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
PANELISTS:

PANEL I: EXECUTIVE BRANCH PANEL

DEPARTMENT OF JUSTICE
Harley Lappin, Director, Federal Bureau of Prisons

DEPARTMENT OF JUSTICE
Laura Duffy, United States Attorney,
Southern District of California

PANEL II: FAIR SENTENCING ACT

FEDERAL PUBLIC DEFENDERS
Jim Skuthan, Chief Assistant Federal Public Defender, Middle District of Florida

PRACTITIONERS ADVISORY GROUP
Jeffrey Steinback, Chicago, Illinois

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
Jim Lavine, President
PANELISTS (Continued):

PANEL III: FAIR SENTENCING ACT

PROBATION OFFICERS ADVISORY GROUP

Teresa Brantley, Supervisory Probation Officer, Central District of California

FRATERNAL ORDER OF POLICE

Richard Fulginiti, National Trustee

FAMILIES AGAINST MANDATORY MINIMUMS

Mary Price, Vice President and General Counsel

THE SENTENCING PROJECT

Marc Mauer, Executive Director

PANEL IV: FIREARMS OFFENSES

FEDERAL PUBLIC DEFENDERS

Kyle Welch, Senior Litigation Counsel, Southern District of Texas

PRACTITIONERS ADVISORY GROUP

William Brennan, Jr., Partner, Brennan Sullivan and McKenna

PROBATION OFFICERS ADVISORY GROUP

Teresa Brantley, Supervisory Probation Officer, Central District of California
CHAIR SARIS: Good morning to all of you.

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

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

So I want to introduce my fellow and sister commissioners:

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

Ms. Ketanji Jackson has served as vice
Chair of the Commission since February 2010. She was a litigator at Morrison & Foerster, and was an assistant federal public defender in the Appeals Division of the Office of the Public Defender in D.C.

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

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

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

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

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

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

(Laughter.)

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

(No response.)

CHAIR SARIS: Okay. All right, so now I would like to introduce our panelists — somebody whom I've always wanted to meet and I've heard about for
years now. Harley Lappin is the director of the
Federal Bureau of Prisons. He is a career public
administrator with the bureau, beginning his career
in 1985 as a case manager at the Federal Correctional
Institution at Texarkana, Texas. He has served with
the bureau in various capacities, including as warden
at FCI in Butner, North Carolina; warden at the U.S.
Penitentiary Terre Haute, Indiana; and regional
director of the Mid-Atlantic Region.

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

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

Mr. Lappin?

MR. LAPPIN: Thank you very much, Judge
Saris. It is a pleasure to be here, and I certainly
appreciate the opportunity to speak before the Commission.

Let me begin certainly by thanking all of you. I'm not sure many people realize the close relationship that we have with the Commission in the sharing of data and other information relative to the work that we do each and every day. And believe me, as you've heard me express in the past, we are greatly appreciative of the alerts, the warnings in advance of changes, or a lack of changes, that may occur from the Sentencing Commission. Because we took it upon ourselves in the aftermath of 1995 to do a much better job of informing inmates of changes that may or may not occur, such that they are as well informed as they can be and consequently not act out as we saw people act out in 1995 after certain decisions by the Congress and others were not made. And so we have built on that relationship. We greatly appreciate your assistance, and believe you me I think we run a safer prison system because of this relationship, and it is greatly appreciated.

As you know, we are now the largest
correctional system in the United States. We house
210,000 inmates. We confine about 171,000 of those
inmates in 116 federal prisons that we own and
operate. There's another 25,000 inmates in private
contract facilities. And then, on any given day,
about 10- to 12,000 inmates in halfway houses.

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

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

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

The average length of sentence today is ten
years. Approximately seven percent of the inmates in the Bureau of Prisons are women, and approximately 26 percent of the federal inmate population are non-U.S. citizens.

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

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

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

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

Reduce the number of inmates coming into
the federal prison system, or reduce the length of

time they spend in prison.

Expand inmate housing at existing

facilities.

Contract with private prisons for

additional bed space for low-security criminal

aliens.

And finally, acquire and/or construct and

staff additional institutions.

The Department of Justice thankfully is

working with Congress on two legislative proposals

that will provide inmates with enhanced incentives

for good behavior and participation in programming

that is proven to reduce recidivism, while also

assisting us in reducing crowding somewhat.

The first proposal increases good-time

credits available by seven days per year for each year

of the sentence imposed. So it's an adjustment to the

current statute.

The second proposal creates a new sentence

reduction credit that inmates can earn for successful

participation in recidivism-reducing programs such as
Federal Prison Industries, education, occupational and vocational programming.

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

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

Most need to acquire job skills, vocational training, education, counseling, and other assistance such as drug and alcohol abuse treatment, anger management, and parenting skills before they return to the community. The bureau has programs to address these skills.
Understanding that substance abuse is a significant problem amongst our inmate population, approximately 40 percent of those admitted have a need for intensive treatment. The Bureau of Prisons provides four levels of substance abuse programming, drug education, and nonresidential treatment, and residential and community transition treatment.

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

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

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

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

Work skills is another important emphasis of our programs. We teach inmates occupational skills and instill in them sound, lasting work habits and work ethics. All sentenced inmates in federal correctional institutions are required to work, with the exception of those who for security, educational, or medical reasons are unable to do so.
Most inmates are assigned to an institution job, such as food service worker, orderly, painter, warehouse worker, groundskeeper.

Annually, approximately 15,500 inmates work in Federal Prison Industries, one of the bureau's most important correctional programs.

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

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

The bureau offers a variety of programs for inmates to enhance education. Institutions offer
literacy classes, English as a second language, adult continuing education, parenting classes, recreation activities, wellness, and library services.

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

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

Several years ago, with the assistance of many partners, to include the United States Probation Service, we implemented the Inmate Skills Development initiative to better identify the skill deficiencies and formulate individual re-entry plans for inmates. The Initiative includes a comprehensive assessment of inmate strengths and deficiencies in nine core skill areas, and links the inmate to programs designed to acquire and improve those identified re-entry skills.
This strategy is now in place at all bureau institutions and greatly enhances our ability to share useful information with probation officers regarding inmates released into their jurisdiction.

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

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

While on home detention, the offenders are under strict schedules with telephonic and electronic monitoring. It is my pleasure, Judge Saris, Vice Chairs, other members of the Commission, to join you today. I certainly appreciate the continued
cooperation that exists between our two agencies, and
I look forward to answering any questions you might
have today.

CHAIR SARIS: Thank you. Ms. Duffy?

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

In addition to being United States
attorney for the Southern District of California, I
can tell you that I've been a federal prosecutor my
entire legal career. And at times as a trial
attorney in various components in the Department of
Justice, I had the opportunity to prosecute drug
trafficking investigations of organizations who were
involved in distributing controlled substances for
Colombian and Mexican cartels. In addition, as an
assistant United States attorney I was responsible
for prosecuting the leadership figures and kingpins
of Mexican Tijuana-based cartels, most particularly
the Arellano-Felix cartel, which was a ruthless
cartel that dominated the Tijuana, Baja California
corridor for numbers of years.

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

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

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

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

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

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

So to be sure, these cartel members are
violent and they are armed. And it is really no secret that these trafficking organizations are carrying out their campaigns of violence and intimidation and smuggling with firearms that are illegally trafficked from the United States where firearms can be purchased, unlike Mexico, in a variety of legal and illegal ways.

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

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

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

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

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

In January, a federal judge in Minnesota sentenced an individual for firearms trafficking of this same type. This individual smuggled more than 100 guns into Mexico and made 20 trips across the
U.S.-Mexico border for that purpose. This individual purchased guns from a licensed dealer in Minnesota after providing false statements on the required application forms.

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

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

It is important to keep in mind that firearms' trafficking, whether it is in Mexico or whether it is within the boundaries of the United States pose a serious public safety concern.
 Obtaining firearms and transporting those
firearms with intent of diverting them for elicit
use, or to prohibited persons, is by its nature
dangerous and leads to violence.

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

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

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

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

Modest but meaningful increases for
certain firearms offenses would help. It will help address the serious safety posed to our public. It will help incapacitate dangerous offenders. And it will serve as a strong deterrent for those who are considering firearms trafficking.

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

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

In October of 2010 the Commission promulgated a temporary, emergency amendments to the federal sentencing guidelines to implement the Fair Sentencing Act of 2010, and now proposes to promulgate as permanent the emergency guidelines that
temporarily implemented that Act.

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

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

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

Thank you.


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

MR. LAPPIN: Yes. As I mentioned, we rely heavily on halfway houses to assist in the transition of people serving a period of incarceration back into the community. And a year ago we had about 9,000 inmates in some form of community confinement, and that is split between halfway house and home detention. The majority of them in halfway houses, probably 90 percent.
We have about 11- or 12,000 beds. And the dilemma is that it is geographic in nature. This is the sad part of this story, is that we have some communities who are receptive to accepting their citizens back and doing so in a meaningful way, and support the placement and the utilization of transition housing, halfway houses, and home detention, in their jurisdiction.

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

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

And so it is less meaningful. I mean, we could go to the existing locations and add beds, but
the inmates are too far from home. I mean, it's no
different than just releasing somebody directly from
prison and putting them out on a street corner with
$50 and a new set of clothes versus they are in
Boston but their home is New Hampshire, or northern
New York, and at the end of their sentence we drop
them off on that street corner with $50 and a new set
of clothes.

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

So we need more, Jonathan. It's just that
the locations where we need them, we're struggling
getting acceptance of them in those communities.
Where they exist, they tend to operate — be well received, certainly some controversy, and are meaningful in the transition of those inmates from prison to the community.

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

So our move afoot right now is to better identify the inmates who need less, and those who
need more, and use what beds we have for those that have the greatest need.

