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Before the
UNITED STATES SENTENCING COMMISSION
Public Hearing
Thursday, March 17, 2011
Training Rooms A&B, Concourse Level
Thurgood Marshall Federal Judiciary Building
One Columbus Circle
Washington, D.C. 20002-8002

The hearing was convened, pursuant to notice, at 8:38 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

1 PANELISTS:

2 PANEL I: EXECUTIVE BRANCH PANEL

3 DEPARTMENT OF JUSTICE

4 Harley Lappin, Director, Federal Bureau of
5 Prisons

6 DEPARTMENT OF JUSTICE

7 Laura Duffy, United States Attorney,
8 Southern District of California

9

10 PANEL II: FAIR SENTENCING ACT

11 FEDERAL PUBLIC DEFENDERS

12 Jim Skuthan, Chief Assistant Federal Public
13 Defender, Middle District of Florida

14 PRACTITIONERS ADVISORY GROUP

15 Jeffrey Steinback, Chicago, Illinois

16 NATIONAL ASSOCIATION OF CRIMINAL DEFENSE

17 LAWYERS

18 Jim Lavine, President

19

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1 PANELISTS (Continued):

2 PANEL III: FAIR SENTENCING ACT

3 PROBATION OFFICERS ADVISORY GROUP

4 Teresa Brantley, Supervisory Probation

5 Officer, Central District of California

6 FRATERNAL ORDER OF POLICE

7 Richard Fulginiti, National Trustee

8 FAMILIES AGAINST MANDATORY MINIMUMS

9 Mary Price, Vice President and General

10 Counsel

11 THE SENTENCING PROJECT

12 Marc Mauer, Executive Director

13

14 PANEL IV: FIREARMS OFFENSES

15 FEDERAL PUBLIC DEFENDERS

16 Kyle Welch, Senior Litigation Counsel,

17 Southern District of Texas

18 PRACTITIONERS ADVISORY GROUP

19 William Brennan, Jr., Partner, Brennan

20 Sullivan and McKenna

21 PROBATION OFFICERS ADVISORY GROUP

22 Teresa Brantley, Supervisory Probation

23 Officer, Central District of California

24

1 P R O C E E D I N G S

2 (8:38 a.m.)

3 CHAIR SARIS: Good morning to all of you.

4 This is our second public hearing of two,
5 and today as you know we are going to discuss
6 amendments dealing with drug and gun penalties.

7 So I want to welcome everyone for coming.
8 Thank you for coming. Especially thank you to some
9 of you who got us our testimony early, but we assure
10 you that we will read everything. So, please, don't
11 feel like you need to read your statement. We are
12 going to have a – we're going to go – we have these
13 little lights here. It will flicker, I think it will
14 go yellow when it's close, and red at the end, and
15 then we will have a lively Q&A period of time.

16 So I want to introduce my fellow and
17 sister commissioners:

18 Mr. Will Carr is the vice chair of the
19 Commission since December 2008. He served as an
20 assistant U.S. attorney in the Eastern District of
21 Pennsylvania from 1981 until his retirement in 2004.

22 Ms. Ketanji Jackson has served as vice

1 Chair of the Commission since February 2010. She was
2 a litigator at Morrison & Foerster, and was an
3 assistant federal public defender in the Appeals
4 Division of the Office of the Public Defender in D.C.

5 Judge Ricardo Hinojosa served as chair and
6 subsequently acting chair of the Commission from 2004
7 to 2009. He is chief judge of the United States
8 District Court for the Southern District of Texas and
9 has served on that court since 1983.

10 I am very pleased to say "Judge" Beryl
11 Howell. We just went to her investiture the other
12 day. She has served on the Commission since 2004.
13 She is a judge now of the United States District
14 Court of the District of Columbia, having been
15 nominated to that position this past July and
16 confirmed in December.

17 And Dabney Friedrich, way over there, has
18 served on the Commission since December 2006.
19 Previously she served as an associate counsel at the
20 White House, as counsel to Chairman Orrin Hatch at the
21 Senate Judiciary Committee, and assistant U.S.
22 attorney in the Southern District of California, and

1 the Eastern District of Virginia.

2 And way over here, Jonathan Wroblewski is
3 an ex-officio member of the Commission, representing
4 the Attorney General of the United States. He serves
5 as director of the Office of Policy and Legislation
6 in the Criminal Division of the Department of
7 Justice.

8 So I wanted to start off by saying, is
9 there anyone here who would like to make any
10 introductory comments?

11 VICE CHAIR CARR: I would just like to
12 wish a happy St. Patrick's Day to my fellow Irish
13 commissioners on my right, O'Hinojosa and
14 O'Wroblewski.

15 (Laughter.)

16 CHAIR SARIS: All right, St. Patty's Day
17 is well recognized. Is there anybody else who would
18 like to say anything?

19 (No response.)

20 CHAIR SARIS: Okay. All right, so now I
21 would like to introduce our panelists – somebody whom
22 I've always wanted to meet and I've heard about for

1 years now. Harley Lappin is the director of the
2 Federal Bureau of Prisons. He is a career public
3 administrator with the bureau, beginning his career
4 in 1985 as a case manager at the Federal Correctional
5 Institution at Texarkana, Texas. He has served with
6 the bureau in various capacities, including as warden
7 at FCI in Butner, North Carolina; warden at the U.S.
8 Penitentiary Terre Haute, Indiana; and regional
9 director of the Mid-Atlantic Region.

10 And Laura Duffy, whom I came in with this
11 morning, although not knowingly, is the U.S. Attorney
12 for the Southern District of California. She
13 previously served as an assistant U.S. attorney and
14 as a deputy chief in the General Crimes Section of
15 that office; and was assigned to the Department of
16 Justice's Criminal Division, Money Laundering
17 Section and the Narcotics and Dangerous Drugs Section.

18 A long introduction. We look forward to
19 hearing from both of you.

20 Mr. Lappin?

21 MR. LAPPIN: Thank you very much, Judge
22 Saris. It is a pleasure to be here, and I certainly

1 appreciate the opportunity to speak before the
2 Commission.

3 Let me begin certainly by thanking all of
4 you. I'm not sure many people realize the close
5 relationship that we have with the Commission in the
6 sharing of data and other information relative to the
7 work that we do each and every day. And believe you
8 me, as you've heard me express in the past, we are
9 greatly appreciative of the alerts, the warnings in
10 advance of changes, or a lack of changes, that may
11 occur from the Sentencing Commission. Because we
12 took it upon ourselves in the aftermath of 1995 to do
13 a much better job of informing inmates of changes
14 that may or may not occur, such that they are as well
15 informed as they can be and consequently not act out
16 as we saw people act out in 1995 after certain
17 decisions by the Congress and others were not made.

18 And so we have built on that relationship.
19 We greatly appreciate your assistance, and believe
20 you me I think we run a safer prison system because
21 of this relationship, and it is greatly appreciated.

22 As you know, we are now the largest

1 correctional system in the United States. We house
2 210,000 inmates. We confine about 171,000 of those
3 inmates in 116 federal prisons that we own and
4 operate. There's another 25,000 inmates in private
5 contract facilities. And then, on any given day,
6 about 10- to 12,000 inmates in halfway houses.

7 In fiscal year 2009 we had a net growth of
8 7,091 new inmates. And in 2010, an addition of about
9 1,465. An increase of approximately 5- to 6,000
10 inmates per year is expected between fiscal years
11 2011 and 2012.

12 So that means, to kind of help put it in
13 perspective, that in those years we release about
14 61,000 inmates a year; but we are admitting on
15 average 67,000 inmates a year into the Federal Prison
16 System.

17 Most inmates are serving drug trafficking
18 offenses. The remainder of the population includes
19 convictions for weapons, immigration law, violent
20 offenses, fraud, property, sex offenses, and other
21 miscellaneous offenses.

22 The average length of sentence today is ten

1 years. Approximately seven percent of the inmates in
2 the Bureau of Prisons are women, and approximately 26
3 percent of the federal inmate population are non-U.S.
4 citizens.

5 Currently we are at 35 percent over our
6 rated capacity. Our greatest concern are at our
7 high- and medium-security institutions, which are
8 above capacity by 50 percent at highs, and 30 percent
9 at mediums.

10 The severe crowding resulted in double and
11 triple bunking. As of January 2011, 94 percent of
12 the high-security inmates – the most violent offenders
13 we house in the Bureau of Prisons – were double
14 bunked; 16 percent and 82 percent of the mediums and
15 lows were triple bunked.

16 And so along with crowding comes idleness.
17 And idleness in prisons is a huge, huge challenge for
18 us to keep inmates productively occupied during that
19 period of incarceration.

20 In order to reduce crowding, one or more
21 of the following must occur:

22 Reduce the number of inmates coming into

1 the federal prison system, or reduce the length of
2 time they spend in prison.

3 Expand inmate housing at existing
4 facilities.

5 Contract with private prisons for
6 additional bed space for low-security criminal
7 aliens.

8 And finally, acquire and/or construct and
9 staff additional institutions.

10 The Department of Justice thankfully is
11 working with Congress on two legislative proposals
12 that will provide inmates with enhanced incentives
13 for good behavior and participation in programming
14 that is proven to reduce recidivism, while also
15 assisting us in reducing crowding somewhat.

16 The first proposal increases good-time
17 credits available by seven days per year for each year
18 of the sentence imposed. So it's an adjustment to the
19 current statute.

20 The second proposal creates a new sentence
21 reduction credit that inmates can earn for successful
22 participation in recidivism-reducing programs such as

1 Federal Prison Industries, education, occupational and
2 vocational programming.

3 We don't control the number of inmates
4 coming into the prison system. We don't control the
5 length of their sentences or the skills' deficits
6 they bring with them. We do control, however, the
7 programs in which inmates can participate while they
8 are incarcerated; therefore, the skills they can
9 acquire before leaving our custody and return to the
10 community.

11 Almost all federal inmates ultimately are
12 released back into our communities. Each year, more
13 than 45,000 federal inmates return to the
14 communities. I mentioned 61,000. About 45,000
15 return to communities in the United States. The
16 balance are deported to their home country.

17 Most need to acquire job skills,
18 vocational training, education, counseling, and other
19 assistance such as drug and alcohol abuse treatment,
20 anger management, and parenting skills before they
21 return to the community. The bureau has programs to
22 address these skills.

1 Understanding that substance abuse is a
2 significant problem amongst our inmate population,
3 approximately 40 percent of those admitted have a
4 need for intensive treatment. The Bureau of Prisons
5 provides four levels of substance abuse programming,
6 drug education, and nonresidential treatment, and
7 residential and community transition treatment.

8 Drug abuse education is provided at all
9 Bureau of Prisons facilities. Nonresidential drug
10 abuse treatment is available at every bureau
11 facility, and focuses on criminal and drug-using risk
12 factors such as anti-social, pro-social attitudes,
13 values, beliefs, and behaviors, and then seeks to
14 replace them with more pro-social alternatives.

15 Residential drug abuse treatment is
16 available at 61 bureau institutions and one contract
17 facility. Annually we treat about 18,500 inmates in
18 the residential treatment programming. The program
19 is geared towards reducing anti-social peer
20 associations, promoting positive relationships,
21 increasing self-control/self-management, problem-
22 solving skills, ending drug use, and replacing lying

1 and aggression with pro-social alternatives.

2 Based on the proven success of the
3 residential substance abuse treatment program, we
4 have used the foundation of this program to develop
5 other programs of a similar type for inmates who are
6 not addicted to drugs and alcohol, anticipating that
7 we will see similar successful results on those
8 inmates who complete those programs, especially in
9 reducing recidivism.

10 We see inmates who participate, for
11 example, in the residential drug abuse program 16
12 percent less likely to recidivate, and 15 percent
13 less likely to relapse when compared to similar
14 inmates who did not participate in the treatment
15 program.

16 Work skills is another important emphasis
17 of our programs. We teach inmates occupational
18 skills and instill in them sound, lasting work habits
19 and work ethics. All sentenced inmates in federal
20 correctional institutions are required to work, with
21 the exception of those who for security, educational,
22 or medical reasons are unable to do so.

1 Most inmates are assigned to an
2 institution job, such as food service worker,
3 orderly, painter, warehouse worker, groundskeeper.
4 Annually, approximately 15,500 inmates work in
5 Federal Prison Industries, one of the bureau's most
6 important correctional programs.

7 Operating without a congressional
8 appropriation, using revenue generated by a wholly-
9 owned government corporation, Federal Prison Industries
10 provides inmates the opportunity to gain marketable
11 work skills and a general work ethic, both of which
12 can lead to viable, sustained employment upon
13 release. Regrettably, due to legislative changes to
14 procurement, the current economic climate, and the
15 changes in military needs, Federal Prison Industries
16 now reaches only nine percent of the inmate population.

17 Vigorous research has demonstrated that
18 inmates who participate in Federal Prison Industries
19 are 24 percent less likely to recidivate than similar
20 nonparticipating inmates.

21 The bureau offers a variety of programs
22 for inmates to enhance education. Institutions offer

1 literacy classes, English as a second language, adult
2 continuing education, parenting classes, recreation
3 activities, wellness, and library services.

4 We also facilitate vocational training,
5 Occupationally-oriented higher education programs
6 that are based on needs of specific institution
7 inmate populations' general labor market skills.

8 Inmates who participate in education
9 programs are 16 percent less likely to recidivate
10 than similar nonparticipating inmates. And those who
11 participate in vocational and occupational training
12 are 33 percent less likely to recidivate than similar
13 nonparticipating inmates.

14 Several years ago, with the assistance of
15 many partners, to include the United States Probation
16 Service, we implemented the Inmate Skills Development
17 initiative to better identify the skill deficiencies
18 and formulate individual re-entry plans for inmates.
19 The Initiative includes a comprehensive assessment of
20 inmate strengths and deficiencies in nine core skill
21 areas, and links the inmate to programs designed to
22 acquire and improve those identified re-entry skills.

1 This strategy is now in place at all
2 bureau institutions and greatly enhances our ability
3 to share useful information with probation officers
4 regarding inmates released into their jurisdiction.

5 As inmates complete their sentence of
6 imprisonment, many transfer to residential re-entry
7 centers, also known as community correction centers
8 or halfway houses, to help them adjust to life in the
9 community and to find suitable post-release
10 employment.

11 These centers provide a structured,
12 supervised environment and support job placement
13 counseling and other services. Some inmates are
14 placed on home detention, either directly from prison
15 if they are minimal risk and have suitable living
16 accommodations, or following a stay in the
17 residential re-entry center.

18 While on home detention, the offenders are
19 under strict schedules with telephonic and electronic
20 monitoring. It is my pleasure, Judge Saris, Vice
21 Chairs, other members of the Commission, to join you
22 today. I certainly appreciate the continued

1 cooperation that exists between our two agencies, and
2 I look forward to answering any questions you might
3 have today.

4 CHAIR SARIS: Thank you. Ms. Duffy?

5 MS. DUFFY: Good morning. And I too
6 appreciate the opportunity to be able to testify
7 before you today on behalf of the Department of
8 Justice and federal prosecutors all across the
9 country regarding the amendments proposed and the
10 issues that are open for comment on the firearms and
11 trafficking offenses.

12 In addition to being United States
13 attorney for the Southern District of California, I
14 can tell you that I've been a federal prosecutor my
15 entire legal career. And at times as a trial
16 attorney in various components in the Department of
17 Justice, I had the opportunity to prosecute drug
18 trafficking investigations of organizations who were
19 involved in distributing controlled substances for
20 Colombian and Mexican cartels. In addition, as an
21 assistant United States attorney I was responsible
22 for prosecuting the leadership figures and kingpins

1 of Mexican Tijuana-based cartels, most particularly
2 the Arellano-Felix cartel, which was a ruthless
3 cartel that dominated the Tijuana, Baja California
4 corridor for numbers of years.

5 And I can tell you that, despite the
6 violent crime rates falling nationally, drug and
7 firearms offenses pose public safety challenges to
8 not just the southwest border but to the entire
9 country. And a successful campaign to curb the
10 challenges and the public-safety threats that those
11 crimes force is going to take not just a law
12 enforcement response, but it's also going to take a
13 very measured and appropriate federal sentencing
14 policy response.

15 The department is eager to continue to
16 work with you to advance efforts for fair, tough, and
17 smart sentencing policies related to drug trafficking
18 and firearms offenses.

19 Drug-related violence, I think as
20 everybody has seen in the headlines, is increasingly
21 including gruesome murders that are skyrocketing in
22 Mexico. That is particularly so along its border

1 with the United States.

2 A tragic example of this hit home I think
3 for all of us last month when an ICE agent was killed
4 and another was wounded as they were working in
5 Mexico. However, the violence related to these
6 cartel activities is not just confined to Mexico.

7 While the criminal activity and the
8 violence is primarily in Mexico, it has begun to
9 extend and to affect U.S. communities, as well. For
10 example, last January in the Southern District of
11 California members of a Tijuana-based trafficking
12 organization unsuccessfully targeted an individual in
13 San Diego for murder for disrespecting a cartel
14 member. That next month, in February of last year,
15 another member of the cartel gave a hit list to a
16 confidential informant targeting four individuals who
17 resided in San Diego for assassination.

18 And just this last month, a Mexican cartel
19 figure who is incarcerated in a prison in downtown
20 San Diego put a hit out on a government trial
21 witness.

22 So to be sure, these cartel members are

1 violent and they are armed. And it is really no
2 secret that these trafficking organizations are
3 carrying out their campaigns of violence and
4 intimidation and smuggling with firearms that are
5 illegally trafficked from the United States where
6 firearms can be purchased, unlike Mexico, in a
7 variety of legal and illegal ways.

8 In diverting firearms from lawful
9 commerce, firearms traffickers are deliberately using
10 so-called "straw purchasers" to circumvent the
11 background checks, and the recordkeeping requirements
12 that otherwise apply so that they can supply firearms
13 to persons who are prohibited under U.S. law from
14 possessing them.

15 And these same tactics are commonly being
16 used to transmit firearms to members of Mexican
17 cartels. This month in the Southern District of
18 California we are going to complete a prosecution
19 against a smuggling cell who is responsible for
20 transporting nearly 100 high-powered automatic
21 pistols and rifles, including AR-15s and AK-47s, from
22 the United States to Mexico. And the majority of

1 these firearms were obtained for cartel members
2 through recruited straw purchasers.

3 And unfortunately that type of conduct,
4 and the resulting prosecutions that must follow, are
5 not – are something that is happening all along the
6 southwest border.

7 Recently, the District of Arizona indicted
8 34 individuals for this same conduct. The U.S.
9 Attorney's Office in New Mexico just last week
10 indicted 11 individuals, including a mayor and a
11 police chief and a village trustee in Columbus, New
12 Mexico, for similar offenses.

13 And while I could give you plenty of
14 examples along the southwest border of this kind of
15 conduct, the cartels appetite for obtaining high-
16 powered firearms from the United States, and the
17 impact of straw purchasers who feed that appetite,
18 extends well beyond the U.S.-Mexico border.

19 In January, a federal judge in Minnesota
20 sentenced an individual for firearms trafficking of
21 this same type. This individual smuggled more than
22 100 guns into Mexico and made 20 trips across the

1 U.S.-Mexico border for that purpose. This individual
2 purchased guns from a licensed dealer in Minnesota
3 after providing false statements on the required
4 application forms.

5 And of the 100 firearms that that
6 individual smuggled into Mexico, 42 were the exact
7 same make and model, model FN Herstal, model 57, 5.7-
8 millimeter pistols. And that particular type of
9 firearm is in very high demand by Mexican cartels
10 because it carries a 20-round magazine, and it fires
11 small rounds capable of piercing body armor.

12 So these kind of purchases, and the ones
13 in the Southern District of California, and the
14 District of Arizona and New Mexico, are exactly the
15 kind of crimes that demand our sentencing attention
16 to ensure that these criminals and these networks are
17 disrupted and dismantled, and the violence that they
18 are carrying on day after day is deterred.

19 It is important to keep in mind that
20 firearms' trafficking, whether it is in Mexico or
21 whether it is within the boundaries of the United
22 States pose a serious public safety concern.

1 Obtaining firearms and transporting those
2 firearms with intent of diverting them for illicit
3 use, or to prohibited persons, is by its nature
4 dangerous and leads to violence.

5 The efforts of the federal law enforcement
6 community to disrupt violence is robust and multi-
7 faceted. However, it is also going to take tough and
8 targeted and thoughtful sentencing policy to get more
9 gun runners off the streets and behind bars, and to
10 deter individuals who might seek to take their place.

11 In our view, it is key to obtain targeted
12 increases in the penalties for certain firearms
13 offenses in the United States through sentencing
14 guidelines:

15 One, more firmly and fairly treat firearms
16 offenders in a manner that recognizes the serious
17 harm caused by those who engage in illegal
18 trafficking; and

19 Two, that reflects more accurately the
20 culpability of those who attempt to facilitate the
21 transfer of firearms over our borders.

22 Modest but meaningful increases for

1 certain firearms offenses would help. It will help
2 address the serious safety posed to our public. It
3 will help incapacitate dangerous offenders. And it
4 will serve as a strong deterrent for those who are
5 considering firearms trafficking.

6 The department supports amendments to the
7 sentencing guidelines this year that focus on issues
8 of straw purchasers generally, but specifically on
9 straw purchaser transfers intended to export firearms
10 and firearms trafficking across the border.

11 We would urge the Commission to revise the
12 U.S. sentencing guidelines as it relates to these
13 offenses. And given my limited time, I would be
14 happy to answer questions about the firearms offenses
15 amendments, but I want to take just a moment to
16 discuss the proposed changes on the drug sentencing
17 policy.

18 In October of 2010 the Commission
19 promulgated a temporary, emergency amendments to the
20 federal sentencing guidelines to implement the Fair
21 Sentencing Act of 2010, and now proposes to
22 promulgate as permanent the emergency guidelines that

1 temporarily implemented that Act.

2 The department supports this promulgation
3 to the extent that it is consistent with
4 Congressional intent. I think we all recognize that
5 the Fair Sentencing Act of 2010 was an important step
6 in ensuring a fairer criminal justice system. And
7 the department supports the broad reforms of that
8 Act, most specifically relating to the reductions in
9 the disparity between crack and powder cocaine
10 penalties, and the increases in penalties for
11 offenders who would use violence and who would prey
12 on vulnerable victims. And also, the modest but
13 important reduction in penalties for non-violent
14 offenders.

15 We respectfully urge the Commission to
16 promulgate the permanent amendments implementing the
17 Fair Sentencing Act. And I can tell you that the
18 department and federal prosecutors across this
19 country value this Commission's hard work on probably
20 one of our nation's toughest issues, the drug
21 trafficking and firearms trafficking, and the
22 violence that attends it that's going on along the

1 southwest border and across our country.

2 We look forward to working with you on
3 these areas and others. And I would be happy, as I
4 said, to answer any questions that you have on either
5 of those areas.

6 Thank you.

7 CHAIR SARIS: Thank you. Jonathan.

8 COMMISSIONER WROBLEWSKI: Harley, could
9 you talk a little bit about halfway house capacity?
10 How much there is now, whether you see that
11 increasing over time. Also, if you could talk a
12 little bit about what do you think the optimal period
13 of stay in a halfway house is, if you have any
14 information on that.

15 MR. LAPPIN: Yes. As I mentioned, we rely
16 heavily on halfway houses to assist in the transition
17 of people serving a period of incarceration back into
18 the community. And a year ago we had about 9,000
19 inmates in some form of community confinement, and
20 that is split between halfway house and home
21 detention. The majority of them in halfway houses,
22 probably 90 percent.

1 We have about 11- or 12,000 beds. And the
2 dilemma is that it is geographic in nature. This is
3 the sad part of this story, is that we have some
4 communities who are receptive to accepting their
5 citizens back and doing so in a meaningful way, and
6 support the placement and the utilization of
7 transition housing, halfway houses, and home
8 detention, in their jurisdiction.

9 We have many, many, many that don't. And
10 so there's been a big discussion about, well, gee, we
11 just need to give the director of the Bureau of
12 Prisons more money to go out and get more beds. And
13 my staff in community corrections says, you know
14 what, that's not going to solve it. Our dilemma is
15 we cannot get the beds we need in the right
16 locations.

17 So, for example, last year I think we
18 solicited for like 35 or 40 new locations; 31 of
19 those were rejected from the very day the notice was
20 issued: Don't want it here. Not in my backyard.

21 And so it is less meaningful. I mean, we
22 could go to the existing locations and add beds, but

1 the inmates are too far from home. I mean, it's no
2 different than just releasing somebody directly from
3 prison and putting them out on a street corner with
4 \$50 and a new set of clothes versus they are in
5 Boston but their home is New Hampshire, or northern
6 New York, and at the end of their sentence we drop
7 them off on that street corner with \$50 and a new set
8 of clothes.

