if Tom Kane were still here he could tell us,
but I think every prison now has E-mail access, every
federal prison.

So the 14,500 people we have now that we
can communicate with directly, it grows every month
by 400 or so. So it makes it possible for us to send
in information directly to the prisoners, which they
widely spread about whatever happens. And so it is
very easy for us to quickly and accurately get them
the straight scoop. And that makes it so easy.

And again, we would talk to the BOP about,
you know, what they are going to recommend so that we
can help spread the way that they want the prisoners
to apply for retroactivity were it to be passed.

MS. TAIFA: Can I just add to that for a
moment? I just remembered, and Julie I know you
remember too, back when the crime bill of 1994 added
the provision for the Commission to study the issue,
prisoners across the country were watching the House
debate and all like that on C-Span and they
misinterpreted. They thought it was saying that they
could get out. And when it was found out that it was
just a study, there was just vast mayhem in the
prisons precisely because of the lack of information,
the fact that the communication was not properly sent
out.

So I think it is good that you are looking
at this issue now so that there won't be any misunderstandings.

COMMISSIONER HINOJOSA: Ms. Darrington,
one of the proposals from the Justice Department is
that we exclude someone that may have had a weapon.
And in your case, Ms. Stewart mentioned, and you
mentioned, possibly the issue of a weapon in your
case. That was the enhancement that was put for
personal possession? Or because it was involved by
some co-defendant? And it wasn't clear to me whether
the Justice Department's view was the person had to
be in actual possession or constructive possession
themselves, as opposed to somebody else in the
conspiracy.

MS. DARRINGTON: No. The two-point
enhancement was because it was found with drugs, and
so they considered them to be together.

COMMISSIONER HINOJOSA: And were you
sentenced before safety valve?

MS. DARRINGTON: No.

COMMISSIONER HINOJOSA: Did that apply in
your case, or not?
MS. DARRINGTON: No.

MS. STEWART: Because of the gun.

COMMISSIONER HINOJOSA: Well, but if you're not personally in possession of the gun, safety valve would still apply. If you didn't have actual constructive possession yourself—

MS. DARRINGTON: No, I didn't, but they just put it together because I was a co-defendant in the conspiracy. And so whatever the head person was responsible for, everybody in the conspiracy also became responsible for that.

COMMISSIONER HINOJOSA: Right. I understand that. But you didn't qualify for safety valve because of that?

MS. DARRINGTON: They said I didn't, that I wouldn't qualify for it.

COMMISSIONER HINOJOSA: Did you have a trial, or did you—

MS. DARRINGTON: I went to trial.

COMMISSIONER HINOJOSA: I was just trying to figure out how that fits with regard—it wasn't clear to me, and I should have asked the question
this morning when the Justice Department testified,
whether it had to be the defendant themselves' actual
or constructive possession as opposed to the
enhancement applying because somebody else may have
had it.

MS. DARRINGTON: I wasn't even in the
vicinity of any of that, and they said I didn't
qualify for anything.

CHAIR SARIS: I had a question for
Ms. Tyler. So you refer to the failed war on drugs.
And we heard from a witness this morning who seemed
to say: I'm all in favor of retroactivity, but
actually there's been some success here, that some of
these laws are actually deterring, you know, stopping
people from using cocaine, and crack.

So I am just trying to understand why you
felt it was failed, and whether or not you have
specific proposals in mind as to, apart from
retroactivity, what you think would it would do to
focus attention from low-level offenders to drug
kingpins, which is how you've worded it here.

MS. TYLER: Well first I think that we
should incorporate more of a health perspective into our drug laws. And so that would mean that lower—
typically, current lower level individuals would be carved out because in a process in which they are assessed, they wouldn't have to go straight to prison if we could have more alternatives available. And I don't just mean drug courts, because there are challenges with drug courts.

The needs of individuals who have substance abuse issues and who may be involved in these drug trafficking networks only to meet their own needs, or to meet the needs, their economical needs, would be automatically carved out. And that is one of the problems with the way our drug enforcement is focused. It has been focused very heavily on the low- and the low-hanging fruit, the easy arrests and the easy prosecutions as opposed to the investigations that take enormous amounts of time to uncover these intricate trafficking networks.