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

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

So length of stay is really driven by the individual and the specific needs that they have or don't have in determining how much time. The other I think myth that I think we need to dispel is that
halfway house is cheaper, cheaper than prison. And today, it is not. On average it costs us about $70, $71 per day per inmate in a residential re-entry center, compared to $50 a day in a minimum security institution, and $61 a day in a low. And when you get to the mediums and highs, then you're exceeding that $70 a day.

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

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

CHAIR SARIS: Thank you. Beryl.

COMMISSIONER HOWELL: Good morning, Mr. Lappin, it's very nice to see you here today. I have to say I'm very pleased that the Commission has invited you to testify. I think it's a very
important part of our statutory mission in 994(g), 28
U.S.C., 994(g), that tasks the Commission with taking into
account the nature and capacity of the penal,
correctional, and other facilities and services
available in terms of our recommendations that we
either make to Congress, and in our consideration of
the guideline amendments and how the guidelines are
operating.

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

One of the amendments that we have pending
before us for consideration are changes to our
supervised release provisions in our guidelines. So
I guess, following along the lines of Jonathan's
questions, I was interested in finding out when a
person is released from prison into a halfway
house — I guess you sort of mentioned that the time
that they spent in a halfway house varies, and I
guess it's up to the discretion of the BOP officials
how much time they're going to spend there— but is
that person's performance in a halfway house relayed
to a probation officer? And how does that
communication work?

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

MR. LAPPIN: Without a doubt, a great
question and one that is critically important.

Because clearly our probation staff need to know as
much about that soon-to-be-supervised inmate as they
possibly can have. And without a doubt, a few years
ago we weren't doing nearly the job that we should
have been doing.

And as I mentioned in my testimony, we
worked with the United States Probation staff in
helping us develop this Inmate Skills Development system, which is an electronic system. And consequently, probation staff, as this is implemented—we're currently in the implementation phase, and most of our locations now are well into the implementation phase. Probation staff should be receiving early on, not only hopefully what's happening at the halfway house, but what happened during the period of incarceration. That is extremely important information for that probation staff in determining how risky of an offender do I have, and what is their attitude about their period of incarceration.

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

So eventually, if not yet, probation staff
should be getting that assessment of what skills they lacked, and what the inmate was programmed for participation in, and their success at that.

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

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

So I'm not sure exactly where we are yet in all those things, because we're implementing, but our goal is to make available as much information as we can. On the other hand, we need information from them. And this is going to allow them to transfer information from probation to the Bureau of Prisons.
much more easily than in the past, again
electronically, more seamless, and hopefully that
will improve communications on both ends.

CHAIR SARIS: Judge Hinojosa, and then
Commissioner Friedrich.

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

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

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

So, you know, if we're getting like 65,000
back, 12 to 13 percent of them are supervised-release
violators. Actually, it was lower than I
anticipated. Now there are people who are coming
back with new violations that may not fall into that
category.

Our recidivism rates are about 40 percent.

So that's a combination of new-offenses from
ex-offenders, as well as supervised-release violators
with some new criminal conduct.

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

MR. LAPPIN: Yes.

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

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

MR. LAPPIN: We are urging that those
noncitizens get that credit.

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

MR. LAPPIN: Some do not, in some cases. We're actually looking at — we're revisiting the possibility of credit for participation in the drug treatment for those who are eligible otherwise. So we would argue, if they are willing participants, if they are cooperating and they're doing things to improve their skills, and they're behaving in prison, that they should get that credit. Again, this is still yet to be determined, but we are certainly looking at how they can achieve that credit. And believe you me, I agree with Ms. Duffy. We have people in prison that need to be in prison for a long, long, long time: violent offenders. Not only as director of the Bureau of Prisons but as a citizen of this country, I want to be safe, as well. The question is, once they're in a period of incarceration, depending on that crime, do they need to be there for as long as they currently are? Or at all, in some cases?
I think that is part of where the debate is. I mean, when you're limited on resources, I think these are the types of things you need to explore. I applaud you for having this debate, because it is the types of things that you need to address. But, yes, we are advocating for more of the non-U.S. citizens to receive that credit, again if they comply, they behave, and participate successfully in some of those programs.

CHAIR SARIS: Commissioner Friedrich?

COMMISSIONER FRIEDRICH: Thank you.

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

John Morton, head of Immigration and Customs Enforcement, testified to that effect about a year ago before us. I'm wondering if you can give us
any specific guidance regarding the number of firearms — if we're going to adjust the guideline — whether we should break down the type of firearm, and also with regard to the amount of ammunition.

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

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

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

First of all, I can tell you based on my experience in talking to a number of cartel figures and individuals who traffic in firearms for cartel figures that quite often they are purchasing weapons maybe in larger quantities, but transferring weapons
down south over the border in onesies, twosies, where
they can fit them in their cars, where they can fit
them in compartments.

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

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

And I think the ammunition should probably
be included in that guideline, and that it should
be – and I've seen, I believe it was a proposed draft
from this Commission, that it be included in, there's a Level 26 and then there's a Level 14, that it be included in the Level 14.

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

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

CHAIR SARIS: Ketanji?

VICE CHAIR JACKSON: Ms. Duffy, good morning.

MS. DUFFY: Good morning.

VICE CHAIR JACKSON: I appreciate your description of what's happening around the border areas in relation to drug and firearms trafficking.
And of course your own experience in prosecuting those sorts of cases.

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

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

Cases like the one that I mentioned in the District of Minnesota is not an anomaly. Those kind of cases are taking place all across the country. And those level of weapons, those types of weapons
are being purchased from federal firearms licensees in states all across the country and making their way down to Mexico.

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

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

CHAIR SARIS: To follow up on the urgency of the cartel situation, I hear it in your voice. I read it in your testimony. To what extent is the issue of straw purchasing a national problem, apart from the border? In other words, in urban areas, et cetera. I mean, do you feel as if there is need for increased penalties for straw purchases when it does not involve the border situation?
MS. DUFFY: I think the straw purchasing is happening all across the country. And we have seen cases that give evidence to that, and that support that. However, it makes its way down to the border, and over the border into Mexico into the hands of the cartel. But the straw purchasing and the transfer and the possession of those firearms that makes its way down there is happening in states on the East Coast and throughout the Midwest center of the country.

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

MS. DUFFY: Well I think that that's a good question, and there is a distinction. In addition to straw purchasing for firearms that are making its way to cartels, there is also a problem in the United States with straw purchasing that are going to prohibited persons and are being diverted within the United States. And there are studies and
statistics that support the fact that arms that are purchased by straw purchasers and that are trafficked not just over the border to Mexican cartel figures but in the United States to prohibited persons are more closely related to violence than other firearms are.

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

CHAIR SARIS: And do you have that data?

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

CHAIR SARIS: And one follow up we're sort of debating. What does "personal use" mean? Maybe you could give us some guidance on that. You said that maybe it should be an exception for personal use. How do you define that? Sporting? How would you define that?
MS. DUFFY: Well I think certainly, you know, owning firearms and hunting and activities that are associated with hunting, that's part of our national culture. And I certainly think that individuals in this country, the large majority of gun owners, an individual who has them for hunting, or sporting purposes, or for their own personal protection, are doing so legally and lawfully.

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

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

So I think that there is indicia that we
can look to to say what is common sense that somebody is using this for personal use?

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

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

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

MS. DUFFY: Okay.

VICE CHAIR CARR: Mr. Lappin, my recollection is that last year you mentioned that prison overcrowding was at 37 percent, and I think today you said 35. Was that just rounding? Or has it gone down?
MR. LAPPIN: It's still about 37. I apologize for that.

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

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

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

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

MR. LAPPIN: — there's about — yes, that's right — about 45,000 inmates are triple bunked in the Bureau of Prisons, either two inmates, three inmates in a cell meant for two, TV rooms and card rooms converted to cell space, or more inmates squeezed in the dorms than we think is wise.
In the next three years, our total construction plan adds 10,000 beds, total. Everything we're currently constructing. And as you've heard, we're trying to purchase this facility in Thomson, Illinois. If we acquire that facility, and finish construction on everything we have funded, we add 10,000 beds.

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

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

If we're fortunate enough that the two pieces of legislation were to pass, we don't think that gets us to zero growth. That's our goal. Let's get to zero growth. Let's get to the point we're not
admitting any more than we are releasing.

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

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

So it complicates it. And I see it continuing, unless we do one of the four things I mentioned: less inmates; less time; add space.
VICE CHAIR CARR: And I'm also guessing that when you are 37 percent over capacity, you don't spend 37 percent more money per prisoner. So that in terms of the cost per prisoner, my guess is that doesn't start to go down dramatically in terms of what it costs for you to run your prisons until you get rid of the overcrowding, and then get below what your current capacity should be.

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

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

So we're operating prisons that are in excess of 100 years old. They're not at all very
efficient. They are very expensive to operate. And so at some point we hope in the future that there is a decline and you could begin saving tax dollars by eliminating some of those older infrastructures and replacing them with the newer ones. But we are a long way from that.

CHAIR SARIS: Judge Hinojosa, then Commissioner Jackson.

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

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

MS. DUFFY: You are correct.

CHAIR SARIS: Ketanji.

VICE CHAIR JACKSON: Mr. Lappin, your command of the statistics is impressive, and I apologize because you may have said this and I didn't
write it down, but do you have a statistic about the percentage of the federal inmate population right now that is attributable to drug offenders, or to drug offenses?

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

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

And so a huge driver for us, not only — not necessarily in the number, but the sentences are extremely long. They're now the second longest. Believe it or not, the longest on-average sentences today in the federal prison system are sex offenses that have now exceeded the drug offenses. But some of the longest sentences are drug-related offenses. So they stay a long time, unlike immigration cases.
which are a shorter length of stay of 27 months on average, compared to 78, 79 months on average for a drug offender.

So about 52 percent for a drug-related offense.

VICE CHAIR JACKSON: Thank you.

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

VICE CHAIR JACKSON: Thank you.

CHAIR SARIS: Any other questions?

(No response.)

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

MR. LAPPIN: You're welcome.