9 And so this is the frustrating part of it,
10 because – and I'm speaking sincerely. I deal with
11 this every day. They don't want to see Harley
12 Lappin, the federal bureaucrat, coming and telling
13 them what's good for them. This needs to be a local
14 initiative where local, respected government and
15 business and faith-based organizations are stepping
16 up saying, accepting the responsibility of allowing
17 this type of facility in their community such that
18 their citizens can transition successfully, or more
19 successfully back into the community.

20 So we need more, Jonathan. It's just that
21 the locations where we need them, we're struggling
22 getting acceptance of them in those communities.

1 Where they exist, they tend to operate – be well
2 received, certainly some controversy, and are
3 meaningful in the transition of those inmates from
4 prison to the community.

5 Length of stay? It varies by inmate. It
6 is really a case-by-case issue. There are some of
7 our inmates who really need no halfway house. They
8 are fairly well educated. They have skill sets such
9 that they can go out and more than likely compete for
10 jobs. They have family support. And so our push to
11 move more of them to home detention rather than home
12 confinement – I'm sorry, home detention rather than
13 halfway house is because they have the skill sets and
14 the support in the community that would allow them to
15 transition in that manner, reserving what beds we do
16 have for those inmates that lack those skills, for
17 those inmates that lack the family and community
18 support that we would like them to have such that
19 they have more structure and more direction and more
20 supervision during that period of transition.

21 So our move afoot right now is to better
22 identify the inmates who need less, and those who

1 need more, and use what beds we have for those that
2 have the greatest need.

3 I'll be honest with you, there are cases
4 that need 12 months in a halfway house. On the other
5 hand, there are some that just need two or three months,
6 given the fact they've got a great attitude, they've
7 got a family or a friend out there who is supportive,
8 and they've shown in prison the willingness, the
9 desire to change. Seven out of ten inmates - I think
10 that's a good guess - we see at least a willingness
11 of, hey, this is my responsibility; I need to do some
12 things to change.

13 Without a doubt, we've got that other 30
14 percent, those that continue to resist, those that
15 continue to direct blame elsewhere, that are going to
16 be troublesome, that we're going to see again, you're
17 probably going to see again, and those are the more
18 difficult ones.

19 So length of stay is really driven by the
20 individual and the specific needs that they have or
21 don't have in determining how much time. The other I
22 think myth that I think we need to dispel is that

1 halfway house is cheaper, cheaper than prison. And
2 today, it is not. On average it costs us about \$70,
3 \$71 per day per inmate in a residential re-entry
4 center, compared to \$50 a day in a minimum security
5 institution, and \$61 a day in a low. And when you
6 get to the mediums and highs, then you're exceeding
7 that \$70 a day.

8 There's a reason for that. We understand
9 why. We've asked our providers to add more services
10 out there: more mental health, more health, more job
11 placement, more drug treatment, more drug monitoring,
12 more supervision. Those things cost money,
13 especially when you've got someone in the community.

14 So we understand why that cost has
15 increased. We're willing to pay that. We think it
16 is worth the investment if the end result is a more
17 successful transition to the community.

18 CHAIR SARIS: Thank you. Beryl.

19 COMMISSIONER HOWELL: Good morning,
20 Mr. Lappin, it's very nice to see you here today. I
21 have to say I'm very pleased that the Commission has
22 invited you to testify. I think it's a very

1 important part of our statutory mission in 994(g), 28
2 U.S.C., 994(g), that tasks the Commission with taking into
3 account the nature and capacity of the penal,
4 correctional, and other facilities and services
5 available in terms of our recommendations that we
6 either make to Congress, and in our consideration of
7 the guideline amendments and how the guidelines are
8 operating.

9 So I think it is a really important aspect
10 of, during our amendment cycle, to hear from you. So
11 I really thank you for being here, and thank you for
12 all of the assistance that BOP gives to our staff
13 when we are doing retroactivity analyses on various
14 amendments, as well as recidivism analysis.

15 One of the amendments that we have pending
16 before us for consideration are changes to our
17 supervised release provisions in our guidelines. So
18 I guess, following along the lines of Jonathan's
19 questions, I was interested in finding out when a
20 person is released from prison into a halfway
21 house – I guess you sort of mentioned that the time
22 that they spent in a halfway house varies, and I

1 guess it's up to the discretion of the BOP officials
2 how much time they're going to spend there – but is
3 that person's performance in a halfway house relayed
4 to a probation officer? And how does that
5 communication work?

6 And as we are considering providing judges
7 more discretion in terms of supervised release and
8 early termination of supervised release, could you
9 just inform us about how much information comes from
10 the halfway house term to the probation office, and
11 therefore ultimately to a judge, in evaluating
12 termination of supervised release, or the length of
13 supervised release?

14 MR. LAPPIN: Without a doubt, a great
15 question and one that is critically important.
16 Because clearly our probation staff need to know as
17 much about that soon-to-be-supervised inmate as they
18 possibly can have. And without a doubt, a few years
19 ago we weren't doing nearly the job that we should
20 have been doing.

21 And as I mentioned in my testimony, we
22 worked with the United States Probation staff in

1 helping us develop this Inmate Skills Development
2 system, which is an electronic system. And
3 consequently, probation staff, as this is
4 implemented – we're currently in the implementation
5 phase, and most of our locations now are well into
6 the implementation phase. Probation staff should be
7 receiving early on, not only hopefully what's
8 happening at the halfway house, but what happened
9 during the period of incarceration. That is
10 extremely important information for that probation
11 staff in determining how risky of an offender do I
12 have, and what is their attitude about their period
13 of incarceration.

14 And so this system is going to allow us to
15 electronically transfer information directly to
16 probation staff not only about what happened in
17 prison, to include the skills assessment. So the
18 inmate arrives in prison and people ask me all the
19 time, when does re-entry begin? It begins on the
20 first day they enter prison, in our opinion. And
21 that is the assessment of their skills.

22 So eventually, if not yet, probation staff

1 should be getting that assessment of what skills they
2 lacked, and what the inmate was programmed for
3 participation in, and their success at that.

4 The disciplinary record. Did they abide
5 by the rules, or did they not? Were they
6 cooperative? Were they uncooperative? And that
7 transitions to the halfway house. And what I don't
8 know right now, but I will get for you, is what
9 mechanism is in place for us to gather the
10 information at the halfway house such that it too is
11 transferred onto probation staff.

12 And so our intent is a more seamless
13 transition from prison to transition housing to the
14 community. And without a doubt, the probation staff
15 are in need of and must have that information, and it
16 be as thorough as it can be.

17 So I'm not sure exactly where we are yet
18 in all those things, because we're implementing, but
19 our goal is to make available as much information as
20 we can. On the other hand, we need information from
21 them. And this is going to allow them to transfer
22 information from probation to the Bureau of Prisons

1 much more easily than in the past, again
2 electronically, more seamless, and hopefully that
3 will improve communications on both ends.

4 CHAIR SARIS: Judge Hinojosa, and then
5 Commissioner Friedrich.

6 COMMISSIONER HINOJOSA: Mr. Lappin, I also
7 want to thank you for being here, and for your
8 cooperation with us through the years.

9 Do you have a number as to how many people
10 are in custody in the Bureau of Prisons that are due
11 to supervised release violations?

12 MR. LAPPIN: I can get you - I can tell you
13 how many are coming back each year, because I just
14 testified on Tuesday. I don't have the number of how
15 many actually remain in our custody, but my guess is
16 their terms are very short. I think we're returning
17 about 12 to 13 percent of the inmates coming into the
18 system in each year are supervised-release violators.

19 So, you know, if we're getting like 65,000
20 back, 12 to 13 percent of them are supervised-release
21 violators. Actually, it was lower than I
22 anticipated. Now there are people who are coming

1 back with new violations that may not fall into that
2 category.

3 Our recidivism rates are about 40 percent.
4 So that's a combination of new-offenses from
5 ex-offenders, as well as supervised-release violators
6 with some new criminal conduct.

7 COMMISSIONER HINOJOSA: You and I have had
8 this conversation through the years about the
9 noncitizens.

10 MR. LAPPIN: Yes.

11 COMMISSIONER HINOJOSA: And you've
12 mentioned some new programs that you're working with
13 the Department of Justice to try to implement: extra
14 credit with regard to participation in certain
15 programs; the residential treatment program, I guess,
16 continuation of that; and individuals who are in the
17 employment program through Prison Industries.

18 With regards to those, is there going to
19 be any change in policy as to the availability of
20 these programs and extra credit for people who are
21 noncitizens?

22 MR. LAPPIN: We are urging that those

1 noncitizens get that credit.

2 COMMISSIONER HINOJOSA: At the present
3 time they don't?

4 MR. LAPPIN: Some do not, in some cases.
5 We're actually looking at - we're revisiting the
6 possibility of credit for participation in the drug
7 treatment for those who are eligible otherwise.

8 So we would argue, if they are willing
9 participants, if they are cooperating and they're
10 doing things to improve their skills, and they're
11 behaving in prison, that they should get that credit.

12 Again, this is still yet to be determined,
13 but we are certainly looking at how they can achieve
14 that credit. And believe you me, I agree with
15 Ms. Duffy. We have people in prison that need to be
16 in prison for a long, long, long time: violent
17 offenders. Not only as director of the Bureau of
18 Prisons but as a citizen of this country, I want to
19 be safe, as well. The question is, once they're in a
20 period of incarceration, depending on that crime, do
21 they need to be there for as long as they currently
22 are? Or at all, in some cases?

1 I think that is part of where the debate
2 is. I mean, when you're limited on resources, I
3 think these are the types of things you need to
4 explore. I applaud you for having this debate,
5 because it is the types of things that you need to
6 address. But, yes, we are advocating for more of the
7 non-U.S. citizens to receive that credit, again if
8 they comply, they behave, and participate
9 successfully in some of those programs.

10 CHAIR SARIS: Commissioner Friedrich?

11 COMMISSIONER FRIEDRICH: Thank you.

12 Ms. Duffy, I have a couple of questions
13 for you relating to the guideline 2M5.2. There does
14 seem to be a consensus that this guideline needs to
15 be recalibrated. Some witnesses are going to testify
16 later today that the Commission should do a more
17 comprehensive revision to this, and that we should
18 look not only at numbers but also types of firearms
19 and have more gradations.

20 John Morton, head of Immigration and
21 Customs Enforcement, testified to that effect about a
22 year ago before us. I'm wondering if you can give us

1 any specific guidance regarding the number of
2 firearms – if we're going to adjust the guideline –
3 whether we should break down the type of firearm,
4 and also with regard to the amount of ammunition.

5 I can tell you that our data for a five-
6 year period since *Booker*, when we look at all the
7 cases sentenced under this guideline, not just
8 firearms cases, but looking at all of them, what we
9 found is about ten percent of the cases involve ten or
10 fewer firearms. And of those cases, over 50 percent
11 involve five or fewer firearms.

12 So I am just interested in any insight you
13 could give us on where we – you know, how we should
14 draw those lines, and specifically where?

15 MS. DUFFY: I think it is a good place to
16 examine, and I think it is worthy of some revision in
17 a couple of different areas.

18 First of all, I can tell you based on my
19 experience in talking to a number of cartel figures
20 and individuals who traffic in firearms for cartel
21 figures that quite often they are purchasing weapons
22 maybe in larger quantities, but transferring weapons

1 down south over the border in onesies, twosies, where
2 they can fit them in their cars, where they can fit
3 them in compartments.

4 And so I think it makes sense to adjust
5 the threshold level down. I believe it's currently
6 at ten. I have seen cases, and know of individuals
7 who are trafficking in firearms with as few as one
8 firearm. But I think the place where you have it now
9 in the two to five range is right. I think that the
10 department would support the two range, but certainly
11 bringing it down to five would be a great improvement.

12 Now I think that there is probably
13 information that you can collect, or that would be
14 collectable as far as ammunition that is typically
15 purchased in the quantities it is purchased in. If a
16 box of ammunition has 100 rounds of ammunition, would
17 an individual purchase that if they had one firearm,
18 a firearm for personal use, that they would buy one
19 box of ammunition?

20 And I think the ammunition should probably
21 be included in that guideline, and that it should
22 be – and I've seen, I believe it was a proposed draft

1 from this Commission, that it be included in, there's
2 a Level 26 and then there's a Level 14, that it be
3 included in the Level 14.

4 And I think the department supports that,
5 with the reduction in the threshold number of
6 firearms; that the ammunition be included there in a
7 way that's reasonably related to the number of
8 firearms.

9 So if it was two firearms and it's 100
10 rounds of ammunition per firearm, and it is for
11 personal use, I think that is also another important
12 criteria. But I think it is important to give the
13 courts guidance on where the ammunition falls. And
14 having that ammunition be in relationship to the
15 threshold number of weapons there.

16 CHAIR SARIS: Ketanji?

17 VICE CHAIR JACKSON: Ms. Duffy, good
18 morning.

19 MS. DUFFY: Good morning.

20 VICE CHAIR JACKSON: I appreciate your
21 description of what's happening around the border
22 areas in relation to drug and firearms trafficking.

1 And of course your own experience in prosecuting
2 those sorts of cases.

3 I am just wondering if you can comment on
4 whether there are substantive differences between the
5 cartel operations that you describe and the drug
6 trafficking that's going on in your area of the
7 country, and perhaps the drug trafficking that occurs
8 in other places, in cities, in rural places, perhaps
9 with regard to different types of drugs, and how much
10 national drug policy should be driven by, or should
11 reflect the horrible situation that's going on in
12 your area?

13 MS. DUFFY: Well I think certainly the
14 Southern District of California and the other
15 southwest borders are the epicenter, if you will, for
16 where the drugs are entering the United States. And
17 certainly along the southwest border is where the
18 cartel activity is the most prevalent.

19 Cases like the one that I mentioned in the
20 District of Minnesota is not an anomaly. Those kind
21 of cases are taking place all across the country.
22 And those level of weapons, those types of weapons

1 are being purchased from federal firearms licensees
2 in states all across the country and making their way
3 down to Mexico.

4 In addition, the drugs that are being
5 imported into the United States into the southwest
6 border of the United States are making their way all
7 across the country to distribution cells that these
8 organizations have networks of throughout the
9 country.

10 So while I can say that the southwest
11 border is a place that deserves great attention and
12 resources, and may be unique circumstances, the reach
13 and the effect of these cartels is certainly not
14 limited to the southwest border.

15 CHAIR SARIS: To follow up on the urgency
16 of the cartel situation, I hear it in your voice. I
17 read it in your testimony. To what extent is the
18 issue of straw purchasing a national problem, apart
19 from the border? In other words, in urban areas, et
20 cetera. I mean, do you feel as if there is need for
21 increased penalties for straw purchases when it does
22 not involve the border situation?

1 MS. DUFFY: I think the straw purchasing
2 is happening all across the country. And we have
3 seen cases that give evidence to that, and that
4 support that. However, it makes its way down to the
5 border, and over the border into Mexico into the
6 hands of the cartel. But the straw purchasing and
7 the transfer and the possession of those firearms
8 that makes its way down there is happening in states
9 on the East Coast and throughout the Midwest center
10 of the country.

11 CHAIR SARIS: So the department doesn't
12 seem so worried about straw purchasing as it affects
13 cities in the East, or the kinds of guns that are
14 going – being sold, or transferred in urban areas,
15 apart from the border?

16 MS. DUFFY: Well I think that that's a
17 good question, and there is a distinction. In
18 addition to straw purchasing for firearms that are
19 making its way to cartels, there is also a problem in
20 the United States with straw purchasing that are
21 going to prohibited persons and are being diverted
22 within the United States. And there are studies and

1 statistics that support the fact that arms that are
2 purchased by straw purchasers and that are trafficked
3 not just over the border to Mexican cartel figures
4 but in the United States to prohibited persons are
5 more closely related to violence than other firearms
6 are.

7 So there is not only just as it relates to
8 the exportation of firearms that have been purchased
9 by straw purchasers, but within our own country in
10 our states throughout the country straw purchases are
11 linked to crimes of violence that are occurring in
12 our cities across the United States.

13 CHAIR SARIS: And do you have that data?

14 MS. DUFFY: We would certainly be able to
15 provide that data to you. I don't have it with me
16 right here at this moment.

17 CHAIR SARIS: And one follow up we're sort
18 of debating. What does "personal use" mean? Maybe
19 you could give us some guidance on that. You said
20 that maybe it should be an exception for personal
21 use. How do you define that? Sporting? How would
22 you define that?

1 MS. DUFFY: Well I think certainly, you
2 know, owning firearms and hunting and activities that
3 are associated with hunting, that's part of our
4 national culture. And I certainly think that
5 individuals in this country, the large majority of
6 gun owners, an individual who has them for hunting,
7 or sporting purposes, or for their own personal
8 protection, are doing so legally and lawfully.

9 So there is certainly the large majority
10 of United States citizens who purchase guns for
11 personal use, whether it be for sporting, or whether
12 it be for their personal protection. Now those
13 individuals are not using straw purchasers to do so.
14 They are not using concealed compartments in vehicles
15 to transport them.

16 So I think what we're looking at is, you
17 know, let's use some common sense here. If somebody
18 is buying a weapon for personal use, they are not
19 going in to multiple gun stores on the same day and
20 buying ten of the same weapons and hundreds of rounds
21 of ammunition, and then transferring to other people.

22 So I think that there is indicia that we

1 can look to to say what is common sense that somebody
2 is using this for personal use?

3 Now with respect to adding a personal use
4 feature into 2M5.2, I think that is important
5 because, you know, looking to Mexico, guns are
6 illegal in Mexico. You cannot legally possess a gun
7 as a lay person, as a citizen, in Mexico.

8 So if you are transporting a weapon over
9 the border into Mexico and you have a certain level
10 of weapons, and you have hundreds of rounds, or half
11 a ton of ammunition, this is not for personal use.

12 CHAIR SARIS: And once again, any data
13 that you could develop on what's the bright line on
14 the amount of ammunition that would be for personal
15 use, or guns as opposed to for, as you say, common
16 sense, clearly would be very useful.

17 MS. DUFFY: Okay.

18 VICE CHAIR CARR: Mr. Lappin, my
19 recollection is that last year you mentioned that
20 prison overcrowding was at 37 percent, and I think
21 today you said 35. Was that just rounding? Or has
22 it gone down?

1 MR. LAPPIN: It's still about 37. I
2 apologize for that.

3 VICE CHAIR CARR: Okay. And I think you
4 also said that, even given the new prisons that are
5 being built, or are planned to be built, that the
6 overcrowding would only increase. And I think you
7 said today there are 5- to 6,000 net more people
8 coming into the system each year.

9 So is it still the case that, as things
10 are projected, even with the extra week a year, and
11 maybe more credit for time served in prison programs,
12 does it still look like that percentage is going to
13 go up?

14 MR. LAPPIN: Yes, it does. Let me define
15 37 percent for you. That means that right now -

16 VICE CHAIR CARR: That's 37 out of 100?

17 MR. LAPPIN: - there's about - yes, that's
18 right - about 45,000 inmates are triple bunked in the
19 Bureau of Prisons, either two inmates, three inmates
20 in a cell meant for two, TV rooms and card rooms
21 converted to cell space, or more inmates squeezed in
22 the dorms than we think is wise.

1 In the next three years, our total
2 construction plan adds 10,000 beds, total.
3 Everything we're currently constructing. And as
4 you've heard, we're trying to purchase this facility
5 in Thomson, Illinois. If we acquire that facility,
6 and finish construction on everything we have funded,
7 we add 10,000 beds.

8 If we receive the 5- to 6,000 inmates a
9 year, at a minimum we're going to get about 15,000,
10 we could get 18,000, we're going to take 10,000 of
11 those beds for the inmates that are coming in, we're
12 going to have about 8,000 more inmates than we have
13 beds. Which means you're going to take that inmate
14 and place him in another cell, or in a card room that
15 was not intended to be housing.

16 So we could end up with close to 70,000
17 inmates triple bunked at the end of that three-year
18 period, even though we've added 10,000 beds.

19 If we're fortunate enough that the two
20 pieces of legislation were to pass, we don't think
21 that gets us to zero growth. That's our goal. Let's
22 get to zero growth. Let's get to the point we're not

1 admitting any more than we are releasing.

2 And unfortunately, we don't think our
3 projections, it quite gets us there. And I realize,
4 I mean 6,000 inmates to the base a year is the
5 equivalent of four prisons. On average our prisons hold
6 between 1,500 to 1,600 inmates. And so yearly for
7 the last ten years, that's been the addition of four
8 prisons. We have not built – we have not added four
9 prisons a year in each of the prior last ten years,
10 nor do we anticipate adding even close to that in the
11 next three years.

12 And so we realize that crowding is going
13 to continue to be a challenge. And that is
14 complicated by the fact that that's more inmates than
15 the prison was built for – not only idleness, but
16 longer waiting lists to get into GED, vocational
17 training, Prison Industries, and other opportunities
18 that we know hopefully reduce recidivism. Even from
19 the willing participants, long waits.

20 So it complicates it. And I see it
21 continuing, unless we do one of the four things I
22 mentioned: less inmates; less time; add space.

1 VICE CHAIR CARR: And I'm also guessing
2 that when you are 37 percent over capacity, you don't
3 spend 37 percent more money per prisoner. So that in
4 terms of the cost per prisoner, my guess is that
5 doesn't start to go down dramatically in terms of
6 what it costs for you to run your prisons until you
7 get rid of the overcrowding, and then get below what
8 your current capacity should be.

9 MR. LAPPIN: That's a very good
10 conclusion. It really does not, until you eliminate
11 enough -- costs really don't go down until you begin
12 closing prisons, okay. And we're a long way from
13 that if we're going to abide by the appropriate
14 capacity of those institutions.

15 So I know some people have been fearful
16 that we may overbuild. I'm really not fearful of
17 that, given the fact that we've got such a surplus
18 that already exists, let alone prisons today that are
19 operating that are extremely inefficient compared to
20 the prisons you build today.

21 So we're operating prisons that are in
22 excess of 100 years old. They're not at all very

1 efficient. They are very expensive to operate. And
2 so at some point we hope in the future that there is
3 a decline and you could begin saving tax dollars by
4 eliminating some of those older infrastructures and
5 replacing them with the newer ones.

6 But we are a long way from that.

7 CHAIR SARIS: Judge Hinojosa, then
8 Commissioner Jackson.

9 COMMISSIONER HINOJOSA: Ms. Duffy, when
10 you addressed the Fair Sentencing Act, you mentioned
11 the temporary amendment, and then obviously we have
12 to decide on the permanent guidelines with regard to
13 the Fair Sentencing Act.

14 Am I correct in interpreting your comments
15 that you feel that we should proceed as we did with
16 the temporary amendment and adopt that as the
17 permanent?

18 MS. DUFFY: You are correct.

19 CHAIR SARIS: Ketanji.

20 VICE CHAIR JACKSON: Mr. Lappin, your
21 command of the statistics is impressive, and I
22 apologize because you may have said this and I didn't

1 write it down, but do you have a statistic about the
2 percentage of the federal inmate population right now
3 that is attributable to drug offenders, or to drug
4 offenses?

5 MR. LAPPIN: It depends on how
6 specifically, or how you define it, but about 52
7 percent of the inmates in federal prison are in for a
8 drug-related offense, either for an offense, a
9 conviction for drugs, or some nexus to drugs.

10 So it has been and continues to be the
11 driver. Realizing that in 1980 we had 26,000 inmates
12 and very few drug offenders, and today we have 210,000
13 inmates and 52 percent of them in for a drug-related
14 offense.

15 And so a huge driver for us, not only – not
16 necessarily in the number, but the sentences are
17 extremely long. They're now the second longest.
18 Believe it or not, the longest on-average sentences
19 today in the federal prison system are sex offenses
20 that have now exceeded the drug offenses. But some
21 of the longest sentences are drug-related offenses.
22 So they stay a long time, unlike immigration cases

1 which are a shorter length of stay of 27 months on
2 average, compared to 78, 79 months on average for a
3 drug offender.

4 So about 52 percent for a drug-related
5 offense.

6 VICE CHAIR JACKSON: Thank you.

7 MR. LAPPIN: And about 40 percent of
8 those, we believe, have drug and alcohol addictions,
9 which certainly complicates things.

10 VICE CHAIR JACKSON: Thank you.

11 CHAIR SARIS: Any other questions?

12 (No response.)