If we look to a country like Portugal that has decriminalized possession of drugs up to a ten days' supply, you will see that they have had immense
impat on their public health problems. Their HIV rate, infection rates, have decreased. The use of treatment has largely increased. The drug use rates for their teens has decreased, because teachers have even said they're able to have much more honest and open conversations with teens and explain to them the opportunities that are available.

Drug seizures have actually also gone up in Portugal. And so I would say that it's because they're doing much more smarter policing, as opposed to focusing again like we are on the low-hanging fruit.

CHAIR SARIS: Would you agree with Mr. Hutchinson, I guess it was, who said that there's been a decrease in drug addiction in the last 30 years?

MS. TYLER: Well I think those numbers are difficult to uncover. Because first of all, many of those studies are done by government agencies who are calling individuals and asking: Do you use drugs? Very few people will admit to anything like that, so those numbers are skewed, first of all.
And second of all, they are taken out of context because they are typically obtained in an instant in a person's life, as opposed to taken into account in the totality of that person's experience.

CHAIR SARIS: So you disagree?

MS. TYLER: I do disagree with Mr. Hutchinson's testimony this morning.

CHAIR SARIS: So a lot of the people who might get released, in your view, just still need to be monitored on supervised release, or drug addiction programs, and all that sort of thing? In other words, supervised release should be a concern?

MS. TYLER: Well I believe that people should have structure when they come home, and there should be re-entry opportunities for them to make their transition much more productive and effective for them so that they are not, you know, in a position where they're going to re-offend either by using drugs, or by being involved in other criminal activity.

CHAIR SARIS: So by "failed," you mean essentially we haven't made any difference? You
would take an opposite point of view?

MS. TYLER: Well I would say we have made very little difference. And in fact, in many cases we've created much more harm than good. And that is certainly the case with respect to syringe exchange funding, and the spread of HIV/AIDS, and Hepatitis C. It is certainly the case with respect to overdose fatalities, which are the second leading cause of accidental death in the United States. And it is certainly the case with respect to our drug sentencing laws and the extreme mass incarceration of particularly low-level non-violent offenders who are generally people of color.

CHAIR SARIS: Thank you.

COMMISSIONER HOWELL: Before I get to my question, I just wanted to join in the thanks to all of you, and the other witnesses who have testified here today. But in addition all of the groups who have taken the reports of the Commission as issued over the years on this issue and really I think carried the ball across the line in Congress in ways that this Commission doesn't have — really can't do.
So we can make recommendations, but to really make sure people in Congress hear it, it is really community groups who really deserve enormous credit for the situation we are in now, which is a much happier situation than before.

But the question I had was sort of falling along the lines of Ketanji, Commissioner Jackson's questions about sort of planning and the future. With our crack-minus-2 amendment, we gave great consideration to implementation periods and the effective date.

Should we decide to make the FSA implementation amendment retroactive, should we give a similar kind of consideration to a delayed effective date? Or do you think that because of the timing of our consideration now is different that we don't have to have the same kind of concern?

Have you thought about that particular issue with respect to the decision was have to make on retroactivity?

MS. STEWART: No. However, could it be done before November 1st? No, right? Retroactivity
couldn't apply before — it could?

COMMISSIONER HOWELL: No, it couldn't.

MS. STEWART: That's what I mean. So that is a long time I think. And so I don't think beyond November 1st there needs to be any delay, if that's the question.

COMMISSIONER HOWELL: So because of the timing of our decision now, you think we don't —

MS. STEWART: Right.

COMMISSIONER HOWELL: — have to have a similar kind of consideration of a delay in the effective date?

MS. STEWART: I think that's right. Now I realize that the LSD and marijuana changes affected far fewer people, but those were done on November 1st. Retroactivity took effect the same day as the change.

COMMISSIONER HOWELL: Does anybody else have an opinion about that?

(No response.)

COMMISSIONER HOWELL: Okay. Thank you.

CHAIR SARIS: Anything else?
(No response.)

CHAIR SARIS: Well thank you very much.

The last panel of the day kept us going. I had a little bit of a chill when I heard about the fictitious Patti going to jail.

(Laughter.)

CHAIR SARIS: That kept me up. But thank you very much once again for all that you do to promote fairness. Thank you.

MS. STEWART: Thank you for what you're doing.

CHAIR SARIS: Thank you. We're recessed.

(Whereupon, at 3:08 p.m., Wednesday, June 1, 2011, the hearing was adjourned.)