MS. DUFFY: You're welcome.
CHAIR SARIS: All right, the next panel should come up, please.

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

MR. SKUTHAN: "Skoo-than".

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

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

And James Lavine?

MR. LAVINE: Jim Lavine, thank you.

CHAIR SARIS: Jim Lavine is the President of the National Association of Criminal Defense Lawyers. He is a partner in the firm Zimmermann,
Lavine, Zimmermann, & Sampson in Houston, Texas.

Previously he was an assistant DA for Harris County, Texas, and assistant state’s attorney for Cook County, Illinois.

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

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

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

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

I come from the Middle District of Florida, which goes from Jacksonville to Orlando to Ft. Myers. We have the second-highest number of
crack retroactivity cases in 2008. We opened over 1,000 files. It was quite an undertaking, but it was a collaborative effort that was led by Chief Judge Patricia Fawsett, as well as U. S. Probation Officer Chief Elaine Terenzi, United States Attorney Robert O'Neill, and the federal defender in our district. We worked together to work on those cases to reach a common ground. And because of the work of this Commission, as well as the work of those agencies in the Middle District, there were many defendants who were serving long sentences who got relief and came home to their loved ones and now have happy families. They are being productive citizens now. They used to come by, a couple a week, to visit with us, to thank us for the job that we had done, but also we told them it was the Commission that had done the hard work in trying to get this done. The effect on those defendants was just tremendous. And what we have found, for those that have been released, is that the violations of their supervised release is very low. That has been our experience. And when they do violate, or when former
clients do violate, it is usually not for crimes of violence or new substantive offenses. What we find is it's usually for technical violations, or for being involved with addiction issues.

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

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

Now these are not prosecutions that take place off the Tampa coast; rather, they are boats that travel from Ecuador and Colombia and the Pacific Ocean, and then they're approached by either Coast Guard or the Navy and they have large amounts of drugs on the boat — usually cocaine — and a lot of those cases are prosecuted in the Middle District of Florida.
So we see every type of drug prosecution that you can imagine in the Middle District. I am here today to discuss some aspects of the Fair Sentencing Act. The first thing I would like to address is the offense levels.

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

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

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

Right now, the levels are such that the minimum mandatory for the drug amounts are below the low level for the guideline. But if it were lower, then it would be within what the minimum mandatory
is. I think that is important.

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

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

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

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

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

So the Commission has recognized that there is a way to deal with some of the more serious offenders that deal in drugs. And probably the biggest one is someone who has an aggravating-role enhancement if he meets one of the criteria that are listed in 2D1.1(b)(14), he gets an additional two
So if you have a person who previously, under the old guidelines, possessed a dangerous weapon, they would get a 2-level enhancement. But now under the new guidelines, as the Commission has considered the aggravating factors, if that person has a dangerous weapon and uses a threat of violence perhaps against a significant other or a girlfriend where he threatens serious bodily injury, then he gets another 2-level enhancement.

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

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

I believe the figure is 83 percent of the people who were convicted of drug-related crimes in
fiscal year 2009 did not possess a dangerous weapon.

Moreover, over 90 percent of those people pled guilty and received acceptance of responsibility. The vast majority of them did not receive a managerial role enhancement.

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

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

One was to build more facilities, which I
don't know if in the current climate is going to be something that is feasible.

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

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

They also are the type of person, as I've indicated before, that usually does not have a dangerous weapon and is usually not involved in violence. Those that are possessing those weapons, those that do engage in violence, then the new law provides for significant enhancements. And the judges, who are in the best position to look at those individual defendants, can apply those enhancements in those situations where they would apply.
I also wanted to state a little bit about the minor-role reduction. It has been in effect since the beginning of the guidelines. The guideline itself has not changed, as we all know, but the commentary has changed. And in 2001, the Commission changed the commentary after the De Varon case from the Eleventh Circuit, and in many ways in the defense bar and in our office we thought the changing of the commentary would help our clients that were more of a, I don't want to say "minor role" but more of a minor type of capacity in drug cases, and we found it had the opposite effect.

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

Well I don't think that would be possible today, especially where I am in the Eleventh Circuit,
because time and time again minor-role reductions are denied by the district court, and it is upheld by the Eleventh Circuit because of the weight of the drugs. But yet the commentary that was in effect before 2001 — I'm sorry, if I could just finish my sentence.

CHAIR SARIS: Yes.

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

Thank you.

CHAIR SARIS: Thank you very much.

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

A year ago I had the privilege of appearing — well, it was last May, actually — before the Commission with respect to the issue of mandatory minimums. And everyone who recalls our presentation knows that we still hope, passionately, that this
Commission will urge the Congress to repeal the vast majority of mandatory minimums because of the unfair and harsh way in which they affect many offenders who just do not deserve mandatory minimums.

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

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

Brian lives in one of the impoverished areas in the City of Chicago on the South Side, and he lives there with a couple of people from his family, his wife Mary who is young, and two young children. They have a three-flat that they rent. From time to time, on the top building, on the top of
the building, the top flat, Brian will hide some of
either his drugs or his money, and his wife Mary is
generally aware of what he's up to but has no clue as
to the scope or extent.

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

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

MR. STEINBACK: I apologize. Plus I have
a cold and the plane ride here—

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

MR. STEINBACK: Can everybody hear me now?

VICE CHAIR CARR: Yes.

CHAIR SARIS: That's better.

MR. STEINBACK: I'm sorry.

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

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

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

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

Now if we look at the criminal history, he's going to get three points under the rules of Chapter Four. So he's in a Criminal History Category II. If we
look at the 450 grams, that's going to put him at Base Offense Level 24. Now the question is with respect to the new enhancements.

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

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

Now if you look at the various enhancements, and you look at his criminal history category with his 450 grams of powder cocaine which does not trigger the mandatory minimum as the Commission well knows, Brian winds up with a projected guideline range of 108 to 135 months, which dwarfs the mandatory minimum of five years he would be looking at if he had another 50 grams of powder with
What I fear from these enhancements is that the director, Director Lappin, is going to have not just his hands filled now, but they're going to be filled even greater. A number of the things that the Commission is looking at is whether and what kind of changes ought to be considered with respect to some of these proposed enhancements.

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

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

Because that's what the application note requires. Otherwise, you are going to have a
situation in which anybody who ever uses those things, and with the literal reading, is going to be subject to the prospect of that kind of enhancement and varied interpretations and inconsistency across the country.

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

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

What is "friendship"? We are going to litigate, and we're going to have witnesses brought in on both sides, and the defense is going to say: He's not really a friend of mine; he's somebody casually I knew from the area. And anybody who comes
from the City of Chicago and is familiar with the
south and west sides — and I'm sure it's the same
across most urban areas — knows that many of these
people know people from the block who are simply
casual acquaintances.

I've known people — I've represented people
who are co-defendants with someone who knows their
first name, or only knows their nickname, even though
they've grown up on the same block with them for 25
years. So you're going to have this debate: He's
not really my friend; he's a casual acquaintance.

Oh, no, no, he's a very close friend of yours. And
the prosecution is going to bring in seven, eight
people to talk about the relationship.

If the Commission does not tighten up
narrowly those kinds of definitions for those terms,
the litigation could be absolutely all over the
place. And, I would add this to that: If you're
undercover DEA and you're working the south side of
the city, and you want to really put it to a offender
who you know has been active for a long time, you
might indict a friend that you would ordinarily
marginalize and not look at for indictment purposes
and prosecute so that you can get that enhancement.
You wind up expanding the base of
potential individuals that would ordinarily not be
charged under the discretion the prosecution has
simply because these enhancements invite them.
You've got words like "impulse," "affection." Now
also, "little or no compensation."

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

If you go to Peoria, Illinois, where I
occasionally practice, you're talking about a quarter
t kilo deal, $500 may be considered significant
compensation, where it would be considered nothing in
south California.

So there are openings here, wide gaps for
widely disparate interpretations that I think are
going to be real troublesome for courts. And there
is very little — very little — if any guidance in these
particular emergency enhancements that are going to help the courts. And unless we narrowly circumscribe what they say and do, we are going to wind up with a lot more people involved in the process, and Mr. Lappin's going to wind up with a whole lot more people in his jails.

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

Because if you talk to agents who work the south and west sides of the City of Chicago, they will tell you that there are already thousands, tens of thousands of young gang members who are deeply involved in the drug trade. They have several juvenile adjudications. They even may have a couple of adult adjudications. And to suggest that those individuals are somehow going to add two levels is really an overstatement.
They should be excluded, and we should be very careful with respect to how we deal with those. And if I could have just one more moment, please?

CHAIR SARIS: Certainly.

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

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

And the incongruity between those two just doesn't seem to make any sense to me. If there's going to be any application to a (b)15 mitigating role kind of decrease, you really need to open that up to minor participants as well as minimal, and make that either one A, B, or C, not all three as would be
comparable with 14.

And I thank you very much for the extra
time.

CHAIR SARIS: Thank you. Mr. Lavine.

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

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

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

(Laughter.)

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

I am also a practicing criminal defense
attorney in Houston, Texas, with trial and appellate-
level experience in federal and state courts. I specialize in criminal law and spend approximately 90 percent of my time on federal cases. Before moving to private practice, I was a prosecutor for over 11 years. I appreciate the opportunity to testify on behalf of NACDL today.

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

The Fair Sentencing Act is a culmination of decades of reform efforts to ameliorate the disparate impact and undue severity of the federal sentencing scheme for crack cocaine offenses jointly established by the Federal Criminal Code and the sentencing guidelines. The Congressionally mandated 100-to-1 ratio proved unfair largely due to the fact that the more severe crack cocaine penalties had a noticeably disparate racial impact on sentencing guidelines and outcomes. African Americans and other minorities
received significantly greater sentences than their White powder-cocaine-involved counterparts. NACDL therefore asks the Commission to equalize the manner in which cocaine offenders are sentenced.