13 CHAIR SARIS: Thank you very much. We
14 appreciate you coming in.

15 MR. LAPPIN: You're welcome.

16 MS. DUFFY: You're welcome.

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1 CHAIR SARIS: All right, the next panel
2 should come up, please.

3 Welcome. Our next panel is on the Fair
4 Sentencing Act. I am going to apologize in advance
5 if I don't pronounce the names correctly. So, Jim –

6 MR. SKUTHAN: "Skoo-than".

7 CHAIR SARIS: – Skuthan, is the chief
8 assistant federal public defender for the Middle
9 District of Florida. He has been with that office
10 since 1990 and has been chief assistant since 2000.

11 Jeffrey Steinback represents the
12 Commission's Practitioners Advisory Group. He is a
13 private practitioner in his own firm in Chicago where
14 he practices civil litigation, plaintiff personal
15 injury, and civil rights violation claims. He [was]
16 a partner at Genson, Steinback & Gillespie, a law
17 firm in Chicago.

18 And James Lavine?

19 MR. LAVINE: Jim Lavine, thank you.

20 CHAIR SARIS: Jim Lavine is the President
21 of the National Association of Criminal Defense
22 Lawyers. He is a partner in the firm Zimmermann,

1 Lavine, Zimmermann, & Sampson in Houston, Texas.
2 Previously he was an assistant DA for Harris County,
3 Texas, and assistant state's attorney for Cook County,
4 Illinois.

5 Welcome to all of you, and we'll start
6 with Mr. Skuthan.

7 MR. SKUTHAN: Good morning, Chairman Saris
8 and fellow Commissioners.

9 Thank you for inviting me here today to
10 speak. I am speaking on behalf of the federal
11 defenders and community defenders throughout the
12 United States.

13 At the beginning what I would like to do
14 is thank the Commission for the work that it has done
15 over the past 14 or 15 years in dealing with the
16 crack retroactivity issue. We know that the
17 Commission started in the mid-'90s to eliminate the
18 disparity between crack and powder offenses and has
19 worked long and hard to accomplish that goal.

20 I come from the Middle District of
21 Florida, which goes from Jacksonville to Orlando to
22 Ft. Myers. We have the second-highest number of

1 crack retroactivity cases in 2008. We opened over
2 1,000 files. It was quite an undertaking, but it was
3 a collaborative effort that was led by Chief Judge
4 Patricia Fawsett, as well as U. S. Probation Officer
5 Chief Elaine Terenzi, United States Attorney Robert
6 O'Neill, and the federal defender in our district.
7 We worked together to work on those cases to reach a
8 common ground. And because of the work of this
9 Commission, as well as the work of those agencies in
10 the Middle District, there were many defendants who
11 were serving long sentences who got relief and came
12 home to their loved ones and now have happy families.

13 They are being productive citizens now.
14 They used to come by, a couple a week, to visit with
15 us, to thank us for the job that we had done, but
16 also we told them it was the Commission that had done
17 the hard work in trying to get this done.

18 The effect on those defendants was just
19 tremendous. And what we have found, for those that
20 have been released, is that the violations of their
21 supervised release is very low. That has been our
22 experience. And when they do violate, or when former

1 clients do violate, it is usually not for crimes of
2 violence or new substantive offenses. What we find
3 is it's usually for technical violations, or for
4 being involved with addiction issues.

5 So we appreciate what the Commission has
6 done, and we look forward to working with the
7 Commission in the future on retroactivity issues.

8 As I stated, I come from the Middle
9 District and we have a lot of drug cases. We have
10 the second-highest number of crack cases in the
11 retroactivity arena. We also get importation cases
12 on the east coast from Colombia and Jamaica. And
13 then on the west coast in Tampa we have a large
14 percentage of what we call fast-boat prosecutions.

15 Now these are not prosecutions that take
16 place off the Tampa coast; rather, they are boats
17 that travel from Ecuador and Colombia and the Pacific
18 Ocean, and then they're approached by either Coast
19 Guard or the Navy and they have large amounts of
20 drugs on the boat - usually cocaine - and a lot of
21 those cases are prosecuted in the Middle District of
22 Florida.

1 So we see every type of drug prosecution
2 that you can imagine in the Middle District. I am
3 here today to discuss some aspects of the Fair
4 Sentencing Act. The first thing I would like to
5 address is the offense levels.

6 We would ask that the Commission strongly
7 consider lowering the offense levels from 26 and 32
8 down to 24 and 30, as well as lowering the offense
9 levels for all drug cases by two levels.

10 We believe that the legislation that was
11 enacted in the Fair Sentencing Act was remedial
12 legislation, and we think that now is the time to go
13 ahead and make that reduction down to 24 and 30.

14 When 706, Amendment 706 was implemented,
15 the levels for the five- and ten-year minimum
16 mandatories were reduced from Level 26 to a Level 30
17 [sic?]. And if this Commission were to do that, the
18 levels would still be tied to the minimum mandatories.

19 Right now, the levels are such that the
20 minimum mandatory for the drug amounts are below the
21 low level for the guideline. But if it were lower,
22 then it would be within what the minimum mandatory

1 is. I think that is important.

2 By virtue of the Fair Sentencing Act, the
3 ratio was lowered from what it was previously to
4 18-to-1. If the Commission were to lower the drug
5 levels by two levels across the board, then you still
6 would have that 18-to-1 ratio that Congress intended,
7 only now it would be 18-to-1 and the guidelines, the
8 five-year minimum mandatory would be at Level 24 and
9 the ten-year minimum mandatory lower level would be
10 Level 30. But if you reduced the two levels for all
11 drugs, then it would still have a 18-to-1 ratio,
12 which Congress intended.

13 The way it is now, it is somewhat
14 problematic because over 51 percent of the cases in
15 2009 fiscal year defendants were sentenced to longer
16 than the statutory minimum mandatory for the offenses
17 for which they were convicted. And that is a large
18 number.

19 So you have a statutory directive of a
20 minimum mandatory sentence, but yet in fiscal 2009
21 more than half of the defendants who were sentenced
22 received sentences in excess of that minimum

1 mandatory sentence.

2 What Congress has done in the Fair
3 Sentencing Act is asked the Commission to recognize
4 the more serious drug offenders, and the more serious
5 actions taken by some of the people in the community
6 who sell drugs. And this Commission has done that by
7 enacting new amendments which recognize an
8 aggravating-role enhancement for people that engage
9 in certain aggravators.

10 Under 2D1.1(b)(2), the defendant who uses
11 violence or credible threats of violence gets an
12 increase of two levels. Under (b)(11), someone who
13 bribes or attempts to bribe a law enforcement officer
14 gets an additional two levels. Someone that maintains
15 a premises for manufacturing/distributing under
16 (b)(12) gets another two levels.

17 So the Commission has recognized that
18 there is a way to deal with some of the more serious
19 offenders that deal in drugs. And probably the
20 biggest one is someone who has an aggravating-role
21 enhancement if he meets one of the criteria that are
22 listed in 2D1.1(b)(14), he gets an additional two

1 levels.

2 So if you have a person who previously,
3 under the old guidelines, possessed a dangerous
4 weapon, they would get a 2-level enhancement. But
5 now under the new guidelines, as the Commission has
6 considered the aggravating factors, if that person
7 has a dangerous weapon and uses a threat of violence
8 perhaps against a significant other or a girlfriend
9 where he threatens serious bodily injury, then he
10 gets another 2-level enhancement.

11 So the guidelines under the temporary
12 amendments do recognize that there's an enhancement
13 for aggravating conduct on behalf of offenders.

14 One of the things that we have noticed in
15 some of the statistics and some of our own personal
16 experience is that is the exception and not the rule.
17 Most of the drug offenders that we represent, most of
18 the drug offenders that we saw in crack
19 retroactivity, and most of the drug offenders that we
20 see nationwide do not possess dangerous weapons.

21 I believe the figure is 83 percent of the
22 people who were convicted of drug-related crimes in

1 fiscal year 2009 did not possess a dangerous weapon.
2 Moreover, over 90 percent of those people pled guilty
3 and received acceptance of responsibility. The vast
4 majority of them did not receive a managerial role
5 enhancement.

6 So when you look at the overall picture of
7 a drug offender, it is usually a non-violent, low-
8 level drug dealer. Our own experience, when people
9 have gotten out of prison on drug offenses,
10 especially crack offenses, is that they don't return
11 to a life of violence, if they ever even had a life
12 of violence to start with. Rather, they return to
13 their community. If they do get into trouble, it's
14 usually for technical violations.

15 I think it was interesting to hear
16 Mr. Lappin speak about the current situation in the
17 prison system. He spoke of double bunking of some of
18 the dangerous inmates. He spoke of triple bunking of
19 some of the people in the low- and medium-
20 facilities. And he identified three ways to address
21 the issue.

22 One was to build more facilities, which I

1 don't know if in the current climate is going to be
2 something that is feasible.

3 The other thing he discussed was reducing
4 the number of inmates that come into the system, as
5 well as reducing the lengths of sentences. And I
6 think one of the best places to start would be with
7 non-violent drug offenders.

8 They have shown they can survive in the
9 community. They can behave themselves when they're
10 under supervision. They're the type of defendant
11 that would be suitable for alternatives to
12 incarceration, which a judge could consider in
13 sentencing an offender.

14 They also are the type of person, as I've
15 indicated before, that usually does not have a
16 dangerous weapon and is usually not involved in
17 violence. Those that are possessing those weapons,
18 those that do engage in violence, then the new law
19 provides for significant enhancements. And the
20 judges, who are in the best position to look at those
21 individual defendants, can apply those enhancements
22 in those situations where they would apply.

1 I also wanted to state a little bit about
2 the minor-role reduction. It has been in effect
3 since the beginning of the guidelines. The guideline
4 itself has not changed, as we all know, but the
5 commentary has changed. And in 2001, the Commission
6 changed the commentary after the *De Varon* case from
7 the Eleventh Circuit, and in many ways in the defense
8 bar and in our office we thought the changing of the
9 commentary would help our clients that were more of
10 a, I don't want to say "minor role" but more of a
11 minor type of capacity in drug cases, and we found it
12 had the opposite effect.

13 For example, the commentary in the initial
14 guideline that was passed back when the guidelines
15 started had an application note that talked about a
16 "minimal participant." And it gave an example where
17 someone who offloads, one time, a large shipment of
18 drugs – and it gave as an example marijuana – that
19 person might be eligible for a minimal-role
20 reduction.

21 Well I don't think that would be possible
22 today, especially where I am in the Eleventh Circuit,

1 because time and time again minor-role reductions are
2 denied by the district court, and it is upheld by the
3 Eleventh Circuit because of the weight of the drugs.

4 But yet the commentary that was in effect
5 before 2001 – I'm sorry, if I could just finish my
6 sentence.

7 CHAIR SARIS: Yes.

8 MR. SKUTHAN: – recognize that if you're
9 going to offload a large, you know, one shipment,
10 then that would qualify you for minor – for minimal
11 participation. And you're not going to have someone
12 offload if it's a small amount of drugs; indicative
13 in that is going to be a large amount of drugs.

14 Thank you.

15 CHAIR SARIS: Thank you very much.

16 MR. STEINBACK: Good morning, Chair Saris,
17 and distinguished members of the Commission.

18 A year ago I had the privilege of
19 appearing – well, it was last May, actually – before
20 the Commission with respect to the issue of mandatory
21 minimums. And everyone who recalls our presentation
22 knows that we still hope, passionately, that this

1 Commission will urge the Congress to repeal the vast
2 majority of mandatory minimums because of the unfair
3 and harsh way in which they affect many offenders who
4 just do not deserve mandatory minimums.

5 After looking at, and carefully reviewing,
6 and discussing with my PAG colleagues the impact of
7 what we expect to come from these new enhancements,
8 our concerns with respect to mandatory minimums, and
9 our concerns with respect to these new enhancements
10 are rivaled. We are equally as concerned about both.

11 I offer a quick hypothetical. If you take
12 an individual, we'll call him Brian, he's 21 years of
13 age; he's involved in a powder cocaine conspiracy
14 case involving 450 grams of powder cocaine, a
15 relatively small amount, I might add, by standards of
16 the Chicago prosecutions.

17 Brian lives in one of the impoverished
18 areas in the City of Chicago on the South Side, and
19 he lives there with a couple of people from his
20 family, his wife Mary who is young, and two young
21 children. They have a three-flat that they rent.
22 From time to time, on the top building, on the top of

1 the building, the top flat, Brian will hide some of
2 either his drugs or his money, and his wife Mary is
3 generally aware of what he's up to but has no clue as
4 to the scope or extent.

5 Now in addition to this, Brian has an
6 individual by the name of Bill who is a cousin 17
7 years of age who -

8 CHAIR SARIS: If you could keep your voice
9 up just a little bit? I'm afraid your mike isn't
10 catching it.

11 MR. STEINBACK: I apologize. Plus I have
12 a cold and the plane ride here -

13 VICE CHAIR CARR: Just pull the mike
14 towards you a little bit and make sure it is on.

15 MR. STEINBACK: Can everybody hear me now?

16 VICE CHAIR CARR: Yes.

17 CHAIR SARIS: That's better.

18 MR. STEINBACK: I'm sorry.

19 CHAIR SARIS: I saw people behind you
20 trying to hear you and want to hear what you're
21 saying.

22 MR. STEINBACK: Brian has a cousin Bill.

1 Bill is 17 years of age. Bill is a user of drugs.
2 They have used drugs together. They've partied
3 together. And Brian hires Bill from time to time
4 when he's hiding his drugs in his three-flat and he's
5 not home to keep an eye on them, and pays him about
6 \$100 each time to do so.

7 Now inevitably Brian is going to get
8 caught. And when he does, he gets caught with his
9 450 grams. And Bill gets caught with him. Now the
10 question is, looking at these guidelines and these
11 new enhancements, how would they apply to Brian and
12 Bill?

13 Add to the hypothetical the fact that
14 Brian has no criminal background with respect to
15 drugs, none at all, no arrests, no convictions. He
16 does, however, have a prior theft conviction. He
17 received two years probation. Unfortunately, that
18 probation was running at the same time that he got
19 caught with these drugs.

20 Now if we look at the criminal history,
21 he's going to get three points under the rules of Chapter
22 Four. So he's in a Criminal History Category II. If we

1 look at the 450 grams, that's going to put him at
2 Base Offense Level 24. Now the question is with
3 respect to the new enhancements.

4 Assume an aggressive prosecution – and
5 that's not a hard thing to assume in Chicago. We are
6 going to look at an enhancement for maintaining
7 premises, because from time to time Brian used that
8 three-flat to hide his drugs or money.

9 We are also going to look at, therefore,
10 an enhancement for his aggravating role because he
11 recruited Bill, who is 17 years of age, and we're
12 going to be looking at the prospect that Bill is
13 someone Brian knew under the age of 17 also to be
14 subject to a (b)(14) enhancement.

15 Now if you look at the various
16 enhancements, and you look at his criminal history
17 category with his 450 grams of powder cocaine which
18 does not trigger the mandatory minimum as the
19 Commission well knows, Brian winds up with a
20 projected guideline range of 108 to 135 months, which
21 dwarfs the mandatory minimum of five years he would be
22 looking at if he had another 50 grams of powder with

1 him.

2 What I fear from these enhancements is
3 that the director, Director Lappin, is going to have
4 not just his hands filled now, but they're going to
5 be filled even greater. A number of the things that
6 the Commission is looking at is whether and what kind
7 of changes ought to be considered with respect to
8 some of these proposed enhancements.

9 And with respect, for example, to the
10 enhancement for maintaining premises, the application
11 note, which I believe is 28, talks about the fact
12 that they need not be exclusive, but they need be
13 primary. So I would recommend very strongly that the
14 Commission include the word "primary" after
15 "premises" and "for." So that what you're really
16 looking at in connection with that is language which
17 essentially says:

18 If the defendant maintains a premises
19 primarily for the purposes of manufacturing or
20 distributing a controlled substance, increase by 2.

21 Because that's what the application note
22 requires. Otherwise, you are going to have a

1 situation in which anybody who ever uses those
2 things, and with the literal reading, is going to be
3 subject to the prospect of that kind of enhancement
4 and varied interpretations and inconsistency across
5 the country.

6 Now with respect to the issues under
7 (b)(14)(A) through (E), again, you're talking about
8 terms that have no definitions in the guidelines, no
9 definitions in any of the criminal statutes I could
10 find, and really no definitions in the criminal
11 context in the case law.

12 For example, the term "friendship." The
13 use of "friendship" in order to engage someone who
14 has already got an aggravating role. For example,
15 Brian uses friendship. Let's say Bill is not 17,
16 he's 19, but he's used friendship to get him involved
17 in something he wouldn't otherwise do.

18 What is "friendship"? We are going to
19 litigate, and we're going to have witnesses brought
20 in on both sides, and the defense is going to say:
21 He's not really a friend of mine; he's somebody
22 casually I knew from the area. And anybody who comes

1 from the City of Chicago and is familiar with the
2 south and west sides - and I'm sure it's the same
3 across most urban areas - knows that many of these
4 people know people from the block who are simply
5 casual acquaintances.

6 I've known people - I've represented people
7 who are co-defendants with someone who knows their
8 first name, or only knows their nickname, even though
9 they've grown up on the same block with them for 25
10 years. So you're going to have this debate: He's
11 not really my friend; he's a casual acquaintance.
12 Oh, no, no, he's a very close friend of yours. And
13 the prosecution is going to bring in seven, eight
14 people to talk about the relationship.

15 If the Commission does not tighten up
16 narrowly those kinds of definitions for those terms,
17 the litigation could be absolutely all over the
18 place. And, I would add this to that: If you're
19 undercover DEA and you're working the south side of
20 the city, and you want to really put it to a offender
21 who you know has been active for a long time, you
22 might indict a friend that you would ordinarily

1 marginalize and not look at for indictment purposes
2 and prosecute so that you can get that enhancement.

3 You wind up expanding the base of
4 potential individuals that would ordinarily not be
5 charged under the discretion the prosecution has
6 simply because these enhancements invite them.
7 You've got words like "impulse," "affection." Now
8 also, "little or no compensation."

9 If we're talking about the prosecuting
10 office in south California, you are talking about
11 "little compensation" there, that might be \$5,000.
12 You've got cartels bringing in tens of thousands of
13 kilos.

14 If you go to Peoria, Illinois, where I
15 occasionally practice, you're talking about a quarter
16 kilo deal, \$500 may be considered significant
17 compensation, where it would be considered nothing in
18 south California.

19 So there are openings here, wide gaps for
20 widely disparate interpretations that I think are
21 going to be real troublesome for courts. And there
22 is very little - very little - if any guidance in these

1 particular emergency enhancements that are going to
2 help the courts. And unless we narrowly circumscribe
3 what they say and do, we are going to wind up with a
4 lot more people involved in the process, and
5 Mr. Lappin's going to wind up with a whole lot more
6 people in his jails.

7 Now with respect to the issue of section
8 [(b)(14)] which talks about the utilization of
9 individuals 18 – nobody wants to see a naive, innocent
10 individual not predisposed to be involved in drugs
11 dragged into a drug conspiracy. But we are not
12 looking at reality when we look at this and we say
13 "anybody we know to be 18."

14 Because if you talk to agents who work the
15 south and west sides of the City of Chicago, they
16 will tell you that there are already thousands, tens
17 of thousands of young gang members who are deeply
18 involved in the drug trade. They have several
19 juvenile adjudications. They even may have a couple
20 of adult adjudications. And to suggest that those
21 individuals are somehow going to add two levels is
22 really an overstatement.

1 They should be excluded, and we should be
2 very careful with respect to how we deal with those.
3 And if I could have just one more moment, please?

4 CHAIR SARIS: Certainly.

5 MR. STEINBACK: Thank you. When you look
6 at the enhancements under 14(A) through (E), and then
7 you look at the mitigating circumstances under 15(A)
8 through (C), you find a tremendous disparity.
9 Because under 14, all you need to do is one or more
10 of those. And it's an aggravating role whether it's
11 a leader, organizer, or manager.

12 But when you get to 15, it's got to be a
13 minimal participant, which as the Commission knows
14 means somebody that's very infrequently used. So
15 you've limited that number. And then you have to
16 have all three.

17 And the incongruity between those two just
18 doesn't seem to make any sense to me. If there's
19 going to be any application to a (b)15 mitigating role
20 kind of decrease, you really need to open that up to
21 minor participants as well as minimal, and make that
22 either one A, B, or C, not all three as would be

1 comparable with 14.

2 And I thank you very much for the extra
3 time.

4 CHAIR SARIS: Thank you. Mr. Lavine.

5 MR. LAVINE: Judge Saris and distinguished
6 members of the Commission:

7 Thank you for inviting me today on behalf
8 of the National Association of Criminal Defense
9 Lawyers to present our views on the proposed
10 amendments to the U.S. sentencing guidelines related
11 to the Fair Sentencing Act of 2010.

12 My name is Jim Lavine, and for a day only
13 also known as Shamus O'Lavin.

14 (Laughter.)

15 MR. LAVINE: I am President of NACDL, an
16 organization of over 10,000 members. NACDL is the
17 preeminent organization in the United States
18 advancing the goal of the criminal defense bar to
19 ensure justice and due process for persons charged
20 with a crime or wrongdoing.

21 I am also a practicing criminal defense
22 attorney in Houston, Texas, with trial and appellate-

1 level experience in federal and state courts. I
2 specialize in criminal law and spend approximately 90
3 percent of my time on federal cases. Before moving
4 to private practice, I was a prosecutor for over 11
5 years. I appreciate the opportunity to testify on
6 behalf of NACDL today.

7 The Commission has set forth several
8 issues for comment which I will address in turn. It
9 is important, however, to acknowledge the context of
10 this amendment.

11 The Fair Sentencing Act is a culmination
12 of decades of reform efforts to ameliorate the
13 disparate impact and undue severity of the federal
14 sentencing scheme for crack cocaine offenses jointly
15 established by the Federal Criminal Code and the
16 sentencing guidelines.

17 The Congressionally mandated 100-to-1
18 ratio proved unfair largely due to the fact that the
19 more severe crack cocaine penalties had a noticeably
20 disparate racial impact on sentencing guidelines and
21 outcomes.

22 African Americans and other minorities

1 received significantly greater sentences than their
2 White powder-cocaine-involved counterparts. NACDL
3 therefore asks the Commission to equalize the manner
4 in which cocaine offenders are sentenced.

5 NACDL's recommendations flow from the
6 association's commitment to parity in cocaine
7 sentencing and from the principle of parsimony, the
8 overarching instruction of 18 U.S.C. 3553(a) that a
9 sentence must be sufficient but not greater than
10 necessary to achieve statutory sentencing purposes.

11 When addressing the directives in the Act,
12 we encourage the Commission to assess its proposed
13 amendments through this lens and with serious
14 consideration of the direct implication these
15 amendments have for the most vulnerable in our
16 society.

17 As to repromulgation, although the Act
18 represents a major step forward in the effort to
19 reduce unwarranted sentencing disparities and promote
20 certainty and fairness, the 18-to-1 ratio created by
21 the Act will not eliminate an unwanted disparity.

22 To achieve that goal, NACDL urges that the

1 guidelines for all cocaine offenses be equalized.

2 While we realize this approach does go further than
3 the dictates of the Act, it remains the most
4 principled approach.

5 Powder cocaine and crack cocaine are part
6 of the same supply chain. The dangers of crack are
7 inherent in powder, and any distinct aggravating
8 circumstances are adequately punished by
9 enhancements, adjustments, and guided departures.

10 Regarding base offense levels for crack
11 cocaine, in 2007 NACDL fully supported the
12 Commission's 2-level decrease in the base offense
13 level. We continue to support that decrease today,
14 and encourage the Commission to anchor the 28-gram
15 threshold to Offense Level 24, rather than 26.

16 Although we urge the Commission to
17 consider implementing a 2-level decrease for all
18 drugs in the Drug Quantity Table, there is no need to
19 revert to the pre-2007 base offense level for crack
20 cocaine.

21 NACDL joined many other organizations in
22 opposing this step backward when initially proposed

1 by the Commission in the emergency amendment. There
2 is no statutory basis for anchoring the guidelines
3 above or even to the mandatory minimums, and doing so
4 is contrary to the bipartisan legislative intent
5 behind the Act.

6 With the Act's passage, a nearly unanimous
7 Congress made it clear that 28 grams trigger the 60-
8 month sentence for a person subject to a statutory
9 mandatory minimum. Setting the base offense level at
10 26, and therefore assigning a higher 63-month
11 sentence to 28 grams, is an affront to the core
12 objectives of the Act.

13 When Congress passed the Act, it was
14 keenly aware of the Commission's 2007 decision to
15 lower the base offense level. The fact that Congress
16 did not instruct the Commission to revert to the pre-
17 2007 level, combined with the Commission's own
18 admission that there is no statutory basis for
19 anchoring the guidelines to mandatory minimums,
20 strongly counsels a return to base offense levels of
21 24 and 30, rather than 26 and 32.

22 As mentioned, this should be one aspect of

1 a broader recalibration of the drug trafficking
2 guidelines. This should be accomplished without
3 regard to mitigating or aggravating factors, or
4 resort to the safety valve criteria.

5 The problem of the drug guidelines is one
6 of proportionality. And that is true for defendants
7 at all levels of culpability. The only complete
8 solution is to alleviate the overbearing effect of
9 drug quantities on all sentences.

10 While falling short of the wholesale
11 guidelines reductions we believe are necessary, our
12 proposal would be a significant step in the right
13 direction. For defendants who are not subject to a
14 statutory minimum sentence, the role then that
15 sentencing factors other than drug quantity play in
16 shaping the ultimate sentence will become more
17 relevant.

18 Turning to a slightly different issue,
19 NACDL further encourages the Commission to reconsider
20 the manner in which it has implemented the directives
21 contained in the Act.

22 The Act directs the Commission to review

1 and amend the federal sentencing guidelines to ensure
2 that the guidelines provide an additional increase or
3 reduction for various factors. Rather than
4 implementing these directives via Chapter Two
5 enhancements and Chapter Three adjustments, NACDL
6 suggests that they be implemented through chapter 5K.
7 Congress did not specify that its mandate must be
8 effectuated through chapters Two or Three, to the
9 exclusion of any other element of the sentencing
10 calculus under the advisory guidelines.

11 In contrast, the pre-*Booker* Sarbanes-Oxley
12 Act of 2002 expressly directed the Commission to
13 promulgate an SOC-enhancing section 2B1.1 for a fraud
14 offense that endangers the solvency or financial
15 security of a substantial number of victims. The
16 Fair Sentencing Act lacks this specificity and leaves
17 the manner of implementation of the directives fully
18 in the Commission's expert hands.

19 Rather than having Congress micromanage
20 the guidelines, the Commission has the independent
21 responsibility to implement the Act so as not to
22 interfere with the integrity and smooth operation of

1 the guidelines.

2 That goal would be best accomplished as to
3 each of the factors by amending chapter 5K as opposed
4 to chapters Two or Three. This would ensure that in
5 appropriate cases the enhancement or mitigation will
6 incrementally increase or decrease a guideline
7 without bearing the imprimatur of general application
8 associated with an SOC or adjustment.

9 Thus, as the last step in the *Booker*
10 consultative process, the sentencing judge must find
11 that the conduct in question is present to an
12 extraordinary degree before departing on that basis.

13 Finally, NACDL believes 3B1.2, the
14 mitigating role adjustment, is currently too narrow,
15 both in and of itself and as interpreted by federal
16 courts. Too few defendants receive this adjustment,
17 and as a result of some courts interpreting it more
18 narrowly than others, there is a growing disparity in
19 its application.

20 Specifically, the language used in the
21 notes to 3B1.2 expressly discourages its
22 application. They explicitly provide for infrequent

1 application; set the bar for qualification high,
2 requiring a defendant to be, quote, "substantially
3 less culpable than the average participant"; and
4 dissuade the court from relying on the defendant's
5 bare assertion when making its finding.

6 This restrictive language and the lack of
7 clarity result in disparate application of this
8 adjustment. In my own Fifth Circuit, for example,
9 defendants who were simply mules, the very bottom of
10 the drug trafficking enterprise, are frequently
11 denied a minor role adjustment.

12 In *U.S. v. Castillo-Salazar*, the court
13 said the defendant was not entitled to the adjustment
14 simply because his role in the offense was limited to
15 transporting drugs since such a role is an
16 indispensable part of drug-related offenses.

17 Similarly, in *U.S. v. Angel-Balderas* the
18 court explained that acting as a mule provides an
19 indispensable service to others involved in the drug
20 trafficking scheme and is essential to their success.

21 For these reasons, the court held that the
22 defendant failed to show that he was substantially

1 less culpable than the average participant, leading
2 as a result to what we heard from Mr. Lappin in the
3 earlier panel, some of the overcrowding we have in
4 the prisons with 52 percent of drug-related offenses
5 being some of the housed people in the prison system.

6 These stories, unfortunately, are not
7 uncommon. There is a strong bias against this
8 particular adjustment. And even where judges are
9 open to the adjustment, the most deserving defendants
10 may still have difficulty climbing over these high
11 hurdles.

12 In order to resolve these inequities,
13 remedy the overly restrictive reading, and expand
14 application to more defendants, the Commission should
15 amend the application notes to 3B1.2 and related
16 guidelines.

17 NACDL fully supports the specific
18 recommendations set forth by the Federal Public and
19 Community Defenders on this point in a very well
20 researched and well reasoned submission to the
21 Commission, and encourages the Commission to
22 implement these changes.

1 In summary, NACDL applauds both Congress
2 and the Commission for this critical extension of the
3 sentencing reform. Elimination of the 100-to-1
4 ratio, and implementation of the Act by the
5 Commission is a milestone on the path to fair drug
6 sentencing. Still, it is not enough. The need for
7 retroactivity now is manifest, and we look forward to
8 addressing that issue in the near future.

9 I am grateful for the opportunity to
10 testify on behalf of our membership, and I look
11 forward to your questions.

12 CHAIR SARIS: Well thank you.

13 Commissioner Howell?

14 COMMISSIONER HOWELL: Yes, I have a few
15 questions -

16 CHAIR SARIS: Judge Howell.

17 COMMISSIONER HOWELL: That's fine. I'm
18 still getting used to being called "Judge" myself.

19 On the minor role, Mr. Skuthan?

20 MR. SKUTHAN: "Shoo-than."

21 COMMISSIONER HOWELL: I'm sorry, I'm going
22 to slaughter your name. Did I understand you

1 correctly to say that you thought adding an example
2 to minor role, one that in fact we eliminated before,
3 would be helpful for encouraging more uniform
4 application of the minor role adjustment? And if
5 that is in fact what you're suggesting, I would like
6 to hear from Mr. Lavine, who also addressed this
7 adjustment, as to whether or not you think that would
8 be helpful or not.

9 MR. SKUTHAN: I think under the old
10 guideline where that commentary was in effect, if you
11 had a large amount of drugs but you had a defendant
12 who was involved in off-loading that one time, that
13 was an example under the commentary where a judgment
14 could give a 4-level reduction.

15 Now, under the present commentary, judges
16 have not been giving the reduction, particularly in
17 our circuit, the Eleventh Circuit, because of the
18 high amount of drugs involved in the transaction.

19 So I think it would be helpful to go back
20 at least to using that example, because as it stands
21 now at least in our district, minimal participant is
22 something that is never – it's like someone's

1 appendix. We all have one, but we never use it. And
2 that is minimal role in our district. It's there.
3 We know it's there. But it's never used.

4 There was a case in the materials from the
5 Southern District of Florida, *United States v.*
6 *Dorvil*, and that was a 1991 case where the defendants
7 were just part of a conspiracy to the extent that
8 they offloaded 278 kilos of cocaine. In that
9 particular case, the district judge, using that
10 commentary that was in effect at the time, gave a 4-
11 level reduction. And he gave it – he looked at the
12 commentary and said, this fits exactly what these
13 individuals were doing.

14 What I would suggest is, under the current
15 case law in the Eleventh Circuit as well as other
16 circuits, when there's a large amount of drugs on a
17 boat or somewhere else, and defendants offload it,
18 they are being denied not only a minimal role
19 reduction but a minor role reduction, and they are
20 being denied that reduction because of the weight
21 involved in the offense.

22 So to that extent I think that language

1 was helpful before. I think the purpose of the
2 amendment was, from the defense bar we thought it was
3 going to help more defendants get a minor or minimal
4 role reduction. In that instance, it has had the
5 opposite effect.

6 COMMISSIONER HOWELL: Well the Commission
7 has been concerned in our review of this issue about
8 disparate use across the country, and in different
9 regions of the minor and minimal role adjustment, and
10 that is one of the reasons we are looking at in this
11 amendment cycle.

12 Mr. Steinback, Mr. Lavine, do you have any
13 comments about, or recommendations about whether or
14 not the Commission should employ examples to ensure
15 more uniform application of the adjustment?

16 MR. STEINBACK: It's my experience, having
17 practiced primarily in Chicago, that not just from
18 district to district, but within the same district
19 you will get a minor role adjustment from Judge A;
20 you will not get one from Judge B for the exact same
21 facts.

22 So this is a very ripe topic for review.

1 I think that an example would be helpful. Obviously
2 the nature of the example I think is what's critical.
3 The example that was previously used and then removed
4 did not strongly encourage the use of minor or
5 minimal role. The current language strongly
6 discourages it. People read minimal role and the
7 infrequency with which the Commission intends it to
8 be used to really apply across the board to any of
9 these minor role/minimal role adjustments.

10 And I think some language in there that
11 encourages utilization in the appropriate case would
12 open up the door to the opportunity for those truly
13 deserving to be placed within that either 2-level or
14 4-level decrease.

15 And I also think that, while we're on this
16 topic, there should be some consideration given to a
17 3-level, middle-of-the-road decrease, where someone
18 is not truly minimal but is more than minor. We have
19 those kinds of gradations clearly with respect to
20 upward adjustments, and I would think that the same
21 could be applied without that much difficulty in
22 overhauling the minor and minimal role; there would

1 be a middle level.

2 So I think an example would be helpful. I
3 think the example ought to be drafted in terms of
4 encouraging application where the courts find such
5 facts to be similar. Because otherwise, I think
6 there's 23 sitting judges in Chicago; I could have
7 the exact same fact pattern and probably get a minor
8 role from half of them.

9 COMMISSIONER HOWELL: Mr. Lavine?

10 MR. LAVINE: Judge Howell, I would tend to
11 agree. The problem we see in the language is the
12 application note that says it's intended that the
13 downward adjustment for minimal participants should
14 be used infrequently. And that's the signal that's
15 sent to the judges. I think that language, it would
16 be helpful if it were removed.

17 COMMISSIONER HOWELL: No, I understand
18 that part of your testimony. The question is about
19 the example.

20 MR. LAVINE: The example I think would be
21 helpful, because here's why: In the cases that I
22 cited, and I'll be certainly happy to give them to

1 Brent, but they are really illustrative. They are
2 nonpublished cases, but the classic is the language
3 from the Fifth Circuit that says this particular
4 defendant was convicted and sentenced based on his
5 possession of the drugs that were found in his
6 tractor trailer.

7 Implicit in that is, okay, he's only being
8 held responsible for what was in his tractor trailer,
9 but that's quantity-based. And the disparate part of
10 that is, depending on the amount of quantity and what
11 level it falls into, he's already bumped up to a
12 higher level even though we, using the common sense
13 the U.S. attorney talked about earlier, said that
14 that person is a minor participant, has a minor role
15 because he doesn't know the extent, or nature, or
16 scope; probably was told not to even look in the
17 back. So he doesn't know if there's 100 pounds, or
18 1,000 pounds.

19 So if you give an example of the overall
20 conduct, the defender characteristic, he's the mule,
21 he's the driver, and that's the kind of thing we're
22 looking at where we consider common-sensically a

1 minor participant, so that we don't have this
2 overcrowding where we know historically from some of
3 the submissions in Mr. Skuthan's presentation that a
4 lot of these low, low-level drivers, mules, couriers,
5 are the ones doing the multiple years.

6 So if you could give an example, I do
7 believe that would be helpful, and remove the
8 language.

9 COMMISSIONER HOWELL: Well, Mr. Lavine,
10 while I'm --

11 MR. LAVINE: It's "La-vayne" by the way,
12 but that's fine.

13 COMMISSIONER HOWELL: Well, Lavine?

14 MR. LAVINE: Lavine.

15 COMMISSIONER HOWELL: Excuse me.

16 MR. LAVINE: Or O'Lavin today, Shamus
17 O'Lavin.

18 (Laughter.)

19 COMMISSIONER HOWELL: Well, I'm with you.
20 I did have a question about your fairly intriguing
21 idea of looking at, in putting the enhancements that
22 Congress directed us to consider in Chapter Five,

1 chapter 5K, which typically has unguided departures.
2 How do you reconcile that with Congress's direction
3 to us to specifically ensure additional increase of
4 at least two offense levels for these specific
5 enhancements? And, which usually is the signal to us
6 that the Congress is expecting an SOC, rather than an
7 unguided –

8 MR. LAVINE: The language you're talking
9 about in the Act mandates the Sentencing Commission
10 to ensure an additional increase if the following
11 factors. But those are factors that a court still
12 must determine.

13 So if you put them in 5K, when the court
14 determines the factors that go into aggravation,
15 mitigation, departure, increase/decrease, the
16 guidelines are the same. You could then say in the
17 5K language that if you so find these super
18 aggravating factors, which I think by the way are a
19 little vague and nebulous, but besides that, if you
20 put them in 5K, the court as part of the last part of
21 the *Booker* consultative analysis has to engage in the
22 5K issue. And they could all be put in here. Then

1 you don't get the formulaic problems of being in
2 Chapter Two or Chapter Three.

3 COMMISSIONER HOWELL: So your suggestion
4 is not that it wouldn't have two levels in 5K, but
5 that you would have to be triggered only by a finding
6 of extraordinary circumstances?

7 MR. LAVINE: Correct.

8 COMMISSIONER HOWELL: Thank you.

9 MR. STEINBACK: Judge Howell, if I could
10 just finish up my answer on that one question that
11 you had, I think an example is good for minimal role,
12 but I also think what needs to be done is some of the
13 language in the commentary that currently is there
14 needs to be removed – such as the fact that the
15 defendant must be substantially less culpable; the
16 fact that a bald assertion is somewhat discounted;
17 when a defendant comes forward, he gets acceptance of
18 responsibility. The judge is in a unique position to
19 evaluate his truthfulness. He believes he is being
20 truthful. And yet that type of language in the
21 commentary seems to discount that if that's all you
22 have is an assertion from the defendant, that is not

1 enough.

2 And I think that is unfair to a defendant,
3 especially when we see increases all the time when an
4 informant gives a bald assertion that this wasn't a
5 50-kilo deal, this was a 500-kilo deal. And the
6 judge, under Chapter Six, can evaluate that testimony
7 and decide whether or not he will credit it, and then
8 increase the offense level based on relevant conduct.
9 And that is a bald assertion from an informant, or a
10 co-defendant, or someone who has a motive to lie
11 because they're getting substantial assistance.

12 I think a defendant's assertion, so long
13 as it is consistent with the rest of the evidence and
14 what is going on, and the judge is in a unique
15 position to evaluate that testimony, it shouldn't be
16 discounted. It should be given as much value as a
17 judge should give it. And I think the language
18 that's in there now, it causes the judge to discount
19 when it just comes from the defendant's mouth and
20 there's no other evidence.

21 CHAIR SARIS: Judge Hinojosa.

22 COMMISSIONER HINOJOSA: Yes. Mr.

1 Steinback, 3B1.2 does have a 3-level decrease
2 between 2 and 4 for between minor and minimal
3 participant as it presently reads.

4 MR. STEINBACK: Oh, forgive me.

5 COMMISSIONER HINOJOSA: That is definitely
6 in there. This whole issue of minor and minimal, and
7 whether it applies or doesn't apply, or the in
8 between minor and minimal and how it's applied in
9 different districts, even within different courtrooms
10 in the same courthouse, doesn't it raise your concern
11 about what's happening here is not the application
12 note and not the commentary, but the individual
13 policy decisions of judges with regards to how they
14 view a minor and minimal participant, and whether a
15 courier is a vital part of the drug transaction.

16 I say this because I've had discussions
17 with judges. Mr. Lavine and I are from the same
18 district, and he's talked about how it's applied
19 differently. Mr. Steinback, you've said in your own
20 courthouse it's applied differently. And the
21 application note and commentary are exactly the same.

22 But doesn't this just indicate the concern

1 that some have about how we may be headed in the
2 direction where we were pre-Sentencing Reform Act
3 with regard to policy decisions being made?

4 You know, the guidelines have always
5 allowed judges to make decisions, individual
6 decisions, with regards to their application, even
7 under a mandatory system. So this example, doesn't
8 this raise serious concerns on your part with regard
9 to the view of some that we should be headed to the
10 pre-Sentencing Reform Act stage?

11 MR. STEINBACK: I liked the pre-Sentencing
12 Reform Act stage. I liked the stage - I go back to
13 those times where I appeared before a judge and I was
14 writing on a clean slate, even where that judge was
15 known to be rather heavy handed, as long as he or she
16 was open minded, the issues were talked out and the
17 courts could make decisions, and generally there
18 wasn't much complaint with respect to how they made
19 them.

20 Now I understand that there were good
21 reasons, and the concept behind the guidelines to
22 achieve uniformity because there were people that

1 were way out of bounds. Whether my politics would
2 have ever lent to ultimately formulating these
3 guidelines in 1987 or not is irrelevant, but the
4 question is not, in my judgment, whether to take away
5 determinations on a case-by-case basis that apply,
6 because every case has uniqueness to it, and every
7 case does not neatly fit into anything more than some
8 generalized guidance, and then ultimately an
9 application by a court, but it isn't a concern that
10 we're going to be all over the place if we don't
11 clamp down.

12 What the concern is is that without more
13 guidance, without more specificity in many of these
14 proposals, we are going to have the wide open
15 disparity that I know this Commission does not want
16 to see, and we don't either. Not just limiting it to
17 minor and minimal role. Again, if you're talking
18 about someone who does not receive any monetary
19 consideration, you're going to have a lot of
20 litigation, in my judgment, over what that means
21 without more guidance and more circumscribed
22 language.

1 For example, an individual who uses his
2 spouse, his wife let's say, to deposit cash into an
3 account that's a front for his drug-dealing
4 operation, is that person – but that spouse doesn't
5 get paid one penny for doing so – is she receiving
6 compensation? Certainly she's sharing in the ability
7 to use the money in that account.

8 And so without some clarification, for
9 example, calling that direct compensation – that is,
10 that she's paid directly – it's going to be applied in
11 varied ways.

12 The guidelines are not untenable. The
13 minor/minimal role is not an untenable guideline, and
14 it can be applied with more uniformity if there is
15 greater definition provided either by example or by
16 the language with respect to the application notes,
17 which really right now are not very broad. They're
18 very, very unilluminating.

19 And so what I think all three of us are
20 saying is: We don't have to – I don't think we have
21 to go back to any kind of a system, or mandate – go
22 back to a mandatory systems. I think we just need

1 more clarification. And I think the question is a
2 very excellent one with respect to what that might
3 be. And we would certainly be pleased to work with
4 the Commission in drafting language that would
5 illuminate examples, and would open up to a certain
6 degree where the Commission thinks that courts ought
7 to go with this, and where they ought not go, rather
8 than to keep it as general as it is.

9 I think specificity is the answer.

10 CHAIR SARIS: Thank you.

11 MR. LAVINE: Could I just comment on Judge
12 Hinojosa's question?

13 COMMISSIONER HINOJOSA: "O-Hosa".

14 (Laughter.)

15 MR. LAVINE: I'm sorry, Judge "O-Hosa",
16 O'Hinojosa -

17 COMMISSIONER HINOJOSA: He doesn't know
18 that we had nuns from Boston and St. Patrick's day
19 that was a big deal in Rio Grande City.

20 (Laughter.)

21 MR. LAVINE: No doubt there were a few
22 blarney stones somewhere around, as well.

1 NACDL's concern is really more at the
2 30,000-foot level. Our concern is that the language
3 in these application notes is restrictive. And,
4 Judge, you know from your own experience that your
5 view of an individual in the valley as a mule, yes, a
6 mule is an indispensable part of the organization.
7 But that mule who has a name is a fungible commodity.
8 When he goes, there's going to be somebody else
9 that's going to take their place for a very few
10 dollars.

11 The issue is that when the Sentencing
12 Commission in its application note instructs the
13 judges as to what weight they will give the,
14 quote/unquote, "bald assertion," then I think it goes
15 too far. It becomes restrictive, and it impinges on
16 the judge's ability to assess the credibility or
17 weight to an individual.

18 You certainly know that there are people
19 who come before you, you look at them in the eye and
20 say, you're full of blarney. And others are not.
21 But the language as it is now is restrictive. And
22 that is where we are at.

1 COMMISSIONER HINOJOSA: But the language
2 isn't restrictive. All it says is you don't have to
3 rely on it. It doesn't restrict anybody. I mean
4 obviously the judge is still making that
5 determination. I don't see that as restrictive
6 language, that you can't rely on it.

7 MR. LAVINE: My sense of the cases that I
8 have found and read and discussions with all of the
9 practitioners in the Southern District, and the
10 disparity we have there, is that there is at least
11 the sense of some of the judges that the message to
12 the Bench that it will be used infrequently is
13 something that would be a healthy sea change if you
14 would change that.

15 Thank you.

16 CHAIR SARIS: Commissioner Friedrich.

17 COMMISSIONER FRIEDRICH: I have a question
18 for Mr. Skuthan. In your testimony you also suggest
19 that we should amend the aggravating role in the
20 cases in which a defendant is a captain of a ship and
21 also gets a plus-2 for being a captain, and a plus-2
22 for the aggravating role.

1 Initially I was very sympathetic to your
2 position. I agree with you, someone who is a captain
3 and gets a plus-2 shouldn't get aggravating role on
4 that basis alone. However, when I looked at the
5 cases you cited, the *Ramirez* case, the *Rendon* case,
6 in each of those cases the defendant not only served
7 as the captain, but he hired and directed the crew.
8 And in addition, he was involved in the delivery of
9 the ultimate destination of the drugs.

10 So my question is: Isn't your complaint
11 really with regard to the plus-2 for the captain?
12 Which of course is the congressional directive that
13 the Commission implemented? I mean, isn't that the
14 issue as opposed to there being a problem with the
15 aggravating role?

16 MR. SKUTHAN: Well I would respectfully
17 disagree because I think whenever - I'm not a seaman,
18 but I think you hear the saying, the captain of the
19 ship is in charge of the ship. So he's going to be
20 involved in all those other functions relating to not
21 only captaining the ship from let's say the Bahamas
22 to the United States, but also the drug role and

1 everything else.

2 COMMISSIONER FRIEDRICH: Not necessarily
3 the hiring, not necessarily the getting the drugs to
4 the destination. I mean, there could be another
5 person who does that once a ship arrives.

6 MR. SKUTHAN: That's true. That could
7 happen. But I think in most instances that we see
8 it, it is one of those situations where the captain
9 is in charge of the ship. He's also involved in
10 controlling what's on the ship.

11 It's one of those double enhancements that
12 doesn't come up very often, but it does come up. And
13 we think it's unfair that a person would get the
14 enhancement for being the captain, or the pilot, or
15 whatever, and then also get it for the aggravating
16 role, because it's double counting. But I see your
17 point.

18 CHAIR SARIS: So did you want to add to
19 that point?

20 (No response.)

21 CHAIR SARIS: All right, so all of you
22 have criticized quantity as being over-emphasized, or

1 too big a proxy for the seriousness of the crime.
2 You come from three very different state systems.
3 You're very knowledgeable. What other -- what would
4 you look to? Are the weights that are being used
5 higher than what you see in your states? Is there
6 another way of thinking about it in terms of
7 wholesale, or street-sale dealer? You're all talking
8 about over-emphasis. So what -- give me a frame of
9 reference? What do you do in Florida?

10 MR. SKUTHAN: Well in Florida the drug
11 penalties are not as -- I won't say draconian -- as they
12 are in the federal system. We saw a lot of cases
13 over the years where crack cases would come to the
14 federal court system left and right because --

15 CHAIR SARIS: Can we hold off crack? It's
16 clearly an inequity and something we've fought to
17 fix. You know, the question is: You have all these
18 different drugs. Do you treat cocaine differently
19 from meth? Differently from marijuana?

20 MR. SKUTHAN: Not really in Florida. They
21 treat them all the same. If you sell drugs, it's
22 considered a second-degree felony. It's a 15-year

1 maximum penalty. If you possess it, it's a third-
2 degree felony. So it's pretty - they treat them all
3 the same across the board.

4 CHAIR SARIS: Are they weight-driven as
5 well?

6 MR. SKUTHAN: There is some weight-driven
7 with that, but that only is when you get up to the
8 trafficking amounts, the people that are the
9 wholesalers, or the serious drug dealers.