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

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

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

To achieve that goal, NACDL urges that the
guidelines for all cocaine offenses be equalized. While we realize this approach does go further than the dictates of the Act, it remains the most principled approach.

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

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

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

NACDL joined many other organizations in opposing this step backward when initially proposed
by the Commission in the emergency amendment. There
is no statutory basis for anchoring the guidelines
above or even to the mandatory minimums, and doing so
is contrary to the bipartisan legislative intent
behind the Act.

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

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

As mentioned, this should be one aspect of
a broader recalibration of the drug trafficking

guidelines. This should be accomplished without
regard to mitigating or aggravating factors, or
resort to the safety valve criteria.

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

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

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

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

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

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

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

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

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

Specifically, the language used in the notes to 3B1.2 expressly discourages its application. They explicitly provide for infrequent
application; set the bar for qualification high, requiring a defendant to be, quote, "substantially less culpable than the average participant"; and dissuade the court from relying on the defendant's bare assertion when making its finding.

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

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

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

For these reasons, the court held that the defendant failed to show that he was substantially
less culpable than the average participant, leading as a result to what we heard from Mr. Lappin in the earlier panel, some of the overcrowding we have in the prisons with 52 percent of drug-related offenses being some of the housed people in the prison system. These stories, unfortunately, are not uncommon. There is a strong bias against this particular adjustment. And even where judges are open to the adjustment, the most deserving defendants may still have difficulty climbing over these high hurdles.

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

NACDL fully supports the specific recommendations set forth by the Federal Public and Community Defenders on this point in a very well researched and well reasoned submission to the Commission, and encourages the Commission to implement these changes.
In summary, NACDL applauds both Congress and the Commission for this critical extension of the sentencing reform. Elimination of the 100-to-1 ratio, and implementation of the Act by the Commission is a milestone on the path to fair drug sentencing. Still, it is not enough. The need for retroactivity now is manifest, and we look forward to addressing that issue in the near future.

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

CHAIR SARIS: Well thank you.

Commissioner Howell?

COMMISSIONER HOWELL: Yes, I have a few questions —

CHAIR SARIS: Judge Howell.

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

On the minor role, Mr. Skuthan?

MR. SKUTHAN: "Shoo-than."

COMMISSIONER HOWELL: I'm sorry, I'm going to slaughter your name. Did I understand you
correctly to say that you thought adding an example
to minor role, one that in fact we eliminated before,
would be helpful for encouraging more uniform
application of the minor role adjustment? And if
that is in fact what you're suggesting, I would like
to hear from Mr. Lavine, who also addressed this
adjustment, as to whether or not you think that would
be helpful or not.

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

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

So I think it would be helpful to go back
at least to using that example, because as it stands
now at least in our district, minimal participant is
something that is never – it's like someone's
appendix. We all have one, but we never use it. And that is minimal role in our district. It's there. We know it's there. But it's never used.

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

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

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

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

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

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

So this is a very ripe topic for review.
I think that an example would be helpful. Obviously the nature of the example I think is what's critical. The example that was previously used and then removed did not strongly encourage the use of minor or minimal role. The current language strongly discourages it. People read minimal role and the infrequency with which the Commission intends it to be used to really apply across the board to any of these minor role/minimal role adjustments.

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

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

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

COMMISSIONER HOWELL: Mr. Lavine?

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

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

MR. LAVINE: The example I think would be helpful, because here's why: In the cases that I cited, and I'll be certainly happy to give them to
Brent, but they are really illustrative. They are nonpublished cases, but the classic is the language from the Fifth Circuit that says this particular defendant was convicted and sentenced based on his possession of the drugs that were found in his tractor trailer.

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

So if you give an example of the overall conduct, the defender characteristic, he's the mule, he's the driver, and that's the kind of thing we're looking at where we consider common-sensically a
minor participant, so that we don't have this overcrowding where we know historically from some of the submissions in Mr. Skuthan's presentation that a lot of these low, low-level drivers, mules, couriers, are the ones doing the multiple years.

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

COMMISSIONER HOWELL: Well, Mr. Lavine,

while I'm —

MR. LAVINE: It's "La-vayne" by the way,

but that's fine.

COMMISSIONER HOWELL: Well, Lavine?

MR. LAVINE: Lavine.

COMMISSIONER HOWELL: Excuse me.

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

(Laughter.)

COMMISSIONER HOWELL: Well, I'm with you. I did have a question about your fairly intriguing idea of looking at, in putting the enhancements that Congress directed us to consider in Chapter Five,
chapter 5K, which typically has unguided departures.  

How do you reconcile that with Congress's direction to us to specifically ensure additional increase of at least two offense levels for these specific enhancements? And, which usually is the signal to us that the Congress is expecting an SOC, rather than an unguided —

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

So if you put them in 5K, when the court determines the factors that go into aggravation, mitigation, departure, increase/decrease, the guidelines are the same. You could then say in the 5K language that if you so find these super aggravating factors, which I think by the way are a little vague and nebulous, but besides that, if you put them in 5K, the court as part of the last part of the Booker consultative analysis has to engage in the 5K issue. And they could all be put in here. Then
you don't get the formulaic problems of being in Chapter Two or Chapter Three.

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

MR. LAVINE: Correct.

COMMISSIONER HOWELL: Thank you.

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

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

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

CHAIR SARIS: Judge Hinojosa.

COMMISSIONER HINOJOSA: Yes. Mr.
Steinback, 3B1.2 does have a 3-level decrease between 2 and 4 for between minor and minimal participant as it presently reads.

MR. STEINBACK: Oh, forgive me.

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

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

But doesn't this just indicate the concern
that some have about how we may be headed in the
direction where we were pre-Sentencing Reform Act
with regard to policy decisions being made?

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

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

Now I understand that there were good
reasons, and the concept behind the guidelines to
achieve uniformity because there were people that
were way out of bounds. Whether my politics would
have ever lent to ultimately formulating these
guidelines in 1987 or not is irrelevant, but the
question is not, in my judgment, whether to take away
determinations on a case-by-case basis that apply,
because every case has uniqueness to it, and every
case does not neatly fit into anything more than some
generalized guidance, and then ultimately an
application by a court, but it isn't a concern that
we're going to be all over the place if we don't
clamp down.

What the concern is is that without more
guidance, without more specificity in many of these
proposals, we are going to have the wide open
disparity that I know this Commission does not want
to see, and we don't either. Not just limiting it to
minor and minimal role. Again, if you're talking
about someone who does not receive any monetary
consideration, you're going to have a lot of
litigation, in my judgment, over what that means
without more guidance and more circumscribed
language.
For example, an individual who uses his spouse, his wife let's say, to deposit cash into an account that's a front for his drug-dealing operation, is that person — but that spouse doesn't get paid one penny for doing so — is she receiving compensation? Certainly she's sharing in the ability to use the money in that account.

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

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

And so what I think all three of us are saying is: We don't have to — I don't think we have to go back to any kind of a system, or mandate — go back to a mandatory systems. I think we just need
more clarification. And I think the question is a very excellent one with respect to what that might be. And we would certainly be pleased to work with the Commission in drafting language that would illuminate examples, and would open up to a certain degree where the Commission thinks that courts ought to go with this, and where they ought not go, rather than to keep it as general as it is.

I think specificity is the answer.

CHAIR SARIS: Thank you.

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

COMMISSIONER HINOJOSA: "O-Hosa".

(Laughter.)

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

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

(Laughter.)

MR. LAVINE: No doubt there were a few blarney stones somewhere around, as well.
NACDL's concern is really more at the 30,000-foot level. Our concern is that the language in these application notes is restrictive. And, Judge, you know from your own experience that your view of an individual in the valley as a mule, yes, a mule is an indispensable part of the organization. But that mule who has a name is a fungible commodity. When he goes, there's going to be somebody else that's going to take their place for a very few dollars.

The issue is that when the Sentencing Commission in its application note instructs the judges as to what weight they will give the, quote/unquote, "bald assertion," then I think it goes too far. It becomes restrictive, and it impinges on the judge's ability to assess the credibility or weight to an individual. You certainly know that there are people who come before you, you look at them in the eye and say, you're full of blarney. And others are not. But the language as it is now is restrictive. And that is where we are at.
COMMISSIONER HINOJOSA: But the language isn't restrictive. All it says is you don't have to rely on it. It doesn't restrict anybody. I mean obviously the judge is still making that determination. I don't see that as restrictive language, that you can't rely on it.

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

Thank you.

CHAIR SARIS: Commissioner Friedrich.

COMMISSIONER FRIEDRICH: I have a question for Mr. Skuthan. In your testimony you also suggest that we should amend the aggravating role in the cases in which a defendant is a captain of a ship and also gets a plus-2 for being a captain, and a plus-2 for the aggravating role.
Initially I was very sympathetic to your position. I agree with you, someone who is a captain and gets a plus-2 shouldn't get aggravating role on that basis alone. However, when I looked at the cases you cited, the Ramirez case, the Rendon case, in each of those cases the defendant not only served as the captain, but he hired and directed the crew. And in addition, he was involved in the delivery of the ultimate destination of the drugs.

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

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

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

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

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

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

(No response.)

CHAIR SARIS: All right, so all of you have criticized quantity as being over-emphasized, or
too big a proxy for the seriousness of the crime.
You come from three very different state systems.
You're very knowledgeable. What other — what would
you look to? Are the weights that are being used
higher than what you see in your states? Is there
another way of thinking about it in terms of
wholesale, or street-sale dealer? You're all talking
about over-emphasis. So what — give me a frame of
reference? What do you do in Florida?

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

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

MR. SKUTHAN: Not really in Florida. They
treat them all the same. If you sell drugs, it's
considered a second-degree felony. It's a 15-year
maximum penalty. If you possess it, it's a third-degree felony. So it's pretty— they treat them all the same across the board.

CHAIR SARIS: Are they weight-driven as well?

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

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

CHAIR SARIS: What are those amounts?