10 The people that sell drugs, if it's below
11 a trafficking amount, then all the penalties are the
12 same.

13 CHAIR SARIS: What are those amounts?

14 MR. SKUTHAN: The trafficking amount in
15 Florida, there's three levels. The first is 28
16 grams. If you sell more than 28 grams - and again,
17 the way that's charged is a person who sells more
18 than an ounce, or possesses more than that with the
19 intent to distribute, which is what the wholesale
20 definition is that the guideline Commission came up
21 with, someone that sells more than an ounce at one
22 time, or possesses more than two ounces at one time.

1 And then it goes up, if you have 200 grams, there's a
2 higher penalty. And if you have 400 grams of
3 cocaine, it's a higher penalty.

4 So it does go up. But only when you get
5 to those serious amounts. And what our contention is
6 with the guidelines the way they are in the federal
7 system across the board is we still see high
8 sentences where people are getting more than the 63
9 months for just being street-level dealers, for just
10 being offloaders, for just being people that store
11 drugs. And I think that's a problem.

12 On page 11 of the submission, we have here
13 an example: 28 percent of street-level dealers, and
14 31 percent of couriers, and 45 percent of loaders, in
15 crack cases were held accountable for more than 50
16 grams. So that is over 80 percent that are held
17 accountable for more than 50 grams, which brings them
18 a sentence of at least 63 months. And these are just
19 low-level dealers, or low-level people that are
20 involved in the drug trade, but yet they're getting
21 these high minimum mandatory sentences.

22 CHAIR SARIS: And what would a 28-gram

1 person in Florida get?

2 MR. SKUTHAN: A three-year minimum
3 mandatory.

4 CHAIR SARIS: It would be three?

5 MR. SKUTHAN: Three-year minimum. But
6 it's not a - I mean, there's different things with
7 substantial -

8 CHAIR SARIS: Sure.

9 MR. SKUTHAN: - and that sort of thing,
10 but the prosecutor has a lot more discretion on how
11 they charge the case. But you cannot aggregate
12 individual sales to get up to the 28 grams. It has
13 to be possession with intent to distribute, or a sale
14 of more than 28 grams, which is more consistent with
15 what a wholesaler is as contained in this
16 Commission's own definition of what a wholesaler is.

17 CHAIR SARIS: Thank you.

18 MR. STEINBACK: In response to your
19 question, I think that it ties into the other
20 questions that the commissioners have raised with
21 respect to minimal and minor role.

22 If you look at the two proposed decreases

1 that are in the new amendments which have been
2 enacted on an emergency basis, both of them are tied
3 to being a minimal participant.

4 If you are looking at the (a)(5) decrease, if
5 the resulting offense level is greater than 32, the
6 defendant receives a 4-level minimal participant
7 reduction, then decrease to 32. Well you have to
8 get to be a minimal participant first.

9 Under the subsection (15) decrease, you
10 first have to be a minimal participant. But you have
11 language at the very end of your application note,
12 and I'm quoting, "that the downward adjustment for [a]
13 minimal participant will be used infrequently."

14 Now if you open that up and take that away
15 and get more practical in the way that you look at
16 how these people at the lower end of these drug
17 conspiracies really operate, you're going to be able
18 to get more uniformity and more relief to the people
19 who deserve it, deserve these kinds of sentences the
20 least.

21 CHAIR SARIS: How does Illinois address
22 it?

1 MR. STEINBACK: The State of Illinois, I
2 only practice exclusively in the federal system, but
3 the State of Illinois does have a situation of
4 mandatory minimums. They have Class Xs, and Super
5 Xs, and they are actually tied, frankly, overall to
6 lesser amounts.

7 However, they have a system in which -

8 CHAIR SARIS: Are they tougher than the
9 feds?

10 MR. STEINBACK: Well on paper it can get
11 tougher, but in practice you can get day-for-day, and
12 any number of other kinds of discounts so that
13 someone who gets a six- or a ten-year sentence isn't
14 going to do three or five years. And that is the way to
15 manage the overcrowding that occurs over there. It's
16 sort of done *sub rosa*, but it happens.

17 But again, if minimal role were to be
18 expanded to include the true group of people who at
19 least we feel fall in that category, we're going to
20 get a lot of relief, and courts are going to be a lot
21 more uniform and more comfortable in applying them,
22 rather than the inconsistency that we have now.

1 MR. LAVINE: But to answer your question,
2 Judge Saris, part of the problem where we think doing
3 these guidelines quantity driven, certainly the
4 kingpin is one person. The cartel that they talked
5 about this morning is an individual that needs
6 serious attention and removal from society.

7 In Texas what they do, to answer your
8 question, at least in the state court system, there
9 is a graded level based on amounts. But the
10 difference is, that's when they get into role. And
11 an individual, for example, who could be the mule who
12 is offloading, or bringing in the truck because it's
13 locked and has 5,000 kilos of marijuana, could very
14 well be eligible for deferred adjudication, which is
15 a form of probation in Texas where he would not be in
16 the federal system.

17 So we go more to a role-based sentencing
18 in the state courts than they do in the federal
19 courts. So while there is a gradation based on
20 amount, presumably the higher amount, the more you
21 get into the street dealers, or the wholesalers, or
22 the suppliers who are the more serious offenders

1 generally, and the state system recognizes that a
2 little bit more than the federal does as to why we
3 say maybe if you look at the minor role, minimal
4 participant a little closer – you know, there are
5 mandatory minimums. We can't deal with what Congress
6 did. As long as they're there, we have to deal with
7 them.

8 But I think you can affect that a little
9 more by changing the minor role or minimal
10 participant. I hope that answers your question.

11 CHAIR SARIS: Thank you.

12 VICE CHAIR JACKSON: Mr. Steinback, I was
13 interested in your experience with regard to under-
14 aged, under-18 defendants being – not "defendants,"
15 but participants in drug offenses.

16 I'm just wondering whether you may have
17 thought more about how we would carve that out. You
18 mentioned that in the super-aggravating role, the
19 (b)(14), it looks as though Congress perceived under-18
20 individuals to be sort of vulnerable such that if a
21 defendant involves them it is considered to be an
22 aggravator for the purpose of the defendant's

1 standpoint.

2 But you suggest that the involvement of
3 such under-age individuals in some cases may be
4 driven by the under-aged individual, or they have a
5 substantial part in this kind of conduct and activity
6 and therefore shouldn't be seen as an aggravator for
7 the purpose of the original defendant.

8 And I'm just wondering how we would even
9 go about thinking of carving out those people.

10 MR. STEINBACK: Where that 18-year-old has
11 a history of prior drug convictions, or that 18-year-
12 old is otherwise shown to be predisposed to engage in
13 drug activity, we are therefore not really protecting
14 somebody who is an innocent who is going to be preyed
15 on by the big drug dealer on the block.

16 The sad reality is, in the last ten years
17 in Chicago most of the heavier drug prosecutions have
18 been gang-related. And the gangs have pretty much
19 run out the other cartels in Chicago. They have more
20 people, more guns, they're more dangerous, and
21 they're more willing to do whatever they have to do
22 to stake out their claim.

1 And within those gangs, it is not unusual
2 to see 13-year-olds acting as lookouts, and 14-year-
3 olds acting as couriers, and 17-year-olds getting
4 involved in small dealing on the side. And I
5 understand that that is a socioeconomic reality and a
6 very harsh one and painful, but to say to a defendant
7 who is leading this conspiracy that the mere fact
8 that you know someone involved is 18 automatically is
9 going to get you a 2-level increase is simply to
10 enhance that defendant beyond the portion. Because
11 there's so many 17-year-olds that are involved.

12 The same unfortunately is the case with
13 65-year-olds. Many of those individuals who live in
14 those areas have been through the wringer. They have
15 long records and a serious history of criminality.

16 Now at 65 or 66 or 67, they're not
17 interested in taking on the big risk they took when
18 they were 20 and 30. They are still willing,
19 however, to make a couple hundred dollars here or
20 there to help out some newcomer's big organization
21 and operation.

22 Those people, just like the 18-year-olds,

1 they're not vulnerable. They're savvy veterans. And
2 if they have prior records and it can be demonstrated
3 that they're predisposed, that ought not to
4 automatically increase two levels for that person
5 sitting there.

6 So those would be the kinds of limiting
7 language that I hope would be considered.

8 COMMISSIONER WROBLEWSKI: Mr. Steinback,
9 first of all let me thank all of you for being here.
10 Mr. Steinback, I am just incredibly taken aback by
11 your testimony on this for a number of reasons.

12 Back when Congress passed the five-grams
13 equals five-year law, it took into consideration a lot
14 of aggravating factors. It said crack was different,
15 and that there were a lot of aggravating factors
16 associated with it, including recruiting juveniles
17 and a lot of other things.

18 And for 15 years, the Practitioners
19 Advisory Group and your brethren in the defense bar
20 have argued that to account for those aggravating
21 factors in the quantity-driven system is not the
22 right way to go, because then it says that everybody

1 who is associated with those aggravating factors in
2 essence gets an enhanced penalty.

3 And it's been suggested year, after year,
4 after year that the way to do it is to change the five-
5 gram number to something higher. Now Congress didn't
6 go as far as the defense bar wanted; it didn't go as
7 far as the President wanted; but it made a change and
8 it said we're going to take you up on what you've
9 been arguing for 15 years, which is less of the
10 penalty is driven by quantity and then more driven by
11 specific enhancements that would apply on a case-by-
12 case basis.

13 And here's one, you're suggesting that if
14 an adult – the defendant we're talking about here is
15 an adult defendant, recruits a 13-year-old, that you
16 have trouble with that aggravating factor?

17 I don't understand how it jibes with what
18 has been going on, and what the Practitioners
19 Advisory Group have been arguing for years.

20 And then, similarly, the Practitioners
21 Advisory Group and others have been arguing that
22 post-*Booker* judges should be given discretion, and

1 that any differences that happen courtroom to
2 courtroom, or district to district, are acceptable
3 disparities; they're warranted disparities. That's
4 what the Practitioners Advisory Group has been
5 telling us over and over again.

6 But here now you are going – and, frankly,
7 also there was an argument about the girlfriend
8 problem with crack cocaine. Here Congress and the
9 Commission have addressed every single one of those
10 things exactly as was suggested. They've made
11 exceptions for the girlfriend problem. They've
12 provided aggravators where someone takes advantage
13 because of friendship, impulse, affection. And yet
14 you see to now have problems with the entire
15 structure of what's going on.

16 Your testimony just seems inconsistent
17 with everything that's been talked about for some
18 years. Could you help me figure this out?

19 MR. STEINBACK: Yes. I believe that there
20 are acceptable differences because of the
21 individualized sentencing that is going on in many
22 courtrooms because of the unique factors that attend

1 to each individual.

2 I bemoan the fact that the reality is that
3 gangs recruit youngsters, children, and -

4 COMMISSIONER WROBLEWSKI: But shouldn't we
5 try to stop that?

6 MR. STEINBACK: Of course we should try to
7 stop that. But the ways to stop that are not
8 necessarily to punish an individual who had nothing
9 to do with the creation of that circumstance. Now we
10 are talking truly about socioeconomic realities.

11 We are talking about gang-driven
12 neighborhoods where people are largely desperate,
13 hopeless, don't ever believe they're going to reach
14 the age of 30, much less concern themselves with it,
15 and have so little opportunity that drugs is a common
16 way out.

17 I wish that it wasn't that way. The real
18 way to address that is far beyond the scope and the
19 power of the people who are sitting in this room.
20 But ultimately you cannot blink at reality. Reality
21 is that there are young people involved in this.

22 And of course we should address that. And

1 if people are being brought in and they have had
2 nothing to do with drugs before, then this is a good
3 provision. However, it is not a provision that
4 stands alone. Title 21, 860(a) and (b) specifically
5 addressed this. It's already in the arsenal of the
6 prosecution.

7 What I'm talking about are circumstances
8 where the damage has already been done. It is set in
9 stone already. There are 15- and 16-year-olds who
10 are running around and understand the drug
11 environment and how it works, and how it operates,
12 and how they can make money on it. And to say that
13 some 19- or 20-year-old that involves them is going
14 to have to bear the brunt of society's shortcomings
15 is to me the wrong response.

16 That's how I think it's not inconsistent.
17 I agree we should protect the elderly. I agree we
18 should protect the young. But when we're involved in
19 neighborhoods where that concept doesn't even exist,
20 to add to these sentences – and by the way, by the
21 time you get done adding those two levels at the
22 levels at which we're at, we all know that they

1 increase exponentially, we are now talking about
2 people instead of doing 10 years doing 15 years, 15
3 years doing 18 years, and creating what looks to me
4 like an ever-increasing population of wards of the
5 Federal Government, people who are going to stay and
6 have most of the rest of their productive life in
7 prison.

8 So that is why I don't think it is
9 inconsistent. I think you have to look at reality.
10 And reality suggests that when you have those kinds
11 of individuals, you are not protecting them from
12 anything; you are just punishing someone else for the
13 reality of the circumstance.

14 CHAIR SARIS: Thank you. I think we have
15 used up all our questions. Thank you for your
16 commitment, and your passion, and coming here today.
17 Thank you.

18 MR. LAVINE: Thank you.

19 CHAIR SARIS: We will come back at 11:00
20 o'clock after a 15-minute break.

21 (Whereupon, a recess was taken.)

22 CHAIR SARIS: Well it's still good

1 morning. Thank you all for coming. I am going to
2 introduce our next panel, which is also on the Fair
3 Sentencing Act, and I will begin with Teresa
4 Brantley, Chair of the Commission's Probation
5 Officers Advisory Group. Welcome. She is a
6 supervisory U.S. probation officer in the Presentence
7 Unit of the Central District of California, and has
8 worked for U.S. Probation for over 12 years.

9 She is very impressive that she's served
10 as a practicing civil law attorney, but I couldn't
11 believe when I saw you're a manufacturing engineer.
12 So you certainly have a lot of expertise in your
13 background.

14 Richard Fulginiti?

15 MR. FULGINITI: That's correct.

16 CHAIR SARIS: He is a 28-year veteran of
17 the Prince George's County, Maryland, Police
18 Department. Welcome. You are a sergeant in the
19 Homicide Unit and a past president of the Fraternal
20 Order of Police Lodge No. 89. And he's currently the
21 national trustee for the Maryland State Lodge, and a
22 member of the National Fraternal Order of Police's

1 Legislative Committee. Welcome.

2 Mary Price is vice president and general
3 counsel of the Families Against Mandatory Minimums.
4 Previously you were associated with the firm of
5 Feldesman Tucker Leifer Fidell & Bank, where you
6 handled appeals of courts marshals and conducted
7 administrative advocacy on behalf of U.S. service
8 members. Welcome.

9 And Marc Mauer has been the executive
10 director of The Sentencing Project since 2005, having
11 joined The Sentencing Project in 1987. He's worked
12 as an adjunct faculty member of the George Washington
13 University – at the law school?

14 MR. MAUER: Sociology.

15 CHAIR SARIS: – Sociology. Mr. Mauer
16 began his work in criminal justice with the American
17 Friends Service Committee in 1975 where he served as
18 the organization's National Justice Communications
19 Coordinator. And he also has the distinction of
20 getting his testimony in first of everyone.

21 (Laughter.)

22 CHAIR SARIS: And thank you, because we do

1 get it -

2 MR. MAUER: You told me it was due on that
3 day.

4 (Laughter.)

5 CHAIR SARIS: We got it electronically
6 sent to all of us, and it is really useful to be able
7 to spend time with it in advance. So thank you for
8 doing that.

9 You saw the light system. So basically as
10 you know it gets yellow, and then red when it's stop.
11 And then I get squirmy. So why don't we begin with
12 Ms. Brantley.

13 MS. BRANTLEY: Madam Chair and esteemed
14 members of the Commission:

15 I want to thank you again for the
16 opportunity to bring POAG's thoughts to you on the
17 proposed amendment -

18 VICE CHAIR CARR: Could you pull the
19 microphone a little closer?

20 MS. BRANTLEY: Thank you.

21 CHAIR SARIS: If you can't hear back
22 there, also, raise your hand because sometimes I'll

1 forget to notice. I'm glad Commissioner Carr just
2 did.

3 MS. BRANTLEY: We took a hard look at the
4 proposed amendment regarding the drug guideline and
5 we wanted to point out some things that we thought
6 might be some application issues.

7 First, POAG concurs with repromulgating
8 the emergency amendment implemented in October of
9 2010 as a result of the Fair Sentencing Act.
10 Specifically, POAG prefers the base offense level of
11 26 for offenses involving quantities of cocaine base
12 that trigger the mandatory minimum. This base
13 offense level structure eliminates the need for that
14 2-level reduction for offenses involving cocaine
15 base and other drugs previously addressed as part of
16 Application Note 10 in the 2009 manual.

17 I still consider myself a novice at
18 providing comments to you, so I hope it's not
19 inappropriate for me to plead to you not to bring
20 back Application Note 10(D). That was an application
21 problem for us. It was often – well, the feedback
22 that we get from probation officers across the

1 nation: I can't quantify "often," "sometimes,"
2 "frequently," "infrequently," but the feedback was
3 that it was missed; and that it was misunderstood and
4 became a source of friction in the courtroom trying
5 to understand what that application note was
6 intending to do.

7 So anything that avoids that is good news
8 to us.

9 We also point out that using the base
10 offense level of 26, that structure, puts cocaine
11 base on par with the base offense levels then for
12 other drugs and has the same guideline range, as
13 opposed to using the Base Offense Level 24. And with
14 the 2-level adjustment, it sets cocaine base at a
15 little different guideline range at the same criminal
16 history category score as other kinds of drugs.

17 In regard to the enhancements based on
18 what we've been calling, I guess, super-aggravating
19 factors, POAG is concerned that the specific offense
20 characteristic at 2D1.1(b)(12), which is the
21 enhancement for maintaining a premises for
22 manufacturing or distributing a controlled substance,

1 that it's very broad, and maybe even too broad.

2 We took a look at Application Note 28,
3 which cites factors the court should consider in
4 determining the applicability of the enhancement, and
5 it looks at two things. And the word "and" is in
6 between them. It looks at whether the defendant held
7 a possessory interest in the premises, and the extent
8 to which the defendant controlled access or
9 activities at the premises.

10 POAG is concerned that this language may
11 lead to inconsistency. For example, would a
12 defendant guarding a cache of controlled substances
13 inside the premises be protected from the enhancement
14 simply because his or her name isn't on the lease,
15 even though they control solely access to the
16 premises?

17 It has been our anecdotal experience that
18 the name on the lease is either a straw person or so
19 far removed from the actual conspiracy that it's
20 difficult to link that owner, if you will, or lessee
21 to the activity there. And so we're afraid that
22 someone who would legitimately control access to it,

1 because their name isn't on the lease, might not get
2 this enhancement. That might be the intention, but
3 it's unclear to us.

4 The downward adjustment for the I guess
5 Super-mitigating, I guess if we could call it that,
6 enhancement, based on an intimate or familial
7 relationship referenced at 2D1.1(b)[(15)](A), we're
8 wondering if perhaps we need an application note to
9 clarify whether the "intimate or familial
10 relationship" to consider is the one within the
11 conspiracy versus one outside of the conspiracy?

12 And here's the feedback that we're
13 getting:

14 For example, if a defendant delivers drugs
15 for her co-defendant boyfriend, a known trafficker,
16 she may be motivated by an intimate relationship
17 within the conspiracy because the boyfriend is part
18 of the conspiracy.

19 However, if a defendant sells drugs to
20 secure money needed to feed her family, the
21 defendant – we're getting arguments, that is – the
22 defendant was motivated by an intimate or familial

1 relationship, that of feeding her family, and
2 therefore we're getting the argument that the
3 reduction should apply.

4 We don't have a lot of guidance one way or
5 the other in the guidelines, and maybe it is intended
6 to be that open, but we're afraid that that's going
7 to lead to inconsistency.

8 POAG also suggests that perhaps an
9 application note could be created to address the
10 timing of the "no monetary compensation" phrase
11 referenced at 2D1.1(b)(15)(B). To qualify for the
12 reduction under this prong, there is no direction
13 provided as to whether the defendant was never to
14 receive monetary compensation, or whether the
15 defendant simply did not receive monetary
16 compensation before the arrest occurred.

17 POAG has received feedback from other
18 probation officers that it is common for couriers to
19 be paid upon the completion of the delivery. But if
20 the courier – so if the courier completes the delivery
21 and is then arrested, the reduction would not apply
22 because the person received monetary compensation.

1 However, if the courier is expecting to
2 receive compensation but is arrested prior to
3 receiving it, some defendants are arguing that there
4 was no monetary compensation. And this might not be
5 what was intended by that language. So we're just
6 looking for some clarification on that.

7 And then finally with regard to the safety
8 valve issues that comment was asked about that,
9 regarding the concept of expanding the applicability
10 of what is now 2D1.1(b)(16), which we also call the
11 safety valve reduction, to expand that to perhaps
12 defendants in Criminal History Category II, POAG is
13 not in favor of that.

14 And the reason is, POAG members noted
15 that, while some defendants in this category have
16 been convicted of petty offenses, Category II opens up
17 criminal history points of 2 and 3. And that could
18 include defendants who were convicted of more serious
19 offenses but received sentences ranging from 60 days
20 to even 13 months or more, which would account for two
21 or three points and still be in Criminal History Category
22 II. And when we look at the language in the proposed

1 amendment that seems to be talking about
2 congressional intent as intending the safety valve to
3 apply to first-time non-violent offenders, we worry
4 that increasing the safety valve reduction to folks
5 who have two or three criminal history points could
6 start to include folks convicted of violent offenses
7 who received lesser sentences than you might expect,
8 or maybe no probation or some other enhancing issues
9 that would have kicked them into another criminal
10 history category.

11 Although we talked at length how to
12 address that, we find that we're far better at the
13 rule-following business than we are at the rule-
14 making business, and just wanted to bring that to
15 your attention; that including Criminal History
16 Category II could be including violent offenders.

17 Regardless of whether the safety valve
18 reduction is expanded, POAG suggests that to ease
19 application confusion that the 2D1.1(b)(16) be
20 amended to copy over and include the criteria listed
21 at 5C1.2.

22 With this change, POAG thinks that

1 2D1.1(b)(16) would operate with complete
2 independence, and it would drive home the idea that
3 the reduction is truly independent of whether a
4 particular offense carries a mandatory minimum prison
5 term.

6 POAG is aware that some districts might
7 only be applying the reduction when the offense of
8 conviction carries a mandatory term, and we know that
9 there's an application note that addresses that, but
10 that's still the feedback we get. And so we are
11 suggesting that if you bring over the 5C1.2 criteria
12 to 2D1.1, that it would stand on its own and be more
13 effectively applied.

14 And with that, that concludes the comments
15 that we had on the drug guideline, and I thank you.

16 CHAIR SARIS: Thank you. Mr. Fulginiti?

17 MR. FULGINITI: Good morning, Madam
18 Chairman, distinguished Vice Chairmen, and the
19 commissioners of the United States Sentencing
20 Commission.

21 My name is Rick Fulginiti, national
22 trustee of the Maryland State Lodge of Fraternal

1 Order of Police. We are the largest labor
2 organization, law enforcement labor organization, in
3 the United States, representing more than 330,000
4 rank-and-file police officers in every region of the
5 country.

6 I want to thank you, Madam Chairman, and
7 the rest of the Commission for inviting me here today
8 to share the views of these rank-and-file officers on
9 the proposed amendments to the sentencing guidelines
10 as they relate to drug offenses.

11 First, the Commission has proposed making
12 permanent the emergency amendments that were put into
13 place November 1st of 2010. As an organization, the
14 FOP was generally opposed to the reduction in
15 penalties for the crack cocaine offenses, though we
16 took no official position on the Fair Sentencing Act
17 of 2010.

18 The changes increased the quantities of
19 crack cocaine that would trigger the five- and ten-year
20 mandatory minimum penalties. Prior to the emergency
21 amendments, any amount of crack cocaine between five and
22 50 grams triggered the five-year mandatory minimum. The

1 emergency amendments raised the quantity required to
2 between 28 and 280 grams to trigger the same penalty.

3 In order to trigger a ten-year mandatory
4 minimum penalty, more than 280 grams of crack cocaine
5 must be involved, a huge increase from the 50 grams
6 previously required for the same sentence.

7 Despite the fact that no other drugs –
8 despite the fact that other drugs may have eclipsed
9 cocaine as the drug of the moment, the market for
10 crack cocaine remains massive. The FOP strongly
11 opposes any permanent amendment that would undercut
12 the important role these mandatory minimums play in
13 prosecuting drug crimes.

14 The Commission has also requested comments
15 on the possible retroactive application of these
16 guidelines. The FOP strongly opposes any retroactive
17 application of the guidelines.

18 According to the data provided by the
19 Commission, nearly 13,000 offenders would be eligible
20 to receive reduced sentences, and within five years more
21 than 7,000 convicted drug offenders could be released
22 back into society.

1 Nearly half that number would be released
2 within two years of enacting the proposed retroactive
3 reductions.

4 It is important to note here that these
5 numbers only apply if the base offense levels in the
6 emergency amendments remain the same. However, the
7 Commission has also suggested lowering the base
8 offense levels that correspond to the mandatory
9 minimums allowing for the early release of an even
10 greater number of convicted drug offenders.

11 These criminals are responsible for
12 creating and feeding the addictions of countless
13 Americans, and the release would serve only to
14 inflict great harm on many more innocent Americans.

15 Furthermore, the current fiscal climate is
16 such that law enforcement agencies are being forced
17 to lay off officers and reduce community services
18 across the nation. The release of criminals through
19 retroactive reduction in sentences will serve only to
20 create a dangerous situation that we can and must
21 avoid.

22 Retroactive application of the guidelines

1 would allow drug dealers with long criminal histories
2 back onto our streets, drug dealers like Leonard
3 Brown who served as the primary drug dealer of
4 Sandersville, Georgia. Mr. Brown regularly engaged
5 minors to sell his drugs to avoid the risks while
6 reaping the financial rewards of his illegal trade.

7 The community of Sandersville breathed a
8 collective [sigh] of relief when Mr. Brown was finally
9 arrested and convicted for his long-standing drug
10 activity. The lengthy sentence he received, as well
11 as his ineligibility for parole, sent the message
12 that we will not tolerate drugs or drug dealers in
13 our communities.

14 That message is one that we cannot afford
15 to silence with the retroactive application of these
16 sentence reductions that risk doing just that.

17 Madam Chairman, Commissioners, on a little
18 more personal note, as we stated earlier I am a
19 police officer in Prince George's County and have been
20 for 28 years. Since 1990 I have worked in the
21 homicide unit as an investigator as well as a
22 supervisor, and I have seen hundreds and hundreds of

1 homicides, been to the scenes, and the vast majority
2 are all drug-related.

3 On June 16th, 1999, 40-year-old Donna
4 Ferguson [phonetic] was hanging draperies in her Capitol
5 Heights home. Across the street from her home were two young
6 drug dealers fighting over who was going to work the
7 corner that night. They began to exchange gunfire.
8 Of course they weren't injured, but a stray bullet
9 went through a kitchen window in Ms. Ferguson's home
10 and struck her in the head as she was hanging
11 draperies. Her family, her husband and kids, were
12 sitting right there in the room where she died.

13 The drug dealer was arrested for that
14 incident, but just prior, three months prior, he was
15 arrested and convicted for possession with the intent
16 to distribute crack cocaine. He was sentenced to three
17 years in jail, which doesn't seem like a harsh
18 sentence, but he was given three years in jail and he
19 served one day and was put on probation.

20 Had he served at least a minor portion of
21 his sentence, Mrs. Ferguson would be with us today.

22 In conclusion, Madam Chairman, I want to

1 thank you and the Commission for consideration of the
2 view of more than 330,000 members of the Fraternal
3 Order of Police. I would be pleased to answer any
4 questions.

5 CHAIR SARIS: Thank you. Ms. Price?

6 MS. PRICE: Thank you, Judge Saris, and
7 Commissioners. I am very happy – oh, this is not on?
8 Oh, closer? Sorry. Is this better?

9 CHAIR SARIS: It's also for the folks
10 behind you, so bring it right in a little closer.

11 MS. PRICE: Sorry. Thank you so much for
12 inviting me to testify today. I am happy to convey
13 our recommendations about the drug guidelines.

14 The majority of our members are affected
15 by the decisions that you make, so I am particularly
16 grateful for the chance to address you on these
17 issues.

18 Before I begin, I wanted to tell you
19 that – well, I wanted to share with you something that
20 I heard. I know that we're going to be asked back I
21 think to share our views on retroactivity, but I just
22 received an e-mail from a woman who had been

1 sentenced to an 85-year sentence for crack cocaine.
2 Her sentence was commuted by President Clinton, but
3 she wrote to us because she knew that we were going
4 to be testifying and concerned about the issue of
5 retroactivity, and I would love to share a short
6 piece of her e-mail.

7 She writes about women, fellow prisoners
8 that she left behind when she left prison in 2001:

9 "These people with their long sentences
10 need some relief. All of my friends are about to
11 give up hope. It is a daily struggle to keep them
12 with a positive outlook. Their release dates are
13 death, death, 2025, 2019, and 2014, and they have
14 already been in for 18 years. It just makes me sick.
15 I just don't understand it."

16 So we do look forward to sharing our
17 predictable but equally passionate views about this
18 issue. Now on to the matters for today.

19 The Commission should make the Fair
20 Sentencing Act emergency amendment permanent, but
21 restore the crack cocaine base offense levels to 24
22 and 30. We thought that overall the Commission did a

1 good job with the directive-laden piece of
2 legislation, and one of the directives that was not
3 in that legislation was the directive to raise base
4 offense levels to 26 and 30.

5 We were disappointed that the Commission,
6 without what we saw as discernable support, decided
7 to do that. The public comment that addressed the
8 question was nearly unanimous in recommending that
9 you retain sentences for crack offenses so that base
10 offense levels contain but don't exceed the new
11 mandatory minimums.

12 Lawmakers who weighed in publicly said so.
13 Senator Durbin pointed out, "In debating and passing
14 the Fair Sentencing Act," he wrote, "Congress did not
15 intend for the base offense levels for crack cocaine
16 to change, and nothing in the text [or] the legislative
17 history suggests otherwise."

18 As he explained, also, increasing base
19 offense levels ensured that otherwise-eligible
20 defendants didn't get the benefit of what you did.
21 Congress worked very – the Commission and the Congress
22 worked very long and hard to accomplish this

1 reduction.

2 Commissioner Castillo pointed out when he
3 decried the decision to raise the guidelines that
4 hundreds of people would be left out in the first
5 year alone.

6 So we can't discern the justification in
7 the Fair Sentencing Act or in the principles that
8 inspired it for making crack sentences longer than
9 those called for.

10 A line in the crack/powder ratio by
11 raising crack base offense levels in our opinion is
12 insufficient. While the mandatory minimum for crack
13 cocaine was assailed as unduly long, it was not
14 assailed as unduly long simply because of the stark
15 disparity between crack and powder sentences. That
16 was a symptom of the problem, but that wasn't the
17 underlying problem.

18 The Commission's decision we thought was
19 also inexplicable because it all but invites
20 variances as judges consider what to do with crack
21 cocaine sentencing. On the one hand they have a
22 congressional judgment about what the appropriate

1 sentence for crack cocaine is, on the other hand
2 they're faced with a higher guideline sentence. So
3 what do they do in this circumstance?

4 It invites a departure. And given the
5 amount of criticism the judges are facing right now
6 because of variance rates, you know we think that it
7 is unfair and rather puzzling.

8 Of course the Commission can sort of
9 obviate any dissonance in this regard by stepping
10 back and taking a look at all drug sentences, and
11 reducing all drug guideline levels by two levels to 24
12 and 30 to correspond with the mandatory minimum
13 sentences. And so we encourage the Commission in
14 fact to do that.

15 We urge you to make this straightforward
16 adjustment in this amendment cycle, even as you
17 conduct a more comprehensive review of how to address
18 the drug guidelines. Doing so will have an immediate
19 effect on guidelines that are widely and I think
20 correctly assailed as too punitive. They will lessen
21 the now-overwhelming impact of drug quantity as a
22 sentence accelerant. And they will help the

1 Commission comply with directives in the Sentencing
2 Reform Act.

3 The Commission has acknowledged that many
4 penalty ranges within the guidelines do not reflect
5 the relative harmfulness of particular drugs. And
6 given that the Commission has consistently urged
7 Congress to address this issue [at] the mandatory
8 minimum level, it makes little sense to maintain
9 guideline ranges that hover above these sentences.
10 Instead, the Commission should utilize its
11 acknowledged authority to place the minimum sentences
12 within the guidelines.

13 The Commission has explained that its
14 decision to set guideline ranges slightly higher than
15 the mandatory minimums permits some downward
16 adjustment for defendants who plead guilty or
17 otherwise cooperate.

18 We are not sure about what mandated
19 purpose for sentencing that responds to, but in fact
20 it leads to increases in sentences not reductions in
21 sentences in the most part.

22 Specific offense characteristics and

1 enhancements increase sentence lengths so much so
2 that most defendants, according to the Commission, in
3 federal court receive guideline sentences higher than
4 the applicable mandatory minimum. As Mr. Skuthan
5 pointed out earlier, in 2009 over half of all drug
6 defendants, or 12,221, were sentenced to terms that
7 exceeded the mandatory minimums for drug quantity.

8 So implementing a change to the drug
9 guidelines now would not only do justice, it would
10 also help the Commission meet a statutory obligation
11 in the Sentencing Reform Act that was I think
12 referred to by Mr. Lappin. The Sentencing Reform Act
13 requires the Commission to promulgate guidelines that
14 minimize the likelihood that the federal prison
15 population will exceed the capacity of the capacity
16 of the federal prisons.

17 In 2009, as Mr. Lappin pointed out, the
18 Bureau of Prisons reported that the majority of
19 prisoners in its facilities, over 100,000 people, 52
20 percent, were serving sentences for drug crimes. The
21 population, as he explained, exceeds the rated
22 capacity by 37 percent.

1 And today's federal prison population is
2 210,000 people, more than that, and they represent
3 nearly a five-fold increase over sentences in the
4 1980s when the drug sentences were established.

5 The sentencing guidelines can't be held
6 accountable for all of this, but the Sentencing
7 Commission has told us in the 15-year report that it
8 is responsible for 25 percent of the increases, since
9 the major cause of the prison population explosion is
10 the increase in sentence length for drug trafficking,
11 from 23 months before the guidelines to 73 months in
12 2001. Seventy-five percent of this increase was due
13 to mandatory minimums, and 25 percent was due to
14 guideline increases above mandatory minimum levels.

15 Finally, given the overbearing influence
16 of drug quantity on the calculated guideline
17 sentence, and in light of the multiple enhancements
18 added to the drug sentence calculations by directives
19 in the Fair Sentencing Act and other ways, this small
20 course correction, reducing somewhat the influence of
21 drug quantity, now would set a marker and would set
22 the tone for the inquiry that you're going to engage

1 in.

2 Finally, I wanted to address the safety
3 valve. And I do ask that the Commission do what it
4 can to expand the safety valve both in terms of its
5 advocacy in Congress, as well as within the
6 guidelines itself.

7 Since 2001 when the Commission extended
8 the 2-level safety valve reduction to defendants
9 who were not subject to the mandatory minimum, 26,500
10 guideline defendants have benefitted. In 2009, fully
11 14 percent of all drug defendants, over 3,000
12 defendants, not subject to mandatory minimum received
13 the safety valve sentences. It has been a really,
14 really good thing.

15 We believe it should be expanded to apply,
16 first of all, to all low-level offenders subject to
17 harsh sentences for any crimes and should be amended
18 with regard to its calculation of criminal history.

19 The current safety valve is restricted to
20 only certain drug offenders. When the Commission
21 argued in testimony to Congress a few years ago that
22 the safety valve reflected a desire to allow

1 flexibility in sentencing for least-culpable
2 defendants and asked that it be made more widely
3 available, we agreed. And we applauded your call for
4 that.

5 Even if Congress doesn't agree with us,
6 the Commission could address this problem by allowing
7 the guideline safety valve to benefit low-level
8 offenders convicted of certain crimes other than
9 those enunciated.

10 For example, it could be used to recognize
11 low-level protected zone offenders and listed
12 chemical offenders. It could also provide relief in
13 other contexts outside of drug offenses.

14 In addition, the safety valve only applies
15 to individuals who don't have more than one criminal
16 history point, as discussed earlier. Criminal
17 history calculations can overstate actual criminal
18 history, and we know that. In part, offenders can
19 earn criminal history points for minor offenses – a
20 contempt of court, reckless driving, and trespassing.
21 It is no surprise that 42.2 percent of all downward
22 departures in 2009 were related to issues of criminal

1 history.

2 The safety valve can apply to defendants
3 with more than one criminal history point even when
4 the court departs down to Criminal History Category I
5 because of the overstatement of criminal history. So
6 we do urge you to amend the safety valve provision so
7 that it embraces defendants in more than one criminal
8 history category, and certainly at a minimum amend it
9 so that if you don't go beyond Criminal History
10 Category I at least amend it to Category I so that
11 those defendants for whom there are departures when
12 criminal history really does overstate culpability
13 can benefit from it.

14 Thank you so much, and we look forward to
15 your questions and to seeing you again on
16 retroactivity.

17 CHAIR SARIS: Thank you.

18 MS. PRICE: Thank you.

19 CHAIR SARIS: Mr. Mauer.

20 MR. MAUER: Judge Saris, and members of
21 the Commission:

22 Thanks for inviting me again. I've always

1 appreciated the hard work you've done on this issue
2 and your openness to our thinking about these issues.

3 You have my written testimony, which was
4 the first to be submitted, and so let me just expand
5 on some of the thoughts that we conveyed there.

6 First, we also would encourage you to
7 consider setting the guideline levels at 24 and 30,
8 the general rationale being that it seems it would be
9 most consistent with the intent of Congress, would
10 avoid some of the sort of excess sentencing outcomes
11 that we've seen for many years now, and would achieve
12 a greater degree of fairness.

13 It seems to me that there's - looking at
14 the higher guideline levels that have been
15 implemented, they achieve what might look on the
16 surface to be a certain uniformity by having an
17 18-to-1 ratio that goes across the board; this
18 strikes me as problematic and not really addressing
19 what the legislation was all about.

20 When the legislation was adopted and being
21 considered, the idea was not to find a number that
22 gave a certain ratio, but rather to define a quantity

1 of drugs that was indicative of a certain level of
2 involvement in the drug trade.

3 Now we might debate whether drug quantity
4 is the best way to set sentencing policy. We might
5 debate whether 28 grams was the right number to pick
6 if you're going to do that. But nonetheless, the
7 intent was to say at this level of drug involvement
8 this is deserving of a higher penalty, which happened
9 to work out to an 18-to-1 ratio. But the number
10 itself, the ratio, was not the goal and therefore if
11 that was not the goal it seems problematic to use
12 that ratio at other drug quantity amounts to
13 determine culpability activity in the drug trade,
14 responsibility, and what the sentence length should
15 be. So I think it's problematic to look at it that
16 way.

17 I want to say some things about the
18 context of federal sentencing in the Bureau of
19 Prisons and what we would hope to achieve through
20 drug sentencing policy.

21 The federal prison system is more,
22 increasingly more and more standing out in terms of

1 its growth and the policies that have contributed to
2 this, particularly in comparison to what's happening
3 across the country at the state level.

4 In recent years, as the federal prison
5 population continues to rise, state prison
6 populations are either stabilizing or declining
7 fairly significantly in some states. New York, New
8 Jersey, as much as 20 percent over the last decade.

9 Now the common explanation for this has
10 been that it's the fiscal crisis causing concern
11 about the cost of corrections, and that is certainly
12 true as one part of this, but all the developments at
13 the state level, most of them, predate the fiscal
14 crisis. So the whole movement towards re-entry
15 programming over the last 15 years, a reconsideration
16 of sentencing policy, and number of states scaling
17 back their mandatory penalties, the broad range of
18 alternatives to incarceration that have been
19 experimented with for 25 years now or so, very much
20 stand in contrast to the more limited range of
21 options we see in the federal system.

22 At this point also we're not back in 1980

1 deciding on what kind of sentencing policy we should
2 have for drug offenses, but we have three decades of
3 experience with what that looks like, and what it
4 tells us I think about public safety outcomes.

5 So we know that we've gone from roughly
6 5,000 drug offenders to have a 20-fold increase to
7 100,000 drug offenders today. This is completely
8 unprecedented for any offense at any level really I
9 think in U.S. history. And it is very dramatic.

10 It is not only sentencing policy, it is
11 not only mandatory sentencing, but that is a
12 substantial portion of what's going on here.

13 When it comes to crack cocaine sentences
14 in particular and where the guideline levels should
15 be set, and what the mandatory penalty should look
16 like, you know, I think we don't want to forget that
17 we're not talking about the difference between
18 probation and two years in prison. In most cases
19 we're talking about the distinction between long and
20 very long sentences. That's what we're looking at
21 right now. And in that regard, it seems to me that
22 it's a very different question in terms of what kind

1 of public safety outcomes we would expect to
2 achieve.

3 We heard some discussion earlier this
4 morning about the need for stiff penalties to achieve
5 a deterrent effect on potential offenders. All the
6 research we've ever seen in criminology tells us that
7 the deterrent effect of the justice system is much
8 more a function of the certainty of punishment rather
9 than the severity of punishment.

10 Like it or not most offenders, or people
11 considering committing offenses, don't believe
12 they're going to get caught, and therefore most of
13 them are not thinking about the consequences. And if
14 they were thinking about them, our penalties are
15 already far too severe in many cases. That should be
16 enough to serve a deterrent.

17 So if we can increase certainty of
18 punishment through various law enforcement practices
19 and other changes in communities, that is more likely
20 to have an impact. So the difference between long
21 and very long sentences doesn't buy us very much in
22 terms of deterrence.

1 We also know in particular when it comes
2 to drug offending, unlike many other kinds of
3 offenses, what the criminologists would call the
4 "replacement effect," that you take a low-level drug
5 seller off the street and, you know, we tell
6 ourselves, well, we've taken care of the problem on
7 that street corner. Well, no. That person is far
8 too often replaced by somebody else looking to meet
9 the demands of that local drug market.

10 And we've seen the practical impact of
11 this as we've incarcerated tens of thousands of lower
12 and mid-level drug offenders. There's a virtual
13 endless supply of them, it seems, willing to step up
14 as long as we have a problem of substance abuse. And
15 by not addressing more the problem on the demand side
16 we keep working at the back end.

17 We also have I think problems in the re-
18 entry area as well. We've heard about the numbers of
19 people coming home from prison each year. The good
20 news I think is that we now do have a national focus
21 on re-entry. The resources are too limited. It's
22 not nearly as comprehensive as it should be. But

1 nonetheless we are making progress. There's a very
2 broad consensus this is an important thing to do.

3 And in this regard, the longer we keep
4 people in prison, the longer they're separated from
5 their family, potential employers, and constructive
6 institutions, and it makes it all the more difficult
7 to make for a successful transition home.

8 So if we can avoid excessive sentencing in
9 reasonable cases, we don't see those negative
10 consequences, the more difficult re-entry transitions
11 that are likely to develop from that.

12 The final area of concern I think around
13 the guideline sentencing, which the Commission is
14 very well aware of, is of course the racial dynamics
15 of crack cocaine sentencing in particular, as the
16 Commission has documented over many years.

17 More than 80 percent of the people
18 prosecuted in these cases are African American.
19 That's a very complicated story, but nevertheless
20 this is the single most significant area where racial
21 outcomes have really been exacerbated over the last
22 quarter century or so. And therefore any

1 constructive ways we can deal with the guidelines
2 that would have a positive effect on reducing those
3 disparities, at least somewhat, I think would result
4 in more fair justice and greater perceptions of
5 fairness around the country.

6 That was what was in large part driving
7 the Fair Sentencing Act, and I think this is the next
8 logical step to be looking at that.

9 Finally, let me just say a note about the
10 safety valve and the possibility of expanding the
11 criteria to use there.

12 It seems to me that we have a good deal of
13 history now with the safety valve. What is I think
14 somewhat surprising is, at the time the safety valve
15 was being considered, there were many people who
16 thought it would have a very limited impact. And I
17 think what we have seen is that the numbers of cases
18 that have been affected by it have been very
19 substantial, which seems to tell us that prosecutors
20 and judges and other actors in the system have found
21 substantial numbers of cases where the prevailing
22 sentences would have been far too high to meet the

1 goals of justice and the goals of sentencing.

2 It is hard therefore to imagine that were
3 we to expand the criteria in modest ways there
4 wouldn't be significant numbers of additional cases
5 that would meet those same kinds of criteria and
6 rationale for consideration. And obviously nobody is
7 getting out of jail free on a safety valve.

8 This is what judges do every day. Judges
9 take this very seriously. I am not aware of any
10 significant concerns that have been expressed about
11 how the safety valve has been used in an individual
12 case, or broadly speaking or so. These are very
13 serious cases, but people look at them very
14 seriously.

15 And so it is hard to see what harm could
16 come from a broader consideration of a policy that
17 has been in place and has been implemented very
18 smoothly and directly for the most part, and I think
19 arguably has helped provide better justice and
20 contributed to lowering prison populations at least
21 by a modest amount.

22 So thank you very much for having me here,

1 and I appreciate the opportunity.

2 CHAIR SARIS: Well thank you. Dab?

3 COMMISSIONER FRIEDRICH: I have a question
4 for Ms. Brantley and your comments to us regarding
5 Application Note 28 in which we tried to define
6 "maintenance of a premises."

7 We always struggle when we do this because
8 on the one hand we want to give some guidance to the
9 courts; on the other hand, we don't want to constrain
10 them excessively. And I can tell you, in this case
11 on the issue you raise we certainly didn't intend
12 these factors to be either exclusive, nor did we
13 intend them to be required, that the court must
14 necessarily find them. And we use the language
15 "among the factors the court should consider." We
16 didn't say "find A and B."

17 So my question to you is: If we intend to
18 cover the guy who is not on the lease but is standing
19 at the front of a stash house with a gun, how do we
20 phrase this any more clearly for a court to say these
21 are things that the court should consider but they're
22 not required to find A and B?

1 MS. BRANTLEY: Well when we're trying to
2 apply a particular specific offense characteristic
3 and then look to the application note for guidance,
4 some of the kinds of words we've looked to
5 historically to help us figure out what is meant is
6 words like "and" and "or." And when it says "and"
7 we've traditionally interpreted that to mean both.

8 COMMISSIONER FRIEDRICH: But we want them
9 to consider, is he on the lease? Is he controlling
10 access? But then consider all of those factors, and
11 then make a determination. Not that he must find A.
12 Do you see what I'm saying? Because we struggled
13 with this. We had this debate internally. And we
14 don't want to say "or" because, you know, you can be
15 on the lease but not really be controlling the -
16 potentially, you could have no idea this is going on
17 but just be the person on the lease. So we don't
18 want to use "or" either.

19 You know, we want a list of factors courts
20 should think about and then make the determination
21 based on the totality of the circumstances.

22 So to the extent you have any specific

1 guidance on how we can do that, if you're saying
2 courts aren't interpreting this the way we intended,
3 please let us know.

4 VICE CHAIR CARR: Are you looking for us
5 to say something like: Here are some factors. They
6 are neither required nor exclusive?

7 MS. BRANTLEY: Yes. That's kind of how
8 our discussion went along these lines. The simple
9 thing that we tossed around was exchanging the word
10 "and" for "or," but saying, you know, "either/or" but
11 not both are necessary. But I understand how
12 cumbersome that can be.

13 So what I'd like to do is - and, as you
14 know, I still owe you an apology because I still owe
15 you a position paper - what I would like to do is take
16 that question back to POAG and answer that in our
17 position paper.

18 COMMISSIONER FRIEDRICH: Just one follow
19 up. Are you saying that in the example you provided
20 that courts are not finding in that scenario? Or
21 that probation is just internally discussing this and
22 struggling with it? Are there cases out there where

1 in the scenario you provided the court is saying that
2 they didn't maintain it because they're not on the
3 lease?

4 MS. BRANTLEY: Well that is the feedback
5 that we're getting, yes, that probation officers are
6 recommending it, but it's not ultimately being
7 applied.

8 CHAIR SARIS: So - Judge Hinojosa?

9 COMMISSIONER HINOJOSA: Well do you think
10 it was the intent of that being in the statute to
11 mean that this is an individual who may be a low-
12 level participant who happens to be the one in the
13 empty house with the mattress sleeping there, but not
14 the person who actually leased the premises and not
15 the person who is responsible for having secured that
16 location for the storage?

17 That's the concern here, that that
18 individual who may just have been there and placed
19 there to guard or whatever else they're doing with
20 regards to the drugs, and it really is not their
21 residence but they are sleeping there, that that
22 person is not covered? Is that the concern?

1 MS. BRANTLEY: Yes, that is the concern.
2 And I have to ask you, if they're sleeping there it
3 kind of is their residence, and they are kind of
4 plunked there.