MR. SKUTHAN: The trafficking amount in Florida, there's three levels. The first is 28 grams. If you sell more than 28 grams—and again, the way that's charged is a person who sells more than an ounce, or possesses more than that with the intent to distribute, which is what the wholesale definition is that the guideline Commission came up with, someone that sells more than an ounce at one time, or possesses more than two ounces at one time.
And then it goes up, if you have 200 grams, there's a higher penalty. And if you have 400 grams of cocaine, it's a higher penalty.

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

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

CHAIR SARIS: And what would a 28-gram
person in Florida get?

MR. SKUTHAN: A three-year minimum mandatory.

CHAIR SARIS: It would be three?

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

CHAIR SARIS: Sure.

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

CHAIR SARIS: Thank you.

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

If you look at the two proposed decreases
that are in the new amendments which have been enacted on an emergency basis, both of them are tied to being a minimal participant.

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

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

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

CHAIR SARIS: How does Illinois address it?
MR. STEINBACK: The State of Illinois, I only practice exclusively in the federal system, but the State of Illinois does have a situation of mandatory minimums. They have Class Xs, and Super Xs, and they are actually tied, frankly, overall to lesser amounts.

However, they have a system in which —

CHAIR SARIS: Are they tougher than the feds?

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

But again, if minimal role were to be expanded to include the true group of people who at least we feel fall in that category, we're going to get a lot of relief, and courts are going to be a lot more uniform and more comfortable in applying them, rather than the inconsistency that we have now.
MR. LAVINE: But to answer your question, Judge Saris, part of the problem where we think doing these guidelines quantity driven, certainly the kingpin is one person. The cartel that they talked about this morning is an individual that needs serious attention and removal from society.

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

So we go more to a role-based sentencing in the state courts than they do in the federal courts. So while there is a gradation based on amount, presumably the higher amount, the more you get into the street dealers, or the wholesalers, or the suppliers who are the more serious offenders.
generally, and the state system recognizes that a little bit more than the federal does as to why we say maybe if you look at the minor role, minimal participant a little closer — you know, there are mandatory minimums. We can't deal with what Congress did. As long as they're there, we have to deal with them.

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

CHAIR SARIS: Thank you.

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

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

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

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

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

The sad reality is, in the last ten years in Chicago most of the heavier drug prosecutions have been gang-related. And the gangs have pretty much run out the other cartels in Chicago. They have more people, more guns, they're more dangerous, and they're more willing to do whatever they have to do to stake out their claim.
And within those gangs, it is not unusual
to see 13-year-olds acting as lookouts, and 14-year-
olds acting as couriers, and 17-year-olds getting
involved in small dealing on the side. And I
understand that that is a socioeconomic reality and a
very harsh one and painful, but to say to a defendant
who is leading this conspiracy that the mere fact
that you know someone involved is 18 automatically is
going to get you a 2-level increase is simply to
enhance that defendant beyond the portion. Because
there's so many 17-year-olds that are involved.
The same unfortunately is the case with
65-year-olds. Many of those individuals who live in
those areas have been through the wringer. They have
long records and a serious history of criminality.
Now at 65 or 66 or 67, they're not
interested in taking on the big risk they took when
they were 20 and 30. They are still willing,
however, to make a couple hundred dollars here or
there to help out some newcomer's big organization
and operation.
Those people, just like the 18-year-olds,
they're not vulnerable. They're savvy veterans. And if they have prior records and it can be demonstrated that they're predisposed, that ought not to automatically increase two levels for that person sitting there.

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

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

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

And for 15 years, the Practitioners Advisory Group and your brethren in the defense bar have argued that to account for those aggravating factors in the quantity-driven system is not the right way to go, because then it says that everybody
who is associated with those aggravating factors in essence gets an enhanced penalty.

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

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

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

And then, similarly, the Practitioners Advisory Group and others have been arguing that post-Booker judges should be given discretion, and
that any differences that happen courtroom to
courtroom, or district to district, are acceptable
disparities; they're warranted disparities. That's
what the Practitioners Advisory Group has been
telling us over and over again.

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

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

MR. STEINBACK: Yes. I believe that there
are acceptable differences because of the
individualized sentencing that is going on in many
courtrooms because of the unique factors that attend
to each individual.

I bemoan the fact that the reality is that gangs recruit youngsters, children, and —

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

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

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

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

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

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

That's how I think it's not inconsistent. I agree we should protect the elderly. I agree we should protect the young. But when we're involved in neighborhoods where that concept doesn't even exist, to add to these sentences – and by the way, by the time you get done adding those two levels at the levels at which we're at, we all know that they
increase exponentially, we are now talking about people instead of doing 10 years doing 15 years, 15 years doing 18 years, and creating what looks to me like an ever-increasing population of wards of the Federal Government, people who are going to stay and have most of the rest of their productive life in prison.

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

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

MR. LAVINE: Thank you.

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

(Whereupon, a recess was taken.)

CHAIR SARIS: Well it's still good
morning. Thank you all for coming. I am going to introduce our next panel, which is also on the Fair Sentencing Act, and I will begin with Teresa Brantley, Chair of the Commission's Probation Officers Advisory Group. Welcome. She is a supervisory U.S. probation officer in the Presentence Unit of the Central District of California, and has worked for U.S. Probation for over 12 years.

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

Richard Fulginiti?

MR. FULGINITI: That's correct.

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

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

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

MR. MAUER: Sociology.

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

(Laughter.)

CHAIR SARIS: And thank you, because we do
MR. MAUER: You told me it was due on that day.

(Laughter.)

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

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

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

I want to thank you again for the opportunity to bring POAG's thoughts to you on the proposed amendment –

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

MS. BRANTLEY: Thank you.

CHAIR SARIS: If you can't hear back there, also, raise your hand because sometimes I'll
forget to notice. I'm glad Commissioner Carr just

did.

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

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

I still consider myself a novice at
providing comments to you, so I hope it's not
inappropriate for me to plead to you not to bring
back Application Note 10(D). That was an application
problem for us. It was often – well, the feedback
that we get from probation officers across the
nation: I can't quantify "often," "sometimes,"
"frequently," "infrequently," but the feedback was
that it was missed; and that it was misunderstood and
became a source of friction in the courtroom trying
to understand what that application note was
intending to do.

So anything that avoids that is good news
to us.

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

In regard to the enhancements based on
what we've been calling, I guess, super-aggravating
factors, POAG is concerned that the specific offense
characteristic at 2D1.1(b)(12), which is the
enhancement for maintaining a premises for
manufacturing or distributing a controlled substance,
that it's very broad, and maybe even too broad.

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

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

It has been our anecdotal experience that the name on the lease is either a straw person or so far removed from the actual conspiracy that it's difficult to link that owner, if you will, or lessee to the activity there. And so we're afraid that someone who would legitimately control access to it,
because their name isn't on the lease, might not get
this enhancement. That might be the intention, but
it's unclear to us.

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

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

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

However, if a defendant sells drugs to
secure money needed to feed her family, the
defendant — we're getting arguments, that is — the
defendant was motivated by an intimate or familial
relationship, that of feeding her family, and
therefore we're getting the argument that the
reduction should apply.

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

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

POAG has received feedback from other
probation officers that it is common for couriers to
be paid upon the completion of the delivery. But if
the courier – so if the courier completes the delivery
and is then arrested, the reduction would not apply
because the person received monetary compensation.
However, if the courier is expecting to receive compensation but is arrested prior to receiving it, some defendants are arguing that there was no monetary compensation. And this might not be what was intended by that language. So we're just looking for some clarification on that.

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

And the reason is, POAG members noted that, while some defendants in this category have been convicted of petty offenses, Category II opens up criminal history points of 2 and 3. And that could include defendants who were convicted of more serious offenses but received sentences ranging from 60 days to even 13 months or more, which would account for two or three points and still be in Criminal History Category II. And when we look at the language in the proposed
amendment that seems to be talking about congressional intent as intending the safety valve to apply to first-time non-violent offenders, we worry that increasing the safety valve reduction to folks who have two or three criminal history points could start to include folks convicted of violent offenses who received lesser sentences than you might expect, or maybe no probation or some other enhancing issues that would have kicked them into another criminal history category.

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

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

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

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

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

CHAIR SARIS: Thank you. Mr. Fulginiti?

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

My name is Rick Fulginiti, national trustee of the Maryland State Lodge of Fraternal
Order of Police. We are the largest labor organization, law enforcement labor organization, in the United States, representing more than 330,000 rank-and-file police officers in every region of the country.

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

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

The changes increased the quantities of crack cocaine that would trigger the five- and ten-year mandatory minimum penalties. Prior to the emergency amendments, any amount of crack cocaine between five and 50 grams triggered the five-year mandatory minimum. The
emergency amendments raised the quantity required to between 28 and 280 grams to trigger the same penalty.

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

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

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

According to the data provided by the Commission, nearly 13,000 offenders would be eligible to receive reduced sentences, and within five years more than 7,000 convicted drug offenders could be released back into society.
Nearly half that number would be released within two years of enacting the proposed retroactive reductions.

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

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

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

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

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

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

Madam Chairman, Commissioners, on a little more personal note, as we stated earlier I am a police officer in Prince George’s County and have been for 28 years. Since 1990 I have worked in the homicide unit as an investigator as well as a supervisor, and I have seen hundreds and hundreds of
homicides, been to the scenes, and the vast majority
are all drug-related.

On June 16th, 1999, 40-year-old Donna Ferguson [phonetic] was hanging draperies in her Capitol Heights home. Across the street from her home were two young drug dealers fighting over who was going to work the corner that night. They began to exchange gunfire.

Of course they weren't injured, but a stray bullet went through a kitchen window in Ms. Ferguson's home and struck her in the head as she was hanging draperies. Her family, her husband and kids, were sitting right there in the room where she died.

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

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

In conclusion, Madam Chairman, I want to
thank you and the Commission for consideration of the view of more than 330,000 members of the Fraternal Order of Police. I would be pleased to answer any questions.