5 COMMISSIONER HINOJOSA: Yes, but since
6 they are not the ones who went and leased the
7 property, I guess it's a question of what Congress
8 meant with regards to "keeping the premises for the
9 purposes." Did they mean them, or the actual person
10 that was higher up who was actually leasing the
11 property and paying for the property to be kept? I
12 guess that's the reason for the "and," possibly, with
13 regards to what the suggestion was that these are
14 just one of the factors you might look at.

15 MS. BRANTLEY: And, you know, I think the
16 picture of what someone looks like who is controlling
17 but maybe not having a possessory interest in, or
18 ownership interest in the property comes really in
19 two flavors.

20 There's the individual you've described
21 who is on a mattress, maybe doesn't even speak the
22 native language, just there because he is told to be

1 there, or she is told to be there; versus a more
2 elaborate operation where they are actually renting
3 houses, and changing them over to some sort of
4 hydroponic kind of thing, and you've got someone who
5 has the keys to five or six of the houses and runs
6 among them on a regular basis maintaining them but
7 maybe doesn't own them.

8 You know, those are two different pictures
9 of people.

10 COMMISSIONER HINOJOSA: Right. That's why
11 these turn on individual decisions. And that is why
12 these are examples, and individually the judge is
13 going to be making these decisions based on the facts
14 of a particular case.

15 CHAIR SARIS: So I was asking, Ms. Price,
16 you went through these very compelling stories of
17 these women who were there for such a long time. And
18 you struggle - did you go into the details of these
19 women's background? Was that driven by amount? Was
20 it role? If people took role more seriously -

21 MS. PRICE: No. This was really an e-mail
22 from somebody who had been sentenced to a very long

1 sentence who left women behind. It was really – no,
2 we haven't unpacked those particular cases, or
3 perhaps we have. I don't know who the women are.

4 I just wanted to share with you some of
5 the hopes of people who are currently serving very
6 long crack cocaine sentences for your upcoming
7 consideration of crack retroactivity.

8 CHAIR SARIS: One of the things we
9 struggle with is what is too long? What is too
10 serious? Can you take care of it – and you all point
11 to, you know, you should of given so much weight to
12 quantity. And so we've been struggling all morning
13 with role –

14 MS. PRICE: Right, exactly.

15 CHAIR SARIS: – and would more of an
16 emphasis on role have the effect you all desire?

17 MS. PRICE: Right. And we – I definitely
18 think so. But I also think that quantity has to play
19 a lower role, or less of a role in the calculation.

20 If we're just going to pile enhancements
21 on top of currently too long base offense levels that
22 call for sentences that are too long, or even

1 mitigate those, you still aren't getting at the heart
2 of the problem. Which is, that we've driven these
3 sentences, accelerated these sentences, as it were,
4 with a single factor that may or may not do a good
5 job of capturing culpability, or of capturing some of
6 the things, you know, some of the reasons for
7 sentences.

8 CHAIR SARIS: So at the low end two levels
9 doesn't mean that much, but what you're saying is
10 that at the high end it starts pushing the sentences
11 up?

12 MS. PRICE: Well it does. But I also
13 think - it means something to everybody. I mean,
14 everybody who gets a sentence is going to be affected.
15 But, yes. What I was trying to convey to you was
16 some of the feeling right now, the very deep,
17 passionate feelings that people who are still serving
18 these sentences are conveying to us. Maybe they're
19 conveying them to you. I hope that they're writing
20 to you about your decisions regarding retroactivity.

21 But you can take steps now with the
22 current guidelines, even as you do a longer stepback

1 to look at them. For example, making an adjustment
2 so that the mandatory minimum is not lower than the
3 corresponding guideline range.

4 VICE CHAIR JACKSON: Can I follow up on
5 that?

6 CHAIR SARIS: Just let Mr. Mauer -

7 MR. MAUER: Well, "determining role" is
8 easier said than done, as all of you well know. And
9 sometimes it is painfully obvious what the role is,
10 and other times it is ambiguous, or you have
11 suspicions that the individual is playing a larger
12 role than the quantity of drugs would suggest, and
13 things like that. So the quantity of drugs is a much
14 easier way to deal with it.

15 And often that may be relevant to what the
16 role is. But as we know from too many cases, both
17 the high end and the low end, the quantity can
18 distort our perceptions of what is going on.

19 So I don't think there are any easy ways
20 to always document who is the kingpin and who is the
21 mid-level and who is the low-level person. You know,
22 it requires lots of investigation. But the more we

1 can get at the role and less we're relying on a
2 number that triggers the quantity, you know,
3 hopefully would punish reasonable conduct in
4 reasonable ways.

5 MS. PRICE: And the considerations, if I
6 can just add one more thing, I mean the
7 considerations that are laid out in the statute in
8 3553(a) walk the court through a variety of things,
9 including what role, seriousness of the offense, the
10 drug quantity is captured by the guideline of course.
11 So really I think there are better ways to
12 individualize sentences, and the Commission can make
13 a contribution to that.

14 VICE CHAIR JACKSON: Yes. Getting back to
15 this notion of where the mandatory minimums should
16 lie in relation to the guidelines, is it FAMM's
17 position that the guidelines should operate
18 independently of the mandatory minimums? And if so,
19 how do you interpret the Commission's statutory
20 obligation to make sure that the guideline range is
21 consistent with all pertinent provisions of the Code?

22 MS. PRICE: What I am testifying today

1 about is reducing guideline ranges by two levels, not
2 about de-linking. We have encouraged in the past
3 that the Commission consider de-linking the
4 guidelines.

5 "Consistent" doesn't necessarily mean
6 "mirror." And when the Commission wrote a few years
7 ago in its child pornography report that it actually
8 has the authority to set guideline ranges below the
9 mandatory minimums so that enhancements and SOCs can
10 bring it up to the mandatory minimum, you know, you
11 have the authority to do that according to that
12 report.

13 You wrote: "The Commission may set the
14 base offense level below the mandatory minimum and
15 rely on specific offense characteristics and Chapter
16 Three adjustments to reach the statutory mandatory
17 minimum."

18 VICE CHAIR JACKSON: So, I'm sorry, in
19 doing that, let's say in the drug offense area,
20 should we make our determination as to whether or not
21 to do that based on the frequency of the application
22 of SOCs, or Chapter Three adjustments?

1 I mean, if we look at our data and we find
2 in the drug arena that very few of the SOCs apply to
3 increase the base offense level, do you think that
4 that should have some bearing as to whether or not we
5 should lower the base offense level?

6 MS. PRICE: I do think that the experience
7 and the data that you get, and the experience with
8 sentencing that judges have should weigh on this
9 decision. I'm not prepared to talk about
10 specifically how it would. I would be glad to
11 provide supplemental comments about that. But
12 absolutely. I mean, you have a wealth of information
13 about how these things are being applied, how
14 frequently they're being applied. And sometimes, as
15 we saw in the crack cocaine guidelines, certainly the
16 crack mandatory minimum prior to the Fair Sentencing
17 Act assumed a lot of – you know, assumed enhancements,
18 assumed dangerousness, and captured some of the
19 qualities and characteristics that might be better
20 accounted for in an individualized sentencing regime.

21 CHAIR SARIS: Judge Hinojosa?

22 COMMISSIONER HINOJOSA: There's been some

1 comments about weight, and how that shouldn't affect
2 sentencing in general with regards to drug cases.

3 I guess under any system that we look at
4 historically in the United States, whether it's the
5 Sentencing Reform Act, pre-Sentencing Reform Act, the
6 type of drug and the weight of drug has always
7 mattered. And it certainly matters now, because the
8 mandatory minimums are based on weights and types of
9 drugs.

10 And I guess one policy reason for this is
11 because of the fact that drugs are a – the general
12 public is a victim of drug trafficking because it
13 does involve an individual user who unwisely and
14 stupidly has made the decision to become a drug user,
15 affects his or her family, and anybody else that he
16 has responsibilities for. It affects the general
17 public because then we have to invest in drug
18 rehabilitation and everything else that we have to
19 spend, and it affects the general public because many
20 times, certainly at the state level, crimes are being
21 committed because somebody is a drug user.

22 And so isn't it different than the amount

1 of drugs that a drug trafficker is putting out into
2 general use? It becomes the higher offense from the
3 standpoint of the damage to the public in general.
4 And as you well know, 3553(a) factors – there's four
5 of them – three of them are protection of the public,
6 basically.

7 And so isn't that something that is
8 important? You're certainly not saying that weight
9 is not important, are you?

10 MS. PRICE: Exactly, yes, we are not
11 saying that you don't take drug type or quantity into
12 account. And I understand that it is difficult to
13 figure out exactly how to calibrate sentences with
14 respect to weight.

15 What I am saying is that certainly drug
16 type and quantity – and quantity particularly – can
17 express culpability in certain cases, as Marc
18 mentioned earlier, but it doesn't always. And we
19 want to be able to – we want to ask you to try and
20 step back from an over-reliance on quantity to see if
21 there's a way to lower sentences for people who may
22 have a relationship to a drug quantity that looks

1 really high, but their relationship may be very
2 minimal.

3 And over the years you have struggled to
4 do that. I mean, I don't want to say that this is
5 not - you haven't taken first steps, or any steps
6 here. Obviously, I mean the mitigating role cap. I
7 mean there's been lots of efforts here.

8 I am saying, with respect to the drug
9 mandatory minimums there's one thing you can do right
10 now, you have the authority to do, you did it with
11 crack minus-2, which is to step back all drug
12 quantities by two levels. You know, there's no
13 question that the Commission has the authority to do
14 it. It did it. It worked. And it would have a huge
15 impact. And it would, as I said, set the tone. It
16 would say, yes, we want to take a look at sentencing
17 people not just based on drug quantity, or not
18 starting out at such high levels.

19 COMMISSIONER HINOJOSA: Thank you.

20 CHAIR SARIS: Go ahead.

21 VICE CHAIR CARR: Mr. Fulginiti, you
22 represent several hundred thousand state and local

1 police officers. And while the federal prison system
2 is the largest in the country, it's probably ten
3 percent of the prison population of the country.

4 And I was just wondering, from the
5 perspective of the state and local law enforcement
6 police officers, why is it desirable to you for us to
7 have very tough federal penalties?

8 MR. FULGINITI: We actually work in
9 concert with federal agencies on a regular basis.
10 And a lot of our officers are part of task forces,
11 and so we work hand-in-hand. I've seen in the past,
12 and it's worked, it's a method, when we have
13 individuals in the area that have been arrested over
14 and over again, we ask our federal friends to go
15 ahead and help and step in.

16 The penalties are stricter on the federal
17 level, and they use that as a wedge. And when
18 speaking to the individual, where they "beat the
19 system" so to say on the state level over and over
20 again, and they may not speak with me and say, hey,
21 you know, listen, I'm willing to go ahead and tell
22 you where the kingpin is, or who the kingpin is, they

1 seem to do that on the federal level. And they are
2 cooperative.

3 They have seen, and I have spoken to the
4 investigators on the task force, that the level of
5 cooperation has decreased as the amounts have gone
6 up.

7 COMMISSIONER WROBLEWSKI: Could I follow
8 up on that, Judge Saris?

9 CHAIR SARIS: Oh, sure.

10 COMMISSIONER WROBLEWSKI: Mr. Mauer, you
11 talked a little bit in your testimony about the lack
12 of, or the available research about what works in
13 enforcement. And you talked about certainty versus
14 severity. And just following up on what
15 Mr. Fulginiti mentioned, I take it you're familiar
16 with the work of Professor David Kennedy at the John
17 Jay College and his work on drug market interventions
18 and so forth.

19 That pretty much follows the model that
20 Mr. Fulginiti outlines where there is an opportunity
21 for the federal government, with severer penalties
22 than what's happening at the state level, can focus

1 on very serious offenders. And then Professor
2 Kennedy's research has shown that, not in all cases
3 but in many, many cases, that strategy has provided
4 deterrence, and provided reduced criminality, and
5 reduced violence far beyond the number of people who
6 are prosecuted in the federal system.

7 So he has laid out work he has done in
8 High Point, North Carolina, and in Chicago, and in
9 Baltimore, and all across the country that says that
10 it's not just getting arrested, but it's getting
11 arrested and there being a real punishment. I'm not
12 saying it's got to be a 20-year punishment, but
13 something more than probation. And we see this over
14 and over again at many state systems that
15 Mr. Fulginiti talked about in terms of the person who
16 shot the woman in Capitol Heights.

17 He got arrested, and he got released, and
18 he was right back into the work that he was doing
19 again. As opposed to this kind of drug market
20 intervention which does focus severer penalties using
21 the federal system in this type of approach that
22 Professor Kennedy saw. Can you talk about that a

1 little bit?

2 MR. MAUER: Yes. Well, a couple of
3 things. The so-called Kennedy approach has been
4 tried in a number of cities now. My understanding is
5 that often they're relying on state penalties, not
6 necessarily federal penalties, to get the message
7 across, if that's what it is. So I don't think it
8 requires necessarily stiff federal penalties per se
9 to make that happen, if we think that's what it is.

10 I think still even in the Kennedy model
11 what happens essentially is that you are increasing
12 the certainty of punishment. As you well know, they
13 bring in a group of people who they believe are high
14 risk potential offenders, and they say: If you do
15 this, and this, we are going to prosecute you and
16 send you back to prison, often on a parole or
17 probation violation. So again it's not a new
18 sentencing charge or federal penalties, but because
19 they're under parole supervision they have the
20 authority to send them back very quickly in many
21 cases.

22 So I think what's changed in large part,

1 yes, the penalties are severe, but they've made it
2 very clear to them that a violation will result in
3 punishment. So I think it is much more still on the
4 certainty side that things have changed.

5 You know, unfortunately we can come up
6 with stories on all ends of things. This is a big
7 country, and we have millions of people committing
8 crimes every year. Millions of people are being
9 sentenced. And, you know, even with the best
10 information, bad things will happen and it doesn't
11 mean that we should develop policy based on a single
12 case, or a handful of cases. And we need to know, of
13 all the low-level drug offenders who were sent to
14 prison or to treatment or probation, you know, what
15 were the various outcomes there?

16 And where judges and well meaning people,
17 and all sorts of people are going to make some
18 mistakes, and some mistakes we can't anticipate, but
19 we need the bigger picture I think.

20 CHAIR SARIS: Does anybody have any other
21 questions?

22 (No response.)

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

3 MS. PRICE: Thank you.

4 MR. MAUER: Thank you.

5 CHAIR SARIS: So we're a little early now.
6 Do you want to try and come back early? Okay.

7 (Whereupon, at 12:02 p.m., the hearing was
8 recessed, to reconvene at 1:02 p.m., this same day.)

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1 AFTERNOON SESSION

2 (1:02 p.m.)

3 CHAIR SARIS: According to my watch, we
4 are right on time here. Let me thank you all for
5 coming back this afternoon.

6 Let me start with – this is on firearms.
7 We started on that a little bit with the government
8 this morning, but we're moving back to it now with
9 "Firearms Offenses."

10 We start with Kyle B. Welch, senior
11 litigation counsel, in the Office of the Federal
12 Public Defender for the Southern District of Texas
13 since 2004, having joined that office as an assistant
14 federal public defender in 2000. Previously he
15 maintained a solo practice specializing in criminal
16 defense, and was a partner in the law firm of Jones
17 and Welch in McAllen, Texas.

18 So William Brennan, Jr., is from the
19 Commission's Practitioners Advisory Group, PAG.
20 Mr. Brennan is a partner in the law firm of Brennan
21 Sullivan & McKenna in Greenbelt, Maryland, where he
22 practices in the area of criminal defense and complex

1 civil litigation.

2 And welcome back to Teresa Brantley from
3 the Probation Officers Advisory Group.

4 I don't know if you all were here this
5 morning, but basically we have this light system that
6 keeps us all on time. It goes yellow when you're
7 almost done, and then red, the hook. So – and then we
8 have a very dynamic Q&A process.

9 So why don't we start with you, Mr. Welch.

10 MR. WELCH: Thank you, Judge Saris.

11 I want to thank the Commission for holding
12 these hearings and giving me an opportunity to
13 testify today on behalf of the federal public
14 defender and community defenders on these issues.

15 I started with the federal defender's
16 office in McAllen ten years ago. At that time I was
17 the sixth lawyer in that McAllen division. There are
18 now 12 lawyers in that office. At the same time, not
19 only has the number of lawyers doubled, but really
20 our average caseload per lawyer has also more than
21 doubled in those ten years. So as you can see, there
22 is just a tremendous, tremendous increase in the

1 caseload of --

2 COMMISSIONER HINOJOSA: But we still only
3 have two great judges there.

4 (Laughter.)

5 MR. WELCH: Yes, we do have great judges.
6 And there is help on the way.

7 So there has been a tremendous increase in
8 the caseload not only in McAllen, but all along the
9 border divisions of the United States. And there is
10 a very serious problem with drug violence in Mexico.

11 For those of us who live on the border and
12 that know Mexico well, it's been a very sad thing to
13 see. Mexico has made tremendous progress in their
14 culture and political order in the last 30 years or
15 so, and it is very sad to see how it is now
16 threatened by the violence along the border.

17 So it is appropriate that the Commission
18 is holding these hearings to examine what, if any,
19 steps the Commission might consider taking to address
20 this problem. We do strongly oppose the amendments
21 relating to straw purchasers, the 2K2.1 amendments,
22 for essentially three broad reasons.

1 One, we believe that these amendments will
2 result in increased prison sentences for – more
3 increased sentences for low-level, first-time
4 non-violent offenders, and with no reasonable
5 expectation that that will have any significant
6 impact on the drug violence problem in Mexico.

7 Secondly, the experience that we have with
8 current sentencing practices with the judges
9 throughout the border and throughout the United
10 States we believe demonstrates that these increased
11 offense levels are neither appropriate nor
12 necessary.

13 And thirdly, the tools are already in
14 place within the guidelines to appropriately punish
15 those offenders that have more egregious conduct that
16 are in need of longer sentences.

17 By definition, straw purchasers are
18 essentially first-time offenders. Many of these
19 people come from various backgrounds, but quite
20 obviously they wouldn't be able to make a straw
21 purchase if they had a significant criminal history.
22 Statistics show that in, I believe for fiscal year

1 2009, three-fourths of straw purchaser convictions
2 under the three straw purchasing statutes, were in
3 Criminal History Category I.

4 Thirteen percent of these were women,
5 which is three times basically greater than the
6 conviction level for women for all firearms offenses
7 generally. Straw purchasers are oftentimes people
8 that are purchasing weapons for spouses, or family
9 members, or significant others. Purchases are made
10 under the influence of that relationship for little
11 or no compensation.

12 Other straw purchasers commit this offense
13 for little compensation, small amounts of
14 compensation. Straw purchasers generally know very
15 little about who they are purchasing the weapons for,
16 oftentimes where the weapons are going, and for what
17 purpose the weapons will be used.

18 And, you know, straw purchasers that we
19 see in our office, it is made so easy for them to
20 commit this offense. Somebody promises them money,
21 maybe \$100 per weapon that they purchase.

22 They take them to the store where they're

1 going to buy the weapon. They show them what weapon
2 to buy. And quite frankly, the people selling these
3 weapons make it very easy for them to fill out the
4 paperwork because they're interested in making the
5 sales.

6 They transfer the weapon to somebody,
7 often in the parking lot, and that is the last that
8 they know about it.

9 It is very typical that in these cases
10 when ATF makes a case against a straw purchaser, they
11 will confront that person. Oftentimes they've had
12 surveillance because they've had information about
13 what may be going on. They will confront that
14 person. They will take a confession from that
15 person. They will gather all of the information they
16 need to make the case. And then they will let them
17 go. And oftentimes it is not at all unusual the
18 prosecution of these cases actually commences a year
19 later. Sometimes more than a year later.

20 Now they may have their reasons for
21 delaying that, but I do think that it is indicative
22 of the way – of the dangerousness, or the view that

1 law enforcement has of these individuals that are
2 straw purchasers. And I think that that is confirmed
3 by the fact that they are low-level, low-culpability,
4 first-time offenders with no violent history.

5 So we think that it is inappropriate to
6 raise the floor of the level on these people. And it
7 is not going to impact, we believe, the violence in
8 Mexico. You know, the weapons that end up in Mexico,
9 many of them undoubtedly come from straw purchasers,
10 but many of them come from many other sources.

11 There is no question that there is a huge
12 black market in illegal weapons in the United States,
13 and in other countries. So we think it would have a
14 really deleterious impact on these individuals. It
15 would increase our prison population, and not really
16 serve the end to the problem that the Commission is
17 concerned about.

18 And if you also look at sentencing
19 practices of federal judges – we've included those in
20 our written material – for the three straw purchasing
21 statutes for the Commission's 2009 statistics, well
22 over 50 percent of those defendants received

1 sentences below the guidelines. One percent
2 sentenced above the guidelines. And the rest were
3 within the guidelines.

4 So I think that is very indicative that
5 the judges that are actually seeing these cases
6 reflect that the guidelines are certainly adequate
7 for straw purchasers as they stand at this point.

8 And the third point is that for more
9 serious straw purchasers, for those that
10 appropriately deserve sentences above the base
11 offense level as it currently exists, there are ample
12 specific offense characteristics in the guidelines.
13 There are ample cross-references, and there are ample
14 encouraged departures in application notes to
15 adequately punish these cases.

16 I was struck this morning that Ms. Duffy
17 gave a number of examples, and I know in her written
18 materials she talked about a case in Minnesota where
19 a judge – and she was talking about the problems with
20 some straw purchasers, and she talked about a case in
21 Minnesota that a judge earlier this year had to
22 punish somebody that was involved in smuggling

1 over – making straw purchases and involved in
2 smuggling over 100 weapons to Mexico. She describes
3 the kind of weapons they are.

4 And just with the information that she
5 gave us, I don't know what sentence was imposed in
6 that case, but that individual would have gone, at a
7 minimum, from a Level 12 up to a base offense level
8 of 28 just with the enhancements that are available
9 in 2K2.1.

10 So to me that shows the Commission that
11 the provisions are in place to adequately punish the
12 straw purchasers that need more enhanced sentences.

13 And the other thing is of course that this
14 is not an issue – an amendment to the straw purchase
15 statute sweeps very broadly beyond more than just the
16 border region. We've also cited the statistics for
17 straw purchase convictions for 2009. Basically
18 three-fourths of those are not in the area that is
19 considered the southwest border region, which is all
20 of Texas, Arizona, New Mexico, and southern
21 California.

22 So there is – undoubtedly, straw purchasing

1 is a problem nationwide, but if the Commission's
2 concern in considering these amendments is dealing
3 with the serious problem of violence in Mexico, this
4 amendment sweeps way too broadly for that. And it is
5 not narrowly tailored to meet the concerns that the
6 Commission has.

7 With regard to the border-crossing
8 enhancement that the Commission is considering in the
9 special offense characteristic, we don't believe this
10 is necessary because we believe that the guidelines
11 already contain sufficient application notes and
12 cross-references to deal with this.

13 For one thing, there is a statute in place
14 that Congress enacted four years ago, 18 United
15 States Code 554. It's a very expansive exporting
16 statute that carries a ten-year maximum, and is also
17 punished under 2M5.2.

18 So for all these reasons, we would urge
19 the court to go slow and certainly not adopt any
20 amendments this year.

21 Thank you.

22 MR. BRENNAN: Good afternoon. My name is

1 William Brennan and I am here on behalf of the
2 Practitioners Advisory Group. I want to thank the
3 Commission for inviting me on behalf of the
4 Practitioners Advisory Group to speak.

5 I certainly will rely on my written
6 testimony that I have submitted, and I just want to
7 expand on a few points.

8 I quite frankly adopt much of what
9 Mr. Welch has said with respect to straw purchasers.
10 But as our written submission indicates, our view is
11 that there are essentially two types of straw
12 purchasers.

13 There is the — and as Mr. Welch said — straw
14 purchaser, per se, who has no significant criminal
15 record; otherwise, they would be unable to purchase
16 the weapon. But we often times have what we call the
17 mitigating person, or the person who is in an
18 intimate relationship. It is often a sister
19 purchasing for a brother; a girlfriend purchasing for
20 a boyfriend; and oftentimes these purchases are made
21 under some duress that may not amount to full legal
22 duress, but certainly the person really would not

1 otherwise be purchasing a weapon but for pressure
2 brought by someone else.

3 And we think in those situations, for that
4 particular straw purchaser, the prohibited person who
5 the straw purchaser is purchasing for is in fact more
6 culpable than the straw purchaser themselves – because
7 it's the boyfriend, the brother, someone else who
8 wants that weapon, needs a weapon, puts pressure on
9 someone to purchase the weapon. So we think that
10 that person really deserves to be in many cases
11 punished less severely than the prohibited person.

12 That is contrasted, however, we
13 acknowledge, that there are the straw purchasers out
14 there who are professionals, who are in fact
15 trafficking in weapons. And those persons certainly
16 deserve to be punished more severely than what we
17 would call the "accommodation straw purchaser." But
18 as Mr. Welch pointed out, 2K2 actually works quite
19 well for that particular straw purchaser.

20 Because if you start, for example, at a
21 base offense of 12, and then if the person is in the
22 business of making straw purchases such as a chief of

1 police, or someone else who clearly wants to profit,
2 they would immediately get a 4-level enhancement
3 under present 2K2 for trafficking. If they're
4 purchasing for use in another felony offense, they
5 would get an additional 4-level enhancement, which
6 would bring them up. And if that doesn't bring them
7 to 18, it requires that it be brought to 18.

8 And then if they purchase a lot of
9 weapons, there's the firearms table. So you could
10 have a straw purchaser who is in the business of
11 purchasing weapons. They would start at a Level 12.
12 They get a 4-level enhancement for trafficking, which
13 would bring them to a 16. If they bought more than
14 100 weapons, they would get an additional 8, which
15 would bring them to a 24.

16 Right away you get high. If they buy more
17 than 200 weapons, you would get to a – add 10, so it
18 would be 12, plus 4 for the trafficking which would
19 be 16, plus 10, you're at a Level 26 right away under
20 the existing guideline of 2K2.

21 So our view is that the straw purchaser,
22 the professional who is in the business, who is

1 making money, whether selling to narco terrorists in
2 Mexico or elsewhere, is adequately punished under the
3 existing guideline.

4 The Level 26 is interesting, because if
5 you go to 2M5.2, which I'll talk about in a moment,
6 which is exporting arms and munitions and military
7 equipment without a valid export license, the base
8 offense level there is 26, the same level that you
9 get to if you are the professional straw purchaser,
10 the purchaser who is in the business of purchasing
11 weapons.

12 So the Practitioners Advisory Group, our
13 main objection to it is that we think that an
14 enhancement across the board for straw purchasers
15 sweeps way to broadly; that it picks up the person
16 who is intimidated, or threatened, or cajoled into
17 making the single accommodation purchase for someone;
18 whereas, it doesn't really enhance any more than is
19 already enhanced in the guideline for the
20 professional straw purchaser.

21 So that is our comment on that.

22 With respect to guideline 2M5.2, quite

1 frankly we think this is a guideline that needs a lot
2 of work and ought to be changed.

3 The guideline – the application note to
4 2M5.2 talks about the Munitions List. And the
5 application note now reads, lists such things
6 as "military aircraft, helicopters, artillery,
7 shells, missiles, rockets, bombs," – my personal
8 favorite – "vessels of war, explosives, military and
9 space electronics, and certain firearms."

10 That certainly is a list that is
11 appropriately on the Munitions List that should in
12 fact be severely punished. We don't quarrel with
13 that as a Level 26. The problem with the guideline
14 is, as the *Sero* case that we mention in our written
15 pleadings, or written submissions, excuse me, the
16 *Sero* case talks about the one-bullet hypothetical;
17 that if certain bullets are in fact on the Munitions
18 List, and if you get picked up and prosecuted for
19 violating the Munitions List and have exported one
20 bullet, you are at a Level 26 and you are treated the
21 exact same way as someone who exports military
22 aircraft, vessels of war.

1 We think there needs to be a gradation
2 under 2M5.2. And in looking at this and discussing
3 it with my fellow members of the PAG, what seems to
4 make a lot of sense, and the suggestion that we made
5 in our submission, is that to take firearms
6 completely out of 2M5.2 and move firearms over into
7 2K2 where we think they belong; and leave 2M5.2 for
8 such things as military aircraft, the helicopters,
9 the space electronics.

10 Because what you can have now, without the
11 gradation – I mean, I referenced the one-bullet
12 hypothetical, but the more realistic hypothetical is
13 someone that exports say 15 firearms to Nigeria, or
14 15 firearms to another country, maybe not even
15 selling them to a narco terrorist, selling them to
16 family members or friends, not to narco terrorists,
17 but at the same time if those firearms are in fact on
18 the Munitions List, that person gets treated at a
19 base offense level of 26, which is the same as the
20 person who sells the helicopter to international
21 terrorists.

22 And so we think that 2M5 needs a lot of

1 work in terms of relative culpability, in terms of
2 gradations, in terms of putting the relative
3 culpability of the people that may violate that, into
4 some format with enhancements.

5 And as we looked at it, and as we talked
6 about it, we thought, well wait a minute. The
7 enhancements for firearms are already there under
8 2K2. Because if you are purchasing firearms, you're
9 selling them overseas, you are a trafficker where you
10 get 4, if they're being used for another felony
11 offense you get an additional 4, if you sell a lot,
12 the firearms table is existing there, there's "3-7,"
13 "8-24," "25-99." I mean there's a gradation.

14 So as we worked it through, the
15 enhancements that we thought that we would recommend
16 to the Commission to make sense of 2M5.2 were
17 already existing in 2K2.

18 And so we thought, well, really, why don't
19 we take firearms out of 2M5, put it into 2K2, and
20 the gradation then is picked up by number of
21 firearms, purpose. And if you want to make it all
22 consistent to reflect the existing cross-border

1 issue, then maybe put in 2K2 a cross-border
2 enhancement of two levels that would, instead of having
3 this Base Level 26 under 2M5.2, put a cross-border
4 enhancement under 2K2 where you then have all the
5 problems that you have for gradation on 2M5 picked
6 up under 2K2.

7 So the PAG thinks that 2M5.2 needs a lot
8 of work. It sweeps way too broadly. It picks up
9 people who – I was told even at lunch today that I
10 think night vision goggles may be picked up under
11 2M5.2. But the fact of the matter is, I think it is
12 an appropriate guideline for the serious things of
13 aircraft, helicopters, those things, but the firearms
14 ought to be taken out completely and shipped over
15 into 2K2.

16 CHAIR SARIS: Thank you. Welcome back.

17 MS. BRANTLEY: Good afternoon, and thank
18 you again.

19 CHAIR SARIS: Welcome back.

20 MS. BRANTLEY: Thank you so much, and
21 thank you again for the opportunity for probation to
22 provide comments on the firearms proposed amendment.

1 In terms of application for the proposed
2 changes to 2K2.1, we didn't see any red flags that
3 we thought would be impediments to applying it
4 clearly. Our one comment has to do with the two new
5 base offenses. There's a base offense level of 16
6 now, and a redefinition of what the base offense
7 level of 14 is.

8 Our question is whether or not convictions
9 under 18 U.S.C., 922(d), 922(a)(6), all of those things,
10 includes conspiracy to commit those things or not.
11 So if we have an offender convicted of conspiracy to
12 commit one of those violations, would these base
13 offense levels still apply? And if the answer is
14 yes, we were thinking that an application note might
15 be helpful for that.

16 The other change that is being looked at
17 for 2K2.1 sets out two options. It's asking for
18 comment on these two options. One option adds a
19 brand new specific offense characteristic to address
20 whether or not firearms or ammunition are leaving, or
21 the person knows they're going to be leaving the
22 United States.

1 Option two takes that conduct and mixes it
2 in with an already existing specific offense
3 characteristic so that if you were to go that route,
4 this 4-level increase that already is there would be
5 something you could consider also if firearms were
6 leaving, or the offender knew they were leaving the
7 country.

8 POAG has concluded, after much discussion,
9 that we believe Option 2 would be the easier of the
10 two to apply. We were given some information from
11 staff that perhaps this might also resolve circuit
12 conflicts in terms of what it means for the
13 enhancement for using it in connection with another
14 felony offense. Those are the two conducts that this
15 Option 2 would cover. The same 4-level increase
16 would apply whether the offense involved committing
17 another felony, or knowing that another felony would
18 be committed, but also firearms leaving the country,
19 or knowing that the firearms would leave the country,
20 the same 4-level enhancement would be triggered.

21 We felt that that would be an easier
22 application question, and that more consistently

1 applied, and we felt that perhaps adding an
2 application note that reminds the courts that if both
3 sets of conduct exist that there's always departure –
4 the court can always make a departure.

5 The one final comment we had, very short
6 and sweet, with regard to the updating Appendix A to
7 make it clear that violations of 50 U.S.C., 1705
8 could be – you could either use any of the three 2M5
9 sections. We were actually really happy to see that.
10 And the reason is that it wasn't as clear in editions
11 past, and so now this would allow the probation
12 officer and the court to select a base offense level
13 for those cases based on export evasion, evasion of
14 export controls. Because several of us shared
15 stories about previously – cases previously involving
16 such things as cameras, night vision goggles, and
17 even fingerprint kits being forced to a guideline
18 with a base offense level of 26. And now with this
19 change, at least we can have the option of looking at
20 a base offense level of 14 if it applies in those
21 cases.

22 So that was it in terms of application for

1 this proposed change, and I am open to any questions
2 or comments. Thank you.

3 CHAIR SARIS: Thank you.

4 COMMISSIONER WROBLEWSKI: Thank you all
5 for being here. Just a couple of questions.

6 Mr. Brennan, both you and Mr. Welch
7 mentioned this concern about gun transactions
8 involving certain close family relationships.

9 According to the Commission's own data,
10 that is not the heartland of this kind of - of this
11 particular guideline application; that it happens
12 somewhere in the neighborhood of ten or 12 percent.

13 To address that problem, would you be in
14 favor of some addition to the commentary that would
15 encourage or permit a downward departure in the
16 circumstances that you're talking about, and that
17 would also permit an upward departure for the person
18 who puts on the pressure, or who takes advantage of
19 that familial relationship?

20 MR. BRENNAN: Well I think the easy answer
21 is, the PAG is always in favor of downward
22 departures. But I think that does -

1 COMMISSIONER WROBLEWSKI: But how about
2 the upward departures?

3 MR. BRENNAN: Well, I'm - I didn't mean
4 to be cavalier. Certainly I think that the - and that
5 was the basis for our objection with the across-the-
6 board, that it sweeps too broadly. But we do think
7 that it would be appropriate for a downward departure
8 for the person that is pressured into making that.

9 And, quite frankly, the person that makes
10 the pressure is the prohibited person and you would
11 in effect be making an upward departure, or an
12 enhancement, I guess may be more - I don't know how
13 you would characterize it, upward departure, or an
14 enhancement - for the person who in effect intimidates
15 someone else into committing a crime.

16 Now I think on balance generally that
17 makes some sense; that a person who intimidates
18 someone else to commit a crime may in fact deserve to
19 be punished more severely.

20 Our concern with the staff proposal was
21 that, even though the heartland is only ten percent,
22 it would sweep up those people. And we think that

1 those people should not be swept up in an across-the-
2 board enhancement for straw purchasers.

3 COMMISSIONER WROBLEWSKI: And you also
4 mentioned a hypothetical where somebody exports 15
5 weapons from out of the country. If a person was
6 caught driving to Mexico with 15 AR-15s and was
7 sentenced under 2M5 because they committed a crime
8 where they didn't provide the information to the DHS
9 officers on the way out, and that person pled guilty,
10 under the guidelines that they would face
11 approximately a four-year sentence.

12 Number one, do you think that's about
13 right? Way too high? Way too low? This is for 15
14 AR-15 weapons crossing the border to Mexico.

15 And secondly, under 2K as it currently
16 is, if the person did not – if the government could
17 not prove that this was the business of the
18 defendant, that person would face a Zone C offense
19 under the current guidelines if those guidelines are
20 not enhanced. And do you think that's the
21 appropriate sentence?

22 MR. BRENNAN: Well we think that if the

1 person is trafficking in firearms that they should
2 get the 4-level enhancement. So bringing 15 weapons
3 to Mexico, I think under most circumstances that
4 person would receive the 4-level enhancement for
5 trafficking.

6 If the person is bringing 15 weapons of
7 that nature to Mexico, would there be knowledge that
8 that would be used in another felony, which would be
9 another 4-level enhancement, or under the enhancement
10 now bring it up to a Level 18 -

11 COMMISSIONER WROBLEWSKI: Right, and -

12 MR. BRENNAN: - and then you add to it,
13 you know, the number of weapons, which you then get
14 another 4-level enhancement. So I mean you're
15 getting up there under the existing 2K2 guideline.

16 COMMISSIONER WROBLEWSKI: Right. But in
17 my hypothetical - I understand you can create a
18 hypothetical where you add up all the enhancements
19 altogether, but I am suggesting a hypothetical where
20 you can't add up all the enhancements. All you know
21 about the person is they're heading to Mexico with 15
22 AR-15s in a compartment in their car, and that's what

1 you know about them.

2 MR. BRENNAN: And if that's what you know
3 and you can't prove that they are trafficking, and if
4 you can't prove that they are going to use those, or
5 distribute them to someone who is going to use them
6 in another felony offense, then perhaps that is the
7 right sentence, if you don't know that.

8 Now if you — and that's why I came back
9 with the other hypothetical, because if you don't
10 know that, then maybe that's how they should be
11 punished under the existing guideline.

12 CHAIR SARIS: Let me ask. We've been
13 struggling with what is "personal use" and what are
14 the number of guns, or the amount of ammunition that
15 would get you to a lower level.

16 Do you have suggestions based on your
17 caseloads, or your feedback from your membership?

18 MR. WELCH: I can weigh in on that,
19 Commissioner.

20 One, we opposed the personal use amendment
21 the Commission is considering because we think that
22 it would exclude virtually any illegal purchaser from

1 the personal use. We're concerned about the
2 application note that contains the language to "the
3 extent to which possession [was] restricted by local
4 law."

5 And I notice that you asked that of
6 Ms. Duffy this morning, and her response would
7 essentially exclude anybody that is illegally
8 purchasing a weapon from a personal use exemption.

9 So I am concerned that what that would do
10 is essentially put all prohibited persons in the
11 higher offense level of 26. And if the court is - I
12 mean if the Commission is going to consider the
13 personal use amendment, we would ask the court to
14 remove from the application note the language that I
15 just referenced.

16 CHAIR SARIS: If we didn't go with the
17 suggestion of eliminating it altogether but are sort
18 of grappling with how do you define that, are there
19 any suggestions you have based on your caseload, or
20 your experience?

21 MR. WELCH: Well based on my caseload and
22 experience, we have a number of people that export

1 weapons to Mexico that are not exporting those
2 weapons to drug cartels. And I think that is the
3 salient point.

4 There are people that export weapons to
5 private individuals in Mexico that use them for
6 security, for self-defense. I have had recently a
7 case of an individual that was exporting weapons to a
8 licensed gun club in Mexico. We did some research.
9 There are licensed gun clubs -

10 CHAIR SARIS: How many guns were in each
11 of those cases?

12 MR. WELCH: In the case of the licensed
13 gun club, over a period of months what it involved is
14 somebody in the agricultural business from the
15 interior of Mexico that would come up to the United
16 States to deliver produce to a produce shed in south
17 Texas.

18 Somebody that worked at the produce shed,
19 he said, you know, if you'll buy shotguns for me I
20 will pay you \$100 a shotgun. And he would come up
21 every month or so. So over the period of six months
22 or so, maybe three or four shotguns each time. I'm

1 not sure exactly what the total number involved were.

2 It was a lot. It was a lot. But we did some
3 research. There are licensed shooting, skeet
4 shooting clubs, gun clubs, sport clubs all over
5 Mexico. It's not just in the United States of
6 course.

7 So the point of that is that if the
8 Commission's concern is targeting guns that are
9 exported for cartels in Mexico, the personal use
10 limitation sweeps too broadly for that.

11 And with regard to the definition, I guess
12 the definition, the application the Commission is
13 considering is very similar to the definition of the
14 "sporting purposes" definition. But we would
15 strongly urge the court to consider taking out the
16 last factor that I think is listed in that
17 definition, which is: to "the extent to which
18 possession [was] restricted by local law."

19 Because we are afraid that what that would
20 do would be to exclude virtually any illegal
21 purchaser from qualifying for that personal use
22 exception.

1 MR. BRENNAN: Just to weigh in very
2 briefly, I had a case where weapons were being
3 exported to Bolivia in South America. A client owned
4 a substantial portion of land down there and was
5 bringing weapons down for hunting purposes for
6 friends and relatives to hunt on his land.

7 And it was really more of a sporting
8 purpose rather than personal use, because he wasn't
9 really going to be using them personally. He was
10 giving them to friends and family for use.

11 In a similar case where we had a client -

12 CHAIR SARIS: How many guns?

13 MR. BRENNAN: I think about ten or 12, if I
14 remember correctly. And then we had another one
15 where a client was bringing, shipping shotguns to
16 family in Nigeria. I share the same concern that
17 Mr. Welch has, that it may very well have been
18 illegal for the family to - his family to possess them
19 in Nigeria, and certainly it wasn't for his personal
20 use, but he was on the Level 26 because, I think it
21 was about 20 shotguns, it exceeded the ten, which is
22 existing under 2M5.2 now. It wasn't for narco

1 terrorists, it was for his family in Nigeria, but he
2 got caught up under the Level 26.

3 And it wouldn't be solved by a personal
4 use exception that we see now. So that's why the PAG
5 I think likes the gradation here. The difference
6 between 14 and 26, and it's a 12-point bump under
7 2M5, we really think there needs to be some
8 gradation under there, more than just personal use.

9 CHAIR SARIS: Thank you. Judge Hinojosa?

10 COMMISSIONER HINOJOSA: I guess for those
11 of us who live on the border, the distinction between
12 the type of weapon isn't as important, at least based
13 on our knowledge of the violence in northern Mexico
14 and in Mexico in general related to drug trafficking;
15 that any weapon becomes a problem because the safety
16 of individuals, whether they are involved in the
17 cartel or just happen to be caught in the crossfire,
18 doesn't depend on the type of weapon but just that
19 weapons are present.

20 And the other thing that you see in the
21 courtroom, at least on the border, is that when
22 someone is charged as a straw purchaser with knowing

1 or having reason to believe that this was going to
2 end up in another country, as opposed to the person
3 that's actually caught at the border which is in some
4 cases just a matter of yards away, that the
5 punishment is much different based on the guideline
6 determination.

7 And so what would be the issue with having
8 a specific offense characteristic in the straw
9 purchaser case when the person knew or had reason to
10 believe that it was going to be exported to try to
11 get them to the same level as the person that was
12 actually caught? Because we know it's the same
13 crime, as far as the outcome as to the violation, as
14 to the effect on society as a whole.

15 So why would that be an issue? That would
16 leave out all the individuals who were buying for
17 their family or their friends, or whatever, that
18 they're just being – I don't even know that those
19 people would get paid. But when somebody is getting
20 paid, and they know or have reason to believe that it
21 is going to end up in another country, what would be
22 the issue with a specific offense characteristic

1 there?

2 The 100-firearms' example really doesn't
3 fit. Because by the time somebody has got 100
4 firearms, we're way past the issue of any question as
5 to how serious the damage is. So what would be the
6 problem with the SOC? And the 2K?

7 MR. WELCH: Because I believe there are
8 already enhancements that cover that. The
9 trafficking enhancement would apply.

10 COMMISSIONER HINOJOSA: Yes, but that
11 applies whether it is here or in Mexico. That's a
12 harm that's going to be an issue whether you're
13 trafficking for here, or trafficking for Mexico. So
14 that should apply in both situations.

15 MR. WELCH: Well the trafficking
16 enhancement was enacted four years ago, I believe,
17 and it covers the same conduct. We believe an
18 additional enhancement for crossing the border would
19 be unnecessary for that reason.

20 And also, if there is in fact evidence to
21 show that the person knew that it was going to be
22 exported into Mexico, they could be prosecuted and

1 convicted under a more serious statute that would be
2 punished under the [2M5.2] guidelines. So I think it
3 would be unnecessary.

4 COMMISSIONER HINOJOSA: But don't you say
5 it's our experience, at least on the border, that
6 most of the cases that are being charged under the
7 2K guideline are actually exportation cases? And
8 that sometimes on the same day when you have
9 individuals who have been charged with a straw
10 purchase type situation, and whether they get charged
11 under the statute with the 2M versus the 2K [guideline],
12 that that doesn't really fit because we don't have a
13 specific offense characteristic under the 2K [guideline]?

14 MR. WELCH: What I can say, Your Honor, is
15 that I believe that in those cases that we do see
16 that where there is information that the weapons are
17 being exported, is that the enhancements already
18 available are already more than sufficient.

19 And I would go back to what we know about
20 sentencing practices on the border divisions and
21 throughout the United States, that for the year 2009
22 you see virtually no upward departures, and you see

1 over 50 percent downward departures. To me, I think
2 that is very telling that we don't need to further
3 complicate the 2K2 guideline with an additional
4 offense characteristic.

5 MR. BRENNAN: The PAG had a slightly
6 different approach on that, Your Honor. We had two
7 conference calls on this, and I guess we didn't
8 actually vote so I'm not sure of the protocol of how
9 far I can go here, but the written submission, my
10 written submission that was reviewed by everyone on
11 the PAG, that if firearms were taken out of 2M5.2,
12 the PAG wasn't - at least some of us were not
13 necessarily opposed to a border enhancement under
14 2K2.

15 The concern seemed to be with the PAG that
16 2M5.2 swept way too broadly; and that the existing
17 enhancements that are there under 2K2 go a long way
18 towards solving what I've already talked about. But
19 in roman numeral II in our written submissions, we
20 did not object to a two-point enhancement on that, if
21 firearms were removed from 2M5.2, which I think is
22 what you're asking. So that's what our position has

1 been: Get firearms out of 2M5.2 and take care of it
2 in 2K2.

3 MR. WELCH: If I could make one further
4 comment on that, Your Honor, if the Commission is
5 going to consider the enhancement that the court is
6 suggesting, we would strongly urge the court, as
7 we've stated in our written materials, to amend the
8 application note to make it very clear that there
9 would not be double counting between the border
10 crossing enhancement and the trafficking enhancement.

11 CHAIR SARIS: Thank you. Commissioner -

12 MR. BRENNAN: And likewise - I'm sorry, I
13 didn't mean to interrupt, but the issue is the 2-
14 level enhancement for border crossing, we certainly
15 do not want - would oppose that in addition to a straw
16 purchaser enhancement across the board.

17 I mean, we think that the straw purchaser
18 should remain where it is, that firearms should come
19 out of 2M5.2, and then under those circumstances our
20 paper suggests the 2-level border crossing
21 enhancement.

22 But we think if you both increase the

1 straw purchaser and add that, we would oppose that.

2 I'm sorry.

3 COMMISSIONER FRIEDRICH: I had a question
4 for Mr. Welch.

5 To address the issue with ammunition under
6 2M5.2, the defenders have suggested that the
7 Commission should simply drop it from Base Offense
8 Level 26 down to a 14. But when we look at our cases
9 over a five-year period since *Booker*, the majority of
10 cases involving just ammunition alone exceed 50
11 percent - I mean, exceed over 10,000 rounds of
12 ammunition, more than 50 percent of the cases involve
13 that much ammunition.

14 So my question is: If we're not
15 comfortable following your suggestion and just
16 putting it at a Level 14 with a departure authority
17 for the court, Ms. Duffy suggested for every 100
18 rounds of ammunition corresponds with the firearm
19 arguably, for 10,000 rounds of ammunition that's 100
20 firearms, if we're looking to do something between
21 Level 26 and this 14 and departure authority, what
22 would your recommendation be?

1 MR. WELCH: Commissioner, I can't give you
2 a specific number today. We are well aware of the
3 problem with 2M5.2 and the great disparity between
4 the two levels. In general we are apprehensive of
5 any amendments that increase the complexity of the
6 guidelines.

7 If the Commission is going to consider
8 that, we would certainly welcome the opportunity to
9 get back to the Commission with additional input into
10 that. But we do strongly believe that the proposal
11 that is currently out there would have very little
12 effect on – I think there would be very, very few
13 exporters of those very small amounts of ammunition
14 that would actually fit in the Level 14. So I think
15 we would certainly search for some middle ground
16 between what was suggested by Ms. Duffy, and we would
17 certainly want to take a look at the Commission's
18 statistics on the 10,000-round level.

19 I can certainly understand the concern
20 about that. That is a very large amount of
21 ammunition, and I can certainly understand the
22 Commission wanting to consider gradations between

1 very large amounts of ammunition and lesser
2 amounts.

3 COMMISSIONER FRIEDRICH: Thank you.

4 CHAIR SARIS: Anything else?

5 (No response.)

6 CHAIR SARIS: Thank you very much. We
7 appreciate it.

8 (Whereupon, at 1:46 p.m., Thursday, March
9 17, 2011, the hearing in the above-entitled matter
10 was adjourned.)

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