CHAIR SARIS: Thank you. Ms. Price?

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

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

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

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

Before I begin, I wanted to tell you that — well, I wanted to share with you something that I heard. I know that we're going to be asked back I think to share our views on retroactivity, but I just received an e-mail from a woman who had been
sentenced to an 85-year sentence for crack cocaine.

Her sentence was commuted by President Clinton, but she wrote to us because she knew that we were going to be testifying and concerned about the issue of retroactivity, and I would love to share a short piece of her e-mail.

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

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

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

The Commission should make the Fair Sentencing Act emergency amendment permanent, but restore the crack cocaine base offense levels to 24 and 30. We thought that overall the Commission did a
good job with the directive-laden piece of legislation, and one of the directives that was not in that legislation was the directive to raise base offense levels to 26 and 30.

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

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

As he explained, also, increasing base offense levels ensured that otherwise-eligible defendants didn't get the benefit of what you did. Congress worked very — the Commission and the Congress worked very long and hard to accomplish this
reduction. Commissioner Castillo pointed out when he decried the decision to raise the guidelines that hundreds of people would be left out in the first year alone. So we can't discern the justification in the Fair Sentencing Act or in the principles that inspired it for making crack sentences longer than those called for. A line in the crack/powder ratio by raising crack base offense levels in our opinion is insufficient. While the mandatory minimum for crack cocaine was assailed as unduly long, it was not assailed as unduly long simply because of the stark disparity between crack and powder sentences. That was a symptom of the problem, but that wasn't the underlying problem. The Commission's decision we thought was also inexplicable because it all but invites variances as judges consider what to do with crack cocaine sentencing. On the one hand they have a congressional judgment about what the appropriate
sentence for crack cocaine is, on the other hand they're faced with a higher guideline sentence. So what do they do in this circumstance? It invites a departure. And given the amount of criticism the judges are facing right now because of variance rates, you know we think that it is unfair and rather puzzling. Of course the Commission can sort of obviate any dissonance in this regard by stepping back and taking a look at all drug sentences, and reducing all drug guideline levels by two levels to 24 and 30 to correspond with the mandatory minimum sentences. And so we encourage the Commission in fact to do that.

We urge you to make this straightforward adjustment in this amendment cycle, even as you conduct a more comprehensive review of how to address the drug guidelines. Doing so will have an immediate effect on guidelines that are widely and I think correctly assailed as too punitive. They will lessen the now-overwhelming impact of drug quantity as a sentence accelerant. And they will help the
Commission comply with directives in the Sentencing Reform Act.

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

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

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

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

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

In 2009, as Mr. Lappin pointed out, the
Bureau of Prisons reported that the majority of
prisoners in its facilities, over 100,000 people, 52
percent, were serving sentences for drug crimes. The
population, as he explained, exceeds the rated
capacity by 37 percent.
And today's federal prison population is 210,000 people, more than that, and they represent nearly a five-fold increase over sentences in the 1980s when the drug sentences were established.

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

Finally, given the overbearing influence of drug quantity on the calculated guideline sentence, and in light of the multiple enhancements added to the drug sentence calculations by directives in the Fair Sentencing Act and other ways, this small course correction, reducing somewhat the influence of drug quantity, now would set a marker and would set the tone for the inquiry that you're going to engage
Finally, I wanted to address the safety valve. And I do ask that the Commission do what it can to expand the safety valve both in terms of its advocacy in Congress, as well as within the guidelines itself.

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

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

The current safety valve is restricted to only certain drug offenders. When the Commission argued in testimony to Congress a few years ago that
flexibility in sentencing for least-culpable
defendants and asked that it be made more widely
available, we agreed. And we applauded your call for
that.

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

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

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

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

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

CHAIR SARIS: Thank you.

MS. PRICE: Thank you.

CHAIR SARIS: Mr. Mauer.

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

Thanks for inviting me again. I've always
appreciated the hard work you've done on this issue
and your openness to our thinking about these issues.

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

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

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

When the legislation was adopted and being
considered, the idea was not to find a number that
gave a certain ratio, but rather to define a quantity
of drugs that was indicative of a certain level of
involvement in the drug trade.

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

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

The federal prison system is more,
increasingly more and more standing out in terms of
its growth and the policies that have contributed to this, particularly in comparison to what's happening across the country at the state level.

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

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

At this point also we're not back in 1980
deciding on what kind of sentencing policy we should have for drug offenses, but we have three decades of experience with what that looks like, and what it tells us I think about public safety outcomes.

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

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

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

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

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

So if we can increase certainty of punishment through various law enforcement practices and other changes in communities, that is more likely to have an impact. So the difference between long and very long sentences doesn't buy us very much in terms of deterrence.
We also know in particular when it comes to drug offending, unlike many other kinds of offenses, what the criminologists would call the "replacement effect," that you take a low-level drug seller off the street and, you know, we tell ourselves, well, we've taken care of the problem on that street corner. Well, no. That person is far too often replaced by somebody else looking to meet the demands of that local drug market.

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

We also have I think problems in the re-entry area as well. We've heard about the numbers of people coming home from prison each year. The good news I think is that we now do have a national focus on re-entry. The resources are too limited. It's not nearly as comprehensive as it should be. But
nonetheless we are making progress. There's a very broad consensus this is an important thing to do.

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

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

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

More than 80 percent of the people prosecuted in these cases are African American.

That's a very complicated story, but nevertheless this is the single most significant area where racial outcomes have really been exacerbated over the last quarter century or so. And therefore any
constructive ways we can deal with the guidelines
that would have a positive effect on reducing those
disparities, at least somewhat, I think would result
in more fair justice and greater perceptions of
fairness around the country.

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

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

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

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

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

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

So thank you very much for having me here,
and I appreciate the opportunity.

CHAIR SARIS: Well thank you. Dab?

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

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

So my question to you is: If we intend to cover the guy who is not on the lease but is standing at the front of a stash house with a gun, how do we phrase this any more clearly for a court to say these are things that the court should consider but they're not required to find A and B?
MS. BRANTLEY: Well when we're trying to apply a particular specific offense characteristic and then look to the application note for guidance, some of the kinds of words we've looked to historically to help us figure out what is meant is words like "and" and "or." And when it says "and" we've traditionally interpreted that to mean both.

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

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

So to the extent you have any specific
guidance on how we can do that, if you're saying
courts aren't interpreting this the way we intended,
please let us know.

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

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

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

COMMISSIONER FRIEDRICH: Just one follow
up. Are you saying that in the example you provided
that courts are not finding in that scenario? Or
that probation is just internally discussing this and
struggling with it? Are there cases out there where
in the scenario you provided the court is saying that
they didn't maintain it because they're not on the
lease?

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

CHAIR SARIS: So — Judge Hinojosa?

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

That's the concern here, that that
individual who may just have been there and placed
there to guard or whatever else they're doing with
regards to the drugs, and it really is not their
residence but they are sleeping there, that that
person is not covered? Is that the concern?
MS. BRANTLEY: Yes, that is the concern.

And I have to ask you, if they're sleeping there it kind of is their residence, and they are kind of plunked there.

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

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

There's the individual you've described who is on a mattress, maybe doesn't even speak the native language, just there because he is told to be
there, or she is told to be there; versus a more elaborate operation where they are actually renting houses, and changing them over to some sort of hydroponic kind of thing, and you've got someone who has the keys to five or six of the houses and runs among them on a regular basis maintaining them but maybe doesn't own them.

You know, those are two different pictures of people.

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

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

MS. PRICE: No. This was really an e-mail from somebody who had been sentenced to a very long
sentence who left women behind. It was really — no, we haven't unpacked those particular cases, or perhaps we have. I don't know who the women are.

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

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

MS. PRICE: Right, exactly.

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

MS. PRICE: Right. And we — I definitely think so. But I also think that quantity has to play a lower role, or less of a role in the calculation. If we're just going to pile enhancements on top of currently too long base offense levels that call for sentences that are too long, or even
mitigate those, you still aren't getting at the heart
of the problem. Which is, that we've driven these
sentences, accelerated these sentences, as it were,
with a single factor that may or may not do a good
job of capturing culpability, or of capturing some of
the things, you know, some of the reasons for
sentences.

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

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

But you can take steps now with the
current guidelines, even as you do a longer stepback
to look at them. For example, making an adjustment so that the mandatory minimum is not lower than the corresponding guideline range.

VICE CHAIR JACKSON: Can I follow up on that?

CHAIR SARIS: Just let Mr. Mauer —

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

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

So I don't think there are any easy ways to always document who is the kingpin and who is the mid-level and who is the low-level person. You know, it requires lots of investigation. But the more we
can get at the role and less we're relying on a
number that triggers the quantity, you know,
hopefully would punish reasonable conduct in
reasonable ways.

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

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

MS. PRICE: What I am testifying today
about is reducing guideline ranges by two levels, not
about de-linking. We have encouraged in the past
that the Commission consider de-linking the
guidelines.

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

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

VICE CHAIR JACKSON: So, I'm sorry, in
doing that, let's say in the drug offense area,
should we make our determination as to whether or not
to do that based on the frequency of the application
of SOCs, or Chapter Three adjustments?
I mean, if we look at our data and we find in the drug arena that very few of the SOCs apply to increase the base offense level, do you think that that should have some bearing as to whether or not we should lower the base offense level?

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

CHAIR SARIS: Judge Hinojosa?

COMMISSIONER HINOJOSA: There's been some
comments about weight, and how that shouldn't affect sentencing in general with regards to drug cases.

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

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

And so isn't it different than the amount
of drugs that a drug trafficker is putting out into

general use? It becomes the higher offense from the

standpoint of the damage to the public in general.

And as you well know, 3553(a) factors — there's four

of them — three of them are protection of the public,
basically.

And so isn't that something that is

important? You're certainly not saying that weight

is not important, are you?

MS. PRICE: Exactly, yes, we are not

saying that you don't take drug type or quantity into

account. And I understand that it is difficult to

figure out exactly how to calibrate sentences with

respect to weight.

What I am saying is that certainly drug

type and quantity — and quantity particularly — can

express culpability in certain cases, as Marc

mentioned earlier, but it doesn't always. And we

want to be able to — we want to ask you to try and

step back from an over-reliance on quantity to see if

there's a way to lower sentences for people who may

have a relationship to a drug quantity that looks
really high, but their relationship may be very minimal.

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

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

COMMISSIONER HINOJOSA: Thank you.

CHAIR SARIS: Go ahead.

VICE CHAIR CARR: Mr. Fulginiti, you represent several hundred thousand state and local
police officers. And while the federal prison system
is the largest in the country, it's probably ten
percent of the prison population of the country.

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

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

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

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

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

CHAIR SARIS: Oh, sure.

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

That pretty much follows the model that Mr. Fulginiti outlines where there is an opportunity for the federal government, with severer penalties than what's happening at the state level, can focus
on very serious offenders. And then Professor Kennedy's research has shown that, not in all cases but in many, many cases, that strategy has provided deterrence, and provided reduced criminality, and reduced violence far beyond the number of people who are prosecuted in the federal system.

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

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

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

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

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

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

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

CHAIR SARIS: Does anybody have any other questions?

(No response.)
CHAIR SARIS: Thank you very much for coming.

MS. PRICE: Thank you.

MR. MAUER: Thank you.

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

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

(1:02 p.m.)

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

Let me start with — this is on firearms. We started on that a little bit with the government this morning, but we're moving back to it now with “Firearms Offenses.”

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

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

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

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

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

MR. WELCH: Thank you, Judge Saris.

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

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

COMMISSIONER HINOJOSA: But we still only

have two great judges there.

(Laughter.)

MR. WELCH: Yes, we do have great judges.

And there is help on the way.

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

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

So it is appropriate that the Commission
is holding these hearings to examine what, if any,
steps the Commission might consider taking to address
this problem. We do strongly oppose the amendments
relating to straw purchasers, the 2K2.1 amendments,
for essentially three broad reasons.
One, we believe that these amendments will result in increased prison sentences for — more increased sentences for low-level, first-time non-violent offenders, and with no reasonable expectation that that will have any significant impact on the drug violence problem in Mexico.

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

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

By definition, straw purchasers are essentially first-time offenders. Many of these people come from various backgrounds, but quite obviously they wouldn't be able to make a straw purchase if they had a significant criminal history. Statistics show that in, I believe for fiscal year
2009, three-fourths of straw purchaser convictions under the three straw purchasing statutes, were in Criminal History Category I.

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

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

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

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

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

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

Now they may have their reasons for
delaying that, but I do think that it is indicative
of the way — of the dangerousness, or the view that
law enforcement has of these individuals that are straw purchasers. And I think that that is confirmed by the fact that they are low-level, low-culpability, first-time offenders with no violent history.

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

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

And if you also look at sentencing practices of federal judges — we've included those in our written material — for the three straw purchasing statutes for the Commission's 2009 statistics, well over 50 percent of those defendants received
sentences below the guidelines. One percent
sentenced above the guidelines. And the rest were
within the guidelines.

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

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

I was struck this morning that Ms. Duffy
gave a number of examples, and I know in her written
materials she talked about a case in Minnesota where
a judge – and she was talking about the problems with
some straw purchasers, and she talked about a case in
Minnesota that a judge earlier this year had to
punish somebody that was involved in smuggling
over — making straw purchases and involved in
smuggling over 100 weapons to Mexico. She describes
the kind of weapons they are.

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

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

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

So there is — undoubtedly, straw purchasing
is a problem nationwide, but if the Commission's concern in considering these amendments is dealing with the serious problem of violence in Mexico, this amendment sweeps way too broadly for that. And it is not narrowly tailored to meet the concerns that the Commission has.

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

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

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

Thank you.

MR. BRENNAN: Good afternoon. My name is
William Brennan and I am here on behalf of the Practitioners Advisory Group. I want to thank the Commission for inviting me on behalf of the Practitioners Advisory Group to speak.

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

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

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

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

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

Because if you start, for example, at a
base offense of 12, and then if the person is in the
business of making straw purchases such as a chief of
police, or someone else who clearly wants to profit,
they would immediately get a 4-level enhancement
under present 2K2 for trafficking. If they're
purchasing for use in another felony offense, they
would get an additional 4-level enhancement, which
would bring them up. And if that doesn't bring them
to 18, it requires that it be brought to 18.

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

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

So our view is that the straw purchaser,
the professional who is in the business, who is
making money, whether selling to narco terrorists in Mexico or elsewhere, is adequately punished under the existing guideline.

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

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

So that is our comment on that.

With respect to guideline 2M5.2, quite
frankly we think this is a guideline that needs a lot
of work and ought to be changed.

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

That certainly is a list that is
appropriately on the Munitions List that should in
fact be severely punished. We don't quarrel with
that as a Level 26. The problem with the guideline
is, as the Sero case that we mention in our written
pleadings, or written submissions, excuse me, the
Sero case talks about the one-bullet hypothetical;
that if certain bullets are in fact on the Munitions
List, and if you get picked up and prosecuted for
violating the Munitions List and have exported one
bullet, you are at a Level 26 and you are treated the
exact same way as someone who exports military
aircraft, vessels of war.
We think there needs to be a gradation under 2M5.2. And in looking at this and discussing it with my fellow members of the PAG, what seems to make a lot of sense, and the suggestion that we made in our submission, is that to take firearms completely out of 2M5.2 and move firearms over into 2K2 where we think they belong; and leave 2M5.2 for such things as military aircraft, the helicopters, the space electronics.

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

And so we think that 2M5 needs a lot of
work in terms of relative culpability, in terms of
gradations, in terms of putting the relative
culpability of the people that may violate that, into
some format with enhancements.

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

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

And so we thought, well, really, why don't
we take firearms out of 2M5, put it into 2K2, and
the gradation then is picked up by number of
firearms, purpose. And if you want to make it all
consistent to reflect the existing cross-border
issue, then maybe put in 2K2 a cross-border enhancement of two levels that would, instead of having this Base Level 26 under 2M5.2, put a cross-border enhancement under 2K2 where you then have all the problems that you have for gradation on 2M5 picked up under 2K2.

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

CHAIR SARIS: Thank you. Welcome back.

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

CHAIR SARIS: Welcome back.

MS. BRANTLEY: Thank you so much, and thank you again for the opportunity for probation to provide comments on the firearms proposed amendment.
In terms of application for the proposed changes to 2K2.1, we didn't see any red flags that we thought would be impediments to applying it clearly. Our one comment has to do with the two new base offenses. There's a base offense level of 16 now, and a redefinition of what the base offense level of 14 is.

Our question is whether or not convictions under 18 U.S.C., 922(d), 922(a)(6), all of those things, includes conspiracy to commit those things or not.

So if we have an offender convicted of conspiracy to commit one of those violations, would these base offense levels still apply? And if the answer is yes, we were thinking that an application note might be helpful for that.

The other change that is being looked at for 2K2.1 sets out two options. It's asking for comment on these two options. One option adds a brand new specific offense characteristic to address whether or not firearms or ammunition are leaving, or the person knows they're going to be leaving the United States.
Option two takes that conduct and mixes it in with an already existing specific offense characteristic so that if you were to go that route, this 4-level increase that already is there would be something you could consider also if firearms were leaving, or the offender knew they were leaving the country.

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

We felt that that would be an easier application question, and that more consistently
applied, and we felt that perhaps adding an
application note that reminds the courts that if both
sets of conduct exist that there's always departure –
the court can always make a departure.

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

So that was it in terms of application for
this proposed change, and I am open to any questions
or comments. Thank you.

CHAIR SARIS: Thank you.

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

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

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

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

MR. BRENNAN: Well I think the easy answer
is, the PAG is always in favor of downward
departures. But I think that does —
COMMISSIONER WROBLEWSKI: But how about the upward departures?

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

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

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

Our concern with the staff proposal was that, even though the heartland is only ten percent, it would sweep up those people. And we think that
those people should not be swept up in an across-the-board enhancement for straw purchasers.

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

Number one, do you think that's about right? Way too high? Way too low? This is for 15 AR-15 weapons crossing the border to Mexico.

And secondly, under 2K as it currently is, if the person did not — if the government could not prove that this was the business of the defendant, that person would face a Zone C offense under the current guidelines if those guidelines are not enhanced. And do you think that's the appropriate sentence?

MR. BRENNAN: Well we think that if the
person is trafficking in firearms that they should
get the 4-level enhancement. So bringing 15 weapons
to Mexico, I think under most circumstances that
person would receive the 4-level enhancement for
trafficking.

If the person is bringing 15 weapons of
that nature to Mexico, would there be knowledge that
that would be used in another felony, which would be
another 4-level enhancement, or under the enhancement
now bring it up to a Level 18 —

COMMISSIONER WROBLEWSKI: Right, and —
MR. BRENNAN: — and then you add to it,
you know, the number of weapons, which you then get
another 4-level enhancement. So I mean you're
going up there under the existing 2K2 guideline.

COMMISSIONER WROBLEWSKI: Right. But in
my hypothetical — I understand you can create a
hypothetical where you add up all the enhancements
altogether, but I am suggesting a hypothetical where
you can't add up all the enhancements. All you know
about the person is they're heading to Mexico with 15
AR-15s in a compartment in their car, and that's what
you know about them.

MR. BRENNAN: And if that's what you know and you can't prove that they are trafficking, and if you can't prove that they are going to use those, or distribute them to someone who is going to use them in another felony offense, then perhaps that is the right sentence, if you don't know that.

Now if you — and that's why I came back with the other hypothetical, because if you don't know that, then maybe that's how they should be punished under the existing guideline.

CHAIR SARIS: Let me ask. We've been struggling with what is "personal use" and what are the number of guns, or the amount of ammunition that would get you to a lower level.

Do you have suggestions based on your caseloads, or your feedback from your membership?

MR. WELCH: I can weigh in on that, Commissioner.

One, we opposed the personal use amendment the Commission is considering because we think that it would exclude virtually any illegal purchaser from
the personal use. We're concerned about the
application note that contains the language to "the
extent to which possession [was] restricted by local
law."

And I notice that you asked that of
Ms. Duffy this morning, and her response would
essentially exclude anybody that is illegally
purchasing a weapon from a personal use exemption.

So I am concerned that what that would do
is essentially put all prohibited persons in the
higher offense level of 26. And if the court is — I
mean if the Commission is going to consider the
personal use amendment, we would ask the court to
remove from the application note the language that I
just referenced.

CHAIR SARIS: If we didn't go with the
suggestion of eliminating it altogether but are sort
of grappling with how do you define that, are there
any suggestions you have based on your caseload, or
your experience?

MR. WELCH: Well based on my caseload and
experience, we have a number of people that export
weapons to Mexico that are not exporting those weapons to drug cartels. And I think that is the salient point.

There are people that export weapons to private individuals in Mexico that use them for security, for self-defense. I have had recently a case of an individual that was exporting weapons to a licensed gun club in Mexico. We did some research. There are licensed gun clubs —

CHAIR SARIS: How many guns were in each of those cases?

MR. WELCH: In the case of the licensed gun club, over a period of months what it involved is somebody in the agricultural business from the interior of Mexico that would come up to the United States to deliver produce to a produce shed in south Texas.

Somebody that worked at the produce shed, he said, you know, if you'll buy shotguns for me I will pay you $100 a shotgun. And he would come up every month or so. So over the period of six months or so, maybe three or four shotguns each time. I'm
not sure exactly what the total number involved were. It was a lot. It was a lot. But we did some research. There are licensed shooting, skeet shooting clubs, gun clubs, sport clubs all over Mexico. It's not just in the United States of course.

So the point of that is that if the Commission's concern is targeting guns that are exported for cartels in Mexico, the personal use limitation sweeps too broadly for that.

And with regard to the definition, I guess the definition, the application the Commission is considering is very similar to the definition of the "sporting purposes" definition. But we would strongly urge the court to consider taking out the last factor that I think is listed in that definition, which is: to "the extent to which possession [was] restricted by local law."

Because we are afraid that what that would do would be to exclude virtually any illegal purchaser from qualifying for that personal use exception.
MR. BRENNAN: Just to weigh in very briefly, I had a case where weapons were being exported to Bolivia in South America. A client owned a substantial portion of land down there and was bringing weapons down for hunting purposes for friends and relatives to hunt on his land.

And it was really more of a sporting purpose rather than personal use, because he wasn't really going to be using them personally. He was giving them to friends and family for use.

In a similar case where we had a client —

CHAIR SARIS: How many guns?

MR. BRENNAN: I think about ten or 12, if I remember correctly. And then we had another one where a client was bringing, shipping shotguns to family in Nigeria. I share the same concern that Mr. Welch has, that it may very well have been illegal for the family to — his family to possess them in Nigeria, and certainly it wasn't for his personal use, but he was on the Level 26 because, I think it was about 20 shotguns, it exceeded the ten, which is existing under 2M5.2 now. It wasn't for narco
terrorists, it was for his family in Nigeria, but he
got caught up under the Level 26.

And it wouldn't be solved by a personal
use exception that we see now. So that's why the PAG
I think likes the gradation here. The difference
between 14 and 26, and it's a 12-point bump under
2M5, we really think there needs to be some
gradation under there, more than just personal use.

CHAIR SARIS: Thank you. Judge Hinojosa?

COMMISSIONER HINOJOSA: I guess for those
of us who live on the border, the distinction between
the type of weapon isn't as important, at least based
on our knowledge of the violence in northern Mexico
and in Mexico in general related to drug trafficking;
that any weapon becomes a problem because the safety
of individuals, whether they are involved in the
cartel or just happen to be caught in the crossfire,
doesn't depend on the type of weapon but just that
weapons are present.

And the other thing that you see in the
courtroom, at least on the border, is that when
someone is charged as a straw purchaser with knowing
or having reason to believe that this was going to end up in another country, as opposed to the person that's actually caught at the border which is in some cases just a matter of yards away, that the punishment is much different based on the guideline determination.

And so what would be the issue with having a specific offense characteristic in the straw purchaser case when the person knew or had reason to believe that it was going to be exported to try to get them to the same level as the person that was actually caught? Because we know it's the same crime, as far as the outcome as to the violation, as to the effect on society as a whole.

So why would that be an issue? That would leave out all the individuals who were buying for their family or their friends, or whatever, that they're just being — I don't even know that those people would get paid. But when somebody is getting paid, and they know or have reason to believe that it is going to end up in another country, what would be the issue with a specific offense characteristic
there?

The 100-firearms' example really doesn't fit. Because by the time somebody has got 100 firearms, we're way past the issue of any question as to how serious the damage is. So what would be the problem with the SOC? And the 2K?

MR. WELCH: Because I believe there are already enhancements that cover that. The trafficking enhancement would apply.

COMMISSIONER HINOJOSA: Yes, but that applies whether it is here or in Mexico. That's a harm that's going to be an issue whether you're trafficking for here, or trafficking for Mexico. So that should apply in both situations.

MR. WELCH: Well the trafficking enhancement was enacted four years ago, I believe, and it covers the same conduct. We believe an additional enhancement for crossing the border would be unnecessary for that reason.

And also, if there is in fact evidence to show that the person knew that it was going to be exported into Mexico, they could be prosecuted and
convicted under a more serious statute that would be
punished under the [2M5.2] guidelines. So I think it
would be unnecessary.

COMMISSIONER HINOJOSA: But don't you say
it's our experience, at least on the border, that
most of the cases that are being charged under the
2K guideline are actually exportation cases? And
that sometimes on the same day when you have
individuals who have been charged with a straw
purchase type situation, and whether they get charged
under the statute with the 2M versus the 2K [guideline],
that that doesn't really fit because we don't have a
specific offense characteristic under the 2K [guideline]?

MR. WELCH: What I can say, Your Honor, is
that I believe that in those cases that we do see
that where there is information that the weapons are
being exported, is that the enhancements already
available are already more than sufficient.

And I would go back to what we know about
sentencing practices on the border divisions and
throughout the United States, that for the year 2009
you see virtually no upward departures, and you see
over 50 percent downward departures. To me, I think that is very telling that we don't need to further complicate the 2K2 guideline with an additional offense characteristic.

MR. BRENNAN: The PAG had a slightly different approach on that, Your Honor. We had two conference calls on this, and I guess we didn't actually vote so I'm not sure of the protocol of how far I can go here, but the written submission, my written submission that was reviewed by everyone on the PAG, that if firearms were taken out of 2M5.2, the PAG wasn't — at least some of us were not necessarily opposed to a border enhancement under 2K2.

The concern seemed to be with the PAG that 2M5.2 swept way too broadly; and that the existing enhancements that are there under 2K2 go a long way towards solving what I've already talked about. But in roman numeral II in our written submissions, we did not object to a two-point enhancement on that, if firearms were removed from 2M5.2, which I think is what you're asking. So that's what our position has
been: Get firearms out of 2M5.2 and take care of it in 2K2.

MR. WELCH: If I could make one further comment on that, Your Honor, if the Commission is going to consider the enhancement that the court is suggesting, we would strongly urge the court, as we've stated in our written materials, to amend the application note to make it very clear that there would not be double counting between the border crossing enhancement and the trafficking enhancement.

CHAIR SARIS: Thank you. Commissioner —

MR. BRENNAN: And likewise — I'm sorry, I didn't mean to interrupt, but the issue is the 2-level enhancement for border crossing, we certainly do not want — would oppose that in addition to a straw purchaser enhancement across the board.

I mean, we think that the straw purchaser should remain where it is, that firearms should come out of 2M5.2, and then under those circumstances our paper suggests the 2-level border crossing enhancement.

But we think if you both increase the
straw purchaser and add that, we would oppose that.

I'm sorry.

COMMISSIONER FRIEDRICH: I had a question for Mr. Welch.

To address the issue with ammunition under 2M5.2, the defenders have suggested that the Commission should simply drop it from Base Offense Level 26 down to a 14. But when we look at our cases over a five-year period since Booker, the majority of cases involving just ammunition alone exceed 50 percent — I mean, exceed over 10,000 rounds of ammunition, more than 50 percent of the cases involve that much ammunition.

So my question is: If we're not comfortable following your suggestion and just putting it at a Level 14 with a departure authority for the court, Ms. Duffy suggested for every 100 rounds of ammunition corresponds with the firearm arguably, for 10,000 rounds of ammunition that's 100 firearms, if we're looking to do something between Level 26 and this 14 and departure authority, what would your recommendation be?
MR. WELCH: Commissioner, I can't give you a specific number today. We are well aware of the problem with 2M5.2 and the great disparity between the two levels. In general we are apprehensive of any amendments that increase the complexity of the guidelines.

If the Commission is going to consider that, we would certainly welcome the opportunity to get back to the Commission with additional input into that. But we do strongly believe that the proposal that is currently out there would have very little effect on — I think there would be very, very few exporters of those very small amounts of ammunition that would actually fit in the Level 14. So I think we would certainly search for some middle ground between what was suggested by Ms. Duffy, and we would certainly want to take a look at the Commission's statistics on the 10,000-round level.

I can certainly understand the concern about that. That is a very large amount of ammunition, and I can certainly understand the Commission wanting to consider gradations between
very large amounts of ammunition and lesser amounts.

COMMISSIONER FRIEDRICH: Thank you.

CHAIR SARIS: Anything else?

(No response.)

CHAIR SARIS: Thank you very much. We appreciate it.

(Whereupon, at 1:46 p.m., Thursday, March 17, 2011, the hearing in the above-entitled matter was adjourned.)